4

# ARKANSAS REPORTS

# Vol. 67

---

CASES DETERMINED

IN THE

## SUPREME COURT OF ARKANSAS

FROM OCTOBER, 1899, TO MARCH, 1900

---

T. D. CRAWFORD
REPORTER

---

LITTLE ROCK, ARKANSAS
PRESS OF
GAZETTE PUBLISHING COMPANY
1900

COPYRIGHT 1900 BY
ALEX. C. HULL,
SECRETARY OF STATE OF ARKANSAS

Rec. Oct. 9, 1900.

# JUDGES

OF THE

# SUPREME COURT

DURING THE PERIOD OF THIS VOLUME.

---

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

# TABLE

## OF CASES REPORTED.


A

Adler (Hess *v.*) . . . . 444
——— (State *v.*) . . . 469
Adler-Goldman Com. Co. (Goddard-Peck Grocery Co. *v.*) . . . . . 359
Allen (Brown *v.*) . . . 386
Anderson (Texarkana & Ft. S. Ry. Co. *v.*) . . . . 123
——— *v.* Wainwright . . 62
Arkadelphia Cotton Mills (Dozier *v.*) . . . . 11
Arkansas Fire Ins. Co. *v.* Wilson . . . . . 553
Atkins *v.* Johnson, Caruthers & Rand Co. . . . 493
Auten *v.* Manistee National Bank . . . . . 243
Ayres (St. Louis, I. M. & S. Ry. Co. *v.*) . . . 371

B

Bach Liquor Co. (State *v.*) 163
Baker (St. Louis, I. M. & S. Ry. Co. *v.*) . . . 531
Bank of Malvern *v.* Burton 426
Bazore (Farmers' & Mechanics' Savings Co. *v.*) 252
Becker (Kansas City, Ft. S. & M. Rd. Co. *v.*) . 1
Bemis Lumber Co. (Texarkana & Ft. S. Ry. Co. *v.*) 542
Benjamin (Kirkland *v.*) . 480
Bittick *v.* State . . . . 131
Black (Coffin *v.*) . . . 219
Blanks (Nelson *v.*) . . . 347
Bowers *v.* Hutchinson . . 15
Boykin *v.* Jones . . . . 571
Brogan (Paget *v.*) . . . 522
Brown *v.* Allen . . . . 386
——— (St. Louis, I. M. & Ry. Co. *v.*) . . . . 295
——— (Stout *v.*) . . . 481
Buckner (Woolfolk *v.*) . 411
Burton (Bank of Malvern *v.*) 426

C

Cady (St. Louis, I. M. & S. Ry. Co. *v.*) . . . 512
Campbell (Stephens *v.*) . 484
Carpenter *v.* Glass . . . 135
Cash *v.* Cash . . . . . 278
——— *v.* Kirkham . . 318
Clausen (Cocke *v.*) . . . 455
Cocke *v.* Clausen . . . 455
Coffin *v.* Black . . . . 219
Coleman *v.* Fisher . . . 27
Crane *v.* Siloam Springs . 30
Cummins (Snell *v.*) . . 261

D

Daniel (Dudley E. Jones Co. *v.*) . . . . . 206
———*v.* St. Louis National Bank . . . . . 223
Davis *v.* Jones . . . . 122
Dickey (Hays *v.*) . . . 169
Dixon *v.* State . . . . 495
Doster *v.* Manistee National Bank . . . . . 325
Dozier *v.* Arkadelphia Cotton Mills . . . . . 11

Dudley E. Jones Co. *v.* Daniel . . . . . 206
Dunn *v.* Lott . . . . . 591
DuVal *v.* School District of Ft. Smith . . . . 67

E

Eastern Arkansas Hedge Fence Co. *v.* Tanner . . 156
Eatman (Wheeler *v.*) . . 133

F

Farmers' & Mechanics' Savings Co. *v.* Bazore . . 252
Fisher (Coleman *v.*) . . 27
Fitzgerald *v.* La Porte . . 263
Fletcher (Morris *v.*) . . 105
Franklin County *v.* McRaven 562

G

Gage *v.* State . . . . . 308
Gardner (Polk *v.*) . . . 441
Gates (Morris *v.*) . . . 105
Glass (Carpenter *v.*) . . 135
Goddard – Peck Grocery Co. *v.* Adler – Goldman Com. Co. . . . . 359

H

Hale (Phoenix Ins. Co *v.*) 433
Hall (Jacoway *v.*) . . . 340
Halliday *v.* Smith . . . 310
Hampton *v.* State . . . 266
Hawkins (Myers *v.*) . . 413
Haymon (United Brothers of Friendship *v.*). . . 506
Hays *v.* Dickey . . . . 169
Henderson (Whitehead *v.*) 200
Henshaw *v.* State . . . 365
Hess *v.* Adler . . . . 444
Hill *v.* St. Louis Southwestern Ry. Co. . . . 402
Hood (St. Louis, I. M. & S. Ry. Co. *v.*) . . . 357
Huffstedler *v.* Kibler . . 239
Hunter *v.* Matthews . . 362
Hurst (St. Louis & S. F. Ry. Co. *v.*) . . . . 407
Hutchinson (Bowers *v.*) . 15

I

Irby *v.* Southern Bldg. & Loan Assn. . . . . 287

J

Jacoway *v.* Hall . . . . 340
Johnson *v.* Shattuck . . 159
Johnson, Caruthers & Rand Co. (Atkins *v.*) . . . 493
Johnston *v.* Miller . . . 172
Jones (Boykin *v.*) . . . 571
——— (Davis *v.*) . . . 122

K

Kansas City, F. S. & M. Rd. Co. *v.* Becker . . . . 1
Kibler (Huffstedler *v.*) . . 239
Kilpatrick (St. Louis & San Francisco Rd. Co. *v.*) . 47
Kirkham (Cash *v.*) . . . 318
Kirkland *v.* Benjamin . . 480

L

Lackey *v.* State . . . . 416
Landers (St Louis, I. M. & S. Ry. Co. *v.*) . . . . 514
Lane *v.* State . . . . . 290
La Porte (Fitzgerald *v.*) . 263
Leach *v.* State . . . . 314
Lohmann (Overton *v.*) . . 464
Lott (Dunn *v.*) . . . . 591
Loyd (Planters' Mut. Ins. Co. *v.*) . . . . . 458

M

McCain (St. Louis, I. M. & S. Ry. Co. *v.*) . . . 377
McGuire (Rowland *v.*) . . 320
McNally (State *v.*) . . . 580
Magness *v.* State . . . 594
McRaven (Franklin County *v.*) . . . . . 526

Manistee National Bank (Auten *v.*) . . . . 243
——— (Doster *v.*) . . . 325
Matthews (Hunter *v.*) . . 362
Memphis & L. R. Rd. Co. as Reorganized *v.* Organ 84
Miller County (St. Louis, I. M. & S. Ry. Co. *v.*) . 498
Miller (Johnston *v.*) . . 172
Moore *v.* St. Louis, I. M. & S. Ry. Co. . . . . 389
Moores *v.* Winter . . . . 189
Morris *v.* Fletcher . . . 105
——— *v.* Gates . . . . 105
Mullins (State *v.*) . . . 422
Myers *v.* Hawkins . . . 413

N

Nelson *v.* Blanks . . . 347
Nunnally (Union Compress Co. *v.*) . . . . . 284

O

Organ (Memphis & L. R. Rd. Co. as Reorganized *v.*) . 84
Osborn (St. Louis, I. M. & S. Ry. Co. *v.*) . . . 399
Overton *v.* Lohman . . . 464

P

Pace *v.* Robbins . . . . 232
Pacific Mut. L. Ins. Co. *v.* Walker . . . . . 147
Paget *v.* Brogan . . . . 522
Petit *v.* Stuttgart Normal Institute . . . . . 430
Phelps *v.* Wyler . . . . 97
Phoenix Insurance Co. *v.* Hale . . . . . 433
Planters' Mut. Ins. Co. *v.* Loyd . . . . . 584
Polk *v.* Gardner . . . . 441
Power (St. Louis, I. M. & S. Ry. Co. *v.*) . . . 142

R

Robbins (Pace *v.*) . . . 232
Robinson (Williams *v.*) . 517
Rogers (Sixkiller *v.*) . . 354
Rowland *v.* McGuire . . 320
Russell *v.* Williamson . . 80

S

St. Louis & S. F. Ry. Co. *v.* Hurst . . . . . 407
——— *v.* Kilpatrick . . 47
St. Louis, I. M. & S. Ry. Co. *v.* Ayres . . . . 371
——— *v.* Baker . . . 531
——— *v.* Brown . . . 295
——— *v.* Cady . . . . 512
——— *v.* Hood . . . 357
——— *v.* Landers . . . 514
——— *v.* McCain . . . 377
——— *v.* Miller County . 498
——— (Moore *v.*) . . 389
——— *v.* Osborn . . . 399
——— *v.* Power . . . 142
——— *v.* Stroud . . . 112
——— *v.* Touhey . . . 209
St. Louis National Bank (Daniel *v.*) . . . . 223
St. Louis Southwestern Ry. Co. (Hill *v.*) . . . . 402
Salyers *v.* Smith . . . . 526
School District No. 4 of Faulkner Co. (Springfield Furniture Co. *v.*) . . 236
School District of Ft. Smith (DuVal *v.*) . . . . 67
Shattuck (Johnson *v.*) . . 159
Siloam Springs (Crane *v.*) 30
Sixkiller *v.* Rogers . . . 354
Smith (Halliday *v.*) . . 310
——— (Salyers *v.*) . . 526
Snell *v.* Cummins . . . 261
Southern Bldg. & L. Ass. (Irby *v.*) . . . . . 287
Springfield Furniture Co. *v.* School District No. 4 of Faulkner Co. . . . . 236
State *v.* Adler . . . . 469
——— *v.* Bach Liquor Co. 163

State (Bittick *v.*) . . . 131
——— (Dixon *v.*) . . . 495
——— (Gage *v.*) . . . 308
——— (Hampton *v.*) . . 266
——— (Henshaw *v.*) . . 365
——— (Lackey *v.*) . . 416
——— (Lane *v.*) . . . 290
——— (Leach *v.*) . . . 314
——— *v.* McNally . . . 580
——— (Magness *v.*) . . 594
——— *v.* Mullins . . . 422
——— (Stricklin *v.*) . . 349
——— (Sutton *v.*) . . 155
——— (Willis *v.*) . . . 234
Stephens *v.* Campbell . . 484
Stokes (White *v.*) . . . 184
Stout *v.* Brown . . . . 481
Stricklin *v.* State . . . 349
Stroud (St. Louis, I. M. & S. Ry. Co. *v.*) . . . 112
Stuttgart Normal Institute (Pettit *v.*) . . . . . 430
Sutton *v.* State . . . . 155

T

Tanner (Eastern Arkansas Hedge Fence Co. *v.*) . 156
Texarkana & Ft. S. Ry. Co. *v.* Anderson . . . . 123
Texarkana & Ft. S. Ry. Co. *v.* Bemis Lumber Co. . 542
Touhey (St. L., I. M. & S. Ry. Co. *v.*) . . . . 209

U

Union Compress Co. *v.* Nunnally . . . . . 284
United Brothers of Friendship *v.* Haymon . . . 506

W

Wainwright (Anderson *v.*) 62
Walker (Pacific Mut. L. Ins. Co. *v.*) . . . . 147
Wallace (Wyatt *v.*). . . 575
Wheeler *v.* Eatman . . . 133
White *v.* Stokes . . . . 184
Whitehead *v.* Henderson . 200
Williamson (Russell *v.*) . 80
Willis *v.* State . . . . 234
Wilmans *v.* Robinson . . 517
Wilson (Arkansas Fire Ins. Co. *v.*) . . . . . 553
Winter (Moores *v.*) . . 189
Woolfolk *v.* Buckner . . 411
Wyatt *v.* Wallace . . . 575
Wyler (Phelps *v.*) . . . 97

# TABLE OF CASES

## CITED BY THE COURT.


### A

American Exchange Nat. Bank *v.* Metropolitan Nat. Bank, 71 Mo. App. 451 248
Anderson *v.* Bowles, 44 Ark. 108 364
Andrews *v.* Portland, 79 Me. 490 492
Anonymous, 3 Day, 308 293
Apperson *v.* Ford, 23 Ark. 746 327, 339
Armistead *v.* State, 43 Ala. 340 497
Armstrong *v.* Insurance Co. 61 Iowa, 216 438
Arnold *v.* Cord, 16 Ind. 177 79
Asia *v.* Hiser, 22 Fla. 378 188
Aspinwall *v.* Aspinwall, 49 N. J. Eq. 302 25
Atkins *v.* Swope, 38 Ark. 528 483, 484
Austin & N. W. Ry. Co. *v.* Beatty, 73 Tex. 592 217
Auten *v.* United States National Bank, 174 U. S. 125 250
Ayers *v.* Hartford Fire Ins. Co., 17 Ia. 176 558

### B

Bailey *v.* Hervey, 135 U. S. 172 208
——— *v.* Smith, 43 N. H. 141 139
Baldwin *v.* Campfield, 4 Halst. (N. J.) 891 336
Ballou *v.* Chicago & N. W. Ry. Co., 5 Am. & Eng. R. Cas. 480 307
Balt. & Pot. Ry. Co. *v.* Mackey, 157 U. S. 72 307
Bane *v.* Ins. Co., 85 Ky. 677 153
Bangs *v.* Hornick, 30 Fed. 97 180, 184
Bank of Little Rock *v.* Frank, 63 Ark. 22 100
Barr *v.* Ins. Co. of North America, 61 Ind. 488 438
——— *v.* State, 10 Tex. App. 507 421
Barry *v.* Hannibal & St. Joseph Ry. Co., 98 Mo. 62 217
Barton *v.* National Land Co., 27 Kas. 634 188
Batte *v.* McCaa, 44 Ark. 398 322
Batten *v.* State, 80 Ind. 394 602, 608
Bayly *v.* Chubb, 16 Gratt. 284 302
Beavan *v.* Earl of Oxford, 6 De G., M. & G.; P. 514 333
Belding *v.* State, 25 Ark. 315 477
Bell *v.* Wilson, 52 Ark. 171 328
Benham *v.* Carry, 11 Wend. 83 605
Bennett *v.* Hutson, 33 Ark. 762 327
Benton *v.* State, 30 Ark. 349 265
Bentonville R. Co. *v.* Baker, 45 Ark. 252 96
Berger *v.* State, 50 Ark. 20 141
Berry *v.* Diamond, 19 Ark. 264 158
Besant *v.* Wood, 12 Ch. Div. 605 24
Bizzell *v.* Booker, 16 Ark. 329 605
Blackburn *v.* Morton, 18 Ark. 384, 395 196
Blake *v.* Maine Cent. R.R., 70 Me. 63 120
Blass *v.* Lawhorn, 64 Ark. 466 172
Bledsoe *v.* Mitchell, 52 Ark. 158 364
Bloyd *v.* Ry. Co., 58 Ark. 66 215
Blythe *v.* Jett, 52 Ark. 547 233
Boyd *v.* Cauthen, 28 S. C. 72 320
Boyle *v.* Maroney, 73 Ia. 70 334
Bressler *v.* People, 117 Ills. 422 420
Bridgman *v.* McKissick, 15 Ia. 260 334
Brigham *v.* Fawcett, 42 Mich. 542 101
Brooks *v.* Cooper, 35 Am. St. 793 67
——— *v.* Hanauer, 22 Ark. 174 195
Brown *v.* St. Louis, I. M. & S. Ry. Co., 52 Ark. 120 56
Browning *v.* Home Ins. Co., 71 N. Y. 508 559
Bruce *v.* Cincinnati R. Co., 83 Ky. 174 299
Bryan *v.* Craig, 64 Ark., 438–43 525
Burnett *v.* Handley, 8 Ala. 685 331

### C

Camden *v.* Doremus, 3 How. (U.S.), 515 119
Campbell *v.* People, 16 Ill. 17 606
Cantrell *v.* K. C. M. & B. Ry., 14 Am. & Eng. Ry. Cases (U. S.) 30 516
Carson *v.* Murray, 3 Paige, 503 23, 24
——— *v.* St. Francis Levee District, 59 Ark. 513 45, 416
Carter, *v.* Carter, 14 Sm. & M. 59 25
——— *v.* Goode, 50 Ark. 155 301
Caruthers *v.* McGarvey, 41 Cal. 15 139
Casborne *v.* Scarfe, 1 Atk. 603 270
Catlett *v.* Ry. Co., 57 Ark. 461 154
Catlin *v.* Springfield Fire Ins. Co., 1 Sumner, 434–40 559

Central Trans. Co. *v* Pullman's Palace Car Co., 139 U. S. 59 549
Chamberlain *v*. St. Paul, etc., R. Co., 92 U. S. 299 205
Chadwick *v*. Hopkins, 62 Am. St 38 67
Chandler *v*. Neighbors, 44 Ark. 479 95
——— *v*. St. Paul F.&M. Ins. Co., 21 Minn. 85 558
Chapman *v*. Gray, 8 Ga. 341 25
Chesapeake & Ohio Ry. Co. *v*. Osborn, 30 S. W. 21 395
Chicago, B. & Q. Ry. *v*. George, 19 Ill. 510 58
Chiles *v*. Bartleson, 21 Mo. 334 520
Cincinnati, H. & D. Rd. Co. *v*. McMullen, 28 Am. & Eng. R. Cas. 172 305
City Electric Ry. Co. *v*. First Nat'l Bank, 62 Ark. 33 551
Clark *v*. Railway Co., 64 Mo. 440 4
Clarke *v*. Dutcher, 9 Cowen, 674 605
Clarkson *v*. Clarkson (Mo.), 28 S. W. 446 520
Cohn *v*. Hoffman, 50 Ark. 108 328-339
Collins *v*. Smith 57 Wis. 284 84
——— *v*. Texas & P. Ry. Co., 39 S. W. 643 395, 398
Columbian Ins. Co. *v*. Lawrence, 2 Pet. (U. S.) 48 590
Commercial Bank *v*. Gillette, 90 Ind. 268 139
Commercial Bank of Manchester *v*. Nolan, 7 How. (Miss.) 506 94
Commonwealth *v*. Richards, 131 Pa. St. 209 25
——— *v*. Woodward, 102 Mass. 155 610
Coughran *v*. Gilman, 81 Ia. 442 302
Coulson *v*. White, 3 Ark. 21 415
Countz *v*. Markling, 30 Ark. 17 23
Courtwright *v*. Leonard, 11 Iowa, 32 139
Cox *v*. Harris, 64 Ark. 213 208
Coykendall *v*. Denkee, 13 Hun, 260 374
Cross *v*. Fombey, 54 Ark. 179 483
Cunningham *v*. Burk, 45 Ark. 267 483
Cushenberry *v*. McMurray, 27 Kas. 328 293
Cutler *v*. Tuttle, 19 N. J. E. 549 336

## D

Davis *v*. Ehrman, 8 Harris, 256 332
——— *v*. Houghtelin, 14 L.R.A. 737 55
——— *v*. People, 114 Ill. 86 420
——— *v*. South Carolina, 107 S.C. 597 477
——— *v*. Tennessee, 100 U. S. 257 477
Deery *v*. Cray, 5 Wall. 807 604
Dennick *v*. R. Co., 103 U. S. 11 196
Dickerson *v*. Johnson, 24 Ark. 251 375
Dickinson *v*. Harris, 52 Ark. 58 364
Dillinger's Appeal, 35 Pa. St. 357 25
Dolan *v*. Magor, 68 N. Y. 274 492
Dolphin *v*. Aylward, 4 Eng. & Ir. Appeals Law Rep. 486 333
Drennen *v*. Walker, 21 Ark. 557 460, 462
Driggs *v*. Norwood, 50 Ark. 46 111
Drovers' National Bank *v*. Anglo-American Packing & Provision Co., 117 Ill. 100 248, 249
Duke *v*. State, 56 Ark. 495 583
Dunham *v*. Rackliff, 71 Me. 345 120
Dunlap *v*. Berry, 4 Scam. 327 139
Dutton *v*. Dutton, 30 Ind. 452 25
Dyer *v*. Jacoway, 42 Ark. 186 342
——— *v*. Jacoway, 50 Ark. 217 342

## E

Ellsworth *v*. Hale, 33 Ark. 637 415
Emery *v*. Neighbour, 2 Halst. 142 25
Erickson *v*. Quinn, 15 Abb. Prac. U. S. 166 330
Estes, *In re*, 6 Saw. 459 330
——— *v*. German Nat'l Bank, 62 Ark. 7 551
Eureka Springs Ry. Co. *v*. Timmons, 51 Ark. 459 299, 302
Eury *v*. Insurance Co. 89 Tenn. 427 153
Ewing *v*. Insurance Co., 89 Tenn. 427 153
Exchange Nat. Bank *v*. Metropolitan Nat. Bank, 71 Mo. App. 451 248
Eyre *v*. McDowell, 9 H. L. Cas. 619 333

## F

Faulkner *v*. Harding, 9 Mo. App. 12 139
Ferguson *v*. Spear, 65 Me. 277 101
Field *v*. Moore, Hill & Denio, 418 139
Fields *v*. Danenhower, 65 Ark. 393 345
Finnell *v*. Southern Kas. R. Co., 33 Fed. 427 196
Fish *v*. Blasser, 146 Ind. 188
Fitzgerald *v*. La Porte, 64 Ark. 34 265
Fitzpatrick *v*. Fain, 3 Cold. 15 139
——— *v*. State, 37 Ark. 257 609
Fordyce *v*. Nix, 58 Ark. 136 144
Forehand *v*. State, 53 Ark. 46 514
Fortenbury *v*. State, 47 Ark. 188 176
Fortenheim *v*. Claflin, 47 Ark. 49 132
Fosdick *v*. Schall, 99 U. S. 253 238
Fowler *v*. Equitable Trust Co., 141 U. S. 411, 415 345
Fox *v*. Davis, 113 Mass. 255 25
Freeman *v*. Watkins, 52 Ark. 446 262
Fretwell *v*. Laffoon, 77 Mo. 26 145
Friend & Fox Paper Co. *v*. St. Charles Starch Co., 6 Mo. App. 598 139
Fry *v*. Mobile Sav. Bank, 75 Ala. 473 139
Fullwood *v*. Fullwood, L. R. 9 Ch. Div. 176 323

## G

Galusha *v*. Galusha, 116 N. Y. 635 25
Garver *v*. Miller, 16 O. St. 528 25
George Taylor Com. Co. *v*. Bell, 62 Ark. 32 111

Georgia M. & G. Ry. *v.* Harris, 83 Ga. 393 516
German Ins. Co. *v.* Gibson, 53 Ark. 494 588
Germond *v.* Home Ins. Co., 2 Hun., 540 560
Gibb *v.* Philadelphia Fire Ins. Co., 59 Minn. 267 559
Gilbert *v.* Neely, 35 Ark. 24 241
Giles *v.* Hicks, 45 Ark. 271 349
Gilkerson-Sloss Com. Co. *v.* London, 53 Ark. 88 103
Gill *v.* State, 59 Ark. 422 235, 420
Gilmer *v.* Higley, 110 U. S. 50 604
Glidewell *v.* Spaugh, 26 Ind. 319 336
Goodrich *v.* New York C. & H. R. R. Co., 116 N. Y. 398 307
Gordon *v.* State, 3 Ia. 410 117
Grable *v.* German Ins. Co., 32 Neb. 645 559
Graeme *v.* Cullen, 23 Gratt. 266 188
Graham *v.* Culver, 3 Wyo. 639 233
Gutridge *v.* Missouri Pac. R. Co., 94 Mo. 468 307

H

Halbrook *v.* State, 34 Ark. 518 281
Hardage *v.* Stroope, 58 Ark. 303 521, 522
Harmon *v.* Columbia & Greenville Rd. Co., 28 S. C. 401 128, 395, 398
Harris *v.* Hanie, 37 Ark. 348 531
Harrison *v.* Harrison, 56 Miss. 174 462
——— *v.* Perea, 168 U. S. 311–326 345
Hart *v.* Girard, 56 Pa. St. 23 605
Hatch *v.* Hutchinson, 64 Ark. 119 357
Hatcher *v.* Hampton, 7 Geo. 48 415
Haver *v.* Cent. Ry. Co., 12 Am. & Eng. Ry. Cas. (N. S.) 261 55
Henderson *v.* Hays, 12 N. J. L. 387 83
Henry *v.* Conley, 48 Ark. 267 232
Henty *v.* White (Ala.), 17 So. 185 336
Herron *v.* State, 51 Ark. 136 141
Hershey *v.* Thompson, 50 Ark. 484 188
Hershy *v.* Clark, 35 Ark. 17 67
——— *v.* Latham, 42 Ark. 305 95, 322, 327, 339
Hibner's Appeal, 54 Pa. St. 110 25
Hickey *v.* Thompson, 52 Ark. 238 101
Hill *v.* Cumberland Valley M. P. Co., 59 Pa. 474 559
——— *v.* Draper, 63 Ark. 141 483
Hoffman *v.* Ætna Fire Ins. Co., 32 N. Y. 405, 414 559
Hogle *v.* N. Y., C. & H. R. R. Co., 28 Hun, 364 376
Holden *v.* Fitchburg R. Co., 129 Mass. 268 306
Holiman *v.* Hance, 61 Ark. 115 29
Home Ins. Co. *v.* Bethel, 142 Ill. 537 559
Horner *v.* Wood, 16 Barb. 386 605
Horsley *v.* Hilburn, 44 Ark. 458 521
Hot Springs Rd. Co. *v.* Deloney, 65 Ark. 177 129
Houston & T. C. Ry. Co. *v.* Washington, 30 S. W. 719 55
Howard *v.* State, 47 Ark. 431 90
Howland *v.* Knox, 59 Ia. 276 334
Huddleston *v.* Spear, 8 Ark. 406 196
Hughes' Succession, 14 La. Ann. 876 525
Humphrey *v.* Spencer, 14 S. E. 410 110
Hussey *v.* State, 87 Ala. 121 117
Hutchinson *v.* Phillips, 11 Ark. 279 172
Hutton *v.* Hutton's Adm'r, 3 Pa. St. 100 25

J

Jackson *v.* Holbrook, 36 Minn. 494 330, 331
Jacoby's Appeal, 67 Pa. St. 434 331
Jones *v.* Freed, 42 Ark. 357 96
——— *v.* Jones, 23 Ark. 213 460
——— *v.* State, 76 Ala. 9 117
Joyce *v.* State, 62 Ark. 510 375

K

Kansas & Ark. Valley R. Co. ——— *v.* Ayers, 63 Ark. 331 409
——— *v.* Fitzhugh, 61 Ark. 341 307
Kansas City, F. S. & M. Ry. Co. ——— *v.* Becker, 63 Ark. 485 2, 386
——— *v.* King, 66 Ark. 439 516
Keating *v.* People, 160 Ills. 480 420
Keeler *v.* Goodwin, 111 Mass. 490 139
Kelly *v.* McDonald, 39 Ark. 393 388
Kempton *v.* State Ins. Co., 62 Ia. 83 559
Kentucky Mut. Ins. Co. *v.* Jenks, 5 Ind. 103 559
Keokuk & W. R.R. Co. *v.* Missouri, 152 U. S. 301 503
Kimberly *v.* Patchin, 19 N. Y. 334 139
King *v.* Cox, 63 Ark. 204 438
Kirby *v.* Burns, 45 Mo. 234 111

L

Lambert *v.* Gallagher, 28 Ark. 451 492
Landigran *v.* State, 31 Ark. 50 401
Lascelles *v.* State, 90 Ga. 375 293
Leominster *v.* Conant, 139 Mass. 384 38
Levells *v.* State, 32 Ark. 585 609
Lexington *v.* McQuillan, 9 Dana (Ky.) 513 38
Little Rock *v.* Katzenstein, 52 Ark. 107 37
Little Rock & F. S. Ry. Co. *v* Barker, 33 Ark. 350 129
——— *v.* Cavenesse, 48 Ark. 106 548
——— *v.* Chilton, 38 Ark. 205 513
——— *v.* Eubanks, 48 Ark. 461 540
——— *v.* Wiggins, 65 Ark. 385 231
Little Rock & M. Rd. Co. *v.* Moseley, 56 Fed. 1009 305
Little Rock Junction Ry. Co. *v.* Woodruff, 49 Ark. 381 375

Little Rock, M. R. & T. R. R. Co. *v.* Hayes, 45 Ark. 497 375
——— *v.* Leverett, 48 Ark. 334 540
Lynde *v.* McGregor, 95 Mass. 182 111
Lyon *v.* Traveler's Ins. Co., 55 Mich. 141 153

M

McAllister *v.* New England Mut. Life Ins. Co., 101 Mass. 558 559
McCarty *v.* People, 51 Ill. 231 117
McCloy *v.* Arnett, 47 Ark. 445 241
McCormick *v.* Market National Bank, 165 U. S. 538 549
McCue *v.* County of Wapello, 56 Iowa, 698 492
McDearman *v.* McClure, 31 Ark. 562 460
McGee *v.* State, 31 Tex. Cr. Rep. 71 293
McGregor's Estate, 131 Penn. St. 359 525
McKellar *v.* Pillsbury, 48 Minn. 396 139
McLaughlin *v.* Piatti, 27 Cal. 463 139
McMahon *v.* Travelers Ins. Co., 77 Ia. 229 153
McMillan *v.* Michigan, etc., R. Co., 16 Mich. 79 410
McNeil *v.* Carter, 57 Ark. 579 328, 339
Macon *v.* Patty, 57 Miss. 378 35, 38
McPaxton *v.* Dickson, 15 Ark. 97 524
McPherson *v.* State, 29 Ark. 255 610
McVeany *v.* Mayor, 80 N. Y. 192 492
Magee *v.* Magee, 67 Barb. 487 25
Main *v.* Alexander, 9 Ark. 112 271
Mangun *v.* Webster, 7 Gill. 78 302
Mann *v.* Scott, 52 Ark. 593 172
Marrey, Matter of, 65 Cal. 287 525
Martin *v.* Ward, 60 Ark. 510 589
Masters *v.* Madison Co. Mut. Ins. Co., 11 Barb. 624 559
Mayfield *v.* Moore, 53 Ill. 428 492
Memphis & L. R. Rd. Co. *v.* Sanders, 43 Ark. 225 516
Merrill *v.* Hunnewell, 13 Pick. 213 139
Meux *v.* Anthony, 11 Ark. 411 328
Miller *v.* Callaway, 32 Ark. 666 492
——— *v.* Davis, 50 Mo. 572 336
Millington *v.* Hill, 47 Ark. 309 328
Milton *v.* Hudson River Steamboat Co., 37 N. Y. Court of Appeals, 215 376
Mining Co. *v.* Anglo-Californian Bank, 104 U. S. 192 551
Mobile Savings Bank *v.* Fry, 69 Ala. 348 139
Moores *v.* National Bank, 104 U. S. 625 604
Morgan *v.* State, 71 N. W. (Neb.) 788 421
Morgan Park *v.* Wiswall, 158 Ill. 262 41
Murphy *v.* State, 108 Ala. 10 421
Myar *v.* Snow, 40 Ark. 125 521

N

Nance *v.* Nance, 84 Ala. 375 110
National B. Ass. *v.* Jackson, 114 Ill. 533 153
Neagle, *in re*, 135 U. S. 1 477
Nevin *v.* Pullman's Palace Car Co., 11 A. M. & Eng. R. Cas. 92 4
New England, etc. Co. *v.* Standard Worsted Co., 165 Mass. 328 140
Newport *v.* Railway Co., 58 Ark. 270 416
N. Y. Cent. R. Co. *v.* Gas Light Co., 5 Hun, 201 502
Nichols *v.* McLean, 101 N. Y. 526 492
Nickens *v.* State, 55 Ark. 567 60
Nonce *v.* Richmond & D. R. Co., 33 Fed. 429 196
Norris *v.* Harris, 15 Cal. 226 302
Northern Pac. Rd. Co. *v.* Babcock, 154 U. S. 190 301
Northside Ry. Co. *v.* Northington, 30 S. W. Rep. (Texas) 1057 549
Norwood *v.* Baker, 172 U. S. 269 38

O

Ober *v.* Carson, 62 Mo. 213 139
Ocheltree *v.* Carl, 23 Ia. 394 605
Ohio *v.* Thomas, 173 U. S. 276 477
Olcot *v.* Tioga R. R. Co., 20 N. Y. 222 94
Oliver *v.* State, 17 Ark. 511 194
Organ *v.* Memphis & L. R. Rd. Co., 51 Ark. 235 89
Osterman *v.* Baldwin, 6 Wall. 116 188
Overby *v.* McGee, 15 Ark. 459 194
Overton *v.* State, 57 Ark. 60 60

P

Palmore *v.* State, 29 Ark. 248 608, 609
Park Hotel Co. *v.* Lockhart, 59 Ark. 465 540
Parsons *v.* District of Columbia, 170 U. S. 45 38
Patton *v.* State, 50 Ark. 53 90
Peay *v.* Western Union Tel. Co., 46 Ark. 538 129
Peck *v.* McKean, 45 Ia. 18 320
Peel *v.* January, 35 Ark. 331 302
Penyan *v.* Berry, 52 Ark. 130 349
People *v.* Common Council, 28 Mich. 228 36
People *v.* Potter, 63 Col. 127 492
——— *v.* Thorne, 42 L. R. A. 398 265
Phelps *v.* Holderness, 56 Ark. 300 181
Phoenix Ins. Co. *v.* Fleming, 65 Ark. 54 588
Pickett *v.* Merchants' National Bank, 32 Ark. 346 260
Pike *v.* Thomas, 62 Ark. 223 525
Pillow *v.* Sentelle, 49 Ark. 438 101
Pillow *v.* Wade, 31 Ark. 678 23
Pleasant *v.* State, 15 Ark. 621 168
Pleasants *v.* Pendleton, 6 Rand. 473 139
Poinsett *v.* Taylor, 6 Cal. 78 194, 197
Pollock *v.* Speidel, 176 O. St. 439 521
Pooler *v.* Reid, 73 Maine 129 492
Potter *v.* Adams, 24 Mo. 159 132

Preston *v.* Cincinnati, C. & H. V. R. Co., 36 Fed. 54 176
Priest *v.* Hudson R. R. Co., 40 How. Pr. 456 55
Proseus *v.* McIntyre, 5 Barb. 425 336

Q

Quarles *v.* State, 13 Ark. 310 166

R

Railroad Co. *v.* Brown, 17 Wall. 450 395
——— *v.* Dial, 58 Ark. 318 55
Railway Co. *v.* Coombs, 51 Ark. 324 374, 375
——— *v.* Davis, 56 Ark. 51 397
——— *v.* Dobbins, 60 Ark. 481 56
——— *v.* Hackett, 58 Ark. 381 55, 117, 121
——— *v.* Jones, 59 Ark. 105 374
——— *v.* Lyman, 57 Ark. 512 375
——— *v.* Maddry, 57 Ark. 306 216
——— *v.* Mitchell, 57 Ark. 418 374
——— *v.* Murray, 55 Ark. 248 216
——— *v.* Petty, 57 Ark. 359 514
——— *v.* Shoecraft, 53 Ark. 96 516
——— *v.* Triplett, 54 Ark. 296 302, 303
Randall *v.* Randall, 37 Mich. 563 24, 25
Rappleye *v.* International Bank, 93 Ill. 396 334
Rector *v.* Southern Bldg. & Loan Assn., 98 Fed. 1007 260
Reed *v.* Lane, 26 S. W. (Mo.) 957 521
Regner *v.* Glens Falls, etc., R. Co., 74 Hun (N. Y.), 202 402
Riddle *v.* County of Bedford, 7 Serg. & Rawle, 386 492
Riggs *v.* C. M. Ins. Co., 125 N. Y. 712 79
Ringgold *v.* Waggoner, 14 Ark. 69 327–328, 335, 336
Robinson *v.* Woodson, 33 Ark. 307 172
Rogers *v.* Blythe, 51 Ark. 519 480
——— *v.* St. Paul, 22 Minn. 494 37
Rohrback *v.* Germania F. Ins. Co., 62 N. Y. 47 590
Roundtree *v.* Smith, 108 U. S. 269 180
Rowland *v.* McGuire, 64 Ark. 412 322
Royall, *ex parte*, 117 U. S. 241 477
Russell *v.* Carrington, 42 N. Y. 118 139

S

Sack *v.* Dolese, 137 Ill. 129 307
St. Louis, Ark. & Tex. R. R. Co. *v.* Anderson, 39 Ark. 167 375
St. L., I. M. & S. Ry. Co. *v.* Berry, 41 Ark. 509 503
——— *v.* Berry, 113 U. S. 465 503
——— *v.* Bragg, 66 Ark. 248 516
——— *v.* Gaines, 46 Ark. 570 303, 305, 307
——— *v.* Rice, 51 Ark. 467 305, 306
——— *v.* Richter, 48 Ark. 349 349
St. Louis & S. F. Ry. Co. *v.* Brown, 62 Ark. 254 299
St. Louis S. W. Ry. Co. *v.* Henson, 61 Ark. 302 287, 302
——— *v.* Russell, 62 Ark. 182 516
Saunders *v.* Irwin, 49 Ark. 376 592
Sayle *v.* McLean, 29 Ark. 612 332
School District *v.* Bennett, 52 Ark. 511 238
Schuman *v.* Peddicord, 50 Md. 560 101
Scott's Estate, 147 Pa. St. 102 25
Senter *v.* Williams, 61 Ark. 189 328
Shattuck *v.* Watson, 53 Ark. 147 480
Shorter *v.* People, 2 N. Y. 193 601, 608, 610
Simons, *in re*, 65 Conn. 239 525
Simpson *v.* Simpson, 4 Dana, 140 25
Skinner *v.* Railway Co., 5 Exch. 787 395
Slater *v.* Jewett, 5 Am. & Eng. R. Cas. 515 306
Slattery *v.* Jones, 96 Mo. 216 331
Smith *v.* Carr, 16 Conn. 450 605
——— *v.* Clay, 3 Brown, Ch. 940 323
——— *v.* Commonwealth, 91 Ky. 588 477
——— *v.* Howell, 53 Ark. 281 23
——— *v.* Juhnson, 45 Ia. 308 320
——— *v.* Lind, 29 Ill. 27 334
——— *v.* Morse, 148 Mass. 407 265
——— *v.* Osgood, 46 N. H. 178 331
——— *v.* Phoenix Ins. Co., 91 Cal. 323 558, 559
——— *v.* Shoemaker, 17 Wall. 639 604
——— *v.* State, 47 Ala. 540 117
——— *v.* State, 59 Ark. 132 603, 608, 610
——— *v.* W. & T. Ry. Co., 41 Am. & Eng. Ry. Cas. 320 217
Soggins *v.* Heard, 31 Miss. 426 79
South Texas Nat'l Bank *v.* La Grange Oil Mill Co., 40 S. W. Rep. (Texas) 328 549
Speidel's Appeal, 107 Pa. St. 18 25
State *v.* Bailey, 94 Mo. 311 293
——— *v.* Barnett, 65 Ark. 80 271, 272
——— *v.* Bevel, 56 N. W. 546 293
——— *v.* Carr, 28 Am. St. 163 492
——— *v.* Carroll, 38 Conn. 449 492
——— *v.* Ellis, 43 Ark. 93 310
——— *v.* Harberson, 43 Ark. 378 271
——— *v.* Knight, 61 Mo. 373 132
——— *v.* Potter, 16 Kas. 80 132
——— *v.* Rainsbarger, 74 Ia. 196 293
——— *v.* Reick, 43 Kas. 279 497
——— *v.* Schoenwald, 31 Mo. 147 421
——— *v.* Williams, 77 Mo. 310 117
State *ex rel.* Bulkeley *v.* Williams, 68 Conn. 131 36
Steaubli *v.* Bank, 11 Wash. 426 139
Stephenson *v.* Osborne, 41 Miss. 119 25
Stidham *v.* Matthews, 29 Ark. 658 23
Stix *v.* Chaytor, 55 Ark. 116, 328, 335, 337
Stout *v.* Brown, 64 Ark. 312 482

Stull *v.* Graham, 60 Ark, 461 111
Switzer *v*, Switzer, 26 Grat. 574 25
Symonds *v.* Northwestern Mut. Life Ins. Co., 23 Minn. 491 558

T

Texarkana & Ft. Smith Ry. Co. *v.* Anderson, 67 Ark. 123 395, 398
Texas & St. L. Ry. *v.* Orr, 46 Ark. 182 540
Thatcher *v.* Franklin, 37 Ark. 66 138
Third Nat. Bank *v.* Guenther, 123 N. Y. 568 101, 102
Thompson *v.* Brazile, 65 Ark. 495 188
Thorn *v.* Weatherly, 50 Ark. 237 302
Tilley *v.* St. Louis & S. F. Ry. Co., 49 Ark. 540 374
Tillman *v.* Thatcher, 56 Ark. 334 429
Titsworth *v.* Spitzer, 42 Ark. 310 172
Traders' Ins. Co. *v.* Newman, 120 Ind. 554 590
Trigg *v.* St. Louis, K. C. & N. Rd. Co., 74 Mo. 147 130
Trimble *v.* James, 40 Ark. 393 346, 347
Triplett *v.* Rugby Distilling Co., 66 Ark. 219 58
Trott *v.* Woolwich Mut. F. Ins. Co., 83 Me. 362 588, 590
Tucker *v.* Grace, 61 Ark. 410 525
Tully *v.* Fitchburg R. Co., 134 Mass. 503 265

U

Union Pac. Ry. Co. *v.* Chicago, etc., R. Co., 163 U. S. 581 549

V

Vance *v.* Austell, 45 Ark. 400 592
Vanzant *v.* Davies, 6 Oh. St. 52 336
Vicksburg & M. Rd. Co. *v.* O'Brien, 119 U. S. 103 604
Volmer *v.* Wharton, 34 Ark. 691 364

W

Walker *v.* Walker, 9 Wall. 741 24, 25
Warner *v.* Capps, 37 Ark. 32 196
Washington Ins. Co. *v.* Kelly, 32 Ind. 421 559
Washington, etc., Ins. Co. *v.* Merchants & M. M. Ins. Co., 5 Ohio St. 450 605
Watson *v.* Watson, 128 Mass. 152 208
Waterman *v.* Railway Co., 32 Am. St. 228 492
Walters *v.* Brown, 44 Mo. 303 376
Weigel *v.* Boone, 64 Ark. 228 158
Wells *v.* Calnan, 107 Mass. 514 561
Wetter *v.* Biscoe, 13 Ark. 423 23
Wheat *v.* Smith, 50 Ark. 267, 273 492
White *v.* Beal & Fletcher Grocer Co., 65 Ark. 278 208
——*v.* Norfolk & S. R. Co., 20 S. E. Rep. 191 395
Wilder *v.* State, 29 Ark. 293 273, 514
Willis *v.* Reinhardt, 52 Ark. 128 194
Williams *v.* Eggleston, 170 U. S. 304 36
——*v.* Tiedemann, 6 Mo. App. 269 180
Wilson *v.* Biscoe, 11 Ark. 44 566
Winstead Bank *v.* Webb, 39 N. Y. 325 429
Wolf *v.* Banks, 41 Ark. 104 346, 347
Wood *v.* Rice, 103 Mo. 329 520
Woods *v.* McGee, 7 Ohio, 413 139
Woolfork *v.* Buckner, 60 Ark. 163 412
Wormser *v.* Merchants' Nat. Bank, 49 Ark. 117 328, 339
Wright *v.* Mattison, 18 How, 56 188
—— *v.* Walker, 30 Ark. 44 574
Wynn *v.* Central Park, N. & E. Ry. Co., 133 N. Y. 375 217

Y

Yonge *v.* Kinney, 28 Ga. 111 58
York Co. *v.* Central Railroad, 3 Wall. 107 140

CASES DETERMINED

IN THE

# SUPREME COURT OF ARKANSAS

67 1
70 415
67 1
83 8
67 1
85 507
67 1
188 37
88 184
67 1
90 334

---

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

Opinion delivered June 17, 1899.

1. MASTER AND SERVANT—BREACH OF DUTY—FORM OF ACTION.—Where the duty which a master owes to his servant is imposed by law by reason of their relation, as well as by their contract of service, the servant may, for a breach of such duty, elect to sue upon the contract, or to treat the wrong suffered as a tort, and bring an action *ex delicto*. (Page 4.)

2. RAILROAD—LIABILITY.—A railroad company operated wholly or in part in this state is liable in tort to an employee for an injury received in this state through the negligence of a co-employee who was not a fellow-servant, within Sand. & H. Dig., § 6249, notwithstanding the injured employee's contract of service was entered into in another state. (Page 4.)

3. ERRONEOUS INSTRUCTION—WHEN CURED.—The court's error in assuming a disputed fact as true may be cured by other and more explicit instructions on the same subject. (Page 6.)

4. MASTER AND SERVANT—FELLOW SERVANTS.—An railroad employee is entitled to recover of his employer when he was without fault injured by the concurring negligence of two co-employees, one of whom at least was not a fellow-servant, within Sand. & H. Dig., § 6249. (Page 7.)

5. SAME—An engine inspector engaged at a roundhouse and a locomotive fireman engaged on the road are not fellow-servants, as they are not engaged in the same department or service, nor "working together to a common purpose," within Sand. & H. Dig., § 6249. (Page 9.)

Appeal from Craighead Circuit Court.

FELIX G. TAYLOR, Judge.

*Wallace Pratt*, *I. P. Dana*, and *W. J. Orr*, for appellant.

*E. F. Brown* and *N. F. Lamb*, for appellee.

BATTLE, J. This is the second time this action has been before this court on appeal. The opinion delivered when it was here the first time is reported in 63 Ark. 477. It was instituted by William Becker against the Kansas City, Ft. Scott & Memphis Railroad Company to recover damages for personal injuries. Plaintiff was a fireman in the employment of the defendant, and was engaged with others in running an engine of his employer from Thayer, Mo., to Memphis, Tenn., and return; Thayer being the starting point. He left the latter place about 6 o'clock in the evening on the 21st of April, 1894, and arrived at Memphis about 4:30 in the morning of the next day, and, returning, left Memphis about 6 o'clock in the evening of the 22d of April, and was injured at Afton, in this state, about daylight of the following morning. He was seriously and permanently injured by the step on the left-hand side of engine No. 30, on which he was employed, turning as he jumped upon it in order to get into the engine cab; the engine being at the time in motion. As a result of the injury, amputation of one of his legs, just below the knee, was necessary.

To be more specific, we relate the cause, manner and circumstances of the injury more at length. At the rear end of the engine, at the entrance to the cab, were two steps—one on either side—for the use of employees. The engineer and fireman rode in the cab,—the former on the right side, and the latter on the left. Each step was fastened to the lower end of an iron or steel rod. The upper end of the rod passed through an iron beam nine inches thick, and was fastened and held in place by means of a tap at the top. When in proper position, the step faced out at right angles to the side of the engine. When the rod was loose, the step could be turned out of place, but this defect could be remedied by means of the tap. A short time before plaintiff was injured, the engine on which he was acting as fireman and the train attached were moved on a side track at Afton for the purpose of allowing a passenger train to pass. While the former train was upon the side track,

the plaintiff, by direction of the engineer, left the cab to put out the headlight, and while so doing the passenger train passed. About the time he finished his work the engineer commenced moving the train from the side track upon the main line, and, while it was running about as fast as a man would ordinarily walk, plaintiff attempted to get upon the engine by means of the left step, and was injured in the manner stated.

The maintenance of the steps in good repair and safe condition was intrusted to two employees of the defendant. It was the duty of the engineer, when his engine was on the road and away from Thayer, to examine and keep the steps in safe condition by means of the tap at the end of the rod, for which purpose he was provided with the necessary tools. It was also his duty, when he ran his engine into the roundhouse at Thayer, where the engines operated on the road between Thayer and Memphis, on their return from the latter place, were inspected and repaired, to report any defects in his engine which needed repairing, and blanks were furnished him for the purpose. At Thayer was a machinist, named Johnson, whose duty it was to inspect the lower part of the locomotives, including the steps, when they came in, as a protection against any neglect of the engineer. Johnson also made repairs. The bad condition of engine numbered 30, if attributed to the fault of any one, was due to the negligence of one or both of these employees. To prove that the defendant was liable for the culpable negligence of these employees in the failure to discharge their duties, evidence was adduced in the trial of this action tending to prove that the engine numbered 30 was taken on the 18th of April, 1894, to its shops at Thayer for inspection and repair, and that on the 21st of April, two days before plaintiff's injury, an employee of the defendant, while in the roundhouse at Thayer, discovered that the engine step on the left or fireman's side was loose, and turned half way round, so that it projected under the engine, and that the engineer on the 22d of the same month, while at Memphis, discovered the step on the right side of the engine to be loose, and tightened it, and that the left step was loose on the next day, when the plaintiff was injured. On the contrary, evidence was adduced by the defendant to

show that the steps were not loosened at the shops when the engine was there for repairs on the 18th of April, and that the inspector examined them, and did not notice that either of them was loose or turned, and that the engineer examined the left step on the evening of April 22, 1894, at Memphis, by striking it with a hammer—the usual test—and found it apparently "all right."

The jury, before whom the issues were tried, returned a verdict in favor of the plaintiff against the defendant for the sum of $5,000, and the court rendered judgment accordingly. To reverse this judgment, an appeal by the defendant to this court is prosecuted.

It is insisted by appellant that its duties to appellee were imposed and governed by the laws of Missouri, where he was employed and their contract for service was entered into, and that the risks assumed by the contract were determined by the same laws; that the relation of master and servant could be created between them by contract; and that the duties and risks assumed grew out of that relation. It is true that the relation was created by contract, but the duty upon which the appellee relies to recover in this action, if it existed, was imposed by law, and arose from the relation, rather than the contract. For a neglect to perform this duty, the appellee had the right to elect to sue upon the contract, or to treat the wrong suffered by the neglect as a tort, and bring an action *ex delicto*. The rule in such cases as this is correctly stated in *Nevin* v. *Pullman Palace Car Co.*, 11 Am. & Eng. R. Cas. 92, 101, as follows: "Where the duty for whose breach the action is brought would not be implied by law, by reason of the relations of the parties, whether such relations arose out of a contract or not, and its existence depends solely upon the fact that it has been expressly stipulated for, the remedy is in contract, and not in tort, when otherwise case is an appropriate remedy." *Clark* v. *Railway Co.*, 64 Mo. 440; Bliss, Code Pl. (3 Ed.) § 14; Pom. Code Rem. (3 Ed.) §§ 568-571; 4 Elliott, Railroads, § 1693.

The railroad of appellant is built and operated in part in this state. In regard to such railroads the constitution provides as follows: "All railroads which are now or may here-

after be built and operated, either in whole or in part, in this state shall be responsible for all damages to persons and property, under such regulations as may be prescribed by the general assembly," Const. 1874, article 17, § 12. Section 6249, Sand. & H. Dig., provides: "All persons who are engaged in the common service of such railway corporations [foreign or domestic, doing business in this state], and who, while so engaged, are working together to a common purpose, of same grade, neither of such persons being intrusted by such corpoations with any superintendence or control over their fellow employees, are fellow servants with each other; *provided*, nothing herein contained shall be so construed as to make employees of such corporation in the service of such corporation fellow servants with other employees of such corporation engaged in any other department or service of such corporation. Employees who do not come within the provisions of this section shall not be considered fellow servants." And section 6250 provides: "No contract made between the employer and employee based upon the contingency of the injury or death of the employee limiting the liability of the employer under this act, or fixing damages to be recovered, shall be valid and binding." The effect of these statutes is to limit the risk assumed by an employee on account of the acts or omissions of persons in the service of the same employer to the neglect of those who are fellow servants within the meaning of the statutes, and to impose upon the master the duty to protect him against the neglect of all other fellow employees in the discharge of their duties, and to render the employer liable in damages for injuries suffered on account of the failure to discharge this duty.

The appellant was and is subject to and governed by these statutes, and is liable to its employees in tort for injuries caused by the failure to discharge any duties growing out of them.

The appellant says that the court erred in giving to the jury an instruction in words as follows: "If you find from the evidence that it was the duty of Bennett to inspect the engine for the defective step, and that by the exercise of ordinary

care he could have discovered the defect, and if you find that the step was defective, and that it was also the duty of Johnson to inspect the engine for such defect, and that he, by the exercise of ordinary care and observation, would have discovered the defect, and that when the plaintiff was injured, if he was injured, he and said Johnson were not engaged in the same department or service of the defendant, and were not working together to a common purpose, and that negligence of said Johnson, if you find that he was negligent, contributed to, or was in part the cause of, plaintiff's injury, and that the plaintiff was not injured by reason of want of ordinary care for his own safety, then your verdict will be for the plaintiff."

This instruction, it says, was defective because it assumes that the step was defective at some time prior to the accident when the engineer and Johnson should have made their inspection, or when they did in fact make it. If this was a defect, it was cured by the following instructions given at the instance of appellant:

"(1) Becker, by virtue of his employment, assumed all the ordinary and usual risks and hazards incident to his employment, and the railroad company was not an insurer of the perfection of the step in question, or the safety of Becker,—the railroad company being required to exercise reasonable and ordinary care and diligence, and only such, in furnishing to its employees reasonably safe machinery and instrumentalities for the operation of its railroad; and it will be presumed, in the absence of anything to the contrary, that the railroad company has performed its duty in such cases, and the burden of proving otherwise rests upon Becker. And in this case, as Becker seeks to recover damages for injuries resulting from alleged defective steps furnished by the railroad company, it not only devolves upon him to prove such defect, but it also devolves upon him to show, either that the railroad company had notice of such defect complained of, or that by the exercise of reasonable and ordinary care and diligence it might have obtained such notice; and proof of a single defective or imperfect operation of such step, resulting in injury, is not of itself sufficient evidence, nor any evidence, that the company had previous knowledge or notice of such defect.

"(2) You are further instructed that although you may find and believe from the evidence that the step in question was loose, and that it turned with Becker, and he thereby received the injuries complained of, still he is not entitled to recover in this action unless he has shown by a preponderance of the evidence (that is, a greater weight of the evidence) that the defendant, or its servants who were intrusted with the duty of inspection, had notice of the fact that said step was loose prior to the time of the injury, or that the step was loose a sufficient length of time before the injury that its condition could have been discovered by the defendant, or its said inspectors, by the exercise of reasonable care, and could not have been discovered by Becker by exercise of the same degree of care; and, unless the plaintiff has so shown, you will find for the defendant.

"And you are further instructed that knowledge on the part of witness Buck that the step was loose at Thayer is not knowledge to the defendant company.

"(3) The presumption is that the railroad company has done its duty by furnishing safe and suitable appliances for the performance of its work, and, when this is overcome by positive proof that the appliances were defective, the plaintiff is met by a further presumption that the railroad company had no notice of the defect, and was not negligently ignorant of it. It is not sufficient to show that the plaintiff was injured, and that the injury resulted from a defect in the step, but he must go further, and establish the fact that the injury happened because the railroad company did not exercise proper care in the premises, in discovering and repairing said step."

At the request of the appellant, and with the consent of the appellee, the court instructed the jury that Bennett, the engineer, and appellee, the fireman, were fellow servants at the time the injury occurred. Now, appellant's counsel says: "If we admit * * * that Bennett, the engineer, did not inspect this step at Memphis, and did not apply the usual test to ascertain its condition, and that he was negligent, it being admitted in this case by the record that Bennett and the plaintiff were fellow servants, then we submit that there is no room for

reasonable minds to differ on the proposition that Bennett's negligence was the direct and promoting cause of this injury, because, but for his negligence (admitting that he was negligent, and admitting that the step was defective at Memphis), the injury could not have happened, and his negligence, if he was negligent, was not a contributing cause, but was the direct, immediate, last moving, and approximate cause of the accident;" and for this reason they say that the instruction objected to by appellant, as before stated, was defective, and should not have been given. But this is not correct. The trial court told the jury, by this instruction, that if they found that the step by which the appellee was injured was defective, that Johnson negligently failed to discover that it was in that condition, that his negligence contributed to the injury, and that he was not a fellow servant of Becker, they should return a verdict in favor of appellee. If such findings were true, Johnson's negligence was a proximate cause of the injury; for there is no evidence that he fastened the step when the engine was at Thayer, the last time before the accident occurred. He testified that he did not. If they were loose, then they remained so until they were fastened; and the evidence shows that the left step, which was the cause of the injury, was not fastened until after the accident. The only negligence of Johnson which could have contributed to the injury was his failure to exercise proper care in the inspection of the step, and, if it contributed, it set the trap which caught and injured the appellee. The failure of the engineer to fasten the step did not render the negligence of Johnson harmless or less effective, but left it free to work the injury it was lying in wait to inflict. The injury was probably the result of the concurring negligence of the two employees, and may not have occurred in the absence of either. It is no defense, however, for the appellant to prove that the negligence of the engineer contributed to it. 1 Shear. & R. Neg. (5 Ed.) p. 292, § 188, and cases cited. This necessarily follows from the imposition of the duty to inspect on both employees, and the purpose it was intended to serve; for it was imposed upon both to serve as a check against the negligence of each of them, and to protect appellee against consequent injuries.

The appellant complains because the court refused to instruct the jury in the following words: "You are instructed that it is a rule of law that the railroad company is not liable to any of its employees for the negligence of a fellow servant; and under the evidence in this case you are instructed that, with reference to the act complained of, and at the time Becker was injured, he and Inspector Johnson were fellow servants, and, if you find and believe from the evidence that Becker was injured through the negligence of said Johnson, then the railroad company would not be liable for such negligence of said Johnson."

Were Johnson and Becker fellow servants? Under the statutes of this state, four conditions must concur to constitute different employees of the same railway company fellow servants: First, they must be engaged in the common service of the railway company; second, while so engaged, they must be working together to a common purpose; third, neither of them must be intrusted by the railway company with any superintendence or control over their fellow employees; fourth, they must be engaged in the same department of service.

Did the relations of Johnson and Becker conform to all these conditions? Johnson was an inspector and repairer of all of appellant's engines at Thayer—about 50 or 60 in number—and Becker was a fireman on one of them. Johnson's duty was to inspect the engines in the roundhouse, and make such repairs as he could in the way of screwing up bolts and nuts, and putting in springs, and other work. In addition to his duties on the road, it was the duty of Becker, as fireman, to see that his engine was provided with tools, and that the tool boxes and supply boxes for oil were kept locked when the engine was in the roundhouse, and, before his engine started out on the road, to see that it was provided with a full tank, that there was sand in the sand boxes, that the ash pan was in a clean condition, and that a fire in the engine was prepared for the road, and on and off the road to keep the engine clean and the signal lamps in repair. His chief duties were performed on his engine while on the road. Johnson was in the mechanical department, and subject to the authority of the round-

house foreman, and Becker, when off the road and at Thayer, was subject to the same authority, and while on the road in the discharge of his duties was in the transportation department, and subject to the authority of the superintendent of the same; but it seems that the roundhouse foreman could, while he was on his engine on the road, discharge him for neglect of duty, or order him to leave his engine for the purpose of discharging a duty at some other place. Until he exercised this authority, however, Becker, while on the road, was in the transportation department, and subject to the authority of those in control of that department. When Becker was at Thayer, his and Johnson's duties were different, and were not such as to associate and bring them together in their work, except casually when they might work on Becker's engine at the same time, Becker cleaning and Johnson inspecting or repairing. They could not be said to have been working together, except when and so long as they were so actually engaged. Their working together was not sufficient to constitute them associates in labor any longer than it continued, no more than the casual meeting of individuals for short periods of time could constitute them associates. As they were not working together in the same department at the time the accident occurred, it follows that they were not fellow servants at the time when Becker was injured, and that the instruction asked for by the appellant to the contrary effect was properly refused.

We think that the evidence was sufficient to sustain the verdict of the jury in this court.

Judgment affirmed.

BUNN, C. J., did not participate.

67 11
71 408

# DOZIER v. ARKADELPHIA COTTON MILLS.

Opinion delivered October 21, 1899.

1. INSOLVENT CORPORATION—AUTHORITY OF DIRECTORS TO MAKE PREFERENCE.—The stockholders of an insolvent corporation adopted a resolution that the corporation be dissolved, and authorized its directors to sell its property and "apply the proceeds thereof to the company's liabilities, so far as the same shall extend." The property was purchased by a director of the company, who was also president of a bank to which the company was largely indebted. With the acquiescence of his co-directors, the director who purchased the property paid therefor by indorsing credits on the notes held by his bank against the company. *Held* that the resolution of the stockholders contemplated a *pro rata* distribution of the company's assets among all the creditors, and that the preference of the bank was unauthorized. (Page 14.)

2. SAME—PREFERENCE—TIME OF OBJECTION.—The contention that a preference made by the directors of an insolvent corporation was not objected to within 90 days after the same was given, as required by the act of March 14, 1893, is not well taken where the preference was made in secret and without the knowledge of the party aggrieved, since there was no point of time from which to measure the 90 days. (Page 15.)

Appeal from Clark Circuit Court in Chancery.

JOEL D. CONWAY, Judge.

*McMillan & McMillan*, and *Rose, Hemingway & Rose*, for appellant.

McNutt, as assignee of the claims against the insolvent coporation, had no vested right to a preference. He had only the right which the original creditors had. Broom, Leg. Max. § 354; Sheld. Sub. § 87. No preference has been "obtained or sought to be obtained" by him, in the sense of that expression in sec. 1427, Sand. & H. Dig. The ninety-day limitation prescribed for contesting preferences did not begin to run in his favor until the filing of his answer, as that was his first assertion of his claim. Nor did he have any power to dispose of the proceeds of the sale, since it was not delegated to him by

the board of directors. 62 Ark. 33. The object of the insolvency statutes is to enforce the equal distribution of assests amongst creditors who have no liens. 98 U. S. 512; 59 Ark. 582. If the sale to McNutt was valid, he could not pay the purchase money by buying up claims against the insolvent corporation. 13 Ark. 576; 18 N. Y. 227; 3 Thomps. Corp. § 3786. The sale to McNutt was voidable at the instance of creditors of the corporation. The president could not be at the same time vendor and vendee. 23 Ark. 622; 54 *Id.* 633; 39 *Id.* 309; 47 *Id.* 537. This is still true, notwithstanding the. sale to Gibney, since the latter was incomplete and ineffectual. 58 Ark. 84; 15 N. E. 296; 45 Oh. St. 512; 4 How. 555. A decree should have been rendered below for a distribution of the assets in accordance to law.

*J. H. Crawford*, for McNutt.

Appellants have failed to comply with secs. 1428 and 1431, Sand. & H. Dig., requiring advertisement of notice as to their suit; and the court was justified in refusing them relief. The president of a corporation, being its chief officer, is presumably authorized to carry out its lawful contracts. 162 Ill. 431; S. C. 53 Am. St. Rep. 312.

*McMillan & McMillan*, and *Rose, Hemingway & Rose*, for appellants, in reply:

The objection that there was no notice to creditors can not be raised for the first time in this court. Sand. & H. Dig., § 1061. There was no need for it until the fund was brought into court for distribution. Sand. & H. Dig., § 1428. The resolution of the stockholders, simply directing the directors "to apply the proceeds (of the sale) to the company's liabilities, so far as the same extends," does not provide for preferences, and the fund should be equally distributed. 1 Pom. Eq. § 407. If McNutt had any authority to prefer himself, the burden was on him to show same. 55 Ark. 302; 45 Ark. 298; 1 Greenleaf, Ev. § 79; Broom, Leg. Max. 121.

BUNN, C. J. The Arkadelphia Cotton Mills, one of the appellees in this case, a corporation organized and doing busi-

ness under the laws of this state at the city of Arkadelphia, having become financially unable to carry on its business further, at a meeting of its stockholders, on the 24th of November, 1892, adopted the following resolutions, to-wit:

"Resolved, by the board of stockholders of the Arkadelphia Cotton Mills, that the embarrassed condition of this company's finances render it inexpedient to further prosecute the business for which it was formed. Therefore, be it resolved, that this corporation be dissolved and retire from business, and that its board of directors be authorized and empowered to sell, either at public or private sale, as it shall seem best to them, all of the rights, privileges, franchises, choses in action, real and personal property of any description belonging to this company, upon such terms as to credit and security as to them shall seem right and proper, and to apply the proceeds thereof to the company liabilities, so far as the same shall extend. Resolved, further, that, upon said sale being duly and properly made according to the instructions of these resolutions, the president of the board of directors of this company be authorized and empowered to execute and deliver bills of sale and deeds of conveyance for said property to the purchaser or purchasers thereof."

It is unnecessary to discuss the question as to whether or not a corporation at that time had the power to dissolve itself, as this one by these resolutions attempted to do, except in so far as the attempt to do so throws light on the intention of the stockholders, and aids in the construction of the language of the resolutions as to the disposition of the proceeds of the sale thereby authorized to be made.

In pursuance of these resolutions, the directors, about January, 1893, sold all the property of every description to one L. E. Gibney, giving him time to make arrangements to pay the $20,000 he was to pay for the same. At the expiration of ten or twelve months from this sale, it was found that Gibney could not pay said purchase price, nor any part thereof, and then he and McNutt, one of said directors and the president of the insolvent company, arranged so that McNutt should take his place as the purchaser of said property at the same price.

and this was accordingly consummated. At this time and when the dissolution resolutions were adopted, the cotton mill owed the local bank a large amount of money, equaling, as we infer, the amount for which the said property sold, and for which the company had executed and delivered to it (the bank) its promissory notes or other obligations indorsed by McNutt and its other directors, individually; McNutt being also the president of the bank. Sometime thereafter (it is not known when) McNutt paid the $20,000 by simply indorsing proportionate credits upon these indorsed notes of the bank against the company, thereby settling the same as far as might be, and thereby also in effect preferring said bank as one of the creditors of said company, and indirectly preferring himself and his co-directors of the company, as possible future creditors, had this settlement of the notes not been made. Although there was no formal ratification of this procedure by McNutt on the part of his co-directors, yet, by their silence, it may be presumed that they approved of it. The stockholders never had another meeting after the adoption of the dissolution resolutions, doubt less thinking that they had thereby done all they could towards winding up the business of the concern, and so gave no sanction to this mode of distribution, as far as the record shows.

The language of the resolutions of the stockholders in reference to the distribution of the proceeds of the sale of the property manifestly meant that the directors having the matter in charge should distribute the fund derived from any sale that might be made *pro rata* among the creditors of the concern; and the directors had no authority to make a different distribution of these assets, for in this they were acting under direct instructions from the stockholders. At the time these resolutions were passed, there was no statutory provision as to the dissolution of private corporations, nor statutes prohibiting insolvent corporations to make preferences among their creditors, but statutes to these ends were passed on the 12th and 14th of April, 1893, before the payment of the bank's claims was made as aforesaid, and at that time the whole spirit of the law was opposed to anything but an equal division in such cases, with a few specified excep-

tions; and this gave emphasis to the manifest intention of the stockholders, as expressed in their resolutions.

It is contended that, while the statute at this time forbade preferences, yet that this could only be made an objection within ninety (90) days from and after the time the preferences should be made. If this was a preference in fact, it was made in secret, so far as this record shows, and there was no point of time from which to measure the 90 days, so far as outsiders were concerned, and no showing is made that plaintiffs had notice of the distribution or payments made as aforesaid.

We are of opinion, therefore, that the decree of the court below dismissing plaintiff's bill for contribution should be reversed, and the appellants should have judgment against appellees in such amounts, respectively, as will give them *pro rata* shares with the plaintiffs, and the cause is remanded with directions to decree accordingly.

BATTLE and HUGHES, J. J., dissenting.

---

## BOWERS *v.* HUTCHINSON.

67 15
f88 309

Opinion delivered October 14, 1899.

1. DOWER—RELEASE.—Under the statutes of this state a married woman can relinquish dower only by joining with her husband in a deed of conveyance to a third person. (Page 22.)

2. HUSBAND AND WIFE—CONTRACT BETWEEN—ENFORCEMENT.—In case of a contract between husband and wife made without the interposition of a trustee, if either party has received the full benefit of the contract, and it is otherwise valid, it will be enforced in equity. (Page 25.)

3. PLEADING—DEFECT OF FORM—REMEDY.—An answer to a petition by a widow for her share in her husband's personalty alleged that she entered into an agreement of separation with her husband whereby she agreed to release all her right to share in his estate in consideration of provisions for her which "were fair and just according to his estate in every respect." *Held*, that the answer was defective in form, as it should have stated the facts necessary to show that the agreement was based upon a sufficient consideration, was fair and equal, reasonable in

its terms, and untainted by fraud or coercion, and that the separation had actually taken place when the agreement was entered into, or immediately followed. *Held,* also that this defect in pleading should be reached by motion, not by demurrer. (Page 25.)

4. DEED OF SEPARATION—EFFECT.—The fact that a deed of separation was invalid as a relinquishment by the wife of her right of dower in her husband's lands does not render it inoperative as a release of her right to share in his personal property. (Page 26.)

Appeal from Arkansas Circuit Court.

JAMES S. THOMAS, Judge.

*P. C. Dooley*, for appellants.

Appellee, having enjoyed all the benefits of the contract, should not be suffered to repudiate it. 37 Am. Dec. 438. Contracts of separation are at the present time enforced in both England and America, without the intervention of a trustee. Macq. Hus. & Wife, 324, 329; Schouler, Dom. Rel. 471, 473; 3 Vesey, 352; Bright, Hus. & Wife, 306; Schoul. M. & D. 474; 37 Mich. 563; 9 Wall. 743; Bish. M. & D. § 1266; 5 H. L. Cas. 59; 113 Mass. 255; 41 Barb. 92; Tiff. Dom. Rel. 168, 169, 170; 24 Atl. 926; Bish. Cont. § 469, 490; Bish. M. D. & Sep. §§ 1264, 1265, 1278, 1286; 12 Ch. Div. 605; 18 Ch. Div. 670; 113 Mass. 255; 3 Metc. 503; 18 Am. Rep. 476; 54 Pa. St. 110; S. C. 42 Am. Dec. 271; 8 Ga. 341; 3 Pa. St. 100; 37 Mich. 563; 35 Mich. 110; 107 Pa. St. 18; 89 Am. Dec. 172; 113 Mass. 257; 22 Barb. 97; 41 Barb. 92; 37 N. Y. 621; 8 W. & S. 102; 1 Blackf. 97; 14 Ohio, 257; 7 Johns. 57; 34 Mich. 342; 15 Ala. 311: 1 B. Mon. 282; 9 Humph. 477; 35 Miss. 638; 17 Mo. 564; 7 Price, 577; 11 Ves. 526; 2 Brown, Ch. 377; 3 Meriv. 266; 2 B. & C. 547; 4 D. & R. 11; 7 Serg. & R. 500; 3 Pa. St. 100; 35 Pa. St. 357; 5 Day, 47; 8 Johns, 73; 2 Wend. 422; 3 Paige, 483; 8 Ga. 341; 9 Cal. 494; 3 Met. 503; 9 Wall. 743; 10 Pet. 583; 16 Oh. St. 527; 14 Ind. 505; 15 Mich. 447; 44 N. E. 20; 4 De G., F. & J. 221; 113 Mass. 255; 77 Ill. 633; 54 Wis. 554; 34 Tex. 536; 8 Bush, 262; 25 Iowa, 350; 4 Bush, 453; 22 Barb. 97; 14 Ohio, 257; 13 Rich. (S. Car.) 157; 41 Barb. 92; 1 Blackf. 97; 4 Greene, 126; 3 Metc. 503; 39 N. Y, 621; 1 Phila. 561; 8 W. & S. 102; 3 Pa. St. 100; 10 Oh. St. 247; 35

Pa St 357. As to powers and rights of married women in this state, see: 47 Ark. 175; 52 Ark. 234; 47 Ark. 235; 44 Ark. 154; 45 Ark. 111; 47 Ark. 111; 51 Ark. 235; 62 Ark. 31; Const. 1874, art. 9, § 7; Sand. & H. Dig. § 4945; 47 Ark. 175; 60 Ark. 70; 56 Ark. 243; 46 Ark. 542; 55 Ark. 85; 55 Ark. 116; 52 Ark. 234; 51 Ark. 390; 1 Kent, 167; 89 Am. Dec. 547; Big. Est. 278; 125 Mass. 25; 43 Am. Dec. 427; 3 Neb. 344; 58 Am. Dec. 112; 6 How. 238; 1 Story, Eq. 385; 1 Pom Eq. 814. A married woman is estopped from denying her acts, or the consequences thereof, the same as a *femme sole.* 50 Mich. 189; 2 Bish. Mar. Wom. § 490; Big. Est. 513, 488; 30 Ala. 382; 21 Pa. St. 436; 2 Pom. Eq. § 698; 94 U. S. 22; 50 Ark. 42; 10 S. E. 95; 52 Fed. 631; 50 Ark. 42.

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

A release of dower to the husband is a nullity. 30 Ark. 17; 31 Ark. 678; 13 Ark. 423; 53 Ark. 281; 3 Paige, 503; 14 Me. 432; 60 Ark. 474; 86 Ill. 547; 76 Tex. 533; 85 Ala. 342; 101 Ill. 242; 102 Ind. 173; 40 Md. 387; 38 Ind. 221; 25 N. Y. 328; 32 N. Y. 423; 14 Barb. 531; 56 Ark. 297; 26 N. E. 128; 60 Ark. 174; 2 Scrib. Dow. 303-313, 288; 3 N. E. 19. A widow can not convey her dower before it is assigned and allotted to her. 21 Ark. 62; 21 Ark. 347; 31 Ark. 334; 3 N. E. 19. The husband was already legally bound to pay the sum advanced to the wife. Hence it was not a valid consideration for the contract or conveyance. 52 Ark. 174. Estoppel does not operate on a matter as to which the party could not contract. 47 Ark. 354; 37 Ark. 555; *Id.* 304; 15 Fed. 707. The transaction, by reason of the confidential and fiduciary relations existing between the parties, is presumably invalid in equity. 2 Pom. Eq. §§ 955, 963.

*Benj. J. Gifford*, for Appellee.

The former doctrine of the courts did not favor such agreements as the one at bar. Schouler, Dom. Rel. 190. The later rule is that if there was a fair division of property, and the wife has all the court would have awarded her, the settlement will not be disturbed. Bish. Sep. 1280; Schoul, Hus.

& Wife, 329; 135 Ill. 457. The presumption is against the validity of such agreements, and the one relying upon such a contract of the wife must show that she had authority to do so, and that the husband acted in good faith. 58 Mich. 1; 75 N. Y. 91; 92 Pa. St. 267; 71 N. Y. 154; 57 Pa. St. 57; 9 How. 55; Kerr, Fraud and Mist. 400; 92 Pa. St. 248; 86 Pa. St. 512; Story, Eq. Jur. § 308; Bisph. Eq. § 231; Schouler, Hus. & Wife, 473; Atherly, Mar. Sett. 162; Tiff. Dom. Rel. 171; Bish. Mar. and Div. 474; Macq., H. and W. 300; Sch. Post Nup. Agreem. 190; 112 Ill. 229; 40 Mich. 473; Schouler, Dom. Rel. 190, 191; Bish. M. and D. 1280: 144 Ill. 436; 104 Ill. 122. While all post nuptial agreements between husband and wife are void in law, those which are not inequitable may be enforced in equity. 9 Wall. 743; 45 Ala. 264; 113 Mass. 255; 54 Pa. St. 110; 3 Pa. St. 100; 1 Blackf. 97; 14 Ind. 505; 145 Ind. 59; 37 Mich. 563; 37 Mich. 326; 135 Ill. 457; 144 Ill. 436.

BATTLE, J. On the 7th day of June, 1876, John H. Hutchinson and Jennie M. Martindale were married. On the 17th day of January, 1897, John H. Hutchinson departed this life intestate, at his late residence in Arkansas county, in this state, leaving Jennie M. Hutchinson, his widow, surviving, but no children. He died seized and possessed of real and personal property. On the 19th of January, 1897, Edward Bowers was duly appointed his administrator; and on the 14th of April, 1897, Jennie M. Hutchinson, his widow, applied to the Arkansas probate court for an assignment of her dower in his estate. The administrator and heirs of the deceased answered, and pleaded in bar of her right to dower a deed, which was duly executed and acknowledged by the petitioner and the deceased in his lifetime, and is in the words and figures following:

"This deed of separation, or articles of agreement, made, entered into, and executed at DeWitt, in the county of Arkansas, this 13th day of September, A. D., 1882, by and between John H. Hutchinson, M. D., as party of the first part, and Mrs. Jennie M. Hutchinson, party hereto of the second part, witnesseth:

"That said parties, with their mutual consent and by agreement, were lawfully joined in wedlock, on the 7th day of June, 1876, at the city of Memphis, Tennessee, and then came to the residence and home of said first party in said county of Arkansas, where they have continued to reside as husband and wife, and whereas, the said first party at the time of such marriage engaged in the practice of medicine in said county in Arkansas, and is still engaged in such practice, from which, as well as from the business of stock raising and farming, he has supported and maintained his said wife and himself comfortably, and has at all times furnished her with all things and articles necessary for her health, comfort, enjoyment and proper maintenance, but the said second party being dissatisfied with and unwilling to continue to reside in said county of Arkansas, and being desirous of residing with a relative at————————; and whereas, the said first party is not in a condition to abandon his said home, practice and business already acquired and established in said county of Arkansas, and remove to and locate in some other state or kingdom; and whereas, said first party is unwilling to exercise his authority as a husband by requiring his wife, said second party, to permanently reside at his said home and domicile in said county of Arkansas, contrary to her desire and expressed wish, therefore said parties mutually covenant and agree to and with each other as follows:

"The said John H. Hutchinson covenants with said Mrs. Jennie M. Hutchinson, (who was prior to said marriage Miss Jennie M. Martindale) that she shall have full liberty and authority, and he hereby agrees that she may from this date have full liberty and authority, to reside where she pleases and desires, away from and free from the direction and control of said first party as her said husband, with the full and distinct understanding that she may select the place of residence, and change the same from time to time as freely as she could do as a single woman.

"The said first party, in consideration of the premises, and of the several covenants of said second party hereinafter expressed, hereby further agrees, promises and covenants with said second party to pay her, this day, the sum of $50 cash in

hand, and to pay her the further sum of three hundred dollars on or before the first day of January, 1883, and also the sum of one hundred dollars on or before the first day of January, 1884, and also the sum of one hundred dollars on or before the first day of January, 1885, and also the sum of one hundred dollars on or before the first day of January, 1886, which said sums are not to bear any rate of interest, but are to be paid, as stated, to said second party, or her designated agent, at the town of De Witt, in said county of Arkansas, on the first days of January, 1883, 1884, 1885 and 1886, respectively; and said cash and said payments to be made as aforesaid are in full satisfaction of all the claims upon, or right of support and maintenance by, said first party of the second part, as well as in release and satisfaction of whatever rights or claims or interest, whether of dower or otherwise, which she has acquired, or might acquire, in and to the estate and property of said first party by virtue of their relations, situations, and position toward each other by virtue of their said marriage.

"The said first party further covenants that he will not attempt to control or set up any claim, interest in, or title to such estate and property as the said second party may hereinafter acquire, but agrees and covenants that she may sell and dispose of the same, or bequeath it, or any part thereof, when and to whom she chooses, without let, hindrance, declaration or control from said first party.

"The said second party, Mrs. Jennie M. Hutchinson, in consideration of the premises and covenants of said first party and of said sum of fifty dollars to me this day in hand paid by said first party, at and before the execution of this deed (the receipt whereof I hereby acknowledge), I, said second party, do agree, promise and covenant with the said first party, his heirs and assigns, as follows: That I will not at any future time set up any claim to or interest in the estate, real, personal and mixed, which is now owned, or may be hereafter acquired, by said first party, or of which he may be seized and possessed, or be in any manner entitled to, at the time of his death, herein fully intending to relinquish, release, remise and forever quitclaim unto said first party, his heirs and assigns,

any or either of them, as occasion may require, all claims, interest, right, demand, or possibility of dower that might or could hereinafter be allotted and assigned to her by virtue of her said intermarriage with said first party, and she hereby expressly relinquishes, releases, remises, and forever quitclaims, and hereby conveys to said first party, his heirs and assigns, all my right, claim, interest, or title in and to the estate of my said husband, and covenant that I will not at any time or circumstances set up any claim whatever to said estate, or any part or parcel thereof. I further promise and covenant with said first party that I will and do accept said sum of four hundred and fifty dollars, paid and to be paid as aforesaid, in full satfaction and payment of all claims to support and maintenance by, or dower out of the estate of, said John H. Hutchinson, and I further covenant with him that I will not at any time hereinafter contract in his name, or purchase any kind of property with the expectation that he shall pay for the same, or be liable in any manner whatsoever for any support and maintenance, or for any debt that I may contract, or anything I may purchase.

"The said parties hereby agree to separate and live apart on the terms and conditions aforesaid.

"In witness whereof, we have hereto set our hands and seals at DeWitt aforesaid, the date first herein written.

"J. H. HUTCHINSON, (Seal.)
"JENNIE M. HUTCHINSON, (Seal.)

"Attest.
"J. M. PINNELL."

They alleged that John H. and Jennie M. Hutchinson conformed to and carried into effect these articles of separation until the death of the husband.

The petitioner demurred to the answers of the defendants, and the court sustained her demurrer, and ordered dower to be assigned; and the defendants appealed to the Arkansas circuit court, and in the circuit court they filed an amendment to their answers in the following words and figures:

"That at and before the execution of the deed of separation set out in their answer, filed on the 20th day of April, 1897, the said Jennie M. Hutchinson was dissatisfied with the

home provided for her by her husband, in Arkansas county, and had decided to no longer live there, but would depart to her relations in a distant state, and would no longer live with him, of which decision and determination she notified her said husband, and, having so determined to separate from him, and no longer sustain the relations of wife to him, and he, being a man of high social and personal and professional standing in the community, to prevent the scandal and humiliation incident to a proceeding in a court of justice to procure a separation and proper settlement, entered into and executed the foregoing articles of separation, which were sought by her and executed voluntarily and understandingly by her. That their separation had actually been decided upon, and had taken place before the execution of said deed, and that she left his house immediately upon its execution, and they have lived separate and apart ever afterwards. That he performed every obligation imposed on him by said agreement, and paid to her the sums of money therein mentioned at the time and place agreed upon, and no dissatisfaction was ever expressed by her to said deed as long as he lived. That said deed of separation and of transfer was faithfully adhered to and respected by both, so long as he lived. That the provisions made for her in said deed were fair and just according to his estate in every respect, and she received and accepted the full benefits of said agreement, and abided by it for sixteen years, living apart from her said husband, and carrying on a separate business for herself, and she is now estopped from denying its validity, or doing any act inconsistent therewith, or with her conduct for sixteen years. Wherefore they ask that her petition for assignment of dower in the estate of said John H. Hutchinson be dismissed."

Mrs. Hutchinson demurred to the answer as amended; and the circuit court sustained her demurrer, and remanded the cause to the probate court, with directions to set apart to the widow dower in the estate of her deceased husband; and the defendants appealed.

The deed which constituted the defense in this action was without effect as a relinquishment of dower in real estate. The statutes of this state provide that a widow shall have dower in

"all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage, unless the same shall have been relinquished in legal form." To relinquish her dower in any land of her husband the statutes require her to join in the conveyance thereof, and to voluntarily appear before a proper court or officer, and, in the absence of her husband, declare that she had of her own free will signed the relinquishment of dower for the purposes contained and set forth in the conveyance, without compulsion or undue influence of her husband. Under these statutes this court has repeatedly held that "a married woman can relinquish dower only by joining with her husband in a deed of conveyance to a third person." *Pillow* v. *Wade*, 31 Ark. 678; *Wetter* v. *Biscoe*, 13 Ark. 423; *Stidham* v. *Matthews*, 29 Ark. 658; *Countz* v. *Markling*, 30 Ark. 17; *Smith* v. *Howell*, 53 Ark. 281.

In *Pillow* v. *Wade*, 31 Ark. 678, this court held that a release of dower by a wife to her husband was a nullity, and cited *Carson* v. *Murray*, 3 Paige, 503, to sustain its ruling. In that case (*Carson* v. *Murray*) a husband and wife agreed to separate, and executed articles of separation, by which the husband agreed to pay to the wife an annuity of $125 per annum during her life, as alimony, and the wife agreed to release her right to dower in his estate. The court sustained the articles as to the annuity, but held that the wife could not relinquish her dower in the real estate of her husband by executing a release to him, or in any other way than by joining with him in a conveyance to a third person.

The validity of the deed executed by Hutchinson and his wife may be attacked in another respect. One of the stipulations of the deed is an agreement of the parties to live separately. At one time such agreements were held to be against public policy and void, because in derogation of the relation created by marriage. In England the law, in this respect, has undergone a complete change, and contracts of husband and wife to live separately are upheld by the courts, even to the extent of enforcing specific performance of the agreement to live separately. This was brought about by the change of opinion as to public policy. As was said by Jessel Master

of the Rolls: "For a great number of years, both ecclesiastical judges and lay judges thought it was something very terrible, and against public policy, that the husband and wife should agree to live separate, and it was supposed that a civilized country could no longer exist if such agreements were enforced by the courts of law, whether ecclesiastical or not. But a change came over judical opinion as to public policy; other conditions arose, and people began to think that after all it might be better and more beneficial for married people to avoid in many cases the expense and scandal of suits of divorce by settling their differences quietly by the aid of friends out of court, although the consequence might be that they would live separately, and that was the view carried out by the courts when it became once decided that separation deeds *per se* were not against public policy." *Besant* v. *Wood*, 12 Ch. Div. 605.

In this country the courts, as a general rule, have enforced covenants and promises in deeds of separation relating to the maintenance of the wife and property, provided they are based upon a sufficient consideration, are fair and equal, are reasonable in their terms, and are not the result of fraud or coercion, and the separation has actually taken place when the agreement is entered into, or immediately follows. But contracts which undertake to provide for the separation of husband and wife in the future have been held to be void, because they encourage the parties to neglect those "duties in the fulfillment of which society has an interest." "The distinction," as has been said, "rests upon the following ground: An agreement for an immediate separation is made to meet a state of things which, however undesirable in itself, has in fact become inevitable"—is made to meet a condition. "Still, that state of things is abnormal, and not to be contemplated beforehand. It is forbidden to provide for the possible dissolution of the marriage contract, which is the policy of the law to preserve intact and inviolate. Or, in other words, to allow validity to provisions for a future separation would be to allow the parties, in effect, to make the contract of marriage determinable on conditions fixed beforehand by themselves." *Walker* v. *Walker*, 9 Wall. 741; *Randall* v. *Randall*, 37 Mich. 563; *Carson* v. *Murray*, 3

Paige, 483; *Chapman* v. *Gray*, 8 Ga. 341; *Magee* v. *Magee*, 67 Barb. 487; *Galusha* v. *Galusha*, 116 N. Y. 635; *Fox* v. *Davis*, 113 Mass. 255; *Aspinwall* v. *Aspinwall*, 49 N. J. Eq. 302; *Hutton* v. *Hutton's Admr.*, 3 Pa. St. 100; *Dillinger's Appeal*, 35 Pa. St. 357; *Hibner's Appeal*, 54 Pa. St. 110; *Speidel's Appeal*, 107 Pa. St. 18; *Com.* v. *Richards*, 131 Pa. St. 209; *Scott's Estate*, 147 Pa. St. 102; *Dutton* v. *Dutton*, 30 Ind. 452; *Emery* v. *Neighbour*, 2 Halst. 142; *Com.* v. *Richards*, 131 Pa. St. 209; *Switzer* v. *Switzer*, 26 Grat. 574.

According to some authorities, the deed in question was voidable because it was executed by the husband and wife alone, without the intervention of a trustee. *Switzer* v. *Switzer*, 26 Grat. 574; *Carter* v. *Carter*, 14 Sm. & M. 59; *Stephenson* v. *Osborne*, 41 Miss. 119; *Simpson* v. *Simpson*, 4 Dana, 140; *Chapman* v. *Gray*, 8 Ga. 349; 2 Story's Eq. sec. 1428. On the contrary, courts have upheld deeds of separation to which no trustee was a party. In some of the cases in which this was done the husband was treated as a trustee. *Randall* v. *Randall*, 37 Mich. 563; *Garver* v. *Miller*, 16 Ohio St. 528; *Walker* v. *Walker*, 9 Wall. 743; *Com.* v. *Richards*, 131 Pa. St. 218. But no question as to the necessity of a trustee arises where the contract for separation has been performed by the husband on his part, and the wife has received the full benefit of it. In such cases, if the contract be in other respects valid, equity will enforce the contract. *Hutton* v. *Hutton's Admr.*, 3 Pa. St. 100; Dillinger's Appeal, 35 Pa. St. 357; *Com.* v. *Richards*, 131 Pa. St. 218.

In this case the defendants alleged in their answer that the separation of plaintiff and her late husband "had actually been decided upon and had taken place before the execution of the deed, and that she left his house immediately upon its execution, and they have lived separate and apart ever afterwards; that he performed every obligation imposed upon him by the agreement;" "that the deed of separation * * * was faithfully adhered to and respected by both so long as he lived;" and, "that the provisions made for her in the deed were fair and just according to his estate in every respect, and she received and accepted the full benefit of the agreement, and

abided by it for sixteen years, living apart from her husband and carrying on a separate business for herself." The facts stated in the answers, if true, are an equitable defense, defectively stated, to so much of plaintiff's application as constitutes a claim to a part of her deceased husband's personal estate. They should have shown more fully, by a statement of facts, that the contract for relinquishment of dower and claims for property was, under the circumstances, at the time it was entered into, based upon a sufficient consideration, was fair and equal, reasonable in its terms, and untainted by fraud or coercion. Instead of that, they allege that "the provisions made for her were fair and just, according to his estate, in every respect"—a conclusion which can be reasonably sustained only by the facts necessary to show that the contract as to the wife was based upon a sufficient consideration, was fair and equal, was reasonable and free from fraud and coercion. But this is a defect in pleading which should have been reached by a motion, and not by demurrer.

The invalidity of the deed as a relinquishment of dower in land does not render it wholly worthless as a defense. The invalidity was the result of the want of power in the wife to release her dower in real estate in any manner except the mode provided by the statute, and did not render the whole deed void. The relinquishment of dower was a part of the consideration the husband was to receive for his performance of what he undertook to do. The fact that he did not receive the whole consideration did not deprive him, his administrator or heirs, of that which was released to him—of that which he had received. The right to rescind the contract on this account belonged to him, and not to his wife. She had no right to complain because the dower in real estate was not relinquished.

The demurrer to the answer as to the personalty should have been overruled.

The judgment of the circuit court is, therefore, reversed to that extent, and the cause is remanded, with instructions to the court to overrule the demurrer as to the personal property, and try the cause *de novo* in accordance with this opinion.

RIDDICK, J., did not participate.

## COLEMAN *v.* FISHER.

Opinion delivered November 4, 1899.

MORTGAGE DEBT—LIMITATION.—A recital in a mortgage to the effect that it is on condition that whereas the mortgagor is indebted to the mortgagees in the sum of $590 evidenced by his 59 promissory notes, of $10.00 each, payable monthly to the order of said mortgagee, with interest from their dates until paid at the rate of ten per cent. per annum, is insufficient to support a promise to pay the sums mentioned; and, the notes referred to not having been executed, the promise rests in parol, and is barred by the three years' statute of limitation. (Page 29.)

Appeal from Pulaski Chancery Court.

DAVID W. CARROLL Chancellor.

*P. C. Dooley*, for appellant.

The mortgage itself is the foundation of the dealings of the parties and the source of the indebtedness. Equity will regard the notes as having all been executed. 61 Ark. 266.

*C. S. Collins* and *John Barrow*, for appellees.

The contract was usurious. 35 Ark. 52; 41 Ark. 331; 32 Ark. 346. As to plea of misjoinder of parties, see 44 Ark. 487.

BUNN, C. J. This case was decided by us some time ago (reported in 41 S. W. Rep. 49) but appellees showed to the court, after the decision was rendered, that the case had been prematurely submitted, because there had been no service of notice of the appeal and summons to them; and the judgment was thereupon set aside, and proper service of summons was served upon appellees as non-residents, and the cause afterwards redocketed and resubmitted. The facts involved are the same as when presented to us before, and no new issues of law are raised. With little additions, we adopt our former as the decision of this cause, and the same is as follows, towit:

This is a bill to foreclose a mortgage on a house and lot in the city of Little Rock, filed by appellant against appellees, on April 12, 1893, in the Pulaski chancery court. Answer and amended answer set up failure of consideration and partial failure of consideration and payment, non-joinder of parties plaintiff, statute of limitations and usury. Upon the pleadings and testimony in the case, the chancellor found generally "upon the whole case for defendant, and dismissed the bill for want of equity, and plaintiff appealed."

Appellee, J. W. Fisher, being in the employ of Smeeton, Coleman & Co. and receiving a weekly salary from them, in January, 1889, or just previously, purchased the lot in suit, and obtained money from his employers with which to pay for same, in whole or in part. In March following, desiring to build a residence on the lot, and otherwise improve it for a home, he entered into a contract with the said Smeeton, Coleman & Co. whereby they agreed to furnish him the money and materials to enable him to build the house, to the estimated amount of $500, including the amount they had already advanced to him to pay for the lot. This amount was secured by a mortgage on that day, to-wit: the 13th of March, 1889, executed and delivered to them by Fisher and wife, Dora, on said lot, and the improvements thereon, and to be placed thereon. It appears that the money and materials were to be paid and furnished as Fisher should need them. The recitals of the mortgage setting forth the contract read thus: "This sale is on condition that whereas, the said J. W. Fisher is justly indebted unto the said Smeeton, Coleman & Co. in the sum of five hundred and ninety dollars, evidenced by his fifty-nine promissory notes of ten dollars each, payable monthly to the order of said Smeeton, Coleman & Co., with interest from their dates until paid, at the rate of ten per cent per annum."

It appears that only 11 of these notes were actually given, and the 11 were all dated the 19th January, 1889, and due and payable on the 19th of February, March, April, May, June, July, August, September, October, November, and December next following, and these 11, except the two (2) due April and May, are all marked "Paid," and they are doubtless settled also,

but by oversight not marked "Paid;" so that all the installments due prior to December 20, 1889, were settled or barred by statute of limitations, and the estimated amount of the debt was thus reduced to the sum of $480, to be paid in installments as aforesaid, the first due the 19th of January, 1890, and the other monthly thereafter.

In *Holiman* v. *Hance*, 61 Ark. 115 (32 S. W. Rep. 488) we held that "the general rule is that a mortgage is not the evidence of the debt secured thereby, and that for that reason, ordinarily, its recitals are not such as make a *prima facie* case of indebtedness on the part of the mortgagor to the mortgagee, upon which alone a personal judgment can be rendered against him. The recitals in a mortgage, however, may be sufficient to support a promise, and, if that was so in the case under consideration, the statute bar would be ten (10) years, the same as that applicable to the mortgage itself, and the decree should be affirmed; but a majority of the court are of the opinion that the recitals are not sufficient to support a promise, and that the mortgage is not evidence of the debt, and that therefore the statute bar is three (3) years."

As in that case, so in this, we think the language the of recitals is not sufficient to support a promise, and the contract, except as to the 11 notes, rests in parol, and can only be established by extraneous evidence, and that the statute of limitations of three years is applicable to the other installments of the debt, as upon separate items of account, and that such of them as were due more than three years before the institution of this suit are barred, and that such of the others as may be found justly, after proper payments may have been allowed as credits and deducted, should be the true subjects of the judgment herein.

Neither the plea of usury, nor the evidence adduced to sustain it, is sufficient to affect this matter with usury.

The evidence, on the other hand, does not satisfactorilly show that plaintiff has acquired from his co-partners their interests in the debt and mortgage sued on, and the exclusive owner thereof. The others are therefore necessary parties, and should be made such.

The decree of the chancellor is therefore reversed, and the cause remanded, with directions to permit plaintiff to amend and make the other members of the firm of Smeeton, Coleman & Co., or their legal representatives, parties in this cause, and to ascertain which of said installments were not barred at the institution of this suit, and to find and decree accordingly.

---

## CRANE v. SILOAM SPRINGS.

Opinion delivered October 28, 1899.

67 30
68 380

67 30
70 459
70 460
70 463

67 30
71 560

67 30
84 393

67 30
89 516
90 39

1. CONSTITUTIONAL LAW—LOCAL IMPROVEMENTS.—Const. 1874, art. 19, § 27, authorizing "assessments on real property for local improvements in towns and cities under such regulations as may be prescribed by law," does not inhibit the legislature from authorizing the creation of improvement districts embracing the entire area of a city or town. (Page 34.)

2. LOCAL IMPROVEMENTS—WATERWORKS.—Cities and towns are expressly authorized to create improvement districts, and to levy assessments, for the purpose of constructing waterworks. (Sand. & H. Dig., § 5332.) (Page 40.)

3. SAME—ORDINANCE—PUBLICATION.—The statutes regulating the creation of local improvement districts (Sand. & H. Dig., §§ 5323–5336) contemplate that two ordinances shall be passed, viz., (1) an ordinance creating the improvement district; (2) an ordinance assessing the real property of the district and appointing the board of improvement. It is provided that the first ordinance shall be published, within five days after its passage, in some newspaper published in the city or town. Within three months after such publication the second ordinance may be passed, upon the requisite petition of the property holders being filed. It is also provided that the second ordinance shall in like manner be published within five days after its passage, and that any person who may feel aggrieved by its passage "shall commence legal proceedings for the purpose of trying the validity of said assessment within twenty days after the date of said publication, or else he shall be forever barred in all courts of law or equity from questioning the validity of the assessment and the lien created thereby." *Held* (1) that the 20-days limitation bars only such omissions or irregularities as occur subsequent to the passage of the first ordinance and the publication thereof; (2) that the requirement that the first ordinance be published within five days after its passage is mandatory, and a failure to comply therewith rendered the entire proceedings void. (Page 41.)

4. SAME—COST OF SEPARATE IMPROVEMENTS—The provision of Sand. & H. Dig., § 5334, that "no single improvement shall be undertaken which alone will exceed in cost 20 per centum of the value of the real property" in the district is not violated where two improvement districts embracing the entire area of a city are created for the purpose of making two distinct improvements, viz., waterworks and electric lights, though the aggregate cost of both improvements exceeds 20 per cent of the value of the real property in the district. (Page 44.)

Appeal from Benton Circuit Court in Chancery.

EDWARD S. MCDANIEL, Judge.

STATEMENT BY THE COURT.

On February 10, 1897, the city council of Siloam Springs, a city of the second class, passed an ordinance laying off the whole of the city into a district for the purpose of constructing and maintaining a system of waterworks for the city. Afterwards, on April 19th, the council passed another ordinance assessing the cost of making such improvement upon the real property in the district, and directing that it be levied and collected in successive annual installments, so that the assessment for each year shall be one per cent of the value of the real property in the district. The council, on the day it created the waterworks district, passed another ordinance creating an improvement district for the purpose of erecting and maintaining electric lights in the city.

The appellants, J. E. Crane, *et al.*, on the 20th day of August, 1897, brought this action to enjoin the collection of the assessment levied for the erection of the waterworks. As grounds for relief they allege, among other matters:

1st. That the ordinance creating the district was not read on three different days, nor the rules requiring the same to be read suspended.

2d. That the ordinance establishing the district was not published within five days after the designation of the district.

3d. That the council created two districts covering the same territory, and assessed for the two improvements sums in excess of 20 per cent. of the value of the real property of the district.

4th. That the council had no authority to create an improvement district including all the real property in the city for the purpose of creating a system of water-works.

The defendants demurred to the complaint, and the circuit court sustained the demurrer, and dismissed the complaint.

*J. A. Rice* and *L. H. McGill*, for appellants.

For the general provisions of the constitution governing taxation by municipalities, see Const. art. 12, sec. 3; *Ib.* art. 19, sec. 27. Municipal corporations also have power to provide for a water supply and the lighting of streets and alleys. Sand. & H. Dig. §§ 5134–5–6. But this can be accomplished only by taxation of all property, real and personal, in the municipality, within the limits of five mills. The Acts of March 22, 1881, (Acts 1881, 161), and of February 19, 1889, (Acts 1889, 17), authorizing local improvements in towns and cities by the formation of improvement districts, in so far as they attempt to authorize the inclosure of a *whole* town or city in an improvement district, are not within the constitutional provisions authorizing *local* improvements. These acts apply only to such property as is located *within* a city, which is *adjoining to or near the improvement*, and which will be benefited thereby to *a degree in excess of the benefits to the use of the city generally*. 52 Ark. 107; 25 Am. & Eng. Enc. Law, 497–8. The only direct authority to construct water-works is by municipal taxation. Their exclusion in the Act of April 12, 1993, was at most a mere expression of legislative opinion on the subject, and does not bind this cause. 59 Ark. 441. The authority to levy an assessment must be distinctly and directly made. 25 Am. & Eng. Enc. Law, 514. The levying of the assessments for local improvements is based upon the consent of the property owners and the authorities are only their agents. 42 Ark. 152; 50 Ark. 116; 55 Ark. 148. The special assessment is enforced only by reason of the special benefits conferred. 25 Am. & Eng. Enc. Law, 496–7; 48 Ark. 370. The presumption is not conclusive that a tract included in such an assessment is specially benefited. 52 Ark. 107; 59 Ark. 344. The statutory requirements as to the publication of the

ordinances and conduct of the board are intended for the protection of the property owner, and must be complied with strictly. 25 Am. & Eng. Enc. Law, 537–554; 59 Ark. 344; 50 Ark. 116. Since there is nothing in the record to show when the ordinance was published, it cannot be determined upon demurrer whether or not the twenty-day statute of limitation (Sand. & H. Dig., § 5336) applies: Without the petition of a majority in value of property holders, there was no authority to levy the assessment. 50 Ark. 116; 59 Ark. 344; 25 Am. & Eng. Enc. Law, 533.

*E. P. Watson*, for appellees.

The council had authority to create an improvement district for the purpose of making any *local improvements of a public nature*. Const. sec. 27, art. 19; 42 Ark. 152. It is a question of law as to what improvements are within the general authorized power conferred by the constitution, and the courts determine each case as it arises. Cooley, Tax. 609, 610. Water pipes are. Cooley, Tax. 621. Also lighting streets by gas. *Id.* 621. The statutes of this state authorize the councils of towns and cities to make assessments for water and lighting plants. Act April 12, 1893; Act June 26, 1897 (p. 114); Sand. & H. Dig., § 5321. The act of Feb. 19, 1881 (Sand. & H. Dig. § 5321, *supra*), being in the nature of a declaratory statute, and having been passed before the assessments complained of, is binding on appellants. Cooley, Const. Lim. 92–96. The assessment of property for a local improvement, levied upon petition of the property owners, is not a *tax*. Cooley, Taxation, 621. When an improvement must of necessity benefit the whole city, the council may, upon being petitioned, lay off the whole city into an improvement district. Sand. & H. Dig., §§ 5321, 5322. Except when attached for fraud or demonstrable mistake, the action of the council in including property in an improvement district is conclusive of the fact that it is *adjoining the locality* to be effected. 52 Ark. 112; Cooley, Taxation, 638–40. The presumption is that the ordinance was duly published. 24 Ark. 402; 30 Ark. 72; 49 Ark. 449; 50 Ark. 276; 45 Ark. 295; 19 Am. & Eng. Enc.

Law, 42, 50, 43. The burden of disproving this was on appellants. 53 Ark. 377; 56 Ark. 272. Appellants are barred by the twenty days statute of limitation. Sand. & H. Dig., § 5336.

*J. A. Rice* and *L. H. McGill*, for appellants, in reply.

On the general principles involved, see also 172 U. S. 269; Cooley, Taxation, 641.

RIDDICK, J., (after stating the facts). This is an action to enjoin the collection of an assessment made upon real property in the city of Siloam Springs, and the questions presented arose on a demurrer to the complaint. The assessment was made for the purpose of constructing and maintaining a general system of waterworks for the city. The whole area of the city was laid off into an improvement district for that purpose, and the first question presented is whether the city council had power to lay off the whole city into an improvement district. It is admitted that our statute expressly authorizes the city or town council to lay off the whole city or town into an improvement district for the purpose of making a local improvement, when, to quote the language of the act, "the whole of the desired improvement be general and local in its nature to said town." Sand. & H. Dig., § 5322.

But it is said that an improvement benefiting the real property of the whole city is not a local improvement, within the meaning of our constitution, which impliedly forbids assessments in towns and cities for other than local improvements, and that the statute above quoted is, therefore, unconstitutional and void to that extent. The section of the constitution referred to is as follows: "Nothing in this constitution shall be so construed as to prohibit the general assembly from authorizing assessments on real property for local improvements in towns and cities under such regulations as may be prescribed by law, to be based upon the consent of a majority in value of the property holders owning property adjoining the locality to be effected; but such assessments shall be *ad valorem* and uniform." Sec. 27, art. 19, Const.

Now, in endeavoring to ascertain the meaning of the different provisions of our state constitution, we should remember that many of them had their origin in events long past, and which are recorded in the history of the English people. It is therefore proper that we should consider this history in ascertaining the object of these provisions and the meaning of the language used. The doctrine of local assessments for local improvements to which the provision under consideration refers is not altogether of modern origin. "It had its origin and development," said the Supreme Court of Mississippi, "in the principle of local self-government characteristic of free institutions, founded by the Anglo-Saxon race, the leaving to each local community the due administration of the affairs in which it had an exceptive, peculiar and local interest." *Macon* v. *Patty*, 57 Miss. 378, 399.

Ages of ceaseless struggle for local self-government firmly imbedded this idea in the race to which we belong.* "The several state constitutions have been framed with this system in view, and the delegations of power which they make, and the express and implied restraints which they impose thereupon, can only be correctly understood and construed by keeping in view its present existence and anticipated continuance." Cooley's Const. Lim. (4 Ed.) 230

It is well, also, to observe, in this connection, that the municipal bodies formed for local government have not only "their public or political character in which they exercise a part of the sovereign power of the state for governmental pur-

*The long and persistent struggle by which the right of local self government was finally won and secured to English towns and to the English race is thus referred to by the historian Green: "In the silent growth and elevation of the English people the boroughs led the way; unnoticed and despised by prelate and noble, they had alone preserved the full tradition of Teutonic liberty. The rights of self government, of free speech in free meetings, of equal justice by one's equals, were brought safely across the ages of Norman tyranny by the traders and shop-keepers of the towns. In the quiet, quaintly named streets, in town-mead and market-place, in the lord's mill beside the stream, in the bell that swung out its summons to the crowded borough-mote, in the jealousies of craftsmen and guilds, lay the real life of Englishmen, the life of their home and trade, their ceaseless, sober struggle with oppression, their steady, unwearied battle for self-government." (Green's Short History of the English People, 121.)

poses, they have their private character, in which, for the benefit or convenience of their own citizens, they exercise powers not of a governmental nature, and in which the state at large has only an incidental concern." Cooley on Taxation, 688; *People* v. *Common Council*, 28 Mich. 228.

Provisions for local conveniences, like water, light, public parks for recreation and other public accommodations of the same kind, are some of the matters which are furnished or provided for by municipal corporations in their quasi-private capacity, in which they act, not as an agency of the state, but exclusively for the benefit of their own inhabitants. It is in respect to such matters of local concern that the largest freedom of action has been allowed municipal corporations. The constitutions of the different states, as a rule, leave their legislatures free to confer ample powers upon such bodies in the matter of laying assessments to provide for such local conveniences when the improvement adds benefit to the local real estate. "The case," says Judge Cooley, "must be extraordinary and clearly exceptive to warrant any court in declaring that the discretion has been abused, and the legislative authority exceeded." Cooley on Taxation (2 Ed.) 145, 688, 689; *State ex rel Bulkeley* v. *Williams*, 68 Conn. 131; *Williams* v. *Eggleston*, 170 U. S. 304.

Keeping in mind these words of the learned author, let us see if it is clear that the framers of the constitution, by authorizing assessments on real property for "local improvements in towns and cities," intended to limit the legislative discretion in conferring such power to improvements made in some particular locality of the city, and when it would follow that the improvement would be less in extent than the area of the city. If there be such limitation, it must be implied from the use of the phrase "local improvements," for there is certainly no express limitation to that effect. But the word "local," which is the restrictive word in that phrase, is often used in reference to towns and cities so as to include the whole municipality. We speak of the "local affairs" of a town, its "local government," the rights of its inhabitants to "local option," or their liability to "local taxation," referring in each instance to the whole

corporation. In the same way, if the local authorities of a town should undertake a general system of street improvement, or a general system of sewerage, covering every street therein, we might, using language in its ordinary meaning, speak of such work as a "local improvement," the purpose thereof being a benefit to the local inhabitants. If we look for the technical or legal meaning of the phrase "local improvement," we find it to be a public improvement, which, although it may incidentally benefit the public at large, is made primarily for the accommodation and convenience of the inhabitants of a particular locality, and which is of such a nature as to confer a special benefit upon the real property adjoining or near the locality of the improvement. *Little Rock* v. *Katzenstein*, 52 Ark. 107; *Rogers* v. *St. Paul*, 22 Minn. 494; 13 Enc. Pl. & Pr. 296.

Supposing this to be its meaning as used in our constitution, there is still nothing to exclude the idea of an improvement district embracing the entire city. It is true that the improvement must be in the city, but an improvement affecting every street in the city would be in the city, and might, in its nature, be such as to confer a special benefit upon the real property of the city, and only an incidental benefit to the general public. Many dwell in cities who do not own real estate, and where the public improvement is such as to confer a special benefit on real property the expense of making it should be borne, at least to the extent of the benefit, by that portion of the public beneficially affected, and not by those who receive no benefit. And this is equally true whether the improvement be confined to a single street, or is such as to include every street in the city. In truth, as each additional improved street adds to the convenience of those dwelling on other connecting streets, there would be more uniformity and equality of burdens in a general system of improvernment by an assessment upon property adjoining the improved streets than there would be in requiring one street to be improved by an assessment upon property adjoining it. If one street only is improved, those bearing the burden have the same expense, but not the full benefit, they would receive were the other

streets also improved, while other owners of property gain incidental advantages, yet bear none of the burden. *Macon* v. *Patty*, 57 Miss. 378; *Lexington* v. *McQuillan*, 9 Dana (Ky.) 513; *Leominster* v. *Conant*, 139 Mass. 384; *Parsons* v. *District of Columbia*, 170 U. S. 45.

It is doubtless true that those inhabitants of the town who own no real property gain incidental advantages from local improvements, and for this reason such improvements are sometimes made in part out of the general fund of the municipality and in part by assessment. But this is permissible whether the improvement district embrace a part or all of the city, for, although the city and district may cover the same territory, they are never the same. In either case, whether the district be great or small, the object in creating it, and the reason that underlies the procedure, is that those receiving special benefits may to that extent bear the burden of the improvement. *Norwood* v. *Baker*, 172 U. S. 269.

No express limitation is found in the constitution forbidding the legislature from authorizing such an equitable apportionment of the assessment in case of an improvement affecting all the real estate of the city, and none should be adduced by implication through a narrow and technical line of reasoning; for this would not only be contrary to the usual rule of allowing the largest liberty in matters of local concern, but, if we should find such a limitation, it would puzzle us to say at what point the power of the legislature would stop. Could it authorize an assessment for an improvement affecting nine-tenths or ninety-nine hundreths of the real property of the city, but not for one affecting the whole city? If a city has a hundred streets, may the legislature authorize the council to place ninety nine of them in an improvement district for the purpose of laying water pipes along them or for improving them, and yet not authorize such a district covering all the streets for such a purpose? What could be the object in making such a limitation, and why make such a distinction? We do not see any reason, nor do we believe that the constitution contains any such limitation upon the power of the legislature.

In coming to this conclusion, we do not overlook or disregard the word "local" in the phrase "local improvements." On the contrary, we attach much importance to it. The use of this phrase limits the power to authorize assessments in cities and towns to those public improvements which are local in their nature, and intended for the convenience and accommodation of the local public, or some portion thereof, and which confer a special benefit upon the real property assessed. It distinguishes such improvements from those that are not local, but intended for the benefit of the general public. Not every improvement in a town or city is a local improvement. A county court house or capitol for the state might be an improvement in a town or city, and in some cases a very desirable improvement, but, being designed and intended for the use and convenience of the general public of the county or state, it would not be a "local improvement," within the meaning of our constitution; or, if such a structure could in any sense be considered a local improvement, it would not be to the full extent of the cost. A town or city hall would probably come within the same category, for, while intended for the convenience of the local community, it would not usually be an improvement of such a nature as to confer a special benefit upon local real estate or the owners thereof, and therefore not a local improvement within the meaning of the law. A consideration of these and other illustrations which could be made we think clearly shows the meaning and purpose of the phrase "local improvements" as used in our constitution.

The framers of that instrument by this section, which expressly recognizes the power of the legislature to authorize assessments on real property in towns and cities, but limits them to local improvements, and requires that they should be made only on property adjoining the locality affected, and be based upon the consent of a majority in value of the owners of such property, did not intend arbitrarily to forbid an assessment for an improvement specially benefiting the real property of the entire city, or to prevent an equitable apportionment of the tax in such a case. They had, as we think, a broader purpose in view. Their object was to limit such local assessments to

proper local purposes, to undertakings intended mainly for the accommodation and convenience of the inhabitants of the city, or of the district upon which the tax was laid. They attempted by the limitations imposed, to prevent unjust apportionments, to keep property from being burdened with assessments without corresponding benefit. They endeavored, as far as practicable, to protect the honest and prudent property owner against those unscrupulous persons who seek to make a private gain by the expenditure of public funds, and also against the equally dangerous class that, swayed by their imaginations, see fortunes in all sorts of undertakings, and clamor for extravagant assessments and appropriations, with a view to advantages which, except the expenditure they entail, often prove as evanescent as a mirage on a desert. The limitations which they imposed in order to effect these purposes usually result in confining assessments for any particular improvement to a limited portion of the city. But this does not prove that in a proper case the whole area of the city may not be included in a district, and assessed for an improvement.

Conceding that the legislature has power to authorize an improvement district embracing the whole area of the city, it is denied that it has conferred upon the city authority to make special assessments for the purpose of constructing water-works, or that it has power to confer such authority. But the different acts of the legislature on that subject show clearly an intention to confer such authority upon the city council. Sand. & H. Dig., §§ 5321, 5322, 5332.

As the power to provide a supply of water by constructing water-works from general taxes has been also expressly conferred on cities, it is said that this by implication forbids them from making special assessments for that purpose. The argument would be strong if the legislature, in the statute conferring power upon cities and towns to make special assessments and regulating the same, had used only general terms, and not specially named waterworks. This was one of the reasons upon which the decision in the case of *Morgan Park* v. *Wiswall*,

158 Ill. 262, was based, where the learned judges of the Supreme Court of Illinois reached the conclusion that a village in that state had no power to make a special assessment to construct water-works. But this argument has no force when it clearly appears from the statute that the legislature did intend to confer such power. Now, our statute, after providing that the city may be laid off into an improvement district, provides that the money raised by assessment may be expended "in the purchase of land or erection of houses, reservoirs or other improvements necessary for the proper construction and operation of water-works outside of the limits of the city in which said district exists." Act April 12, 1893. It also provides how the water-works may be operated after their construction by the improvement district.

This act leaves it no longer doubtful, but very clear, that the legislature did intend to authorize the city council to levy special assessment for the construction of water-works. The decision of the circuit court on these points we think was correct. The complaint does not show of what this particular system of waterworks which the city of Siloam Springs proposed to erect consisted. Whether it was a local improvement, within the meaning of our constitution, whether the land sought to be taxed adjoined the locality affected, and whether or not it received a benefit from the improvement, are questions of fact which cannot well be determined on a demurrer. The allegations of the complaint in regard to these questions are not in all respects definite, but, as this can be cured by amendment we will, without noticing them further, pass to the next question which disposes of the case here.

The complaint alleged facts showing that the improvement district had not been lawfully established, and it is stated in the brief of appellees that the circuit court sustained the demurrer mainly on the ground that the facts stated in the complaint show that the action was not commenced within twenty days after the publication of the ordinance making the assessment, and that the action was therefore barred by the statute. The statute regulating the method by which real property in cities and incorporated

towns may be assessed for local improvements provides that, upon the petition of ten resident owners of real property in any city, the city council may lay off the city, or any portion thereof, into an improvement district, and it further provides that the ordinance establishing the district shall be published. Sand. & H. Dig., §§ 5322, 5323. Having made provision for the establishment of the district, the statute then sets forth the steps necessary for procuring an assessment upon the real property in the district, and for the publication of the assessment ordinance. Sand. & H Dig., §§ 5324 to 5336. It will be noticed that the statute makes provision for two separate proceedings and two separate ordinances, each having as its foundation a petition of owners of real property in the city. The object of the first proceeding is to procure an ordinance establishing an improvement district, and the statute provides that "within five days after the designation of such district or districts the clerk of said city shall publish the order or ordinance of the council establishing the district in some newspaper published in said city for one insertion." Sand. & H. Dig., § 5323.

Now, following the provision for the publication of this ordinance, there is no limitation of the time within which the property owner may show that the district has not been legally established. But the passage of the ordinance establishing the district and the publication thereof is the basis of the second proceeding relating to the assessment. This second proceeding must be commenced by a petition of a majority in value of those owning land in the district, and may result in the passage of an ordinance making an assessment. In that event the statute provides that, within five days after the passage of the ordinance making the assessment, "the clerk shall publish a copy of it in some newspaper published in the city one time; and any one who may feel aggrieved thereby may object to the assessment; and such person shall commence legal proceedings for the purpose of trying the validity of said assessment within twenty days after the date of said publication, or else he shall be forever barred in all courts of law or equity from questioning the validity of the assessment and the lien created thereby." Sand. & H. Dig., §5336.

It is contended by counsel for appellees that this provision of the statute cuts off all omissions, irregularities and errors on the part of the council in creating the improvement district, and making the assessment upon the property therein, unless the action contesting the same be commenced within twenty days after publication of the order of assessment. The question is not free from doubt, but, after considering the same, we are of the opinion that the section quoted has reference to errors or irregularities on the proceeding upon the second petition relating to the assessment, and that the twenty days limitation bars only such omissions and irregularities as occur subsequent to the passage of the ordinance establishing the district and the publication thereof. If no improvement district has been established, then the petition for the assessment and the ordinance therefor have no foundation to rest upon, and are without authority and void, for the council has no power to make the assessment until after a district has been established and publication made in accordance with the statute. The property owners may set up and show this want of authority before or after the expiration of the twenty days from the publication of the assessment ordinance.

We cannot concur in the contention that the requirement of the statute that the ordinance creating the district shall be published within five days after its passage is not mandatory. The intention was that the owners of real estate to be affected should have early notice of the creation of the district and of the scheme to levy assessments upon their property. The statute does not permit a majority in value of the owners of land in the district to come in and by one petition procure an ordinance establishing a district and levying an assessment for erecting the improvements. It requires that the ordinance creating the district and indicating the contemplated improvement shall be first passed, and notice of its passage given by publication within five days. It is important that this notice should be given in the manner and within the time prescribed by the statute; for it is in the nature of a warning to all owners of land in the district that a proceeding of that kind is on foot. So that if they wish to oppose

the undertaking they may at the beginning, before public sentiment in regard thereto has become fixed, have an opportunity of discussing the question with other owners of land in the district, and, if the undertaking be unwise, perhaps defeat it by securing a majority in opposition to it. Failing in this, they can still be on guard, and watch the proceedings leading up to the assessment, to see that they are regular and in conformity with the law. We think, for these reasons, that the provision as to the time of the publication is for the benefit and protection of the land owners of the district, and must therefore be treated as mandatory. 13 Enc. Pl. & Pr. 307, and cases cited.

The complaint alleged facts showing that the ordinance establishing the district was not legally adopted, and not published within the time and in the manner required by law. It therefore stated a good cause of action, and the demurrer should have been overruled.

As to the question of the cost of two different improvements, we have to say that the statute provides that no single improvement shall be undertaken which alone will exceed in cost 20 per centum of the value of the real property in the district, but when there are two different improvements, with two districts, the statute does not forbid that the aggregate cost of such improvement shall exceed the per cent named.

There are many other points discussed, but, as most of these will probably pass out after the filing of the answer, we feel it unnecessary to discuss them further.

For the reasons stated, the judgment is reversed, and the cause remanded, with an order to overrule the demurrer and for further proceedings.

BUNN, C. J., (dissenting.) These two cases are identical, so far as the points at issue are concerned, and I will treat them as one case.

It is admitted that these suits were not brought within the twenty days after the publication of the assessment ordinance on the 22d of July, 1897, and unless that limitation upon actions of this character is for some reason inapplicable to this case, these suits were barred, and the lower court's judgment

of dismissal on demurrer and failure to plead over should be affirmed.

By the decision of the majority of this court, however, the statute bar is obviated, for the reason assigned that the first or organizing ordinance of February 10, 1897, was not published within 5 days provided by statute from and after its adoption by the city council. It is argued, from this premise, that the provision of the statute requiring this publication to be made in the local newspapers within the 5 days after the adoption of the ordinance is mandatory, and not directory merely; and, being such, the failure to make the publication within that time is a fundamental defect, on account of which all after proceedings were mere nullities; and that it could be set up, notwithstanding the suits were not instituted within twenty days from and after the publication of this last or assessment ordinance. I do not think that a statute of limitation upon actions is to be made applicable or not to a case merely because a defense is fundamental or not, or is even jurisdictional or not; for, even in this latter case, the statute of limitations cuts off all inquiry as to jurisdiction as well as everything else, and the defendant's remedy is by certiorari, or some such direct proceeding, if he has any.

Moreover, I think a land owner can raise all kinds of legal and valid objections to any and all of the proceedings to organize the district and assess the rates upon his lands within the twenty days, and, having this right, he will not be allowed to say that the prior acts and proceedings of the district, made without notice to him, cannot be inquired into after the assessment ordinance is passed, and that therefore he is without remedy by reason of the defect in the organization. He has a day in court for all matters affecting his interest, and, failing to avail himself of the opportunity afforded to make his objection, he is barred. This principle entered into the decision of *Carson* v. *St. Francis Levee District*, 59 Ark. 513.

It is hardly necessary to discuss the question whether the requirement of the publication of the organizing ordinance within five days is mandatory or directory, if my position be the correct one. But one or two considerations affecting that

question may not be inappropriate just here. The legislature cannot be presumed to do a useless thing, or to have enacted a law that may be impossible, or even impracticable, of execution under certain circumstances likely at any time to present themselves. At least, we ought always to give such construction to legislative enactments, if possible, as will obviate such embarrassing difficulties and obstacles.

These publications often are to be made in weekly newspapers, each of which has its fixed day of publication. As a matter of fact, the typesetting is ordinarily done on the day previous to the publication day, and this almost of necessity. The town council has also its regular days of meeting, or rather days for its regular meetings. If it should so happen that one of these meetings should fall on the 10th of February, and it should pass the ordinance on that day, as in the case at bar, and that or the next day should be the weekly newspaper's publication day, then the recorder could not possibly have the ordinance published within five days from its passage, and, if published in the very next issue of his town paper, that would be seven days at least after the publication, and his ordinance would be a nullity, according to the decision of the court. Again, the recorder is given the five days in which to copy and otherwise arrange his ordinance for publication. His newspaper must necessarily have its publication day on or before the fifth day, or it could not publish the ordinance within time under any state of things, if the limitation be strictly mandatory. It is plain that a publication in the first issue of the paper after the ordinance is ordered to be published is all that is required, except that the recorder must do all that he can within the five days.

The dates given in this record show that the ordinance was passed on the 10th of February; that the next publication day of the paper was the 15th of February, until which time the recorder had to copy his ordinance for publication. He may have got it ready on the 14th, and presented it to the newspaper publisher, but it had to lie over for reasons stated, and was published on the next publication day—the 22d. It

is simply very unfortunate that the legislature did not name seven or a greater number of days instead of five, if the statute is to be held strictly mandatory; for, as it stands, an ordinance may be annulled without anyone being in fault.

---

## ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY v. KILPATRICK.

Opinion delivered October 28, 1899.

67 47
70 140

67 47
73 383
74 480
75 257
76 96

67 47
84 51
84 52

67 47
82 292

67 47
88 489

1. CARRIER—PASSENGER.—The purchase of a ticket is not a prerequisite to the relationship of passenger and carrier, under Sand. & H. Dig., § 6213, providing that "all passengers who may fail to procure regular fare tickets shall be transported over all railroads in this state at the same rate and price charged for such tickets for the same service." (Page 52.)

2. SAME.—One who entered upon the platform of a railway coach without a ticket, intending to pay his fare, became a passenger, although he did not go upon the car at the proper place, and made no effort to enter the coach until the train had run six hundred feet. (Page 54.)

3. DAMAGES—EXPULSION OF TRESPASSER.—A railway company is liable for damages where a trespasser is expelled from a train wilfully, wantonly and maliciously by a brakeman in the course of his employment. (Page 55.)

4. SAME—EXPULSION OF PASSENGER.—A railway passenger who receives injuries while being wrongfully expelled from a train by a brakeman may recover damages of the carrier, whether the brakeman was acting within the scope of his employment or not. (Page 55.)

5. BRAKEMAN—SCOPE OF EMPLOYMENT.—Where it is the duty of a brakeman to see that persons do not enter the cars without tickets, he is acting within the scope of his employment when he forcibly ejects a passenger who has entered upon the platform of a car without a ticket. (Page 55.)

6. NEGLIGENCE—PROXIMATE CAUSE.—Where a boy, pushed from the platform of a rapidly moving train by a brakeman, caught at the iron hand-rail, and fell under the wheels, so that his foot was crushed, the push was the proximate cause of the injury. (Page 55.)

7. WITNESS—RIGHT TO PROCESS FOR PHYSICIAN.—It is not error to refuse an attachment for a witness who is a practicing physician, unless it appears that he has failed, when duly summoned, to appear and give his deposition. (Page 56.)

8. CONTINUANCE—CUMULATIVE EVIDENCE.—It is not error to refuse a continuance for the absence of a witness whose evidence would be merely cumulative, where no prejudice could have resulted from his failure to testify. (Page 56.)

9. SAME—ABSENCE OF NON-RESIDENT WITNESS.—It is not error to refuse a continuance asked on account of the absence of a non-resident witness. (Page 57.)

10. EVIDENCE—WAIVER OF OBJECTION.—Appellant company cannot complain that appellee introduced parol evidence to prove a writing if it introduced similar evidence to the same effect, and asked instructions bearing upon the proof thus offered. (Page 57.)

11. PAROL EVIDENCE—CONTENTS OF WRITING.—Where it is a question whether a brakeman in ejecting a ticketless passenger was acting within the scope of his employment, it is competent to introduce parol evidence of the contents of a placard attached to the coach defining the duties of a brakeman in this respect. (Page 58.)

12. NEW TRIAL—SURPRISE.—A new trial should not be granted on the ground of surprise at the adversary's testimony if no postponement was asked in order to procure evidence in rebuttal. (Page 58.)

13. SAME.—The fact that appellee made statements to strangers out of court in conflict with his subsequent sworn testimony is not a ground for a new trial, however such conduct, if proved, might have affected appellee's credibility as a witness. (Page 60.)

Appeal from Franklin Circuit Court.

JEPHTHA H. EVANS, Judge.

*L. F. Parker* and *B. R. Davidson*, for appellant.

Appellee was not a passenger, and had not the rights of one. A railroad company may make reasonable rules and regulations to govern the receiving of its passengers, and the passengers are bound to take notice of and obey such rules. 4 Ell. Rys., §§ 1576, 1579, 1580, 1581, 1603; 132 Mass. 116. At least, until a party who enters in violation of the rules is accepted by the carrier as a passenger, he is not such. 139 Mass. 238; 19 Ore. 354; 15 Gray, 20; 59 Ark. 395–404. The burden was on appellee to show that he was ejected by an employee acting within the scope of his authority. 37 Kan. 212; 60 Mo. 413, 419; 72 Mo. 62; 82 Tex. 516. A brakeman has no such implied authority. 27 S. W. 118; 56 Fed. 1014; 59 Ia. 428; 69 Miss. 723; 86 Pa. St. 418; 20 Ala. 268; 48 Ark. 177; 56 N. Y. 489. And the company is not liable for his unauthorized

act. 124 Ind. 394; 19 Oh. St. 110; 19 Pa. St. 256; 5 Wheat. 326; 32 N. J. L. 328–331; 26 Ind. 70–75. It was an abuse of discretion to refuse the adjournment asked by appellant, in order to give his witnesses time to arrive. 52 Miss. 23, 34; 10 Ark. 527; 21 Ark. 460; 60 Ark. 564; 79 Cal. 477; 34 Kas. 312. Likewise, it was an abuse of discretion to make the granting of such adjournment conditional on defendant's payment of the jury's fees for one day. 23 Ark. 722; 7 N. Y. S. 90; 9 Wash. 222; 5 N. J. L. 539; Cf. 13 R. I. 364; Const. Ark. art. 2, § 13; Black, Con. Law, 443. It was error to admit secondary evidence of the contents of the placard on defendant's cars. 1 Phil. Evid. p. 595; ch. 9, § 4; 2 *ib.* pp. 518–525, ch. 7; 1 Greenl. Ev. §§ 82, 84, 88–94; Best, Ev. §§ 30, 87, 89, 215, 216 *n*; 37 Pa. St. 228; 16 How. 14–26; 10 Kas. 184, 188; 50 Kas. 436; 88 Ala. 182; Bradner, Ev. pp. 333, 249, 246; 1 Rice, Ev. pp. 155, 157, 158, 159, 166. The only permissible secondary evidence would have been an examined copy. 1 Phil. Ev. p. 263; 87 Cal. 209. The motion for a new trial on account of surprise and misconduct should have been granted.

*Chew & Fitzhugh* and *C. B. Moore*, for appellee.

The finding of the jury on conflicting evidence will not be disturbed on appeal. 19 Ark. 684; 23 Ark. 209; 23 Ark. 32; 46 Ark. 524; 47 Ark. 196; 50 Ark. 511. It was not error to refuse a postponement in order that the defendant might procure evidence which was merely cumulative. 46 Ark. 182; 60 Ark. 481; 52 Ark. 120. The supplemental bill of exceptions can not be considered, because not attested by disinterested bystanders. 3 Am. & Eng. Enc. Pl. & Pr.; 14 S. W. 946. The contents of the placard were only collateral to the issue, and hence were provable by parol. 1 Greenl. Ev. § 85; 19 Ill. 510; 28 Ga. 111; 49 S. W. 975; 1 Rice, Ev. 420; 11 Ex. 133; 39 Am. Dec. 39; 99 Mass. 542; 124 Mass. 318; 11 St. Rep. 737; Whart. Cr. Ev. 163–8; 39 S. W. 203. Appellant waived all objection on this point by first entering into proof of the matter. Thomps. Trials, 706–7; 29 N. W. 661. The exceptions should have been specific. 58 Ark.

373; 29 Ark. 17; 15 Ark. 345; *ib.* 415, 48 Ark. 177. Appellant was responsible for the act of the brakeman. 2 Wood, Rys. 1045; 42 Ark. 542; 58 Ark. 381; 48 Ark. 177; 64 N. Y. 129; 112 Pa. St. 551; 36 Kas. 655; 117 N. Y. 505; 72 Ga. 292; 29 Ill. App. 90; 95 Ky. 72; 38 Ind. 116; 14 How. 468; 110 Ind. 156; 40 How. Pr. 456; 4 Am. & Eng. Ry. Cas. 537. Newly discovered evidence, to entitle a party to a new trial, must be such as could not have been procured at the trial by the exercise of reasonable diligence, it must go to the merits of the cause, it must not be merely for the purpose of impeaching a witness, and it must not be merely cumulative. 17 Ark. 404; 26 Ark. 496; 2 Ark. 144; 25 Ark. 387–8; 40 Ark. 447; 38 Ark. 506–9; 60 Ark. 485; 28 Ark. 124. It was not error to refuse a new trial. 25 Ark. 312; 38 Ark. 516; 55 Ark. 312.

WOOD, J. The complaint alleged, in substance, that Geo. Kilpatrick boarded appellant's train at Van Buren, intending to go to Chester as a passenger, but that appellant negligently, wilfully and maliciously ejected him, whereby his foot was caught under the cars, and so badly crushed as to necessitate amputation. The answer denied all material allegations, and set up contributory negligence.

The substantive facts, as testified to by appellee, are: That he went to appellant's station at Van Buren for the purpose of taking its passenger train to Chester. The fare from Van Buren to Chester was 75 cents, and appellee had the money to pay his fare. Appellee got upon the depot platform, even with the front end of the smoking car, and got on the front end of the smoking car. He did not enter the coach, for the reason that he desired to see two companions who had gone up the track a short distance, to "wave" at him as he passed by. He went and was standing upon the rear end of the second car from the engine. He went to the depot, and just as he stepped upon the platform the train was ringing the bell and getting ready to pull out. He noticed a man standing down at the rear end of the smoking car,—the third car from the engine,—who had a lantern in his hand, and who was helping passengers on and off. Appellee did not go to the end of the car where the brakeman was, because he

did not have time. He did not get on until after the cars had started. The brakeman did not get on until after appellee had got on. The man appellee had seen standing at the rear end of the car came on through the car to where appellee was standing on the platform, and appellee saw the word "Brakeman" on his cap. He asked appellee where he got on, and appellee told him, "At Van Buren." He then asked appellee where he was going, and appellee replied, "To Chester." He then asked appellee if he had a ticket, and appellee told him he did not have time to get a ticket. The brakeman then told appellee to get off, and appellee replied that "the train was running too fast; besides, he had the money to pay his fare to Chester." And the brakeman said, it "did not make a damn bit of difference; that he [appellee] would have to get off," and the brakeman put his hands upon appellee's shoulders, and gave him "a pretty hard shove down the steps," and as appellee was falling he grabbed the iron at the end of the car, and it threw him to one side, and the train ran over his foot, crushing it all to pieces, so that it had to be amputated. Appellee was thrown off at the road crossing about two hundred and fifty yards from the depot platform.

The testimony of appellee as to his having money to pay his fare and as to the time, place, and circumstances of his getting on the cars, is corroborated by several witnesses. There was much evidence on behalf of appellant contradictory of all this.

It was shown that the train which injured appellee consisted of two sleepers, a chair car, a coach, a combination car, and baggage car. A part of the train was vestibuled. The vestibule requires the door to be opened to enter, that is, passengers passed through a door on the steps of the car before getting on the platform. The sleepers, the chair car, and between the chair car and smoking car are vestibuled. Between the combination car and the smoking car it is vestibuled on the coach end. The platform of the combination car was open. It was the duty of the brakeman to station himself at the steps of the car, and prevent people from entering the cars who did not have tickets.

A placard fastened to the handles of the platform on the rear end of the coach read: "Trainmen must examine tickets before allowing passengers to enter the cars." This was one of the rules of the company. A man on the platform would not be considered within the cars. It was further shown that, if a passenger applied to enter the train without a ticket, same would be held to enable him to purchase one.

The verdict was for $12,000. A remittitur was entered for $7,000, and judgment was rendered for $5,000. Appellant insists upon a reversal of this judgment for the following reasons, which we will consider in the order presented by its counsel.

1. *Because the plaintiff was not a passenger.* The court, *inter alia*, instructed the jury as follows: "Unless it appears from the preponderance of the evidence that plaintiff at the passenger station got upon defendant's passenger train, able and intending to pay for being carried as a passenger thereon, and that a brakeman on said train, acting within the scope of his authority, wilfully, maliciously and wantonly, knowing the danger to plaintiff of such act, pushed plaintiff from said train while it was in such rapid motion as to endanger plaintiff's safety, and thereby caused plaintiff the injuries mentioned in the complaint, he cannot recover.

"If the plaintiff was stealing a ride on defendant's train, and was pushed off in any manner by a brakeman on defendant's train, plaintiff cannot recover, and you must find for the defendant."

Under these instructions the jury must have found that appellee was a passenger, and that he was "wilfully, maliciously, and wantonly expelled." Appellant contends that appellee was not a passenger, even if the facts be taken as stated by him, because they show "that he had not purchased a ticket, that he did not go upon the car at the proper place, and that he remained on the platform of a coach in which he would not have been permitted to ride, and made no effort to enter the train until after it had run six hundred feet." We are of the opinion, conceding the facts to be as appellee states them, and as the jury might have found, that appellee was a passenger. In

other words, one who in good faith goes to a railroad station, intending to take passage upon one of its regular passenger trains, who is able and intends to pay his fare upon the demand of the carrier, and who enters over the steps of a passage way to a car where passengers ride, and through an entrance, unobstructed, which passengers may freely use,—we say, one who embarks upon a passenger train under such circumstances is a passenger, although he may not have purchased a ticket, and may not have entered at a place where a porter or brakeman was stationed to inspect tickets, and although he may have passed over to, and may have been found standing temporarily upon, the platform of a coach in which passengers were not permitted to ride. The purchase of a ticket is not a prerequisite to the relationship of passenger and carrier under our statute. Sand. & H. Dig., § 6213.

A rule requiring those who intend to become passengers to purchase tickets before entering the cars, and to exhibit same to an agent of the company stationed at the steps or entrance of the cars, being for the convenience of the company and the traveling public as well, is generally considered reasonable, and may be enforced by any proper methods. In some jurisdictions the manner of enforcement may be carried to the extent of expulsion on failure to comply with the rule. And where there is no inhibitory statute, a common method of enforcement is by requiring the one who does not purchase a ticket to pay more fare than one who does. But, before such a rule can be enforced in those jurisdictions, a reasonable opportunity must have been afforded the passenger to comply with the rule, and there must have been notice given of such rule. See Hutch. Car. § 570; 3 Wood, Railways, 1674; 4 Elliott, Railroads, § 1603, and authorities cited by these writers; 1 Fetter, Car. Pass. p. 689–90, §§ 267, 268.

But our statute provides that "all passengers who may fail to procure regular fare tickets shall be transported over all railroads in this state at the same rate and price charged for such tickets for the same service." Sand. & H. Dig., § 6213, *supra*. Any rule which prescribed, as a method of enforcement for non-compliance therewith, the forfeiture of the right to be

carried as a passenger would contravene this statute, which, in our opinion, does not contemplate the expulsion of passengers for failure to purchase tickets and to exhibit same before entering the cars. It seems to make no difference, under this statute, whether the failure of the passenger to procure a ticket is caused by the infidelity or carelessness of the railway's employees or by the carelessness of the passengers.

As to appellee's standing upon the platform of a coach where passengers were not permitted to ride, the proof by appellee would warrant the inference that this was but a temporary position, taken for the purpose of seeing two of his companions who had gone up the track a short distance "to wave at him" as he passed by. The jury might have inferred that the brakeman did not eject appellee because he was standing upon the platform, but because he had no ticket.

Taking the appellee's testimony as true, it does not appear that he had furtively taken his position on the platform for the purpose of stealing a ride, and thus defrauding the company of its fare for transportation. Believing him, as the jury did, there is nothing in his position upon the platform to constitute him a trespasser.

One who goes upon the platform of the cars of a passenger train with the *bona fide* intention of paying his fare and becoming a passenger does not forfeit his right to be protected as such, because, forsooth, he tarried for a short time, before entering the car, in a place where passengers are forbidden to ride. Such a one, we think, comes completely under the control of the company when he steps upon the train intending to become a passenger. His acceptance by the carrier from that moment should be implied, and his divergence temporarily from the right way as a passenger should not lessen the duty of care due him by the carrier, but only lessen his chances for recovery by reason of his own negligence. A passenger who voluntarily assumes a dangerous and forbidden position on a train does not thereby forfeit his rights to the care due by the railway company to its passengers. But if an injury occurs to him while in the position, which would not have been produced had he not been in such position, although the injury

was also the result of the negligence of the company, he cannot recover, because of his contributory negligence. Hutchinson, Car. §§ 651–2, and authorities cited; 1 Fetter, Car. Pass. p. 428, § 167; 4 Elliot, Railroads, §§ 1630, 1633; 2 Wood, Railways 1327, § 308.

But, whether appellee was passenger or trespasser, the company, under the finding by the jury that he was wilfully, maliciously and wantonly expelled, would still be liable, if it were bound by the conduct of the brakeman. For, although the carrier owes the trespasser no positive duty of care, it must not injure him wilfully, wantonly and miliciously. *Railroad Co.* v. *Dial*, 58 Ark. 318, authorities cited; *Ry. Co.* v. *Hacket*, *id.* 381; *Davis* v. *Houghtelin*, 14 L. R. A. 737, note; 2 Wood, Ry. 1045; 2 Fetter, Car. Pass. § 240, p. 622, authorities cited; 4 Elliott, Railroads, § 1253. The instructions *supra* were therefore more favorable to appellant than it had the right to ask. This brings us to consider appellant's second reason for reversal.

2. *Because appellee did not prove that he was ejected by an employee acting within the scope of his employment.* Appellee being a passenger, this was immaterial. Hutchinson, Car. § 595 *et seq;* 4 Elliott, Railroads, § 1638; *Haver* v. *Cent. Ry. Co.*, 12 Am. & Eng. Ry. Cas. (N. S.) p. 261, and note. But there was evidence to justify the conclusion that the brakeman was acting within the scope of his employment. It was his duty to see that persons did not enter the cars without tickets. There was evidence from which the jury might have found that he was attempting to perform this duty, and pushed it to the rigorous and unwarranted extreme of removing all possibility of the passenger's entering, ticketless, by violently removing him from the train. For a similar act it has been held that the company, as well as the brakeman, is liable. *Priest* v. *Hudson R. R. Co.*,40 Howard Pr. 456; see 3 Elliott, Railroads, sec. 1253, and authorities cited in notes; *H. & T. C. Ry. Co.* v. *Washington*, 30 S. W. Rep. p. 719.

3. *Because pushing the boy from the platform was not the proximate cause of the injury.* Pushing a boy "with a pretty hard shove" down the steps from the platform of a car on a

train running "pretty fast" might reasonably be expected to produce most serious consequences. Just such an effect as was produced here might naturally be expected to follow as the proximate result of such a forcible expulsion. It was but natural that one should attempt to break the force of his fall by catching to any support at hand, and in doing so to bring his feet, which were necesarily dangling and uncontrolled, under the wheels of the moving train.

4. *Because it was an abuse of discretion to refuse an attachment for the witness, Dr. Giles Lucas, and also to refuse to adjourn the hearing from seven o'clock p. m. until nine a. m. of the following morning for the testimony of Dr. Lucas and J. R. Cocke; and it was contrary to law, as well as an abuse of discretion, to impose upon the defendant the payment of twenty-four dollars to the county of Franklin, expenses of the regular panel of the jury for one day, as a condition upon which the case could stand open, and compel the defendant to proceed to prepare, argue and settle instructions in the night, and argue a case of this magnitude in the night, and deprive it of this valuable testimony expected on the morning train.*

Under our statute, the deposition of a practicing physician may be used, instead of his testimony *ore tenus*. Sand. & H. Dig., § 2978, sub-div. 2. And such witness shall not be compelled to attend unless he has failed, when duly summoned, to appear and give his deposition. There was no showing that Dr. Lucas had been summoned, and had failed to appear and give his deposition. *Id.* § 2979. Appellant could not, therefore, enforce his attendance, and the court did not err in refusing an attachment for him. Moreover, it appears that the testimony he was expected to give was but cumulative, and no prejudice could have resulted from his failure to testify. *Ry. Co.* v. *Dobbins*, 60 Ark. 481; *Brown* v. *St. Louis, I. M. & S. Ry.*, 52 Ark. 120. Appellant had not asked for a continuance of the cause on account of the testimony of the witness Cocke, but consented to go into the trial without him, with the understanding that, if he did not appear in person before the conclusion of the evidence, a certain statement, which was reduced to writing and agreed upon, should be read as evidence. Cocke

did not appear, and this statement was read. It was certainly not error for the court to refuse to postpone the cause for any length of time under these circumstances, in order to obtain these witnesses. If it was not prejudicial error for the court to have refused it absolutely, it certainly could not be erroneous for the court to have granted the request for a postponement, *ex gratia*, but upon condition that appellant pay the expense of the regular panel of the jury for one day. As appellant did not see proper to comply with the condition, the result was tantamount to a refusal by the court to grant the request for postponement. It would have been quite different had appellant been entitled as a matter of right to the postponement. Then, had the court imposed, as a condition for the granting of such request, terms that were unreasonable and illegal, the appellant would be in an attitude to complain. It appears that witness Cocke lived in Iowa, and was absent from the state. Under Sand. & H. Dig., § 2978, his deposition might have been taken. Appellant was not in a position to enforce the attendance of these witnesses in person, nor to insist upon a continuance or postponement of the cause on account of their absence. The court could not know that the absent witnesses, whose coming was of their own volition, would certainly make their appearance at the time expected. Many contingencies might have prevented. The witnesses were not within the court's power. The court, we think, under the circumstances, might very properly have granted the postponement without imposing the condition, inasmuch as it does not appear that such a postponement would have been detrimental to the rights of appellee. But its refusal to do so was not error.

The time for preparing and presenting requests for instructions, and for determining the law of the case after the evidence is closed, and for making arguments to the jury, are all within the sound discretion of the trial court; and it is a large discretion, which will not be restricted further than to prevent injustice or oppression. No abuse of such discretion is shown here.

5. *Because the court erred in allowing the plaintiff to introduce the testimony of W. R. Titus as to what the placard contained.*

The evidence was not introduced for the purpose of showing the contents of the placard. That was not the matter in issue. The purpose of the evidence was to determine what was the duty of the brakeman. The placard was one method of showing it, but it was not the only one. It could have been and was established by other proof, and that too without objection from appellant. Appellant itself proved by two witnesses precisely the same thing that the appellee showed the placard contained, and it asked instructions bearing upon the proof thus offered by it. We think appellant therefore must be held to have waived any objection it might have had to the manner of proving the contents of the placard, even if such objection were otherwise well taken. Thomps. Trials, §§ 706–7.

But the contents of the placard were merely incidental to the main issue, and we might say of this placard as we said of a certain statement in *Triplett* v. *Rugby Distilling Co.*, 66 Ark. 219: "It 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 Greenl. Ev. § 85 *et seq.*; *Id.* § 97. See also *Chicago, B. & Q. Ry.* v. *George*, 19 Ill. 510; *Yonge* v. *Kinney*, 28 Ga. 111, and other authorities cited in appellee's brief.

6. *Because of error in the granting and refusing of requests for instructions.* (Embracing reasons for reversal from six to thirteen inclusive.)

The charge of the court contains no error for which the appellant may complain, and really presents the law more favorable to appellant than it had the right to ask or expect. We refrain from discussing the objections *seriatim*, because what we might say would be but a repetition of familiar principles oftentimes announced by this court.

7. *Because the motion for new trial on account of surprise and misconduct should have been granted.*

In its motion for new trial appellant states that it "was surprised by the testimony of Geo. Kilpatrick to the effect that he had entered the train from the right side of the train (that is, from the platform of the station), when he had repeatedly told credible parties that he had entered the train from the left

side, opposite to the platform, which facts had been communicated to defendant, and defendant had no notice that anything would be claimed to the contrary, and relied upon the testimony being in accord with his statement. And also by his testimony to the effect that he was on the rear end of the car next the smoker (which was two car lengths from the locomotive), when he had repeatedly stated to divers parties that he was on the front end of the first coach or car (which was the end of the car next to the locomotive), which facts had been communicated to defendant, and it relied upon plaintiff's testifying to this state of facts, and was prepared to show by many witnesses that there was a solid partition in the second car from the engine through which no one could pass from the position where the brakeman was conceded to be, to the place where Kilpatrick had represented himself to be. That defendant's surprise was such that ordinary prudence could not have guarded against it." The alleged misconduct of plaintiff for which a new trial was asked consisted in the making of the statements set out *supra*, and the further statement to divers parties, who communicated same to defendant, "that he did not know who pushed him off; did not see the party that pushed him off,"—whereas upon the trial he testified to a different state of facts. And further misconduct in refusing to make any statement of the facts set out *supra* to defendant, and in exercising control over his witnesses to such an extent that he would not allow them to make any statement of facts within their knowledge to defendant.

The appellant made no effort at the trial, after the testimony of Kilpatrick was adduced, to have the cause postponed or continued for the purpose of getting the witnesses by whom it expected to show that the plaintiff had made statements upon which it relied contradictory to his testimony on the trial. It did not show that the witnesses to whom he made these contradictory statements complained of were not then present at the trial, nor that he could not prove the alleged facts and statements in contradiction of the testimony of appellee, as well by the witnesses who were present as by those who were absent. If appellant had any right to be surprised, and was really sur-

prised, at the testimony of appellee, it certainly did not manifest its surprise at the proper time. As these statements which appellee is said to have made before the trial were communicated to appellant, it knew who the witnesses were at the time of the trial, when appellee was giving the alleged inconsistent evidence, yet appellant did not then express its desire to have these witnesses, and to show these alleged inconsistencies.

In *Nickens* v. *State*, 55 Ark. 567, it is held that "one who is surprised by his adversary's testimony is not entitled to a new trial on that ground, if, instead of asking a postponement to procure necessary evidence, he reserves his surprise as a masked battery in the effort for a new trial." *Overton* v. *State*, 57 Ark. 60, and authorities there cited, including many civil cases. There is no reason for a different rule in civil cases. Appellant has not brought itself within this rule. Asking for a temporary postponement on account of the absence of witnesses Lucas and Cocke was not put upon the ground of surprise. But, aside from this, a motion for a new trial should never be granted on the ground of surprise when it is shown that the party who claims to have been surprised had the means at hand to challenge and overcome the conditions which caused the alleged surprise. Such was the case here. If appellant was surprised that appellee testified that he entered the car from the right side, when he had previously told divers persons he entered from the left, then appellant was prepared to show, and did show, that appellee had stated that he entered from the left, and additional testimony upon that point would only be cumulative and for contradiction. So also if the appellant was surprised that appellee testified that he was on the rear end of the car next to the smoker, when he had previously stated to divers persons that he was on the front end of the first coach, it was prepared to show, and did show, by witnesses that he had made such statements. In fact, it appears, from an examination of the affidavits in support of the motion for new trial, that, when compared with the facts proved at the trial, they are but reiterations, in all substantive and pertinent points, of what was actually shown at the trial.

The alleged misconduct of appellee in making statements to

persons out of court different from his testimony on the trial, by which appellant was deceived and disappointed, and in not permitting his witnesses to talk with appellant's agents with reference to the facts of the case, presents a cause for reversal more novel than substantial. However reprehensible in morals such duplicity and disengenuous conduct might be, we know of no rule of law that makes such conduct a bar to recovery, or even a plausible ground for surprise in actions of this kind. Undoubtedly, such conduct should go very far towards convincing the jury that the one guilty of such conduct was unworthy of belief, and thereby lessening the chances of his success in a case depending upon his evidence. But that is as far as it could go. Appellant and appellee were dealing at arm's length. Appellee was under no obligation to disclose his case to appellant. Nor can his making statements to various parties, out of court, in conflict with his sworn testimony, which statements were communicated to appellant, be considered such misconduct as would forfeit his right to recover. Such alleged misconduct did not deprive appellant of its right to prove the truth at the trial. We do not see that there is anything what ever in the alleged misconduct germane to the issue of the liability or non-liability of appellant, further than as we have indicated as affecting the credibility of appellee as a witness, and that was for the jury.

8. *Because the verdict was contrary to the evidence.*

We have grave doubts of the correctness of the verdict. It seems to us that appellee, in view of the statements he is shown to have made to various persons, so utterly contradictory of his testimony on the witness stand, was rendered wholly unworthy of belief. In coming to this conclusion, the numerous affidavits of appellant produced on its motion for new trial have made their impression upon us. But, of course, we must eliminate any such impression in favor of the jury's verdict, for the affidavits were not before it. But, aside from these, it seems to us the preponderance of the evidence was in favor of appellant's contention, and the learned trial judge might very properly have set aside the verdict. But he saw and heard the witnesses, and doubtless knew something

of their character and standing, which it is impossible for us to know. After the trial judge has permitted such a verdict to stand, such deference is given to his opinion that it has become a time-honored rule of law not to disturb his finding when there is any legally sufficient evidence to justify the verdict. The question here is not what we think the verdict should have been, but was there any evidence before the jury sufficient in law to warrant the verdict as it is? When brought down to this point, it is impossible for us to say that there was no evidence to support the verdict. Other questions were presented in the motion for new trial, and not abandoned in the presentation on oral argument, and we have examined them, but find nothing in them to constitute reversible error.

The judgment is affirmed.

---

## ANDERSON v. WAINWRIGHT.

67 62
87 97

Opinion delivered October 28, 1899.

1. EVIDENCE—WRITTEN CONTRACT.—A written contract cannot be changed or added to by parol evidence. (Page 66.)
2. AGREEMENT TO RECEIVE RENTS—EFFECT.—Plaintiff, having a prior attachment lien on land, agreed with creditors holding subsequent liens to accept a first lien on the land to secure his claim, and to accept the rent accruing therefrom, less insurance and taxes. The rents were so applied for four years, but failed to reduce the principal of the debt. *Held*, that plaintiff was entitled to enforce his lien by a sale of the land. (Page 66.)

Appeal from Hempstead Circuit Court in Chancery.

RUFUS D. HEARN, Judge.

STATEMENT BY THE COURT.

On December 12, 1896, plaintiff filed her complaint in the Hempstead circuit court on the chancery side thereof, alleging: That on the 23d day of September, 1892, one Wm. R. Crossett, a defendant herein, was indebted to her in the sum of two

thousand dollars, evidenced by a promissory note bearing ten per cent. interest per annum, and that on said day she entered suit in the Hempstead circuit court against said Crossett to recover said amount, and that under a writ of attachment issued in said suit she levied upon certain real estate belonging to Crossett, and thereby obtained a prior lien thereon to secure payment of her demand. That at that time the said Crossett owed various amounts to the respective defendants in this cause or their respective grantors. That on the 23d day of November, 1892, said plaintiff, E. E. Wainwright, W. R. Crossett and the other said creditors of said Crossett entered into a contract by which it was agreed that said suit of plaintiff against W. R. Crossett should be dismissed, and a lien made and given to the plaintiff, E. E. Wainwright, upon said above described lots to secure prompt payment of said two thousand dollars' debt, and that a deed should be made by W. R. Crossett to said other creditors conveying said real estate above mentioned to them subject to said lien. That said deed was executed and delivered, carrying out said agreement, and duly recorded; and that a copy of said agreement was filed with this complaint, marked "Exhibit A," and that a reference to said deed will disclose the fact that the title to said lots thereby conveyed is warranted to the grantors therein against all claims except the lien of the plaintiff. That in said deed the following words are found to-wit: "Except the claim of $2,000, payable to Mrs. E. E. Wainwright, for which said debt a lien is hereby reserved." And plaintiff prays for judgment for twenty-three hundred dollars, for a lien upon said lots, and that they be sold to pay said debt.

The defendants answered that Nettie Kenser, Ida Hatch, A. J. Anderson, M. A. Lowery, M. C. Rodgers, Katherine A. Forney and Jossie Lee Yowell had become possessed of all the rights and interest of the original defendants; that they supposed it was true that the plaintiff, E. E. Wainwright, had a prior lien by attachment against W. R. Crossett on the property in controversy, as alleged in her complaint. Further, they alleged that they and their grantors were at the same time creditors of the said Crossett, and held liens by attachment

sued out against Crossett on the property in controversy, and that such was the condition of affairs on the 11th day of November, 1892, when the following basis of settlement was agreed upon between the said W. R. Crossett and his then attaching creditors, who were the plaintiffs in this cause and the original defendants: The said E. E. Wainwright agreed to accept a first lien on the property in controvery to secure her claims, and to accept the net monthly rents of same, less insurance and taxes, a copy of which agreement was attached to said answer in words and figures as follows: "I agree to accept a first lien on the two brick buildings in Hope, Ark., now belonging to W. R Crossett,. located on parts of lots one (1) and two (2) in block twenty seven (27), fronting forty nine (49) feet on Elm street, and extending back one hundred (100) feet west, to secure to me the payment of the sum of two thousand dollars and interest thereon due me on note executed to me by W. R. Crossett, and I agree to accept the rent accruing from said buildings monthly, except so much thereof as is necessary to pay insurance and taxes on said buildings. This November 11, 1892. E. E. WAINWRIGHT."

Said defendants in their answer further say, in consideration of her said agreement, that they liquidated their claims against said Crossett by accepting a deed from said Crossett, burdened, however, with a lien in favor of Mrs. E. E. Wainwright, being the deed referred to by plaintiff in her complaint. That both of said instruments, to-wit; the deed and agreement, were executed and delivered to them in the month of November, 1892. They furthur state that the moving consideration of their relinquishment of their claims against Crossett and accepting a deed to the property, burdened as it was with a lien in favor of Mrs. E. E. Wainwright, was the agreement of the said E. E. Wainwright as above set forth. That, at the time said adjustments were made, it was specially understood by both themselves and the said E. E. Wainwright that her claim was to be liquidated, by the net proceeds of the rent of the property in controversy, deducting taxes and insurance, and in no other way, and it was her wish and desire that she should be paid in that way, and not by sale of said premises in con-

troversy. The defendants further say that they have strictly performed their part of said contract until commencement of this suit, and that Mrs. E. E. Wainwright received all the rents of the property in controversy, less insurance and taxes, and that they still stand prepared to carry out their said agreement. They further allege that the attempt of E. E. Wainwright to liquidate her said claim by foreclosure sale of property in controversy is wrong, and against the rights and interest of the defendants, and in violation of said E. E. Wainwright's solemn contract and agreement, and they pray judgment against the plaintiff, and for costs and for other relief.

On April 13, 1897, the plaintiff, through her attorney, J. H. McCollum, files her written demurrer to defendant's answer as follows: The plaintiff demurs to the answer of the defendants herein, and for cause says that the facts alleged and set out in said answer are not sufficient to constitute a defense. The court sustained said demurrer. To which judgment the defendants except, which exception is noted of record. Whereupon the court rendered judgment for the plaintiff in the sum of two thousand and five dollars, with ten per cent interest until paid; that she have a lien upon the property in controversy; and that said property be sold to satisfy her debt; and that the equity of redemption of said defendants be forever cut off and barred. To the court's findings and judgment the defendants at the time excepted, and asked that their exceptions be noted of record, which was done, and defendants prayed an appeal to the supreme court, which was granted.

*J. P. Harvey* and *Green & McRae*, for appellants.

The contemporaneous agreement of appellee was admissible in evidence, and should have been received and construed in connection with the deed and other writings. 17 Am. & Eng. Enc. Law; 442[7], 443[8]; 27 Ark. 510; 1 Greenl. Ev. § 283; Laws. Cont. § 378, p. 378.

*Jas. H. McCollum*, for appellee.

As appellee's agreement to accept rents was not for any definite length of time, she should be required to accept them for

only a reasonable length of time. 62 Am. St. Rep. 38; 1 Beach, Cont. § 80; Clark, Cont. 627; Bish. Cont. §§ 63, 327. Parol evidence could not be admitted to show anything beyond the terms of the written agreement. Clark, Cont. 565, 567; 1 Beach, Cont. §§ 28 and 29; 65 Ark. 333. The latter clause of the agreement is too vague to amount to a contract. Clark, Cont. § 63, 64 and 474; Bish. Cont. § 316; 1 Beach, Cont. § 72; 2 *Id.* § 1766; 64 Ark. 398. The agreement, in so far as it attempts to deprive appellee of her right to resort to the courts for enforcement of her rights, is unenforceable. 8 Am. St. Rep. 913; 35 *Ib.* 793; 35 Ark. 17. The violation of appellant's duty to keep the buildings in repair, and the charging of said repairs to appellee, constituted such a breach of the contract as entitled appellee to rescind. 39 Am. St. Rep. 415; 5 Laws on Rights, Rem. & Pract. § 2589. The contract alleged would be unilateral, and not binding on appellee. 3 Am. St. Rep. 758; 19 Am. St. Rep. 205; Clark, Cont. 165, 166; 12 How. 126; 23 S. W. 392; Bish. Cont. § 61; 1 Beach, Cont. §§ 147 and 168. The agreement was merged into the deed executed subsequently. 5 Lawson, Rights, Rem. & Pract. § 2580; Clark, Cont. 81; Bish. Cont. § 129. The contract and the deed are plain and unambiguous in their terms, and evidence should not be admitted to contradict, change or modify them. 5 Lawson, Rights, Rem. & Pract. §§ 2580, 2284; 11 Am. St. Rep. 889; 2 Demb. Land Tit. § 137; Clark, Cont. 80, 81; 11 Am. St. Rep. 159; 47 Ark. 301.

HUGHES, J., (after stating the facts.) The contract was in writing, and could not be changed or added to by parol evidence. The demurrer to the answer was properly sustained.

If it is shown that there was a valid consideration for the plaintiff's agreement not to enforce her lien, she could only be held bound to refrain from doing so for a reasonble length of time. She did refrain from suit to enforce her lien for four years. We think that this was as much as could be required of her. A party cannot be held to have precluded himself from the exercise of the right to resort to the courts to protect and enforce a legal right. *Chadwick* v. *Hopkins*, 62 Am. St.

Rep. 38; *Hershy* v. *Clark*, 35 Ark. 17; *Brooks* v. *Cooper*, 35 Am. St. Rep. 793.

The judgment is affirmed.

BATTLE, J., did not participate in the determination of this cause.

---

## DUVAL *v.* SCHOOL DISTRICT OF FT. SMITH.

Opinion delivered October 28, 1899.

SCHOOL DISTRICT—SALE OF LAND—EFFECT.—A school district loaned money to a corporation, secured by a mortgage on land. At maturity of the mortgage the school district was proceeding to foreclose when one of the corporation's stockholders proposed that the school district buy in the land at foreclosure sale and convey it to him, upon his paying part of the purchase money, and executing a mortgage upon the property to secure the remainder, which was done. In a suit by the school district to foreclose the latter mortgage, *Held*, that the school district acted as trustee for the stockholder in making the purchase; that it was merely a mortgagee of the land, and not a vendor, within the act of April 1, 1891, requiring sales of land by such school district to be at public auction to the highest bidder. (Page 79.)

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

EDGAR E. BRYANT, Judge.

*Rose, Hemingway & Rose*, for appellants.

Since appellee's acceptance of Duval's proposition was conditioned on his carrying insurance, it did not close the contract. Metc. Cont. 14; 1 Pars. Cont. *477. The statute required the school board to sell at public sale. Act April 1, 1891; Sand. & H. Dig., §§ 7114–7120; Acts 1895, p. 74. The board had no power to bind itself to sell the property at private sale to DuVal. Perry, Tr. § 43; 2 Johns. 425. The board could not, by its unwarranted act, bind any one, and the sale to DuVal is void. 34 Ark. 346; 42 Ark. 140; 93 U. S. 257; Story, Agency, § 307*a*; Mechem, Agency, § 292; 9 Wall. 45; Mechem,

Pub. Off. § 511; 19 Ia. 199; S. C. 87 Am. Dec. 423; 99 Ind. 428, 440; 20 Ark. 354; 22 Ark. 347; 23 Ark. 87; 24 Ark. 409; 39 Ark. 583; 40 Ark. 256; 42 Ark. 120; 6 Ark. 78; 37 Ark. 142; 49 Ark. 172. School directors are public officers, and their powers are limited by the terms of the statutes. 1 Thomps. Corp. § 25; 9 Wall. 197; 5 Pet. 188. If in selling lands they exceed their powers, no title passes. 13 Pet. 436; 2 How. 317; 12 *id.* 74; 6 Wall. 143; 92 U. S. 713; 16 Wall. 335; 115 U. S. 406; 113 U. S. 134; 11 How. 291. DuVal is not estopped because: (1.) Estoppels must be mutual. 13 Ark. 217; 152 U. S. 126; 123 *id.* 551–2; Big. Estop. 334; 53 Ark. 364; 100 U. S. 564. (2.) The payment of money under a mistake of law or fact does not create an estoppel. 46 Ark. 180; 93 U. S. 335; 150 *ib.* 335; 77 N. W. 242; 15 Ark. 62; 22 *Id.* 496; 53 *id.* 200; 64 *id.* 105; 3 De G. & J. 501; 59 Ark. 573. (3.) No estoppel can arise to prevent any one from relying on a principle of public policy or a positive statute. 31 Ark. 702; 47 *id.* 352; 48 *id.* 363; 53 *id.* 241–2; 51 *id.* 31. Nor could the school board ratify the illegal contract. 2 Pom. Eq. § 964; 19 Am. & Eng. Enc. Law, 473. The contract made after the foreclosure and purchase by the appellee should be rescinded, and the notes and deed cancelled for want of consideration. 46 Ark. 348; 33 *id.* 762; 53 *id.* 512; 1 Story, Eq. Jur. § 700. The money was lent to the corporation, and not to the stockholder (DuVal). Hence the deed can not be said to have been for money borrowed. 4 Ark. 357; 102 U. S. 160. Appellant should have a decree for the money already paid by him, less rents received. 171 U. S. 151; Green's Brice, Ultra Vires, 658.

*Cockrill & Cockrill*, and *Charles E. Warner*, for appellee.

The board bid in the land for DuVal, and was merely a trustee for him or a conduit of title. 2 Warv. Vend. 589; 46 Ark. 32; 20 Ark. 381; 41 Ark. 264, 270. The whole transaction of the purchase and resale was to continue the loan of its funds and substitute DuVal for the original mortgage debtor; and this was not prohibited by the act of 1891. The presumption, where in one phase a contract is illegal and in another legal, is

that the party intended to comply with the law. 46 Ark. 129. The substance, and not the form of the transaction, is to be looked to. 52 Ark. 30, 42, 43; *ib.* 65; 54 Ark. 6. Equity will treat that as done which ought to have been done; and DuVal must be held to be the real purchaser. 2 Warv. Vend. 580; 47 Ark. 285; 33 Ark. 239; 41 Ark. 282. The doctrine of *ultra vires* will not be applied to defeat the ends of justice, if such a result can be avoided. 96 U. S. 312, 315; 2 Herm. Estop. § 1178; 2 Kent, Comm. 381. The approval of the sale by the court vested a good title in DuVal. The act of 1891 does not declare a private sale void, and the courts will not impose penalties not found in the act. 103 U. S. 99; 98 U. S. 62; 56 Ark. 47. The act was not *ultra vires* (5 Thomps. Corp. § 5975, 5977), and the deed would have bound the school district by estoppel. 5 Thomps. Corp. §§ 5978, 6016, 6025; 102 Mo. 149; 113 N. Y. 423; 145 U. S. 393; 96 U. S. 258, 267; 12 C. C. A. 14, 22; S. C. 64 Fed. 36. Estoppel may apply to an act strictly *ultra vires*. Dill. Mun. Corp. pp. 444, 516, § 675; 2 Herm. Est. § 1222. DuVal is estopped to set the plea of *ultva vires*. 50 Miss. 403; 43 Wis. 421; 102 Mo. 149; 5 Thomps. Corp. §§ 6024, 6025–6; 47 Ark. 269, 284; 48 Ark. 254, 256. If the act was illegal, the parties being *in pari delicto*, DuVal cannot recover. 12 C. C. A. 14; 145 U. S. 407.

*Rose, Hemingway & Rose*, for appellants in reply.

The deed of the trustees to DuVal, being made in violation of the statute, was void, and conveyed no title. 101 U. S. 82, 86; 47 Ark. 383; 29 *id.* 386; 33 *id.* 450; 1 Whart. Cont. § 360; Bish. Cont. § 458; 32 Ark. 631; 166 U. S. 340; 25 Ark. 267; 59 Ark. 356; 28 Ark. 362; 33 Ark. 450; 37 Ark. 110; 48 Ark. 246; 31 Ark. 339; 130 U. S. 22; 19 Ark. 308; 2 Jones, Mort. §§ 1822, 1831, 1839, 1842, 1845, 1852. As in ordinary cases of failure of title in land sales, the vendee has a lien for whatever payments he may have made. 30 Ark. 692. Further, that there is no estoppel in this case, see: 130 U. S. 37; 58 Ark. 275; 59 *id.* 361. Nor does the doctrine of parties *in pari delicto* apply to DuVal. 22 N. Y. 507; 131 U.

S. 349; 7 Wall. 558. Appellant should be given the difference between what he has paid and the rents, etc., received by him. 23 Fed. 214; 131 U. S. 389; 107 U. S. 353; 5 Thomp. Corp. § 6004; 10 Wall. 684; 4 Ark. 289; 49 Ark. 25; 52 Ark. 481; 102 U. S. 299; 106 U. S. 503. No trust on the part of the school board in favor of DuVal is shown, and, to establish such, *clear and convincing* evidence is required. 64 Ark. 162; 41 Ark. 400; 57 Ark. 637; 44 Ark. 365; 48 Ark. 174. Under terms of the act of 1891, no title passed until the requirements were complied with. 58 Ark. 307; 54 Ark. 480; 62 Ark. 214; 34 Ark. 346; 32 Ark. 97.

BATTLE, J. On the 10th day of July, 1896, the School District of Fort Smith filed its complaint in equity against Ben T. DuVal and his wife, alleging the following facts:

"On the 6th day of December, 1892, the defendant, Ben T. DuVal, executed to the plaintiff several notes, of $5,000 each, payable in five, six, seven, eight and ten years, amounting in the aggregate to $25,000. On the same day the defendant, Ben T. DuVal, executed his mortgage to the plaintiff for $25,000 on a certain piece of land lying in Fort Smith, known as the 'Grand Opera House Property'; the mortgage providing that if any of these notes should not be paid at maturity, then the land might be sold for payment thereof. That there was then due on the notes, and for taxes and insurance paid by the plaintiff, the sum of $31,385.62. That DuVal's wife had joined in the mortgage for the purpose of relinquishing her dower." The prayer of the complaint was that the mortgage be foreclosed, and for all other proper relief.

The defendants answered, and made their answer a cross-complaint, in which they alleged that the notes sued on were given for the purchase money of certain real estate sold to Ben T. DuVal by the plaintiff, and that the notes were without consideration, because the sale was not in conformity with the statutes in such cases made and provided. In order to make the answer and cross-complaint more intelligible, we state that by an act of April 1, 1891, it was provided that the board of the School District of Fort Smith might buy at any sale of

lands donated to the city of Fort Smith by congress, and become the purchaser of any property situated in the school district, on or in which it might, at the time of such purchase, have any lien or any interest, whenever in the opinion of the school board it should be necessary in order to protect the interest of the school district. The act then proceeds as follows:

"Provided, that no sale of real estate, or lease thereof, shall be made by said school board except at public auction, to the highest bidder, after an advertisement of twenty days in some newspaper, or an advertisement of four weeks in a weekly newspaper published in said city, if there be no daily newspaper in said city, giving the time, place and terms of sale, and a description of the property to be sold. Provided, also, that all sales shall be for not less than one-third cash, and balance of purchase price shall be secured by a mortgage upon the property sold; which mortgage shall not run longer than five years, at not less than 8 per cent interest, payable semi-annually in advance, on the first days of January and July of each year. Provided, further, that in case of lease the lessee shall give bond, to be approved by said school board, for the prompt payment of the rental, or the amount for which said property was leased, in advance, on the first days of January and July of each year. Provided, also, that no sale or lease of property by said school board shall be effectual to pass the title to said property, or leasehold therein, until said sale or lease has been reported to and approved by the circuit court of Sebastian county for the Fort Smith district in the manner hereinafter provided."

"Sec. 2. When said school board shall have made a sale or lease of real estate as hereinbefore provided, the president and secretary of the board shall make full report thereof to said circuit court, verified by affidavit; said report shall remain on file in said court for a period of ten days before action is taken thereon by said court, during which time any citizen of Fort Smith, or said school district, may file his objections or exceptions to said sale, and the same shall be heard by the court; and if it shall appear that said sale or lease was not fairly or

properly conducted, or that said land was sold or leased for an inadequate price, or it was not for the best interest of said school district to sell or lease the same, then said court shall set aside said sale."

The defendants alleged in their answer and cross-complaint, as follows:

"That the notes and mortgage sued upon were executed to the plaintiff for a part of the purchase money of the property mentioned, which the plaintiff agreed and undertook to sell to the defendant for $33,788.85 at private sale. That the plaintiff also pretended to execute to said DuVal its deed of conveyance, dated December 6, 1892, signed by the president and secretary of the school board, for the sum last named, of which defendant paid in cash $8,788.85.

* * * * * * * * * * * * * * *

"That the plaintiff, in undertaking to sell said lot to the defendant, neither offered it at public auction to the highest bidder, nor did it advertise it twenty days in a newspaper or otherwise, giving the time, place and terms of sale, and description of the property to be sold, nor for one-third cash; and the mortgage taken for the deferred payments was for more than two-thirds of the purchase money, and ran longer than five years. Neither did the president and secretary of the board of directors of the school district make report of said sale to the circuit court, as required by the statutes in such cases made and provided. Wherefore they say that by said attempted sale to the defendant, and deed made by the plaintiff, no title was passed; and the notes sued upon, and the mortgage given to secure them, are without consideration and void. Wherefore the said attempted sale should be rescinded and canceled, and the money paid by defendant to the plaintiff should be refunded."

The plaintiff answered the cross-complaint, alleging as follows:

"It is not true that the notes were executed for the opera house property, but they were executed for money lent by the plaintiff to the defendant, as is recited in said notes and in the face of the mortgage. The facts regarding the execution of the notes are as follows:

"In 1887 defendant DuVal, Wm. M. Cravens and John S. Park organized a business corporation styled the Grand Opera House Company, of which defendant was a large stockholder and president. The board of directors of the opera house company secured two loans from plaintiff, one on March 16, 1887, for $15,000, and one on September 26, 1887, for $15,000, both of which were secured by mortages made by the Grand Opera House Company, the first executed by defendant as president, and the second by Cravens, as vice-president, said loans bearing interest at the rate of eight per cent. per annum. Payments on the notes and mortgage being greatly in arrears, on December 4th the school board directed its secretary to call on DuVal for a written proposition as to what the opera house company proposed to do in regard to said loans. On the 8th of February, 1892, the plaintiff adopted a resolution extending the loan upon certain conditions; and on February 12, 1892, the board resolved to take no action looking to the foreclosure of said mortgage, provided interest was paid by a certain time; but that, as the Opera House Company did not comply with the terms of this resolution, the plaintiff was about to foreclose, when, on February 26, 1892, DuVal appeared before the board, and the matter was discussed, when it was resolved by the school board not to proceed with foreclosure on certain conditions. DuVal and the Opera House Company failing to comply with these conditions, the school board instituted proceedings for the foreclosure of said mortgage, in which a judgment and decree of foreclosure was rendered in the Sebastian circuit court on the 20th day of April, 1892. According to the terms of said decree, the opera house property was advertised for sale on the 6th of June 1892. DuVal was anxious to become the sole owner of the property. On the 28th of May, 1892, he sent to the school board the following proposition in writing:

" 'Fort Smith, Ark., May 25, 1892. To the Fort Smith School Board, Fort Smith, Ark: Gents: The Grand Opera House is advertised to be sold under decree of foreclosure on the 6th day of June next. The decree was entered as of April 20, 1892, for $33,301.49, with interest at 8 per cent,

which, up to the day of sale, amounts to about $346.00. Balance, principal and interest, $33,647.49. Costs, including commissions, not known. You all understand my relations to the property. I have made arrangements by which, if I purchase the property at the sale, to pay the interest and $5,000 of the principal, so as to reduce the debt to $25,000. For the balance, I propose to give my notes payable by installments in five, six, seven, eight and ten years, at 8 per cent, payable semi-annually, on the first days of June and December, secured by a mortgage on the property, conditioned that a failure to pay promptly shall make all due at once, and, if desired, will assign as further security whatever lease I may make on the opera house property. With this agreement, I can save the property, and pay the debt due the school fund.'

"This proposition was accepted on the condition that DuVal should carry $20,000 insurance on the property. In accordance with this proposition and agreement, it was expected and understood by the school board that DuVal would buy the property at the foreclosure sale to be made on the 6th of June following, but before that time, in conversation about the matter between the secretary of the school board and DuVal, the question was suggested as to whether, if DuVal purchased, he might not be considered in law as chargeable as trustee for the Opera House Company. On this account DuVal suffered and allowed W. R. Martin, the secretary of the school board, to buy the property in the name of the school district, with the distinct understanding that the school board should convey to DuVal such title as it acquired by said purchase, upon the terms set forth in the written proposition of DuVal and accepted by the school board.

"Immediately after the sale DuVal paid to the plaintiff $8,788.85 including all interest and cost of the foreclosure proceedings, and $5,000 of the principal debt, leaving then due $25,000.

"The purchase of the property at the foreclosure sale, and the agreement to convey the title acquired to DuVal, constituted the only consideration. The $8,788.85 paid by

DuVal was intended to complete the foreclosure sale. It was understood by DuVal that the school district did not buy for itself, but for him; the school district having bought only as trustee for him. DuVal has never, until the bringing of this suit, made any pretense that he was not the owner of the property."

Upon a final hearing of the cause upon the evidence adduced by both parties, the court found as follows:

"1. That during the year 1887 the plaintiff loaned the sum of thirty thousand dollars to the Grand Opera House Company, a corporation organized under the laws of Arkansas, and located at Fort Smith, of which company the defendant, Ben T. DuVal, was a stockholder, and the president of its board of directors; that said loan was embraced in two items of $15,000 each, the first being dated May 16, 1887, and the second, September 26, 1887, each being evidenced by notes, and each being secured by a mortgage duly excuted, conveying the property known as the 'Grand Opera House Property' and particularly described in the original complaint herein; that said debt for borrowed money bore interest payable semi-annually at the rate of 8 per cent per annum; and that said borrowed money was not paid when due, and default was made in the conditions of said mortgages, so that plaintiff began in this court, at the April term thereof, 1892, proceedings for the recovery of judgment and foreclosure of the said mortgages, and on the 20th day of April, 1892, a judgmeent was had in the said proceedings for said debt, interest and cost, and for the foreclosure of said mortgages.

"2. That prior to the recovery of said judgment the said DuVal personally appeared before the board of directors of plaintiff, School District of Fort Smith, and endeavored to effect some arrangement of said indebtedness, but did not succeed in doing so, and that after said judgment was rendered the said property, in pursuance thereof, was advertised for sale on the 6th of June, 1892; that said DuVal, being desirous of becoming the owner of said property in his own right, and to assume and to pay the said mortgage indebted-

ness as ascertained and adjudged by the said decree, submitted to the board of directors of plaintiff, on the 28th of May, 1892, a proposition in writing, wherein he proposed to become the purchaser of said property at the foreclosure sale to be had on June 6th, at and for the amount of the judgment, interest and costs, then stated by him to be $33,647.49, exclusive of costs, which costs were not then fully known, and that in case he purchased the same he could pay all interest and costs and $5,000 of the principal in cash, thus reducing the principal debt to $25,000, and for that he would execute his five several promissory notes in installments of $5,000 each, payable in five, six, seven, eight and ten years, bearing interest at 8 per cent, payable semi-annually in advance, and to be secured by a mortgage on said property, and that, if said board would accept this proposition, he could thus save the property; that said board of directors of plaintiff, being desirous of aiding said DuVal in saving said property, by resolution of that date accepted his proposition, with the further condition that he should carry certain insurance on said property, and that, on his failure to pay any part of said indebtedness when the same fell due, the whole thereof should be due, to which conditions the said DuVal assented, as is shown by the facts and by the contract afterwards, on the day of the sale, delivered to him by the said board; that it was intended, both by the said board of directors and the said DuVal, that the said DuVal would buy said property at said foreclosure sale as previously agreed on, but before the sale occurred, for some reason, it was agreed by DuVal and the school district that the plaintiff, School District of Fort Smith should bid the amount of said judgment and costs for the said property, and buy same at said sale for him, the said DuVal, in pursuance of the agreement previously made, so that, when said sale was in fact made, the plaintiff bid off said property for the amount of said judgment and costs, and the same was struck off and sold to plaintiff; that immediately thereafter the said DuVal, in accordance with his proposition made as aforesaid, paid to the plaintiff the sum of $8,788.85, the same being the amount required to reduce said mortgage debt, interest and costs down

to the balance of $25,000, and at the same time plaintiff, School District of Fort Smith, executed and delivered to the said DuVal a contract whereby it agreed to convey such title as it acquired by said purchase to said DuVal as soon as said sale was approved by the court, and said DuVal went into immediate possession of the said property.

"3. That, on December 6, 1892, the said sale having been confirmed by the court, plaintiff, School District of Fort Smith, made, executed and delivered to said DuVal a deed of conveyance, conveying to him the said property for the same consideration, to-wit, the said cash payment of $8,788.85 and the balance of said original mortgage debt of $25,000, for which said DuVal executed and delivered to plaintiff his five several promissory notes, each for $5,000, and due and payable in five, six, seven, eight and ten years respectively, with 8 per cent. interest, payable semi-annually in advance, for which interest coupons were attached, stipulating that, if interest was not paid at maturity, it should draw interest at 10 per cent.; and for the purpose of securing the full and prompt payment of said notes, and interest accruing thereon, the said DuVal at the same time made and delivered to plaintiff his certain deed of mortgage, whereby he conveyed to plaintiff the said opera house property; and that detendant, Rose DuVal, as wife of said Ben T. DuVal, joined in the execution of the said mortgage for the purpose of relinquishing her dower therein.

"4. That said DuVal continued in possession of the said property, claiming the same as his own, and operating and using the same as his own exclusive property, and, on March, 5, 1894, he, the said DuVal, being then in default in the payment of interest in a large sum, and plaintiff being about to take foreclosure proceedings against him, in order to get further time said DuVal made a contract in writing with plaintiff, by the terms of which plaintiff agreed to extend the time for one year, in consideration of which said DuVal agreed to surrender all rents, income and profits arising from said property' which was to be applied to payment of expenses, first; second, to the payment of interest; and, lastly, towards the payment of principal. And that on March 5, 1895, the said DuVal

being then in ,arrears in the sum of about $3,505.70, accrued and past-due interest, and requesting a further extension of one year, the same was by the plaintiff granted, and a like written contract was made and entered into by the said DuVal and plaintiff; and that from that time forward to the present time the plaintiff has been receiving the rents and profits and paying the taxes, insurance and expenses on said property, and during all this time the said DuVal has occupied and used his law offices in said property and Box No. 1 in the opera house, without accounting for the use thereof, and that during the time plaintiff has received rents and profits from said property as aforesaid, the said rents and profits have amounted to the gross sum of $5,379,23, and during the same time plaintiff has paid taxes, insurance, repairs and expenses of said property, amounting to the sum of $4,442.65, so that there has remained a net amount of said rents and income, applied upon said mortgage debt, the sum of $936.58. * * * * * *

"5. That said mortgage contained a provision to the effect that, if default was made in the payment of the sums thereby secured, when the same or either of them became due and payable, then the said property should be sold for the satisfaction of said debt and interest, and that, by the terms of said agreements between the parties as hereinbefore recited, all of said indebtedness is due.

"6. And the court further finds that by the intention and agreement of said parties the purchase at said foreclosure sale by plaintiff, School District of Fort Smith, was for the use and benefit of said Ben T. DuVal; that he paid all the money which was paid upon said sale; that it was not intended that said school district should acquire ownership of said property by said purchase, except in form merely, for the purpose of carrying out the agreement of the parties; and that the plaintiff in good faith fully executed and carried out the agreement on its part in respect to the said property with DuVal, and that DuVal accepted said property as his own under said purchase, accepted said deed from the plaintiff, and never questioned its sufficiency in law until he filed his answer in this cause, a period of nearly five years after the sale."

Upon these findings the court dismissed the cross-complaint, and rendered a judgment against the defendant, Ben T DuVal, in favor of the School District of Fort Smith for the sum due on the notes sued on, and ordered that the mortgage be foreclosed to pay the same; and defendants appealed.

As the finding of facts by the court is in accordance with what appears to be the preponderance of the evidence, we accept it as true and correct, and adopt it as a correct statement of the facts in the case, as shown by the evidence.

The Grand Opera House Company was a corporation. Ben T. DuVal was one of its two principal stockholders, and president of its board of directors. The real estate purchased by DuVal belonged to it (the company) when it executed the mortgage to secure the notes given for the money borrowed by it from the School District of Fort Smith, and thereafter remained the owner, subject to the mortgage, until the sale on the sixth day of June, 1892, under the decree of foreclosure. DuVal, as a stockholder, had no legal title to it, nor any equitable title which he could convert into a legal title. But he had equitable rights of a pecuniary nature growing out of his relation as a stockholder. He was entitled to share in the profits acquired by the exercise of the corporate franchises of the company, and to share in the final distribution of the corporate assets when the corporation shall be dissolved. *Riggs* v. *C. M. Ins. Co.*, 125 N. Y. 712. On account of this interest in the assets of the Grand Opera House Company, and to save something out of his investment in the stock of the company, it was his privilege and right to enter into the agreement he made with the school district; and when the school district purchased the property in its name for him, under their contract, it thereby constituted itself a trustee for his benefit, and bound itself to convey the property to him upon the performance of his part of the agreement. *Soggins* v. *Heard*, 31 Miss. 426; *Arnold* v. *Cord*, 16 Ind. 177.

When the school district entered into the agreement with DuVal, it did not undertake to sell him land. It had loaned to the Grand Opera House Company the sum of thirty thousand dollars, and had taken a mortgage on the real estate in question

to secure the same. The school district was a mortgagee only. If it could collect the amount due it in excess of $25,000, it preferred to continue the loan for the latter amount upon the conditions named in its agreement. DuVal proposed to do this, and it accepted his proposition. This contract was not contrary to the statutes or unlawful. How could its performance be illegal? When it bid for the property, it acted for and in behalf of DuVal. In so doing its act was the act of DuVal. It did not sell the land. It was sold by the court through its special commissioner appointed for that purpose. When the land was conveyed to it, it acquired and held it, not for itself, but as trustee for DuVal; and when it conveyed it to him, it executed the trust it had undertaken. All it attempted to do was to keep its money loaned, and what it did was a means devised to secure that end, and that is all it accomplished.

Decree affirmed.

BUNN, C. J., and HUGHES, J., dissent.

---

RUSSELL v. WILLIAMSON.

Opinion delivered October 28, 1899.

67 80
75 8

EXECUTION SALE—WANT OF NOTICE.—A complaint by a judgment creditor, who purchased land at his own execution sale, seeking to have the sheriff's deed reformed, will be dismissed where such deed fails to show on its face that printed advertisements of the sale were posted, as required by Sand. & H. Dig., § 3095, and there was no other evidence that such notice was given. (Page 82.)

Appeal from Pope Circuit Court in chancery.

JEREMIAH G. WALLACE, Judge.

Bill for reformation of a sheriff's deed and for partition. The complaint alleged that the land was purchased in the name of Alva Russell under execution against Williamson in favor of J. W. and Alva Russell, and that by mistake the deed

was taken in the name Alva Russell, when it should have been in the name of J. W. and Alva Russell. To correct this mistake, J. W. Russell and the minor heirs of Alva Russell, deceased, join in the complaint as plaintiffs. Certain intervening mortgagees of Williamson were also made parties to the suit. The chancellor found that there was no equity in plaintiffs' bill, and dismissed it. Plaintiffs have appealed. Other facts necessary to the understanding of the opinion are stated therein.

*Dan B. Granger*, for appellant.

The burden of showing want of service of the summons in the justice's court was upon appellee, and with proof could be made only in a direct proceeding to vacate the judgment. 22 Am. & Eng. Enc. Law, 192, n. 5; 193 n. 3 and 4; 195, n. 2; 39 Ark. 70; 44 Ark. 202; 1 Rice, Ev. 217–223; 2 Neb. 126. The absence of recitals in the sheriff's deed to the effect that he had posted the notices required by statute is not conclusive that they were not so posted, and does not render the sale void. 22 Ark. 19, 27. Appellant was an innocent purchaser, and is not affected by any inequality in the sheriff's proceedings. 4 Greene (Ia.) 456; 14 Ark. 11; 22 Ark. 32.

*Ratcliff & Fletcher*, for appellee, Williamson.

The minors had no power to join in the suit for partition, and the court has no jurisdiction of the matter. Their title could be divested only in an adversary proceeding in which a defense is made and proof offered. 42 Ark. 222; 40 Ark. 56; 44 Ark. 236; Sand. & H. Dig., §§ 5647, 5648. A court of equity had no jurisdiction to entertain the petition to partition, because possession of plaintiffs is neither alleged or shown. 27 Ark. 77, 96, 97; 40 Ark. 155; 47 Ark. 235; 56 Ark. 391.

BUNN, C. J. The plaintiff, James W. Russell, and his brother, Alva Russell, were partners doing a mercantile business in the town of Russellville, Pope county, this state, under the firm name of Russell Bros. and on the 7th day of November, 1871, the defendant, G. M. Williamson, was indebted to this

firm in the sum of $280, which had become due and payable on the first day of January, 1871, and for this sum Williamson executed and delivered his promissory note, due one day after date, bearing interest at the rate of ten per centum per annum from 1st of January, 1871, until paid.

Payments were made upon this note from time to time until 18th of December, 1882, so that the same was not then barred by the statute of limitations, and on the last-named date said firm instituted their suit before a justice of the peace of said county for the recovery of the balance due thereon, and on the 30th day of December, 1882, judgment was rendered against Williamson, by default, for the sum of $129.11 principal and $336.13 interest, and on the 30th January, 1883, execution was issued by said justice of the peace, and the same was returned on the 20th February, 1883, "*nulla bona,*" and on the 26th March, 1883, a transcript of said judgment was filed in the office of the clerk of the circuit court of said county, and the same was duly entered on the docket as required by statute, and became a lien on all the real estate of said G. M. Williamson in said county. On the 29th May, 1883, an execution was issued out of the office of said circuit court clerk on said transcribed judgment, and placed in the hands of the sheriff of said county, and the same was levied upon the interest of said Williamson in the W. ½ of S. W. ¼, the N. E. ¼ of S. W. ¼, in section 28, township 8 north, range 20 west, and the undivided one-third interest in the N. E. ¼ of the S. E. ¼, and part of the S. E. ¼ of the S. E. ¼ (the last named tract containing 30 acres), in section 29 in township 8 north, range 20 west; and on the 14th day of July, 1883, in pursuance of said levy the same was sold by said sheriff to satisfy said execution, and the said Alva Russell became the purchaser at said sale, he bidding the amount of said judgment and costs, and, twelve months having expired, deed was made to him accordingly,—presumably the said judgment being duly credited as the consideration of said sale and purchase.

The return of the sheriff is alleged to have been on file when the deed of the sheriff to Alva Russell was acknowledged in open court, but it does not appear in the record, and the

only evidence of the notice of sale, presented for our consideration, is the deed itself and its recitals, and this of course is *prima facie* evidence. Among the recitals in said deed is the following: "And whereas, afterwards, to-wit, on the 23d day of June, 1883, I advertised the said tracts and parcels of land for sale according to law, by an advertisement inserted and published in the *Russellville Democrat*, a newspaper published and printed in the county of Pope, to be sold at the door of the court house of said county of Pope on the 14th day of July, 1883, at which time and place I attended, and between the hours prescribed by law for judicial sales, etc." From this recital no other notice appears to have been given than the newspaper advertisement, whereas the statute requires in addition the posting of printed advertisements, one at the court house door and one each at five other public places in the county, Sand. & H. Dig. § 3095.

The notice was not sufficient, under the statute, and the sale was void, and so is the deed made in pursuance thereof, and this makes it unnecessary to discuss the several other questions raised by the pleadings and discussed in the briefs of counsel. *Henderson* v. *Hays*, 12 N. J. L., 387. The authorities sustain the theory that a sale defective in this and similar ways may be set aside on motion in court to quash the return or report of sale, and thus prevent the execution of the deed by the sheriff. 22 Am. & Eng. Enc. of Law, p. 670. But this remedy pending the proceedings is evidently not exclusive, for while, in most cases, the owners have opportunity to pursue this remedy by motion as a part of the case, yet, in other cases, from the nature of things, they would not have such opportunity; and it reasonably follows, since one must not be entirely without available remedy, that he may make his defense, as Williamson has done in this case, where the complaint is based on a defective deed, and the same is to be considered a direct attack, rather than a collateral one, for it is a direct defense.

While, strictly speaking, it may be that there can be no innocent purchaser at execution sale, since no purchaser can acquire in any event anything more than the interest the judg-

ment debtor has at the time the levy of the execution, yet there is a well recognized difference between the status of the purchaser who is a third party, and that of the judgment creditor, growing out of their different relations to the record in the case; for, where there is a valid judgment, and a formal and valid execution, and perhaps other facts which the public are expected to look after, a third party is protected against many mere ministerial irregularities if he is without notice otherwise (but this is not really in the case, since the purchaser is not a third party), while the judgment creditor, as purchaser, is "presumed to have notice of all defects in the record and proceedings, and will not be protected as a *bona fide* purchaser if the notice of the sale was insufficient." *Collins* v. *Smith*, 57 Wis. 284. And the same rule pertains in this state regarding the relative rights of the two classes of purchasers at execution sales, and the difference at last depends upon a want of knowledge on the one hand and reputed knowledge on the other.

As the deed involved in this case upon its face shows that the notice of the sale was not given in compliance with the statute on the subject, and that therefore the sale was void, so also is the deed void, and confers no title. The decree of dismissal, as between plaintiffs and Williamson, is affirmed, but without prejudice to the rights of the mortgagees of Williamson.

---

67 84
e70 196

## MEMPHIS & LITTLE ROCK RAILROAD COMPANY AS RE-ORGANIZED v. ORGAN.

Opinion delivered October 14, 1899.

1. ADVERSE POSSESSION—RIGHT OF WAY.—Appropriation and continued use of land by a railroad company for purposes of its right of way, without the owner's authority, constitute adverse possession, when the owner has notice thereof. (Page 94.)

2. STATUTE OF LIMITATIONS—TACKING POSSESSION.—A railroad company which has purchased the rights and franchises of another railroad company at a foreclosure sale has such a privity of estate as will entitle it to tack its predecessor's adverse possession of land to its own, in order to establish the defense of the statute of limitations. (Page 94.)

3. SAME—RIGHT OF WAY.—An action to enforce a claim for land taken by a railroad company for its right of way without authority is barred as to all claimants who were *sui juris* at the time of the taking, where the evidence shows that the defendant has been in adverse possession for more than seven years. (Page 95.)

4. SAME—MARRIED WOMEN.—The Act of April 23, 1873, which authorized married women to sue alone and in their own names, did not by implication repeal the saving clause in their favor in the statute of limitations relating to suits to recover land (Sand. & H. Dig., § 4815.) (Page 95.)

5. SAME—REVERSIONER AND REMAINDERMAN.—While the statute of limitations will not ordinarily run against the owner of a reversionary estate until the particular estate is determined, the statute will bar an action by a reversioner or remainderman to recover damages for land taken and appropriated by a railroad company if he does not bring his action within seven years from the time the land was taken and appropriated, whether the particular estate has been determined or not. (Page 96.)

6. DAMAGES—UNLAWFUL APPROPRIATION OF LAND.—Where a railroad company appropriated a tract of land without authority, and another company acquired the former's rights, and took possession of so much of the land as had not been washed away by the encroachment of the river, the latter company is liable to the owners of the land, not for rent, but for the value of so much of the land only as it received from its predecessor, such value to be estimated as of the time of the original taking. (Page 96.)

Appeal from Crittenden Circuit Court in Chancery.

JAMES E. RIDDICK, Judge.

*Rose, Hemingway & Rose*, for appellants.

The burden of proof, under the statute of limitations, was on the plaintiff. 21 Ark. 386; 43 *id.* 139. The bill and the amended bill did not state a case within the period of limitation; hence the suit should have been dismissed, regardless of what the evidence showed. 16 Ark. 169; 20 Ark. 200; 24 Ark. 390; 9 Pet. 415. The entry of the Federal troops did not affect the continuity of appellant's possession. 20 S. W. 443; 24 Ark. 392; 83 Am. Dec. 499. Possession, once established, is presumed to continue until the contrary is shown. 34 Ark. 102; 30 S. W. 509; 38 N. E. 620. There was no such entry as would break the continuity of appellant's possession. 53 Mich. 461; 47 N. W. 657; 3 Washb. R. Prop. 129, 486; 2 So. Rep. 24; 14 Act. 762; 51 N. W. 295. The mere

failure to rebuild the track after the war was not an abandonment. 29 Atl. 379; 28 Atl. 860; 18 N. E. 830. Plaintiff is barred by laches extending over about 22 years. 61 Ark. 527; *id.* 575; 14 Ark. 62; 22 *id.* 272; 19 *id.* 16; 55 *id.* 93; 60 *id.* 55. The agreement under which the railroad company entered the lands gave them an easment therein, which became indefeasible on their building the road. 37 So. Rep. 303; 19 Ark. 24. It must be presumed that, after the lapse of so great a time, the contract not being produced, appellant satisfactorily complied with its terms. Lawson, Presumptive Ev. 308, 406, 407, 413, 419. This being true, the plaintiff had no cause of action, and the demurrer should have been sustained. 29 N. Y. 634; 13 Am. & Eng. Enc. Law, 547; 1 Wash. R. Prop. p. 630, § 36. As the terms of agreement are not set out, the presumption is that they justified the railroad company's action. 46 Ark. 131; Lawson, Presumptive Ev. 93; 32 Ark. 764.

*Wm. M. Randolph & Sons* and *T. B. Turley*, of Tennessee, for appellee.

Upon the former appeal of this case, this court decided, in effect, that the action was not barred by limitation. 51 Ark. 273–4. The railroad's right of way over appellees' land was not adverse to their title. 5 Pickle (89 Tenn.) 294; 54 Ark. 608. As to burden of proof under the statute of limitations, see, Buswell, Lim. § 236; 43 Ark. 504. Where the complaint fails to show the date at which the cause of action accrued, or leaves same in doubt, the defendant must plead the statute. 19 Ark. 16; 56 Ark. 399–401; 28 Ark. 27; 31 Ark. 684; 34 Ark. 164. The facts in the record being such as to entitle plaintiff to relief, the court should have granted it, whether prayed in the complaint or not. 56 Ark. 399–401. Certainly, the statute of limitations did not run against the heirs during the life estates of their fathers. 22 Ark. 567; 35 Ark. 84; 60 Ark. 74. If any statute of limitations applies to this case, it is the seven year statute. 51 Ark. 270–271. Plaintiff had a right to the full value of the land taken, at the time it was taken, without reference to the manner, extent or time of the use. 51 Ark. 266; 51 Ark. 324; 51 Ark. 330

54 Ark. 141; 49 Ark. 381. As appellees had no remedy provided for the ascertainment of the compensation and damages due them for their land, and no remedy provided to recover rents during its occupation and use, no statute of limitation could run against them in respect thereto. 87 Tenn. 175–178; 16 Ark. 181; Buswell, Lim. §§ 128, 131–132; Wood, Lim. §117; Ang. Lim. §§ 54, 488; 10 Ark. 228; 25 Ark. 462; 32 Ark. 131, 151–153. The original possession, being under agreement, and not being shown to have changed, cannot ripen into a title. 35 Ark. 500; 40 Ark. 366; 42 Ark. 118; 57 Ark. 157, 158; 43 Ark. 494; 4 How. 289; Wood, Lim. § 260; Sedg. & Wait, Tr. Tit. Land., §§ 736, 751; 57 Ark. 526; 58 Ark. 142; 57 Ark. 97; 33 Ark. 633; 43 Ark. 504, 520. Separate trespassers or separate acts of trespass cannot be connected, for the purposes of the statute of limitations. 48 Ark. 277; 49 Ark. 266, 276; 22 Ark. 79; 24 Ark. 371, 390; Wood, Lim. § 271; 57 Ark. 157–158; 27 Ark. 77. Even if appellant claims to hold in succession to the title of the original company, since it held by contract, appellant's possession is not adverse. The relation of landlord and tenant is implied from their taking as such succession to the original company. Lewis, Em. Dom. § 621; Tay. L. & Ten. §§ 436–437, 629, 705–706; Wood's L. & Ten. §§ 3, 236; Wood's Lim. § 265; 35 Ark. 547; 43 Ark. 469, 494; 43 Ark. 504, 519–521; 56 Ark. 485–493; 40 Ark. 366; 50 Ark. 554; 57 Ark. 526. Mere occupancy without intent to claim title does not confer title. Wood, Lim. § 256, p. 513; Buswell, Lim. § 237; 2 Wall. 328; 59 Ark. 626; 115 U. S. 407. The proper measure of compensation due appellees was the value of the land, just as it was, and not its rental value for the time it was occupied by the appellant. 51 Ark. 266; 51 Ark. 324; 51 Ark. 330; 49 Ark. 381; 54 Ark. 141; 41 Ark. 202; 98 U. S. 403.

*Rose, Hemingway & Rose*, for appellants, in reply.

After appellant's title by limitation was perfected, it owed appellees no rents. 20 Ark. 508; 38 Ark. 181; 20 Ark. 542; 34 Ark. 534; 50 Ark. 140; 23 Ark. 147. The former appeal of this case did not decide the question of limitation. 51 Ark.

274. The decision on the former appeal is not binding on this appeal as to any point not then considered. 52 Ark. 473; 14 *id.* 132. See further as to burden of proof on limitation questions: 6 Ark. 381; 27 Ark. 344; 47 Ark. 172; Abb. Tr. Ev. 822: 2 Greenl. Ev. § 431. The entry and holding of appellant were adverse. 43 N. J. Law, 605; S. C. 11 Am. & Eng. R. Cas. 509; 129 N. Y. 252; S. C. 50 Am. & Eng. R. Cas. 292; 51 Fed. 932; 90 Tenn. 157; S. C. 16 S. W. 64; 80 Ga. 776; 50 Ark. 250; 59 Tex. 29; 24 Fed. 539. As the bill shows no claim within the statutory period, it shows no cause of action. 55 Ark. 92; 20 Ark. 200; 1 Dan. Ch. Pl. & Pr. 559; Story, Eq. Pl. § 484. Appellant has a right to tack its possession to that of its predecessors in title or possession, if that possession has been continuous. 20 Ark. 359; *id.* 508; 40 Ark. 108, Wood, Lim. § 272. To preclude this, a break in possession is essential. 23 Ark. 340. No exceptions by appellant were necessary to the report of the master, because of the agreement of counsel reserving all questions of law. Such agreements are to be liberally construed. 7 Pet. 254; 54 Ark. 346; 150 U. S. 591; 45 Ark. 33; 120 U. S. 777; 3 Burrow, 1477; 8 How. 257. Their effect is to waive all technicalities. 1 Enc. Pl. & Pr. 391, 401; 96 Am. Dec. 748, and note; 144 Mass. 546; 5 Allen, 307; 129 Mass. 32; 11 Pick. 310; 8 Allen, 349: 32 Me. 102; S. C. 52 Am. Dec. 642; 5 Greenl. 140; S. C. 17 Am. Dec. 211. That, on the evidence, the claim is barred, see: 51 Ark. 271; 50 Ark. 53; 47 Ark. 431; 58 Ark. 503. In respect to the statute of limitations, there is no difference between this and any other case. 115 Ind. 22; S. C. 17 N. E. 171; 37 Md. 237; 22 Wis. 288; 39 Miss. 394; 23 Conn. 421. The plaintiff's cause is barred by laches. 3 Wash. R. Prop. 53, *449; 19 Ark. 16; 55 *id.* 92; 94 U. S. 806; 15 N. E. 256; 25 Am. & Eng. R. Cas. 83. A general demurrer raises this question. 120 U. S. 387. When laches is apparent, plaintiff must specifically excuse it in his bill. 124 U. S. 183. Plaintiffs' silent assent to the building of the tracks, etc., estops them. 36 Ark. 688; 33 Ark. 465; 55 Ark. 85; 60 Ark. 55.

HUGHES, J. This is the second appeal in this case. The opinion in the first appeal is reported in 51 Ark. 235 (*Organ* v. *Memphis & Little Rock Railroad Co.*), where many of the facts are set out, and many questions of law involved in the case are discussed and settled, so that in the present appeal mainly questions of fact are involved. The question of law involved is the statute of limitations, and this depends upon the evidence.

In the former opinion at page 267, 51 Ark., the court, through Judge Battle, said: "But it is insisted that appellee is not responsible for the debts of its predecessors. This is true. While it did not assume their personal liabilities, it could only take from them by purchase what they had a right to convey. As said in Lewis on Eminent Domain, sec. 621, 'no rights can be acquired in private property under the power of eminent domain except subjeet to the duty of making just compensation therefor. Consequently, the party originally taking or occupying the property cannot transfer to another, by mortgage, lease or otherwise, any right in the property except subject to the same duty. In other words, the owner's claim to just compensation is paramount to any right which can be derived by or through the party making or seeking the condemnation.' " This means simply that the predecessors of the appellant here could convey to appellant, and that it could take from them, no rights the predecessors did not have. If the property received by appellant from its predecessor was subject to the right of the appellees in this case to be compensated for the damages sustained by them by the wrongful appropriation of their property by the predecessors of the appellant, it was still liable after its conveyance to the appellant. The court on the first appeal also said: "The possession of the railroad company, although wrong in the beginning, may ripen into a right by virtue of the continuance of the wrong for the requisite statutory period. As seven year's adverse possession, under the statutes of this state, will bar an action to recover lands, it will be sufficient to bar the action to enforce the claim of the owner against the land or to enjoin the railroad company from using it until just compensation is made, as in that time the right necessary to support the action will be divested, and there

will be no basis upon which it can be maintained." 51 Ark. 271; citing: *Howard* v. *State*, 47 Ark. 431; *Patton* v. *State*, 50 Ark. 53, where "it was held by this court that 'a road becomes established as a public highway, by prescription, when the public, with the knowledge of the owner of the soil, has claimed and continuously exercised the right of using it for a public highway for the period of seven years, unless it was so used by leave, favor or mistake.' In the Patton case it was said, 'the right to a public highway acquired in this manner is based upon adverse possession for the full statutory period of limitation.' The same doctrine applies with equal force to railroads. In both cases the land is taken and appropriated and used as a highway for the public benefit. We know of no reason why the same limitation should not prevail in both cases."

The court said further on the first appeal, p. 274: "Under the agreement of the parties, appellee [Memphis & Little Rock Rd. Co.] is entitled to the benefit of the statute of limitations in all cases where the recovery of the relief sought by the appellants [Organ et al.] is barred thereby. On account of the numerous appellants, and because the cause will have to be remanded, we will not attempt to ascertain whether any and how many of them are barred. It is impossible to ascertain from the evidence before us what damages or compensation the appellants are entitled to. It is evident that they are entitled to some. It was agreed between the parties that the taking of the testimony as to damages of all kinds might be deferred until the final hearing, and that it might be thereafter taken, if desired, upon reference to a master. For this reason, doubtless, it was not taken."

I have thus quoted largely from the opinion on the first appeal, in order that the questions in the case before the lower court on the second hearing may be fully understood.

The appellee in this case contends that what the court said in this second paragraph, quoted from page 274 of the opinion in the first appeal, (*i. e.* that the appellants on the first appeal were entitled to some relief), settled the question as to the statute of limitations. But not so. The court, when we consider all that was said, must be understood to have meant that if the

railroad company had taken the land, and appropriated it to its use, and had not condemned or paid for it, the appellants in the former appeal were entitled to some relief, if their right of action was not barred when they brought their suit; and this question was expressly left and referred to the lower court for determination. Let us now consider the evidence in the case at bar upon the question of the statute of limitations, and determine if the right of action of the appellees was barred when they brought their suit. The right of action of the plaintiffs (the appellees), if not barred by the statute of limitations, was the right to recover compensation for the value of their land taken and appropriated by the defendant (the appellant) at the time it was taken. In the statement of facts in the opinion on the former appeal (51 Ark. 254) the court said: "The track [of the railroad] running up the bank of the river was used until 1859, when it was taken up, and the track was changed and laid through appellant's land, in the locality of the track used by the appellee [railroad company] when this suit was begun. This last mentioned track was used until the war came on. It was then torn up by the military authorities of the United States. After the war the railroad company again laid iron on the track running up the bank of the river to the depot before mentioned, which was used until about the year 1873 or 1874, when the iron on it was taken up, and put back by the railroad company on the track running through the land of appellants, which was used when this suit was commenced (which was August 3, 1880,) and afterwards until the land caved into the river. At the same time the iron was moved the railroad abandoned the land covered by the track running up the river to the owner. The depot on the bank, however, was continuously used from about the year 1866, by the appellee and its predecessors, until the land on which it stood caved into the river. * * * * "The switches were not placed until about the year 1873 or 1874, and were changed from time to time as the railroad company saw proper." (51 Ark. 254 and 255.) The facts are shown by the agreed statement of facts in the case. The agreement of counsel shows that the line of the railway was surveyed across this land sometime before 1886.

Bogle, a witness for the plaintiff, said: "The railroad had the use of the land, and, whenever they wanted to put down a side track, they did so, without asking anybody. They also took sand off the land." W. S. Smith, who was superintendent of the road, says: "The eastern terminus of the Memphis & Little Rock Railroad was last changed from Hopefield to the point where it now is prior to 1870." Vance, one of the plaintiffs, testified that he gave Greenlaw, manager of the road, notice to quit digging on the land in 1872 or 1873. Forgle, a witness for plaintiffs, testified that the inclines were built in 1873. Waddle, a witness for plaintiff, testified that the tracks were on the land in 1873. Malone, for plaintiffs, testified that he helped put down the first incline about 1869. Organ, for the plaintiffs, testified that in 1873 the railroad company had on the land a stone house, a freight depot, a turntable and a roundhouse. W. E. Smith, who was introduced as a witness both by plaintiffs and defendant, and who had been general manager of the road, testified that the track was relaid in the early part of 1873, and that it had been used ever since. His testimony is definite, and he is not contradicted, but is rather corroborated. The master, to whom a reference was made with directions to find the facts, found that there were some eighteen to twenty structures upon the plaintiff's land; that there was one main track of railroad upon it, and some eight or ten side tracks; that there was a wharf boat and elevator on the river, which was moved to plaintiff's land, and also an incline leading from the top of the bank of plaintiff's land; but that all of them were on the right of way of defendant's line, except one hole, which was made by the excavation of dirt in the year 1877 by defendant, and covered about three acres of land. He says: "I find the depot house was constructed in 1866. The other houses were erected subsequent to that time, but I am unable to find the dates of their erection." He reports that nearly all these houses caved into the river between May, 1883, and May, 1884. He says: "I find the plaintiffs owned about 270 acres of land at the time the defendant entered into possession of the position used by it, and about fifteen acres of the land is all that remains. The

defendant is now using what is known as the 'Grave Yard Track' covering a fraction over an acre." The master, in his report, found that the railroad company, as reorganized for the year 1878, used of plaintiff's land 26 acres, for which use he assessed $390.00 with interest to November 1, 1893, 15½ years at 6 per cent, $362.70, and the same for the years from 1879 to 1885 inclusive. From May 1, 1884, to May 1, 1889, both inclusive, the area of the land used by the appellant (railroad company) annually grew less by reason of caving into the river, until in 1893 there remained only five acres. The aggregate charges under this head were $5,506.75. The master continued his charge for that remaining each year at the same price, with the same rate of interest. He then stated an account charging the railroad company in favor of the plaintiffs with incline privileges aggregating $1,793.00. He then stated an account against the railroad company in favor of the plaintiffs for wharf boat and elevator privileges amounting to $2,880.00. He then charged the railroad company with $247.50 for "one acre of land now in use," and 16½ years' interest, in the aggregate $377.55, and with $500 for excavating three acres of land, and 15 years' interest thereon, in the aggregate $975, making a grand total of $11,532.30, which the court upon exceptions increased to $13,868.80, and gave a decree therefor, with interest; the items of increase being 50 per cent. on the findings of the master for incline privileges, and 10 per cent. over the master's findings or estimate for wharf boat and elevator privileges. The railroad appealed.

Was the right of action of the appellees barred on the 3d of August, 1880, when they brought their suit? The only definite and satisfactory evidence upon the point is that the track was laid where it now is, and the possession of the land taken, in the early part of the year 1873. If this is true, and we must so regard it, then it follows that from the early part of 1873 till the 3d of August, 1880, is more than seven years. The appellant took possession and commenced to operate the road May 1, 1877. Did the statute begin to run from the early part of 1873, when the Memphis & Little Rock Railway Company, the predecessor of the Memphis & Little Rock Rail-

way Company, as reorganized, laid its track where it now is, and has been since the early part of 1873, or from the time the present company (the appellant) took charge—May 1, 1857?

One of the contentions of the appellees is that the appellant's possession was not adverse; in effect, that it was not hostile, but permissive. This we think is not the case. Appellees contend that appellant took, appropriated and used and continued to use their land without authority; and if this did not constitute hostile, adverse holding, what would? This was an invasion of their rights, and they had notice of it, and a cause of action accrued to them at once by reason thereof. But appellees say the appellant, in respect to the statute of limitations cannot be considered as the successor of the Memphis & Little Rock Railway Company, whose property, franchises and rights it purchased under a decree of foreclosure rendered by the United States district court. Why not? They say there is no privity. In this they are in error. Mr. Wood in the second volume of his work on Limitations says: "But if a successive privity exists between them, the last occupant may avail himself of the occupancy of his predecessors. * * * In order to create the privity requisite to enable a subsequent occupant to tack to his possession that of a prior occupant, it is not necessary there should be a conveyance in writing. It is sufficient if it is shown that the prior occupant transferred his possession to him, even though by parol. So, too, the possession of a prior occupant may be passed by operation of law, as of an execution debtor to the purchaser of the land on execution sale." 2 Wood, Lim. § 271, pp. 695 and 696, and cases cited in the notes. There is no controverting this doctrine. It is the doctrine of our own court.

In the application and operation of the statute of limitations, there is no distinction between corporations and natural persons, under the general provisions of the statute. Corporations are persons, in contemplation of law, and the general provisions of law applicable to natural persons apply in like manner to corporations. *Olcot* v. *Tioga R. R. Co.*, 20 N. Y. 222; *Commercial Bank of Manchester* v. *Nolan*, 7 How. (Miss.) 508.

We are of the opinion that the evidence in the case shows that the right of action of all the plaintiffs not under disability at the time the suit was brought was barred before the 3d of August, 1880, when the summons was issued.

The plaintiffs who were married women and minors when the suit was brought were within the saving clause of the statute, and their right of action was not barred.

Section 4815 of Sand. & H. Dig. provides that "no person or persons, or their heirs, shall have, sue or maintain any action or suit, either in law or equity, for any lands, tenements or hereditaments but within seven years next after his, her or their rights to commence, have or maintain such suit shall have come, fallen or accrued; and all suits, either in law or equity, for the recovery of any lands, tenements or hereditaments shall be had and sued within seven years next after title or cause of action accrued, and no time after seven years shall have passed. *Provided*, if any person or persons that are or shall be entitled to commence and prosecute such suit or action in law or equity be or shall be, at the time said right or title first accrued, come or fallen within the age of twenty one years, *femme covert* or *non compos mentis*, that such person or persons, his, her or their heirs, shall and may, notwithstanding said seven years may have expired, bring his or her suit or action, so as such infant, *feme covert* or *non compos mentis*, his, her or their heirs, shall bring the same within three years next after full age, discoverture or coming of sound mind. *Provided*, also, that no cumulative disability shall prevent the bar hereby formed and constituted by the saving of this section." (Act of January, 4, 1851).

"Where seven years have elapsed since the cause of action accrued, and three of those years have been free of disability, the right of entry or of action is tolled." *Chandler* v. *Neighbors*, 44 Ark. 479.

The act of April 28, 1873, which authorizes married women to sue alone and in their own names, does not repeal by implication the saving clause in their favor in the statute of limitations. *Hershy* v. *Latham*, 42 Ark. 305. The statute gives a married woman three years after discoverture (that is,

after the release from the bonds of matrimony by death of the husband or by divorce) in which to bring her suit. The statute as to married women does not say "three years after disability removed," but "three years after discoverture."

Ordinarily, "the statute of limitations will not run against the owner of a reversionary estate until the particular estate be determined. *Jones* v. *Freed*, 42 Ark. 357.

When land is taken and appropriated by the railroad company, the law contemplates that not partial, but full, compensation shall be made to all persons having an interest in the land, and the right of action accrues to all such persons, not under the disability of coverture or infancy, upon the taking and appropriation of the land by the company; and the statute will bar an action by a reversioner or remainderman if he does not bring his action within seven years from the time the land is taken and appropriated. See *Bentonville R. R. Co.* v. *Baker*, 45 Ark. 252.

The court below seems to have tried this case upon the theory that the plaintiffs were entitled to recover for rents for the use and occupation by the defendant of their lands, and the master's report is based on that theory. This was error. Plaintiffs, if entitled to recover, were entitled to recover against the defendant the value of the land of plaintiffs taken and appropriated at the time it was taken, and this recovery to be confined to the value of plaintiff's land received by the defendant from its predecessor.

We find that, according to the law and the evidence in this case, the following-named plaintiffs' right of action were not barred when the suit was brought, and that the right of action of all the other plaintiffs was barred when the suit was commenced on the 3d of August, 1880, the date of the issuance of the summons as shown by the record: *Osceola Chapline*, who married George Chapline in 1873, who died in 1878, only about ten years before the suit was brought. She was a married woman in 1873, when the right of action accrued. She was the daughter and one of the heirs of Laura Nelson, nee Winchester, and granddaughter of Marcus B. Winchester. *Alice Cole*, nee Nelson, daughter of John and Laura Nelson,

born in 1849, married Frank Cole July, 1868, was a married woman, when right of action accrued in early part of 1873. *Loftus Nelson*, son of John and Laura Nelson, born in 1860. *Theresa Louise Lang*, born in 1862, wife of James Lang, and heir of Louisa Winchester. Valeria Winchester married Robert Richards, and died in 1879. Her heirs who were not barred were *Charles*, *Lawrence*, *Edward* and *Jesse*. She was a married woman at the time of her death.

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

RIDDICK, J., did not sit in this case.

---

## PHELPS *v.* WYLER.

Opinion delivered April 29, 1899.

1. MARRIED WOMAN—INSOLVENCY.—PREFERENCE OF HUSBAND.—An insolvent married woman who is justly indebted to her husband may prefer him in an assignment of her separate property for the benefit of creditors. (Page 101.)

2. ASSIGNMENT FOR BENEFIT OF CREDITORS—DELIVERY OF PROPERTY.—Under act April 19, 1895, providing that the title to property assigned for benefit of creditors shall vest in the assignee on delivery and acceptance of the assignment, a deed of assignment is not void because it provided that the property shall not be delivered to the assignee till he files his inventory and bond, where it was executed in good faith, and the assignee filed his inventory and bond and took possession. (Page 102.)

Appeal from White Chancery Court.

THOMAS B. MARTIN, Chancellor.

*Ben Isbell*, for appellant.

*Green & Roberts*, *Roberts & Roberts*, *John T. Hicks*, and *W. B. Smith*, for appellees.

BATTLE, J. For many years Mrs. M. A. Phelps, a married woman, carried on and conducted a mercantile business on her sole and separate account at El Paso, in White county, in

this state, under the name and style of M. A. Phelps & Co. Becoming much involved, and unable to continue her business profitably, on the 26th of January, 1897, she conveyed all her property, except so much as she was allowed by law to hold exempt from execution, to David M. Dayle, as assignee, in trust for the payment of her debts. She directed the payments of the same as follows: First. She directed that Ben Isbell be paid $50 for preparing her deed of assignment. Second. She directed that the note executed by her to Lee Burrow on the 1st of January, 1897, for $110, for clerk hire, be paid. Third. She directed that her husband, J. T. Phelps, be paid the sum of $477.50, which she owed him on account for money loaned, and used by her in her business. Fourth. After the payment of the debts mentioned in the order named, she directed that the residue of her property thereafter remaining be applied pro rata to the payment of her other debts.

The deed of assignment was duly acknowledged, filed, and recorded, and the property conveyed was delivered to the assignee. Thereafter, on the 13th of January, 1897, Wyler, Ackerland & Co. and others filed in the White chancery court a complaint against Mrs. Phelps, Isbell, Burrow, and J. T. Phelps, therein alleging that Mrs. Phelps was indebted to them for goods, wares, and merchandise sold to her for the purpose of carrying on a general mercantile business at El Paso; that she pretended to convey all her property to an assignee for the benefit of her creditors, but had fraudulently withheld a material part thereof; that she had preferred her husband in the assignment, and directed that he be paid $477.50, when in truth and fact she was not indebted to him in any amount whatever; and that the deed was void because it provided that the assignee should not take possession of the property until he had filed his inventory and bond as required by the statute. They asked that the assignment be set aside, and for other relief, which they specified.

The defendants answered, and denied all allegations of fraud.

On the 17th of June, 1897, upon the hearing of the cause, the court found and declared the deed void, because made in

fraud of the creditors of the assignor, and decreed that the assignment should be treated as a general assignment for the benefit of all the creditors of Mrs. Phelps, except her husband, whose claim it declared fraudulent.

The evidence fails to show that Mrs. Phelps fraudulently withheld from her assignment any material part of her property. Some small articles of little value were accidentally overlooked, and worthless notes, barred by the statute of limitations, were not included in the schedule attached to the deed of assignment, but the articles overlooked and the worthless notes were delivered to the assignee, to be disposed of for the benefit of creditors.

The attack upon the assignment on the ground that it provides that the property shall not be delivered to the assignee until he filed his inventory and bond as required by law is unsupported by reason. We are unable to see how the interest of creditors could be affected by it. We have heretofore held, under statutes which have been amended, that assignments were void when made with the understanding that the assignee should take possession of the property assigned before he filed his inventory and bond. He can now take possession upon the execution of the deed of assignment. The failure to do so does not necessarily delay the assignee in the discharge of his duties, or the creditors in the collection of their debts, or in the enforcement of their rights.

The attack upon the assignment because of the preference of the husband is the only objection which deserves serious consideration. The facts relied upon to show that this preference was fraudulent are substantially as follows: In 1887, J. T. Phelps failed in business. How his assets were disposed of is not satisfactorily shown. He was in debt to his wife's father for land in the sum of $400. He paid this, according to the direction of his father-in-law, to his wife. When testifying in this cause he was asked, "When you failed in business, what became of the proceeds of your stock of goods?" He replied, "Part of it—about $400—went to M. A. Phelps, part to Wolf & Bro., and part to other creditors." He was then asked, "Who did you sell out to?" He answered, "I sold out

to my wife and Mr. Booth, her father." The evidence, however, shows that his wife succeeded him in business, and that she carried on a mercantile business at El Paso on her sole and separate account, and that he, for a stipulated salary, contracted and managed it in her name as her agent, and did so for ten years. In the meantime, he paid off and discharged his debts according to terms which were agreed upon by him and his creditors. He borrowed $265 from one person and $150 from another. He gave his notes for these amounts, his wife joining in the execution of them as surety, and secured them by mortgages on his real estate. One of these amounts was borrowed about two years before the assignment, and the other about twelve months. He loaned this money to his wife, and she invested it in her business. On account of this loan and interest she is indebted to him in the amount for which he was preferred in her assignment. His wife continued in business for ten years, or longer, when she failed, and made an assignment, reserving and taking out of her property so much as she is entitled to hold free and exempt from sale under execution. She let her son, a boy about sixteen years old, have this property, to enable him to commence a mercantile business, and he has used it accordingly; his father, J. T. Phelps, occasionally assisting him.

Do these facts prove that that the assignment was fraudulent? In *Bank of Little Rock* v. *Frank*, 63 Ark. 22; 37 S. W. 401, it is said: "Fraud is never presumed, but must be proved, and the burden of proving it is upon the party alleging it. It need not be shown by direct or positive evidence, but it may be proved by circumstances. 'Slight circumstances, or circumstances of an equivocal tendency, or circumstances of mere suspicion leading to no certain results,' are not sufficient evidence. 'They must not be, when taken together and aggregated, when interlinked and put in proper relation to each other, consistent with an honest intent. If they are, the proof of fraud is wanting.' They may be sufficient to excite suspicion, but suspicion is not the equivalent of proof. Circumstances necessary to prove fraud must be such as naturally, logically, and clearly indicate its existence."

In this case J. T. Phelps has satisfied his creditors. The plaintiffs are creditors of his wife. They certainly have no right to complain of her holding too much property, nor do we understand that they do. The fact that Mrs. Phelps claimed that she was indebted to her husband, and directed that he be paid in preference to others, excites their suspicion. But the evidence shows that she was indebted to him for money loaned in the sum preferred, and there is no evidence to the contrary. This, however, does not render the assignment fraudulent. At common law the contracts of husband and wife with each other are void, but in equity a promise of one to repay a loan made in good faith by the other is obligatory and enforceable. *Pillow* v. *Sentelle*, 49 Ark. 438. It has been held that "when the husband is justly indebted to the wife he may, without fraud, prefer her to his other creditors, and may make a valid appropriation of his property to pay her claim, even though he is thereby deprived of the means to pay other debts." *Ferguson* v. *Spear*, 65 Me. 277; *Brigham* v. *Fawcett*, 42 Mich. 542, 4 N. W. 272. Under our statute, she has the authority to make an assignment of his property used in her separate business to pay her debts. *Hickey* v. *Thompson*, 52 Ark. 238, 12 S. W. 475; *Third National Bank* v. *Guenther*, 123 N. Y. 568, 25 N. E. 986; *Schuman* v. *Peddicord*, 50 Md. 560. Having this authority, there is no reason why she cannot, in equity, prefer her husband to her other creditors, as he can prefer her, as to any debt she may justly owe him, in any assignment she can make in the settlement of her business. *Third National Bank* v. *Guenther*, 123 N. Y. 568, 25 N. E. 986. *Schuman* v. *Peddicord*, 50 Md. 560.

Does the fact that Phelps managed and controlled her business prove that he was preferred for a simulated debt? It was not inconsistent with good faith, dishonest or unlawful for him to serve his wife in the capacity of an agent. He managed her business for ten years. She failed, like thousands of others have done whose business was not managed by husbands. Her fate was like that of many who have honestly failed. The fact that he managed her business was no evidence of a dishonest failure, nor was it evidence that she did not owe him.

It was natural for him to assist her in any way he could, and that he did so by loaning her money is no evidence that the debt thereby contracted was fraudulent. *Third National Bank* v. *Guenther*, 123 N. Y. 568, 25 N. E. 986.

We think that the evidence in the case fails to show that the assignment made by her was fraudulent.

The decree of the chancery court is therefore reversed, and the complaint of the plaintiff is dismissed.

ON MOTION FOR REHEARING.

(April 14, 1900.)

BATTLE, J. Appellees earnestly insist that the deed of assignment in question should be declared void, because the assignor, in pursuance of a collateral agreement entered into by him and the assignee contemporaneously with the execution of the deed, retained possession of the property assigned until after the assignee filed an inventory and executed a bond in the manner provided by the statute. Is this contention correct?

Prior to the enactment of the act entitled "An act to regulate assignments for the benefit of creditors," approved April 19, 1895, the statutes of this state provided that "in all cases in which any person shall make an assignment of any property * * * for the payment of debts, before the assignee thereof shall be entitled to take possession, sell or in any way manage or control any property so assigned, he shall be required to file in the office of the clerk of the court exercising equity jurisdiction a full and complete inventory and description of such property, and also make and execute a bond to the state of Arkansas in double the estimated value of the property in said assignment, with good and sufficient security, to be approved by the clerk of said court, conditioned that such assignee shall execute the trust confided to him, sell the property to the best advantage and pay the proceeds thereof to the creditors mentioned in the assignment according to the terms thereof, and faithfully perform the duties according to law." Under this provision of the statute it was held that "where, in pursuance of a collateral agreement of the assignor and assignee, entered into contemporaneously with the execution of a

deed of assignment for the benefit of creditors, the assignor delivers possession of the property assigned to the assignee before the bond and inventory required by law are filed, the assignment is void as to creditors." This was so held because the assignee was required to file the inventory and execute the bond before taking possesion of the property for the purpose of protecting creditors. The theory was that the interest of the assignor in the preservation of the property assigned would make it safer in his hands than it would be in the possession of the assignee before the filing of the inventory and bond. *Gilkerson-Sloss Commission Co.* v. *London*, 53 Ark. 88, 13 S. W. 513, 7 L. R. A. 403.

Under the act of April 19, 1895, the title to the property assigned vests in the assignee upon the delivery and acceptance of the deed of assignment. No other act of the assignor is necessary to complete the title. The assignee is then required to take immediate possession of the property, and to file an inventory of the same and a bond with the clerk of the court having equity jurisdiction within ten days thereafter. He is impliedly authorized to enforce such right by legal proceedings, if necessary. In the event the assignment shall be declared void, the title and right to possession still remain in him in his fiduciary capacity, and the assignment becomes a general assignment for the benefit of all the creditors of the assignor pro rata, and the assignee becomes subject to the control and direction of the chancery court in the same manner he would be had he been appointed a receiver to take charge of the property. No creditor can defeat his title. He cannot, in the discharge of his duties, remain passive, and wait until the assignor delivers possession, but he is required to assert his right to the same immediately, and he is liable for the damages occasioned by his failure to do so. Any neglect to discharge this duty cannot affect the validity of the assignment, and any agreement with the assignor that he will not take such possession is void.

Under former statutes it was not the agreement made contemporaneously with the execution of the deed of assignment which made the assignment void, but the delivery of the property assigned in pursuance thereof. Such agreement, unless

incorporated in the deed of assignment, was of no effect; but the delivery in pursuance thereof affected the security of the rights of creditors. The interest which the assignor had in taking care of his own property was considered some protection to his creditors. When possession was delivered to the assignee, that protection was gone, and the security of the rights of the creditors was impaired. Hence this court held that the provision of former statutes which forbade the delivery of possession to the assignee before he had filed an inventory and executed a bond was mandatory. But the retention by the assignor of the possession of the property assigned until the assignee files his bond and inventory cannot impair the security of creditor's rights. They are just as safe after the assignment as they were before. The same interest which makes them so still exists. How can it injure creditors? There is no obligation or duty upon the part of the assignor to execute a deed of assignment, and creditors lose nothing by the retention of possession by the assignor until the assignee files his bond and inventory, because until then the latter cannot sell or dispose of the property. The continuance, therefore, of the assignor in possession for such time, in good faith, under an agreement with the assignee, after the execution of the deed, will not, under the act of April 19, 1895, render the assignment void, but, in case the property be personal, it is, as in other cases, *prima facie*, and not conclusive, evidence of fraud, which may be explained so as to show that the assignment was made in good faith; and, if the property be real estate, it may be shown, in connection with other facts, for the purpose of proving a secret trust, and that the assignment was, consequently, void.

The deed of assignment in this case did not authorize the assignor to hold possesssion of the property assigned. The evidence shows that possession was not delivered to the assignee until he filed his inventory and executed a bond, and that the assignor remained in possession until that time. When the inventory and bond were filed, all the property assigned was delivered to the assignee. The evidence shows that the property was assigned and delivered in good faith.

As to the other grounds upon which appellees rely in their motion for reconsideration, sufficient has been said in the first opinion.

The motion is denied.

BUNN, C. J., and HUGHES, J., concur.

WOOD and RIDDICK, JJ., dissent.

---

MORRIS v. FLETCHER.

MORRIS v. GATES.

67 105
74 595
e75 568

67 105
87 64

Opinion delivered October 21, 1899.

1. FRAUDULENT CONVEYANCE—DEED BY HUSBAND TO WIFE.—Where a husband, owning the reversionary estate in lands of which his wife owned a life estate, conveyed his interest to her, thereby depriving himself of the means of paying his debts, his conveyance is a fraud upon the rights of his creditors. (Page 110.)

2. SAME—HUSBAND IMPROVING WIFE'S PROPERTY.—Where a husband of his own money expended a large sum in making permanent improvements upon his wife's land, whereby he denuded himself of the means of paying his debts, the money so expended will be treated as a charge upon the lands for debts existing at the time such improvements were made. (Page 110.)

Appeal from Lonoke Chancery Court.

THOMAS B. MARTIN, Chancellor.

*Williams & Bradshaw*, and *Jno. C. England*, of St. Louis, Mo., for appellants.

Since High was under a legal obligation to convey the lands to his wife, no other consideration was required. 40 Ohio St. 400; 66 Ia. 422; 92 Ga. 485. If he mingled his own property with the trust property in such a manner that it could not be separated, he was bound to account for it all to the *cestui que trust*, his wife. 104 U. S. 54; 83 Mo. 210, 216; 53 Ark. 545, 558; 47 Ark. 533. High having failed to carry out his part of the agreement, his heirs cannot rescind, in the

face of his default. 6 Rich. Eq. (S. C.) 324; 19 C. B., N. S. 393; 4 Barb. 614; 2 Cal. 138; 80 Ia. 194; 31 Neb. 678. It is not enough, to justify the overthrow of the conveyance, that the creditors show it was merely voluntary. Circumstances of actual fraud must be shown. 50 Ark. 42; 74 Mo. App. 419; 95 Pa. St. 69. Mrs. High was not estopped to take and hold the lands as against the creditors of Capt. High. 58 Ark. 20; 119 Mo. 615; 128 Mo. 85; 137 Mo. 369; 34 N. J. Eq. 158; 2 Stockt. 344; 32 Ill. App. 183; 39 Fla. 111. High's action in improving his wife's property was not a fraud upon his creditors, and the value so added can not be reached by them. 33 Vt. 457; 78 Ill. 94; 34 N. Y. 493; 44 N. Y. 343; 50 Ill, 481; 5 Sneed, 39. The recitals in the deed bind appellees. Jones, Ev. § 283; 58 Ga. 178; 88 Ill. 427; 97 Pa. St. 342; 44 N. Y. 50; 43 Pac. 294; 48 Ark. 258.

*Trimble*, and *Rose*, *Hemingway & Rose*, for appellees.

The agreement to execute the will was the consideration for the deed of High; and this agreement should be enforced. 2 Vern. 48; 3 Ves. 412; 19 Ves. 67; *ib.* 63; 7 Sim. 644; S. C. 8 Eng. Ch. Rep. 643; 3 Beav. 469; 12 C. & F. 45; 8 Jur. (N. S.) 607; 11 Jur. (N. S.) 475; 3 Dess. 194; 72 Mich. 76; S. C. 40 N. W. 173; 2 Stockt. Ch. 332; S. C. 66 Am. Dec. 773; 5 Am. L. Reg. 177; 13 N. J. Eq. 246; 13 N. E. 10; S. C. 145 Mass. 69; 41 N. W. 515; 41 N. Y. 480; 26 N. E. 1024; S. C. 124 N. Y. 423; 48 N. W. 450; 30 Mo. 389; 47 Mo. 37; 12 Pa. St. 27; 5 Bush, 625; 6 Bush, 245; 11 Bush, 142; 3 Bush, 35; 31 Mich. 247; 4 Stockt. Ch. 371; 29 Md. 58; 20 Ind. 223; 9 N. Y. Supp. 114; 3 Cliff. 169; 1 Roper, Leg. 766; 17 Atl. 995; S. C. 127 Pa. St. 341; 20 Atl. 579; S. C. 137 Pa. St. 35; 17 S. W. 742; 15 N. E. 345; 114 Ind. 311; 4 S. E. 621; 8 Atl. 300; 49 N. J. L. 274; 2 So. 624; 3 Pars. Cont. 406; 2 Story, Eq. 785; Poll. Cont. 308. Appellees are not estopped by the deed because: (1) An estoppel by deed must be pleaded to be available. 8 Am. & Eng. Enc. Pl. & Pr. 9; 12 Ark. 769. (2.) The recital of consideration in a deed never works estoppel. The true consideration may be shown. 55 Ark. 112; 62 *id.* 330; 54 *id.* 195.

Mrs. High having known of and acquiesced in her husband's expenditures on her land cannot now resist the claim for them. 2 Perry, Tr. § 850. Since the deed comes into this case only collaterally, as evidence, its recitals are not estoppels. 101 U. S. 240, 247; Herm. Estop. § 238; 41 N. Y. 345; 19 Barb. 484, 488; 2 Dev. Deeds, § 292 n. 1; 8 M. & W. 213; 19 Ark. 319. The conveyance was fraudulent and void as to creditors. 62 Ark. 32; 50 Ark. 46; 60 Ark. 461. The presumption is that the property was bought with the husband's money. 46 Ark. 542; 94 U. S. 580. The evidence, to establish a constructive trust, such as appellant contends for in favor of Mrs. High in the lands standing in her husband's name, must be clear and convincing. 44 Ark. 365, 370; 29 Ark. 612; Perry, Tr. § 137; 1 N. Y. Ch. (L. C. P. Ed.) 340.

BATTLE, J. The first-mentioned action was instituted by the administrator and heirs of W. T. High, deceased, against the administrator and heirs of Lizzie J. High, to set aside a deed of conveyance of certain lands, which was executed to Lizzie J. by W. T. High in his lifetime. The grounds of the action, as set forth in the complaint, are that W. T. High, being the owner of the lands mentioned, conveyed them to Lizzie J. on the 19th day of February, 1887, she then being his wife; that High and his wife each had children by former marriages; that the consideration of the deed was the promise of Mrs. High to execute a last will and testament, and thereby devise the lands which were conveyed to her to the children of both of them, by existing and previous marriages, equally, share alike; that, having acquired the lands, she refused to execute the will, as she promised, but departed this life intestate, leaving the defendants, Lilly Morris, Lula Hicks and John Hicks, as her sole heirs at law; and that a large number of claims have been probated against the estate of W. T. High, and there are no assets in the hands of his administrator with which to pay them.

The last-mentioned action was commenced by certain creditors of W. T. High, deceased, against the administrator and heirs of Lizzie J. High. The plaintiffs alleged in their com-

plaint that W. T. High departed this life on the 17th of February, 1887, largely indebted to them; that letters of administration had been issued to W. P. Fletcher; that his estate is wholly insolvent, and his administrator had in his hands no assets to pay his debts; that they had probated claims against his estate as follows: Daniel & Strauss for the sum of $169.45, Sanders for the sum of $216.79, Eagle for $179.34, and T. H. Knodel for $922.30; that these debts or claims are wholly unpaid; that, on the 19th day of January, 1887, at a time when he owed all of said debts, and was the owner of certain lands of great value, W. T. High conveyed them to his wife, Lizzie J., thereby denuding himself of all means of paying his debts, and leaving himself utterly insolvent; that the conveyance was entirely voluntary, and a fraud upon their rights; and that the defendants are the heirs and administrator of Lizzie J. High, deceased; and prayed that the deed be set aside, and the lands thereby conveyed be subjected to the payment of the debts which W. T. High owed to them.

The plaintiffs in both these actions asked the court to set aside the same conveyance; being in controversy, and no other.

The defendants in each case answered and denied that W. T. High was ever the owner of the lands described in the complaints; and alleged that all these lands belonged to Isaac C. Hicks, who departed this life leaving Lizzie J. Hicks, his widow; that they were regularly set apart to his widow by a court of competent jurisdiction as dower; that, the estate of Hicks being insolvent, the reversionary interest in them was sold to pay debts; and at this sale, W. T. High, who had previously intermarried with Lizzie J. Hicks, became the purchaser of the same, for and in her behalf, and paid therefor with her "funds," and without her knowledge and consent took the deed therefor in his own name; and that, on the 19th day of January, 1887, W. T. High, at the request of his wife, conveyed to her the reversionary interest in these lands, thereby vesting in her the legal and equitable title to the same.

The allegations of plaintiffs in the complaint in the last-mentioned action as to the indebtedness of W. T. High to each

of them, as to the probate and allowance of their claims against his estate and the non-payment thereof, as to the existence of this indebtedness on the 19th of January, 1887, when he executed the deed of conveyance to his wife, and as to the effect of the deed in denuding him of the means to pay his debts and leaving him insolvent, are wholly undenied.

In the first action the circuit court, sitting in chancery, found the consideration of the deed which was executed by W. T. High on the 19th of January, 1887, was the promise of his wife, Lizzie J., to execute a will and thereby devise the lands in controversy equally to the children of each; and decreed that the promise to make a will be enforced by vesting in the children the interest they would have taken had the will been executed, that is, by vesting in each of them one undivided twelfth part of the lands, there being twelve children.

In the last-mentioned case the court found that the deed executed by High to his wife on the 19th of January, 1887, was voluntary and a fraud upon the rights of the plaintiffs, and set it aside as to them and all other creditors whose claims existed at the time it was executed, and have been legally probated; and decreed that, "unless the defendants within six months * * pay to plaintiffs the amounts of their respective claims, * * * with accrued interest thereon," and costs of this action, "the said lands will be turned over to the probate court of Lonoke county to be disposed of in the regular administration as the assets of the estate of said W. T. High, deceased, for the payment of said debts due from said estate."

The defendants in both actions appealed to this court.

The finding of the court in the first action that the consideration of the deed executed by High to his wife on the 19th of January, 1887, was a promise of the wife to make a will is entirely unsupported by the evidence. The consideration is stated in the deed, but no promise to make a will is recited as any part of such consideration. On the contrary, the recitals tend to refute allegations to that effect. No will was demanded as a condition of the delivery of the deed. Mrs. High testified that in 1886, when she was in bad health, and

was not expected to live long, her husband requested her to make a will, and both of them for a while believed that they would, but afterwards abandoned it; and that a promise to make a will was no part of the consideration of the deed. The evidence clearly shows that the making of wills was considered and discussed by them, but does not show that the deed was, wholly or in part, based upon any such consideration.

High remained in possession of the lands in controversy about eleven years before he executed the deed, and in that time made valuable improvements upon them. If they had been the separate property of his wife, and belonged to her in fee, and he was insolvent at the time, money expended by him in the permanent improvement of the same, though expended without a fraudulent intent in fact, could have been treated by his creditors as a charge upon the lands for debts existing when the improvements were made. Materials furnished by a husband and used for such purposes, under such circumstances, with the knowledge and consent of his wife, are regarded as a gift in fraud of his creditors. As in other cases, he must be just before he is generous; and he cannot defeat his creditors in the collection of his debts by placing his property in the name of his wife in the guise of improvements upon her estate. It is said: "When the debtor with his family lives on the property of his wife, he may keep it in repair and habitable. Within reasonable limits this may be regarded as a necessary and proper means of performing his obligation to support his wife and family. But whenever the expenditures are beyond what is absolutely necessary and proper for the shelter and maintenance of the family, they may be reached by his creditors. What amounts to an excessive expenditure is difficult to determine, and depends upon the peculiar circumstances of each case. If he puts improvements upon her real estate which are temporary in their character, and primarily calculated to promote his use and enjoyment of the premises as tenant for life, her estate cannot be charged with the value of the temporary improvements." But under no circumstances can the husband's creditors make the wife's separate estate liable for mere labor performed by him. *Nance* v. *Nance*, 84 Ala. 375; *Humphrey* v. *Spencer*, 14 S. E.

Rep. (W. Va.) 410; *Lynde* v. *McGregor*, 95 Mass. 182; *Kirby* v. *Burns*, 45 Mo. 234; Bump, Fraudulent Conveyances (4 Ed.), § 218.

There is still another rule which governs the rights of the husband's creditors in respect to the wife's property, and it is this: A wife who gives her husband unlimited control of her property, and permits him to hold the title in his own name and use it as his own for a series of years, is not, in case of his insolvency, permitted to shield it from the just claims of persons who, in good faith, have given the husband credit, in reliance upon his ownership. "In such a case a conveyance by the husband to the wife is fraudulent and void as to creditors." *Driggs* v. *Norwood*, 50 Ark. 46; *George Taylor Com. Co.* v. *Bell*, 62 Ark. 32; *Stull* v. *Graham*, 60 Ark. 461.

Tested by the rules we have stated, was the deed which was executed by High to his wife void as to his creditors? The lands described in it, except forty acres, were set apart to Mrs. High as dower in the lands of Isaac C. Hicks, deceased, her former husband. The reversionary interest in the same was conveyed by the administrator of Hicks to Mr. High. The forty acres were purchased at private sale, and were conveyed to W. T. High by the vendor. High took control of all the lands. At the time he took possession, all of them, except ten acres, were wild and unimproved. He held possession and controlled them, ostensibly as his own, for about eleven years. He sold all his real estate, and expended $7,000 or $8,000 of his own money in improving them. He caused to be cleared and put in cultivation about two hundred acres of the land assigned to his wife as dower and in controversy, and erected houses and other improvements on the same, which, with the clearing and preparing for cultivation, was of the reasonable value of $8,000. In selling his real estate to improve them, he deprived himself of all means to pay his debts except the property improved. Still he contracted debts. After he had sold all his real estate, and expended large sums of money in improving them, he conveyed the lands to his wife, and completely deprived himself of the ability to pay his debts. At this time he was indebted to the plaintiffs in the second action. In contract-

ing debts with him, or giving him time to pay them, they certainly relied upon the property held by him in his own name, which he improved and made valuable by his materials, for the payment of his debts. Without any other means to earn money, as he was, they could not expect him to pay his debts when he had no property. Tested by the rules we have stated, the conveyance was obviously fraudulent and void as to them.

The decree in the first action is reversed, and the cause is remanded, with instructions to the court to dismiss the complaint; and in the other it is affirmed.

---

## ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILROAD COMPANY v. STROUD.

Opinion delivered April 29, 1899.

1. RAILROAD—EXPULSION FROM DEPOT—DAMAGES.—In a suit against a railroad company by one who went to its depot to board a train for the purpose of visiting his sick wife and child, seeking to recover damages for being wrongfully expelled therefrom, an instruction that the jury should allow plaintiff damages for the anxiety suffered by him on account of being kept from his wife and child was improper where the evidence showed that he was not prevented by such expulsion from going to see them, but that he voluntarily remained away. (Page 118.)
2. EVIDENCE—LETTER—GENERAL OBJECTION.—A general objection to the reading of a letter in evidence was properly overruled if a part of it was admissible. (Page 119.)
3. SAME—RELEVANCY.—In a suit against a railroad company to recover damages for the wrongful expulsion by its servant of a passenger from its depot, evidence of previous acts of misconduct on the part of such servant was irrelevant and inadmissible. (Page 120.)

Appeal from Saline Circuit Court.

ALEXANDER M. DUFFIE, Judge.

STATEMENT BY THE COURT.

The complaint charged that on the night of January 17, 1895, the plaintiff went to the depot of defendant in North

Little Rock, for the purpose of taking a train to Hot Springs, to visit his sick wife and child; that he entered the depot waiting room provided for passengers, to wait for the train. While there, one Pat Gallagher, in the employ of the defendant as watchman, "entered said depot, and with a large club and pistol, recklessly, maliciously, forcibly, and wrongfully restrained and falsely imprisoned, and with violence and threats, and rough and brutal language, and with pistol drawn, assaulted and drove plaintiff out of the depot, and off the platform and away from the depot, and prevented plaintiff from taking said train." It further charged that watchman Pat Gallagher was an incompetent, unreliable and vicious person, unfit to fill the position entrusted to him by the defendant, all of which was well known to defendant, and had been so known to it for a long time prior thereto. It further charged that by reason of all of the above things plaintiff had suffered "great damage and humiliation to himself, and great suffering in anxiety on account of the condition of his wife and child, and great injury and suffering on account of said wrongful restraint, to his damage in the sum of $5,000.

The answer specifically denied each and every allegation of the complaint, and charged that, if plaintiff had suffered as alleged, it was the result of his own unlawful and improper acts in the premises, and from no fault of defendant.

There was a verdict for plaintiff of $4,000. Remittitur of $3,000, and judgment for $1,000. Defendant appealed.

*Dodge & Johnson*, for appellee.

The court erred in admitting evidence of collateral acts of Gallagher, and of the issues in a suit foreign to the one at bar and between different parties. 1 Greenleaf, Ev. § 52. The court erred in its charge to the jury. The jury can find in favor of the one holding the affirmative of an issue only when there is some preponderance of evidence in his favor. The existence of such preponderance and its degree are questions to be determined by the jury under proper instructions. 37 Ark. 164; 20 Ark. 600. The court erred in its instructions as to the measure of damages. Appellee could, in no event, recover

for any injury which he might have prevented by reasonable care. 38 Ark. 358. The verdict is excessive; and, being plainly the result of passion and prejudice, and rendered under erroneous instructions, it cannot be cured by a remittitur. 53 Ark. 11; 48 S. W. 222; 66 Ill. 71; 7 S. W. 497; 12 Johns. 236; 71 N. W. 715; 24 Mo. App. 334; 46 Mo. 310; 38 N. Y. 181; 18 N. Y. 512; 49 Pac. 436; 42 Am. & Eng. R. Cas. 136; 44 Kas. 410; 49 Pac. 78; 91 Ga. 820; 46 Mo. App. 638; 16 S. W. 11; 70 Ga. 120; 7 S. W. 492; 5 Minn. 376; 17 Gratt. 366; 18 W. Va. 4; 11 Wis. 415; 43 Kas. 309; 68 Tex. 617; 49 Kas. 12; 37 Kas. 578; 49 Pac. 436.

*Hill & Auten*, for appellee.

The evidence of the bad reputation of the watchman, and the appellant's knowledge thereof, was competent. 58 Ark. 381. Also evidence of particular acts of wrongdoing on his part, as watchman, known to the appellant, prior to this injury. Deering, Ev. § 206; 10 Am. Rep. 111; 17 Am. Rep. 325. The court's instructions were correct. Appellant, having acted maliciously, is responsible for the anxiety of mind suffered by appellee on account of the supposed condition of his family. 53 Wis. 345; 7 Am. & Eng. Enc. Law, 691. In addition to compensatory damages, the jury could properly assess such amount against the railroad company as would restrain it from further acts such as the one complained of here. Suth. Dam. 719–723, 751–752; 15 Ark. 452; 35 Ark. 492; 42 Ark. 321; 56 Ark. 51; 58 Ark. 136.

*Hill & Auten*, for appellee, on motion for re-hearing.

If any part of the letter was competent evidence, it was not error for the court to overrule a general objection to it. Rice, Ev. 925, 926; Shinn, Pl. & Pr. § 895; 16 N. Y. 193; 20 Barb. 343; 38 U. S. 302; 26 U. S. 337; 44 U. S. 515, 530. There was no error in the 5th instruction, as to appellee's right to recover for anxiety and mental suffering. The damage was not too remote to be compensated. Sedgw. Dam. § 426; 7 Am. & Eng. Enc. Law, 691; 53 Wis. 345; 18 R. I. 791; 53 N. Y. Super.

Ct. 107. The evidence as to the character of the appellant's watchman was admissible. 1 Whart. Ev. §§ 48, 56; 71 Me. 349; 23 Pa. St. 424; 98 Mo. 338; 20 Mich. 121; Shear. & Redf. Neg. § 192; 38 Ind. 311; 46 Ia. 17; 78 Md. 253; 65 Fed. 953; 65 Fed. 941. Cf. 58 Ark. 389. This knowledge of the appellant of the character of the watchman tended to show malice or recklessness and increase the damages. 1 Suth. Dam. 71, 72, 716, 748, 751; 32 Mich. 77; Whart. Ev. § 48.

HUGHES, J., (after stating the facts). There was much evidence introduced on the trial of this cause which it is unnecessary to state or discuss here. The plaintiff testified that on the evening of January 16th, 1895, he received a letter from his wife in Hot Springs, calling on him to come there at once. The letter was then offered in evidence, and read to the jury, over the defendant's objection, to which he excepted. That letter was as follows:

"HOT SPRINGS, ARK., Jan. 16, 1895.

"DEAR HUSBAND:

Please come at once, as Mary is very sick, and I am in one respect very dangerous. Been sick for over a week, and you know what bad spells I have with my heart, and other troubles; so do come. The doctor says I am liable to die at any time. My cook is gone, and I am here all alone. I thought, in spite of all I could do last night, Mary would have convulsions. Now I need you; let work and everything go. If you never get work, come at once. Your true loving wife until death.

"ETTA STROUD."

May, alluded to in the letter, is shown in evidence to have been the plaintiff's adopted daughter. So much of this letter as was necessary or tended to show that the plaintiff's purpose in going to the depot on the night of the 16th was to take the train for Hot Springs was competent and relative evidence, but the reading of it in full to the jury was not necessary for that purpose, and it was calculated to excite the sympathies of the jurors, and prejudice them against the defendant, and was therefore erroneous.

S. W. Williams was permitted, over the objection of the defendant, to testify as follows:

Q. "How long have you known him (Pat Gallagher)?

A. "Over thirty years. I have known him ever since the war; before, I think.

Q. "Do you remember the suit of Thomas Hackett against the St. Louis Iron Mountain reported in 58 Arkansas?

A. "I do. I was one of the attorneys for plaintiff; I was senior counsel for plaintiff.

Q. "Was the defendant in this case, the Iron Mountain Railway Company, defendant in that case?

A. "Yes, sir, there is no other in the state of Arkansas.

Q. "What was that action brought for?

A. "That action was brought for the shooting of Hackett by this man Gallagher, while in the employ of the Iron Mountain Railway Company, near the foot of Rock street, at the freight depot of the said road.

Q. "Then that case was brought to recover damages for the conduct of Pat Gallagher?

A. "It was brought by plaintiff for personal injuries inflicted by Pat Gallagher as employee of the Iron Mountain Railway Company.

Q. "What was the result of the suit?

A. "We recovered for plaintiff for his injuries. The railway company appealed the case to the supreme court, where the judgment of the Pulaski circuit court was affirmed, and the defendant railway company paid the judgment to me as Hackett's attorney, but, in order to hold recourse upon Gallagher, the company had me, as attorney in fact for Hackett, assign the judgment to it, and the railway company satisfied it in the form of a purchase, instead of payment of the judgment. The judgment was against both the railway company and Gallagher.

Q. "Do you remember, Colonel, about when that shooting of Hackett took place?

A. "April 7, 1890."

S. N. Davis was allowed, over defendant's objection, to give testimony about the shooting of Hackett by Pat Gallagher, and questions were asked various other witnesses about the same, which they were allowed to answer over the objection of the defendant, to all of which it excepted and urged in its motion

for re-hearing, which was overruled by the court, to which defendant excepted.

The purpose of all this testimony was to show that Pat Gallagher was an incompetent, dangerous and malicious man, unfit for watchman, and that the defendant railway company knew this, and continued him, after it knew it, in its service as watchman. This evidence was incompetent, and it was prejudicial error to admit it. *Railway Co.* v. *Hackett*, 58 Ark. 389. If it were competent to introduce evidence to show that Pat Gallagher was a man of bad character, violent, dangerous, unfit and incompetent for the position of watchman, it was not competent to show it by proof of individual instances of bad conduct upon his part in that position. No evidence is allowed of particular acts of good or bad conduct, either to sustain or impeach character. The evidence must be confined to general reputation. 3 Rice, Evidence, § 376; *Jones* v. *State*, 76 Ala. 9; and *Hussey* v. *State*, 87 Ala. 121. "Every person is supposed to be capable at any time of sustaining his general reputation, but it would be unreasonable to expect any one to be prepared, without special notice, to answer an assault on his character imputed by particular acts of bad conduct." 3 Rice on Evidence, § 376. "Neither good nor bad character can be proved by specific acts or charges. *Smith* v. *State*, 47 Ala. 540; *McCarty* v. *People*, 51 Ill. 231; S. C. 99 Am. Dec. 542; *Gordon* v. *State*, 3 Ia. 410; *State* v. *Williams*, 77 Mo. 310.

In civil cases evidence of the general character is not admitted unless the nature of the action involves the general character of the party, or goes directly to affect it, Thus, evidence impeaching the previous general character of the wife or daughter in regard to chastity is admissible in an action by the husband or father for seduction, and this again may be rebutted by counter proof." 1 Greenleaf, Evidence, § 54, and cases cited.

There could be no doubt that when a witness is put on the stand to attack or defend character, he can only be asked, on the examination in chief, as to the general character of the person whose character is in question, and he will not be permitted to testify to particular facts, either favorable or unfavorable

to such person; but when the witness is subject to cross-examination, he may then be asked, with a view to test the value of his testimony, as to particular facts. 3 Rice on Evidence, § 375, p. 603 and § 376, and cases.

On the trial, at the instance of the plaintiff, the court gave to the jury instruction numbered 5, which is as follows:

"If the jury find for the plaintiff, then plaintiff is entitled to recover full compensation for the restraint imposed upon him, and the pain and anxiety of mind he suffered on account of said restraint; also for any insult or indignity inflicted upon his person, and the humiliation and shame caused by said injury, if any, and for the anxiety he suffered, if any, on account of being kept from his wife and child at Hot Springs."

The latter clause of this instruction is erroneous, in which the jury are told that they might award the plaintiff damages "for the anxiety he suffered, if any, on account of being kept from his wife and child at Hot Springs." The proof shows that the plaintiff was ejected from the depot at about 1:30 o'clock a. m., and that the south bound passenger train was due at the station at 2 o'clock a. m., and that he could have taken that train had he so desired; also, that another train south bound was due at that depot at 7 o'clock a. m. and still another at 1:45 p. m. and that the plaintiff took neither, nor made any effort to take either. Then it appears he was not delayed by being expelled from the depot. He voluntarily remained over at Little Rock several days after this expulsion by Gallagher. There was no evidence upon which to base that part of this intruction, and that part is erroneous and prejudicial. Besides, to say the least of it, if such damages were not too remote, the instruction is to broad and unlimited in this latter clause.

We will not discuss the testimony, as the case must be remanded. Life is too short to discuss the great number of instructions given and refused.

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

ON REHEARING.

Opinion delivered January 13, 1900.

HUGHES, J. We said in the original opinion in this cause that "so much of this letter (referring to the letter of Etta Stroud to her husband) as was necessary or tended to show that the plaintiff's purpose in going to the depot on the night of the 16th was to take the train for Hot Springs was competent and relative evidence, but the reading of it in full was not necessary for that purpose, and it was calculated to excite the sympathies of the jurors, and prejudice them against the defendant, and was therefore erroneous."

The reading of this letter was really unnecessary to show the defendant's purpose in going to the depot, for it was competent for him to testify as to this, and, having done so, he need not have read the letter to show it, unless it was made necessary to corroborate his testimony by denial of the defendant that he had received such a letter, when it would have been proper to read it only to show, by way of corroboration, his purpose in going to the depot. The counsel for the plaintiff below have called our attention to the point that there was only a general objection to the reading of the letter, and this we find on further examination is true. Therefore the counsel's contention that if any part of it was admissible all of it was is correct. If the defendant wished to exclude that part of it that was calculated to prejudice the jury against him, that is, that part of it relating to the sickness of the wife and daughter, he should have made a special objection to the reading of that part of the letter. It was not error for him to be allowed to read that part of the letter which showed that it contained a request for him to come to Hot Springs. This much tended to corroborate his testimony as to his purpose in going to the depot to take the train for Hot Springs on the night of the 16th. Having objected generally to the reading of the letter, the objection was properly overruled, and the letter was admissible to be read as evidence. Rice on Evidence pp. 925 and 926; *Camden* v. *Doremus*, 3 How. (U. S.) 515.

As to the testimony of S. W. Williams and others, introduced over objection of defendant below, to show the character of Pat Gallagher, the watchman of the defendant, for violence and unfitness for his position, it was incompetent, for the reason that if he acted maliciously, violently and wrongfully, his principal, the railroad company, was liable, whether his character was good or bad,—as much liable as though the principal had been present, and had done the wrong, for, in contemplation of law, the principal was present in the person of the agent. In this case the question was, whether there was a specific wrong committed, and, if the proof showed there was, then, without regard to the character of Gallagher, the railroad company was liable, if at the time of the wrong, if any was done by Gallagher, he was acting within the scope of his employment. The case of *Dunham* v. *Rackliff*, 71 Maine, 345, was an action for damages alleged to have been caused by a collision between two teams in the night time. The court said in this case: "The plaintiff offered to show that the person by whom defendant's team was driven was represented to be a careless driver, but the evidence was excluded, and properly. The issue was as to the negligence of the defendant's servant at the time when and place where the injury occurred. It mattered not how negligent he may have been in the past, if at the time of the collision there was no negligence nor want of care. * * * The reputation of the servant for skill or want of skill was not admissible as relevant testimony to the issue tried." In an action by the servant against the master for the negligence of a fellow servant, the reputation of the fellow servant for negligence may be shown. "The law is well settled that the master is not liable in such case, unless guilty of negligence in the selection of the servant negligently causing the injury complained of, and this negligence of the master must be averred in the declaration and established by proof." *Ib.* p. 349; *Blake* v. *Maine Central R. R.*, 70 Maine, 63. Such is the character of cases cited by counsel on this point in the brief on motion for re-consideration, and on this point the cases cited in the original opinion, though correct, are not applicable in this case, and are calculated to mislead.

But the position of the court that in this case evidence as to the character of Gallagher, the watchman, was inadmissible is correct. The same ruling was made in the *Railway Co.* v. *Hackett*, 58 Ark. 389, where it was said "the testimony was clearly incompetent," which counsel seems to think is a typographical error, and that it should have been competent instead of incompetent.

We said in the opinion that the latter clause of the fifth instruction given for the plaintiff, in which the court told the jury that if they found for the plaintiff they might assess damages, if any, caused by the anxiety he suffered, if any, on account of being kept from his wife and child at Hot Springs, was erroneous, because there was no evidence on which to base it. There was evidence that, at the time Stroud was expelled from the depot by Gallagher, there was a train coming south within about two hundred yards from the depot, upon which Stroud might have gone, which the appellee's counsel suggests he did not take through fear of Gallagher, who had made demonstrations of violence toward him. The evidence is that Stroud was expelled at 1:30 a. m., that a train passed at 2 o'clock a. m., another at 7 a. m. next morning, and a third at 1:45 p. m. next day, and there is no evidence that plaintiff could not have taken either one of these three trains. There is no showing that Stroud had received any information, between the passing of the first train south and the passing of the three last-mentioned, that the condition of his wife and child had improved. He remained over at Little Rock, it appears, to prosecute Gallagher. It was not proper, therefore to instruct the jury that they might award Stroud damages on account of his anxiety by reason of being kept away from his wife and child at Hot Springs. The proof shows that he could have suffered no anxiety on that account, and there was no evidence to base the instruction upon. The instruction was abstract and misleading.

The opinion is modified as indicated, and the motion is denied.

## DAVIS v. JONES.

Opinion delivered October 14, 1899.

FRAUDULENT CONVEYANCE—WHAT IS NOT.—A deed absolute on its face, though intended to secure a pre-existing debt, will not be deemed a fraud upon creditors if the value of the property was less than the debt secured, and the deed was made in that form at the request of the grantee. (Page 123.)

Appeal from Boone Circuit Court in Chancery.

BRICE B. HUDGINS, Judge.

*Blevins, Lyons & Swarts*, and *W. F. Pace*, for appellants.

The plaintiffs, by the levy of attachment, sale of property, confirmation and deed, place themselves in a position to attack the deed from Stannard to Murray. Bump, Fr. Con. 511; Beach, Eq. 875. As to general grounds of equitable relief against fraudulent conveyances, see: 11 Ark. 411; 22 Ark. 184; Bump, Fr. Con. 76-78; 31 Mo. App. 62; 31 Ark. 666. The conveyance was in reality a secret trust, reserving an interest to the grantors, and hence is fraudulent. Bump, Fr. Con. § 41; Wait, Fr. Con. § 272; 43 Mo. App. 515; 13 Mo. App. 515; 132 Mo. 413; 3 N. H. 424; 4 N. H. 178; 45 Pa. St. 449; 28 Mo. 177; 31 Mo. 448; 87 Mo. 189.

*G. J. Crump*, for appellees.

A debtor, even in failing circumstances, may, by a *bona fide* deed, prefer one creditor to the rest. 22 Ark. 184. Fraud will never be presumed. 9 Ark. 485. The evidence fails to sustain appellant's allegations of fraud.

RIDDICK, J. This was an action to declare fraudulent and void, and to set aside, a conveyance of a town lot made by one of the members of the firm of M. H. Jones & Co.

The firm, being indebted to the Exchange Bank of Springfield, Mo., in the sum of over five thousand dollars, to secure

said debt, mortgaged its stock of goods to the bank, and one member of the firm also conveyed the bank the lot in the town of Harrison, Ark., which is involved in this suit. On the hearing of the case, the chancellor found that the conveyance of the lot was made for the purpose of securing the debt due the bank, and that it was free from fraud, either actual or constructive.

We have carefully examined the evidence, and believe that the evidence supports the finding of the court. We are fully satisfied that the conveyance was given to secure the debt of the bank, and not as an absolute sale. While the fact that the conveyance of the lot, although intended as a security, was in form an absolute deed of conveyance is a circumstance tending more or less to show fraud, still it was not conclusive, and was subject to explanation. The evidence tends to show that the whole of the property conveyed did not equal in value the debt due the bank, and that, after selling all of said property and applying the proceeds on the debt, the firm is still owing the bank a balance on its debt. The evidence also shows, as we think, that the conveyance of the lot was made in that form at the request and for the convenience of the bank, and that the lender neither concealed, nor intended to conceal or cover up, his property to hinder or delay his creditors.

On the whole case, we think the finding and judgment of the court was correct, and it is therefore affirmed.

---

## TEXARKANA & FT. SMITH RAILWAY COMPANY v. ANDERSON.

67 123
f67 395
f67 398

67 123
69 85

67 123
84 46

Opinion delivered November 4, 1899.

1. CARRIER—EXCURSION TRAIN—LIABILITY.—A railroad company cannot, by leasing its cars for the purposes of an excursion, relieve itself of liability for carrying a passenger beyond her destination, or of liability for failure to protect her from the misconduct of fellow passengers. (Page 128.)

2. DAMAGES—MENTAL SUFFERING.—There can be no recovery for mental suffering, where a personal injury does not constitute the basis of the action. (Page 128.)

3. SAME—CARRYING PASSENGER BEYOND STATION.—Nominal damages only can be recovered by a passenger who was carried beyond her destination without circumstances of aggravation or personal injury, and subjected to a delay of two hours, if there was nothing to show the value of her time lost, or that she incurred any expense on account of the delay. (Page 130.)

Appeal from Little River Circuit Court.

WILL P. FEAZEL, Judge.

*Trimble & Braley*, of Kansas City, Mo., *Jno. A. Eaton*, and *Shaver & Norwood*, for appellants.

Plaintiff was not defendant's passenger, but that of the parties who had chartered the train. 22 U. S. App. 220; S. C. 9 C. C. A. 666; S. C. 61 Fed. 605; 2 C. P. Div. 205; 88 Tenn. 692; S. C. 13 S. W. 691; 76 Ia. 655; S. C. 13 S. W. 691; 76 Ia. 655; S. C. 39 N. W. 188; 78 Fed. 610; S. C. 2 Am. Ry. Rep. 669; 78 Fed. 497; S. C. 2 Am. Ry. Rep. 677. It was lawful for defendant to lease the train. 47 Fed. 15; 51 Fed. 309, 318; Sand. & H. Dig., §§ 6321, 6322; 16 Am. & Eng. R. Cas. 501; S. C. 93 N. Y. 609. Where the statute permits a lease, the lesser is not liable for the defaults of the lessee. 57 Fed. 165; 14 S. W. 346; 28 Kas. 622; 43 Am. & Eng. R. Cas. 688; S. C. 86 W. Va. 629. The court erred in permitting plaintiff to say, as her opinion, that the conductor was asleep. 24 Ark. 251; 29 Ark. 448, 458; 55 Ark. 593; 56 Ark. 581. Evidence tending to prove mental suffering of appellee was improper. 45 S. W. 351; 64 Ark. 538; 151 N. Y. 107; 18 Ind. App. 202; S. C. 47 N. E. 694. Nor were her mere fears and alarms, occasioned by the conduct of the other passengers, elements of damage. 147 Pa. St. 40; 23 Atl. 340; 52 Fed. 261, 264; 14 Fed. 396; 74 Mo. 147; S. C. 6 Am. & Eng. R. Cas. 345; 60 Fed. 537; 6 Nev. 224; 13 App. Cas. 222; 47 Fed. 544. The verdict was excessive. 31 S. E. 182.

*Collins & Lake*, and *T. E. Webber*, for appellee.

The railroad company had no power to make a contract which would disable it from performing its public functions. 19 Am. & Eng. Enc. Law, 896; 28 S. C. 401; 26 Vt. 717. The lessor and lessee are jointly and severally liable for tortious

injuries. 19 Am. &. Eng. Enc. Law, 899, 900; 3 Wood, Ry. Law, §§ 490, 495; 80 N. Y. 27; Redf. Railroads (5 Ed.) 616; 20 Ill. 623; S. C. 71 Am. Dec. 291; Pierce, Railroads, 283; 23 L. R. A. 758. There is no error in the instructions of the court as to the proper elements of damages. 1 Suth. Dam. 156, 732, 734, 735; and note, 1 Bouv. L. Dict. 420; Hutch. Car. § 807. Mental suffering is recognized in all cases of expulsion, to the extent of the wrong inflicted and humiliation suffered. 2 Rorer, Rys. 844; 1 Suth. Dam. 162; Hutch. Car. § 810. The verdict is not excessive. 64 Miss. 80; 43 Ark. 463.

BUNN, C. J. This is an action for personal damages, laid in the complaint at $2,500, and verdict and judgment for $500, from which the defendant railway company appeals.

Perhaps to state the case in the briefest and most intelligible manner is to quote from the allegations in the complaint, and then give the evidence in support of the same:

"The plaintiff, Turie Anderson, states that the defendant, the Texarkana & Ft. Smith Railroad Company, is a corporation, organized under the laws of the state of Arkansas, and operated between Texarkana, Arkansas, and Horatio in said state; that on 25th day of July, 1895, plaintiff, desiring to go to Ashdown, a point on said railroad, purchased from defendant's agent at Mistletoe, one of defendant's passenger stations, tickets for herself and two children to Ashdown and return, and paid therefor a valuable consideration, to-wit, the sum of forty cents each; that said tickets entitled plaintiff and her children to first-class passage on the passenger trains of defendant company to Ashdown and back to Mistletoe. Plaintiff further says that on the 25th day of July she offered herself and said two children as passengers to the conductor of one of defendant's passenger trains, and was by said conductor accepted as such both to Ashdown and return. She further says that she and her two children were properly and safely conveyed to Ashdown, but that on her return from Ashdown to Mistletoe, in the evening of said day, plaintiff and her said children were exposed to taunts and insults from both passengers and employees of defendant company; "that the conductor

in charge of said train and other employees connected therewith, together with a number of the passengers, were drunk, and consequently boisterous and insulting to plaintiff and other lady passengers; that before reaching Mistletoe, plaintiff's destination, she notified said conductor that she desired to leave the train there, and demanded that he bring the train to a stop, which he at the time, with an oath, refused to do; that by reason of such refusal plaintiff was compelled to pass her destination and go on to Horatio, the terminus of defendant's road, a distance of —— miles, and that the trip to Horatio and back to Mistletoe was made at imminent risk to lives of plaintiff, her said children and other passengers, by reason of the drunken and reckless condition of defendant's employees and passengers on said train; that said employees and passengers were swearing, carousing and shooting off fire arms, and demeaning themselves otherwise to the alarm of plaintiff. Plaintiff further says that, if she had been permitted to leave the train at her destination, she could have reached her home (about two miles from defendant's line of road) early in the evening, whereas, in consequence of having been negligently and carelessly carried beyond same, she could not and did not reach her home until late in the night. Plaintiff further says that, by reason of defendant's carelessness, insults and negligence, plaintiff was damaged in the sum of two thousand and five hundred dollars. Wherefore she asks judgment against defendant company for said sum of two thousand five hundred dollars, and other proper relief."

This complaint was sworn to positively, and the defendant answered as follows, to-wit: "Defendant denies that plaintiff purchased passenger tickets from it, or rode on its passenger train, and denies that its employees were in charge of said train, or were drunk or guilty of any misconduct, and denies that it carried plaintiff by any station, or that she has been damaged in the amount sued for, or any other amount, by reason of any act or default of defendant. Defendant avers that plaintiff was riding on an excursion train, which had been chartered from defendant by others, and which was not under defendant's control, except as to its safe movement over de-

fendant's track; that all tickets on said excursion train were sold, and fares collected, by the parties who chartered said train from defendant for picnic or excursion purposes; that plaintiff agreed with those in charge of said train to ride thereon to Horatio and return to Mistletoe, which she did voluntarily, and was safely conducted accordingly. Wherefore she is estopped from complaining."

Upon the theory that this was an excursion train chartered by a third party for the day, for the purpose of carrying picnickers or excursionists, as set forth in the answer, at the instance of the plaintiff, the court gave instruction No. 2, over the objection of defendant, which is as follows:

"You are hereby instructed that the defendant company cannot relieve itself of liability by evidence that it had leased its train to individuals to run an excursion train over its railroad, if said company had an agent and representative on said train, who controlled the motive power, and was subject to orders from headquarters of said road as to the movement of the said train with relation to other trains and its safe conduct; and if you find from the evidence that the defendant company had this employee on said train, who were [was] engaged in the operation of the said train, then the defendant company would be liable to plaintiff for any damages shown by evidence to have been sustained by her by reason of said train not being stopped at her station, if the evidence shows it was not stopped at said station."

On the other hand, the court refused to give the following instruction asked by the defendant, to-wit: No. 3.

"You are instructed that if private individuals obtained the use of said train for the purpose of running an excursion, and paid a rental therefor, and sold tickets thereover, one of which was sold to plaintiff, and that she purchased the said ticket and took passage upon said train, the relation of passenger and carrier did not arise between the plaintiff and defendant, and that, if such relation arose, the same is between the parties chartering or leasing the said train and the plaintiff, and she will not be entitled to recover for a failure to stop said train at Mistletoe upon the return trip to Ashdown."

The instruction numbered 4, immediately following, is of similar import. The other instructions affecting the questions, given by the court at the instance of the plaintiff over the objection of the defendant, were given upon the theory that plaintiff sustained the relation of a passenger on a passenger train, and that the defendant owed her the duty it owed to passengers generally and ordinarily, and the issue of law was thus made by the instructions given and refused as aforesaid, whether or not a railroad company can, by leasing or hiring out its cars temporarily, as in this case, relieve itself of liability for carrying persons thereon beyond stations where they desire to get off, and from the duty of protecting passengers from the misconduct of one another, as in ordinary cases. A majority of the court are of the opinion that the company was liable for such injuries as might be shown to have been done, under these heads, in this case, growing out of its negligent running and control of the train. This is the doctrine of many and may be most, of the courts; and, as a fair exponent of the same, we cite the opinion in the case of *Harmon* v. *Columbia & Greenville Railroad Co.*, 28 S. C. 401. In that case, the charter of the railroad company was granted directly by the legislature, and there was a provision in it that the company might "farm out" its right of transportation to others. The circuit judge, on this peculiar provision, had held that the company leasing its road to another was relieved of liability for damages accruing during the time the road was operated by the lessee. This ruling was reversed by the the supreme court of that state, and the doctrine here announced by a majority of the court was sustained. It is unnecessary to make other citations, as that one presents the argument concisely.

The next question in the case at bar grows out of the evidence, and is made by the giving of the following instruction at the instance of the defendant over the objection of the plaintiff, to-wit: No. 7. "You are instructed that a person who, in violation of her contract of carriage, is carried beyond her destination, is entitled to recover all damages she has actually suffered, and which approximately resulted from the failure to permit her to alight at the station to which she con-

tracted to be carried. In this connection, in the absence of physical injury, she may recover compensation for the inconvenience, loss of time, labor and expense of traveling back, but not for anxiety and suspense of mind suffered in consequence of the delay, or of the danger, real or imagined, to which she was so exposed, and which was attendant on her trip made subsequently to the time she should have been permitted to alight. Hence, it follows, if from the testimony you believe that the plaintiff herein was, in violation of her contract, carried past her destination of Mistletoe, and as a result of same was carried on to the station of Horatio, and thence back to Mistletoe again, she may recover for all inconvenience she suffered thereby; also for the value of her loss of time, her labor and expense of traveling back, if any is shown by the evidence; but not for any anxiety and suspense of mind suffered in consequence of the delay incurred in reaching home, or for any apprehended danger that attended her trip to and from the station of Horatio."

In our view of the question, there was no material error in giving this instruction. The question raised thereby is simply the oft-recurring question, whether or not one can recover for mental suffering without showing some personal injury as a basis of the action, independent of mental suffering, an incident of the main cause of action, and of course dependent upon it. In *Peay* v. *Western Union Telegraph Company*, 46 Ark. 538, this court, in a well considered opinion by Mr. Justice Hughes, and in which all the then available authorities are cited, said: "Damages of mental pain and anguish are not recoverable for negligent failure of a telegraph company to make prompt delivery of a telegram." And this on the ground stated by Judge English in *L. R. & Ft. S. Ry. Co.* v. *Barker*, 33 Ark. 350, therein cited with approval, that "there must be a loss to claimant that is capable of being measured by a pecuniary standard; * * * and a mere injury to the feelings cannot be considered." This doctrine was really involved in *Hot Springs Rd. Co.* v. *Deloney*, 65 Ark. 177, although we denied the claim for damages for mental suffering in that case, because of the remote connection of the mental suffering with the injury com-

plained of as the basis of the action. Practically, there is little difference in principle. This subject is fully treated in *Trigg* v. *St. L., K. C. & Northern Railroad Co.*, 74 Mo. 147, where it is held (quoting from the syllabus) that "a passenger on a railroad train, who is carried beyond her station by negligence of the company, but without any circumstances of aggravation, and without receiving any personal injury, may recover compensation for the inconvenience, loss of time, labor and expense of traveling back; but not for anxiety and suspense of mind suffered in consequence of the delay, nor the effects upon her health, nor the danger to which she was exposed in consequence of the train being stopped at her station an insufficient length of time to enable her to get off." In the case at bar there do not appear to have been any circumstances of aggravation, such as is referred to in the foregoing extract; and, as to the evidence in support of the allegations of the complaint, all that is proper to say will be said on the last proposition we deem it necessary to consider at this time; that is, whether or not the damages were excessive.

It is not claimed that there was any personal injury, and no proof is adduced showing the value of the time and labor lost and expense incurred, or of any inconvenience other than is ordinarily attendant—a mere delay of two hours, without peculiar circumstances giving unusual importance to the delay. The testimony of plaintiff and her son, a grown young man who accompanied her on this excursion, at most shows that, in the conversation between her and the conductor, the latter spoke "short-like," that he was drunk, and that some of the people on the train were drinking and boisterous, some cursing, and one or two more singing the popular songs of the day. None of this is claimed to have been directed at plaintiff, and all is denied or so explained by other witnesses as to amount to nothing as a basis of a damage claim. Further than this we deem it improper to comment on the evidence. Nominal damages is all that could be properly recovered under such a state of things, and of course the $500 dollars assessed was excessive.

The judgment of the court is therefore reversed for the want of evidence to sustain it, and the cause is remanded for a new trial.

# BITTICK v. STATE.

67 131
174 402

Opinion delivered November 4, 1899.

1. AFFIDAVIT FOR CHANGE OF VENUE—OMISSION OF CLERK'S SIGNATURE.—A conviction of a felony will not be set aside because the defendant's affidavit to his application for a change of venue was not signed by the clerk before whom it was made, such omission being amendable. (Page 132.)

2. INSTRUCTIONS—HARMLESS ERROR.—Where the jury were instructed to convict defendant of voluntary manslaughter if they found that he acted in a sudden heat of passion caused by considerable provocation, and they so convicted him, and there was evidence that he acted in the heat of passion and not in self-defense, errors in instructions given on the right of self-defense, and in comments thereon by the prosecuting attorney, will not be ground for new trial if they manifestly were not prejudicial. (Page 132.)

Appeal from Craighead Circuit Court, Jonesboro District.

FELIX G. TAYLOR, Judge.

*E. F. Brown* and *N. F. Lamb*, for appellant.

The court had no jurisdiction, and consent could not give it. 48 Ark. 51. It was error to instruct the jury that defendant was bound to retreat unless by so doing he would have increased his danger. 49 Ark. 543. It was also error for the court to repeat this instruction several times in different instructions. 38 Ark. 334; 43 Ark. 184; 59 Ark. 143. There was error in the sixth instruction. 62 Ark. 286.

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

The failure of the clerk to affix the jurat to the petition was a mere irregularity, and could not have prejudiced appellant. 5 Ark. 409; 22 Ark. 216; 26 Ark. 142. The instructions as to the duty of appellant to retreat were correct. 37 Ark. 253. There was no error in the sixth instruction. 1 Russ. Cr. 662; 23 Ala. 28; 55 Ark. 600, 601.

BATTLE, J. Charles Bittick was indicted by a grand jury of the circuit court of the Eastern district of Clay county for murder in the first degree. On his application for change of venue, the cause was transferred to the circuit court of the Jonesboro district of Craighead county. He was tried in the latter court, and convicted of voluntary manslaughter. He now insists that the conviction was void because the circuit court in which he was tried did not have jurisdiction. The ground of this contention is that the memorandum at the end of his affidavit to his application, which was intended as a jurat, was not signed by the clerk before whom it was made. He signed the affidavit, and the court found that it was sworn to by him. His affidavit was supported by the affidavits of two credible persons, and was not void because it was not signed by the clerk, if it was sworn to. *Fortenheim* v. *Claflin*, 47 Ark. 49. The omission of the clerk to sign it was a mere error, and was amendable. The defendant was not prejudiced by it, as the venue was changed upon his application; and he has no right to complain. *Potter* v. *Adams*, 24 Mo. 159; *State* v. *Knight*, 61 Mo. 373; *State* v. *Potter*, 16 Kas. 80, 93.

He objected to the instructions which the court gave to the jury upon the right of self defense, and the comments upon them by the attorney for the state. As he was convicted of voluntary manslaughter, it is evident that the jury found that the killing was done by him "in a sudden heat of passion caused by considerable provocation." In that event the court instructed them to convict, as they did. There was evidence to show that in the killing of which he was accused he acted in the heat of passion, and not in self defense; and we think that it is manifest that he was not prejudiced by the alleged errors of which he complains. Judgment affirmed.

HUGHES, J., did not participate.

## WHEELER v. EATMAN.

Opinion delivered November 4, 1899.

EXEMPTION—PROCEEDS OF SALE OF LAND.—The fact that land sold by a debtor did not constitute his homestead did not deprive him of the right to hold the purchase money received therefor exempt from garnishment as personal property. (Page 135.)

Appeal from Ashley Chancery Court.

JAS. F. ROBINSON, Chancellor.

*Geo. W. Norman*, for appellant.

The sale of the homestead and the appellants' accompanying acts constituted an abandonment. 48 Ark. 543; 9 Am. & Eng. Enc. Law, 436; 4 Cal. 273; 39 Ill. 86; 43 Ill. 174; *id* 231; 54 Ill. 175. The proceeds of the sale were liable to appellants' claim. 60 Ark. 264; 65 Ala. 439; 61 Ia. 160; 65 Ia. 533; 24 Ia. 76; 62 Miss. 354. The intention to return to the homestead, in order to preserve the right, must be found at the time of renewal. 75 Mo. 559.

*Wells & Williamson*, and *W. A. Roby*, for appellees.

Abandonment is a question of intention. 55 Ark. 55; 48 Ark. 543; 22 Ark. 400; 37 Ark. 283; 41 Ark. 30; Thomp. Hom. & Ex. § 263; 7 S. W. 549. As to exempt property, creditors have no rights. 52 Ark. 247; 54 Ark. 193; 57 Ark. 331. As to general exemption rights in this state, see: Sand. & H. Dig., § 3716; 46 Ark. 159. Choses in action may be selected as exempt. 31 Ark. 652; 42 Ark. 410. There being evidence to support it, the finding of the chancellor as to abandonment will be upheld. 55 Ark. 58; 48 Ark. 543, 544.

*Geo. W. Norman*, for appellant, in reply.

A chancellor's finding is not conclusive, and will be set aside if against the preponderance of the evidence. 41 Ark.

292; 42 Ark. 521; 15 Ark. 209; 23 Ark. 341; 43 Ark, 307; 50 Ark. 185; 55 Ark. 112.

BATTLE, J. On the first day of January, 1896, the clerk of the Ashley circuit court issued a writ of garnishment, in which he recited that W. G. Wheeler, on the 15th of August, 1883, recovered a judgment against L. S. Eatman and W. P. Sherford for $380.15, and commanded the sheriff, to whom it was directed, to summon E. E. Smith to appear before the Ashley circuit court, on the first day of its January term, 1896, then and there to answer what goods, chattels, moneys, credits or effects he had in his hands or possession belonging to L. S. Eatman to satisfy said judgment. Wheeler alleged that E. E. Smith was, on and after the date of the service of the writ of garnishment, indebted to L. S. Eatman in the sum of $300. Smith answered, saying that he had contracted with Eatman for a certain tract of land, and agreed to pay to him for the same the sum of $300, $150 of which was to be paid on the 15th of December, 1895, and the remainder on the 15th of December, 1896, and that he was ready to pay these sums when Eatman conveyed to him the land. Eatman thereupon appeared, and filed a schedule, in which he alleged that he was then and at the date of the writ of garnishment a married man and the head of a family, and a citizen and resident of this state, that the land sold to Smith was, at the time of sale, his homestead, and that he sold it for the purpose of buying another homestead with the proceeds of the sale; and filed a list of all his personal property, including the $300; alleged that all of it was of the value of $356; and claimed the $300 as a part of his exemptions. In response to the schedule, Wheeler stated that Eatman was not entitled to hold the $300 as a part of his exemption, because the land which he sold to Smith was sold under an execution in his favor against Eatman, and was purchased by Smith, and Eatman did not at that time claim it as a homestead, and had abandoned it as a homestead long before it was levied upon to satisfy the execution. There was no controversy as to the personal property owned by Eatman, and it was not denied that he was a married man, and a citizen and resident of this state. The only controversy was as to the land

being the homestead of Eatman. The court, upon the evidence adduced by both parties, found that it was, and that Eatman was entitled to the proceeds of the sale to Smith, and dismissed the garnishment; and Wheeler appealed.

Eatman was entitled to hold the $300, which Smith agreed to pay him for the land, as a part of his exemption. It was personal property. The fact that the land which was sold for it did not constitute his homestead at any time did not deprive him of the right to hold it as exempt from garnishment. If the land was subject to execution, Wheeler had his remedy against it. That did not entitle him to the proceeds of the sale by Eatman to Smith. The finding of the court that the land was the homestead of the defendant was unnecessary.

The judgment of the circuit court, for the reasons given, is affirmed, without prejudice to Wheeler in respect to his remedies against the land.

---

67 135
82 246

## CARPENTER v. GLASS.

Opinion delivered November 4, 1899.

1. REPLEVIN—WHEN ACTION LIES.—To maintain replevin for chattels, plaintiffs must not only have title, general or special, in them, but must be entitled to immediate possession thereof. (Page 138.)

2. SAME—GOODS SOLD BUT NOT SEGREGATED.—Plaintiff ordered 35 barrels of flour, to be paid for on 30 days' time. Other persons at the same place, including defendant, ordered enough flour from the vendors, together with defendant's order, to make a car-load. The entire shipment, without segregation of any part thereof, was consigned to defendant, one of the purchasers, who was instructed not to deliver the flour ordered by plaintiff until it was paid for. *Held*, that defendant was agent of the vendors to receive and deliver the flour, and that plaintiff had neither title to nor right to immediate possession of the flour ordered by him, and could not maintain replevin therefor. (Page 138.)

Appeal from Jackson Circuit Court.

RICHARD H. POWELL, Judge.

STATEMENT BY THE COURT.

The appellee brought replevin against the appellant, and recovered judgment for fifteen "barrels of Superior Patent Flour in wood barrels, and twenty barrels of Baker's Extra Flour in one-eighth sacks," or, in default of the return thereof, $195.00, the value of the said flour. From this judgment Carpenter appealed to this court. The cause came on for trial in the circuit court of Jackson county at its January term, 1898. Appellee, Glass, testified: "Sometime about August 10th, Captain Day, a traveling man, came through here [Swifton], and wanted to make up a car load of flour, and came to me and wanted me to take some of it. I told him, provided he made up the car, I would take thirty five barrels. I gave him my order, and it was to be shipped to some of us—some one of the parties that were in the car load. He did not know at that time who would be in the car load. About August 20th—I think it was August 22d—I got my bill for the flour, as follows:

"Gordonville, Mo., August 20, 1897.

J. M. Glass, Jr., Swifton, Ark.

Bought of Winkler & Lupkes, Proprietors of the Gordonville Roller Mills. (Terms 30 days. Payable in St. Louis or New York Exchange. Prepay all charges on remittances.)

| | |
|---|---|
| 15 Brls. Sup. Pat. flour, wood, at $4.75 | $ 68.55 |
| 20 " Bak. Extra " ⅛ at $3.97 | 70.40 |
| | $147.95 |
| Less freight (which please pay Carpenter) | 10.95 |
| | $137.00 |

"I offered to pay this freight to Carpenter, and to take the flour from him, but he said I could not have it. I paid $6 per barrel to old man Coffin for some of that same shipment or car load of flour." Cross-examination. "I never had the flour in my possession at any time. It was not billed to me, and I had no bill of lading for it. Carpenter showed me a letter, and probably a telegram, from the milling company, notifying him not to deliver the flour to me before I paid him for it. I told him I bought the flour on 30 days' time, and then I went to get up the money. This was on Sunday, and about

Friday following I got up the money. The flour was then in Carpenter's store in Swifton. I had not offered to pay any part of the freight prior to Friday." Re-direct. "I offered to pay for the flour the amount stated in the account." Re-cross. "I offered to pay for the flour on Saturday, by check. I did not offer the money, but offered a check which would have been paid."

Appellant, Carpenter, testified that in August Mr. Day came over and sold him some flour and wheat bran, to be shipped from Gordonville, Mo. He said also he had contracted to ship Mr. Glass and Mr. Coffin some flour, and asked to whom he should ship the car. I said: "To Mr. Glass." But, instead of that, he billed the car to me. I think that must have been Friday. Sunday morning I got a telegram to hold the car, and at the same time I got a letter from them requiring me to collect from J. M. Glass and Coffin before delivering the flour. * * * I showed this letter to Glass. He said he had contracted to have 30 days. I showed the letter to Coffin, and he said he bought on 30 days' time, but I delivered the flour to him, and he paid for it. * * * Wednesday following I went and saw Glass, and he said: "I do not know what I can do until I go to Newport. * * * The mill had instructed me to unload the flour, which I did, and the following Saturday evening Glass called for the flour. I received the following bill of lading, under which the flour in controversy was shipped to Swifton:

"ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY CO.

"Received at Gordonville station, August 20, 1897, from Winkler & Lupkes, the following articles, in apparently good condition (except as noted below), to be forwarded to R. L. Carpenter, at Swifton, Ark., I. M. R. R., under the conditions and exceptions printed upon the back of this receipt:

| MARKS. | ARTICLES. | WG'T STATED BY SHIPPER. |
|---|---|---|
| 532. | 120 sacks of mill feed 100 lbs. | 12,000 |
| H. C. A. & N. | 30 bls. of flour 200 " | 6,000 |
| | 16 sacks of flour . 49 " | 763 |
| | 328 sacks of flour . 24 " | 7,872 |
| | | 26,640 |

*Gustave Jones*, for appellant.

Until the goods were actually set apart and appropriated to the appellee, the sale was incomplete, and no title passed. 50 Ark. 20; Benj. Sales, § 399; 2 Sch. Pers. Prop. § 27 *et seq*; 51 Ark. 136; Hare, Cont. 415; Benj. Sales, § 352 *et seq*. Appellee was not entitled to maintain replevin. 37 Ark. 66; 17 *ib*. 450; Wells, Rep. § 129; 71 Ill. 105. The verdict should have specified the value of each article. 10 Ark. 504; 37 Ark. 548; 53 Ark. 411.

*M. M. Stuckey*, for appellee.

The delivery by the mill to the railway company was equivalent to a delivery to appellee, and completed the sale. 43 Ark. 356; 44 Ark. 556; 58 Ark. 196; 51 Ark. 136.

HUGHES, J., (after stating the facts.) "To maintain replevin for goods, the plaintiff must not only have title, general or special, in them, but must be entitled to immediate possession thereof." *Thatcher* v. *Franklin*, 37 Ark. 66.

It appears from the evidence that the appellee contracted with the agent of Winkler & Lupkes to buy of them the flour in controversy on 30 days' time, and that they sent appellee the bill of the articles, and consigned the goods to Carpenter, with other barrels and sacks of flour of the same brand and quality, and that, before the goods were delivered to the appellee, Winkler & Lupkes instructed Carpenter not to deliver the flour to Glass, unless he paid cash for it; and that the flour was not appropriated, marked or set aside or designated to fill Glass' order. No part of the flour was ever marked, set aside or in any way designated for Glass.

A majority of the court are of the opinion that Carpenter was the agent of Winkler & Lupkes to receive the flour and deliver the same according to their directions only, and that there was, under the circumstances of this case, no such delivery of the flour to Glass as to warrant him in bringing replevin; that he was not entitled to immediate possession of the same. Though Glass may have had his remedy against the vendors for failure to comply with their contract, he could not main-

tain replevin until he had the right to the immediate possession. Neither the title nor right to possession of any specific property had passed to him. There are cases which hold, under circumstances similar to those in this case, the title and right to the immediate possession of the property passes; but we think the weight of the decisions and the better and later decisions are to the contrary. Among the cases, according to the doctrine of which it might be said that the title and right to immediate possession of the flour in controversy in this case passed to the appellee, Glass, are: *Pleasants* v. *Pendleton*, 6 Rand. 473 (1828); *Kimberly* v. *Patchin*, 19 N. Y. 334 (1859); *Mackellar* v. *Pillsbury*, 48 Minn. 396; *Russell* v. *Carrington*, 42 N. Y. 118 (1870). In these cases two judges dissented, but *Kimberly* v. *Patchin* was approved, and many other cases. In conflict with the above cases are an equal, if not greater, number of cases, among which are *Merrill* v. *Hunnewell*, 13 Pick. 213 (1832); *Woods* v. *McGee*, 7 Ohio, 413 (1836); *Dunlap* v. *Berry*, 4 Scam. 327 (1843); *Field* v. *Moore*, *Hill & Denio*, 418 (1843); *Courtright* v. *Leonard*, 11 Iowa, 32 (1860); *Bailey* v. *Smith*, 43 N. H. 141 (1861.)

"In *McLaughlin* v. *Piatti*, 27 Cal. 463 (1865), it was declared to be a fundamental principle of the law of sales that if goods be sold (which are mingled with others) by number, weight or measure, the sale is incomplete, and the title continues with the seller until the bargained property is separated and identified." *Caruthers* v. *McGarvey*, 41 Cal. 15 (1871); *Keeler* v. *Goodwin*, 111 Mass. 490 (1873). In *Commercial Bank* v. *Gillette*, 90 Ind. 268 (1883), the supreme court of Indiana somewhat warmly vindicated the general rule so often stated, citing many authorities, and disapproving of *Pleasants* v. *Pendleton* and *Kimberly* v. *Patchin*, which are leading cases on the other side. See also *Fry* v. *Mobile Savings Bank*, 75 Ala. 473 (1883); *Mobile Savings Bank* v. *Fry*, 69 Ala. 348; *Ober* v. *Carson*, 62 Mo. 213 (1876); *Friend & Fox Paper Co.* v. *St. Charles Starch Co.*, 6 Mo. App. 598; *Faulkner* v. *Harding*, 9 *ib.* 598; *Fitzpatrick* v. *Fain*, 3 Cold. 15; *Steaubli* v. *Bank*, 11 Wash. 426, and other cases cited in Benjamin on Sales, 321 to 327 inclusive. After reviewing the cases, Mr. Bennett, in

his note to Benjamin on Sales, says: "We have cited more cases on this point than was perhaps necessary, partly on account of Mr. Ralston's very clever and interesting monograph, inclining to the opposite view, and favoring what he calls the 'new rule,' though our examination leads us to believe that the newer cases 'prefer the old way.' Benjamin on Sales, 326–7. He further says (page 327): "Whether the title of unseparated goods from a mass has in fact passed, may be tested by a simple illustration: A buys of B 100 barrels out of 1,000, and nothing is done to distinguish or separate them. C steals one barrel from the mass. Can he be safely indicted for stealing the goods of A? It does not follow, however, in such a case that the parties are under no obligations, and have no rights as to each other before separation. If the goods are still in the possession of the vendor, he may separate at his election; and recover the price. If he declines to do so, the vendee, upon paying or tendering the price, may have an action for damages for such refusal to separate and deliver, in which he could recover the whole loss sustained. The only substantial loss to which the vendee is exposed is that if an irresponsible vendor should resell to another party, who gets possession, the vendee could not recover the goods of the second vendee, nor entire satisfaction against the vendor; but this is incident to all executory sales of personal property." At page 327 Mr. Benjamin says: "From the foregoing review of the cases, we seem to be justified in these conclusions: First. In a sale of a portion of a larger mass, the whole remaining in the possession of the vendor, with a right and power in him to make a separation, both upon principle and the weight of authority, no title passes until that is done, so as to enable the vendor to recover the price, even for goods bargained and sold. Approved in *New England, etc. Co.* v. *Standard Worsted Co.*, 165 Mass. 328, 329.

"Second. Nor to enable the vendee to maintain trespass, trover, or replevin against the vendor, or any one wrongfully taking away the goods from the vendor's possession.

"Third. If the vendee has paid the price, and the vendor refuses to separate or set apart the portion sold, the vendee

may recover back the amount paid; if not paid, damages for non-fulfillment.

"Fourth. In case the whole mass is delivered to the vendee, with a right and power in him to make the separation, the title sufficiently passes to render him liable for the price, or enable him to sue any one for the wrongful conversion of the goods, even before he has separated them.

"Fifth. A constructive delivery may be sufficient for this purpose, as where a bailee of the goods agrees to hold them, on the order of the vendor, for the benefit of the vendee."

The main principle in these cases cited by Benjamin on Sales (*i. e.*, that before title and right to possession of a part of a mass agreed to be sold pass to the vendee, so as to enable the vendee to maintain trespass, trover or replevin therefor, there must be a separation of the part sold from the mass, by setting it aside for the vendee, or marking it, or in some way designating it or distinguishing it from the mass, for the vendee) is the doctrine of our own court. See *Berger* v. *State*, 50 Ark. 20; *Herron* v. *State*, 51 Ark. 136.

The judgment is reversed, and a judgment entered here for appellant.

WOOD, J., (dissenting). I do not differ with the court as to the principles of law announced. But to my mind there is a misapprehension of the facts, and a misapplication of the law announced to the facts of this case. It is a mistake to consider Carpenter the agent of Winkler & Lupkes to receive the flour and deliver same according to their directions only. The correct view, in my opinion, is to consider Carpenter as the agent or bailee of Glass and Coffin, the other purchasers, to hold the flour until called for by them. When the flour was shipped to, and received by, Carpenter, and same was segregated or set apart, so that each purchaser could distinguish his portion, certainly nothing further could be done, so far as the vendor was concerned, to make the sale complete. It only remained for the vendee to call and get his flour. The title had passed completely, and the ownership and right to the possesion was in the vendee. Carpenter testified: "I unloaded the flour, and stacked it separately by

itself, that is, the flour Glass was to get. Saturday evening Glass called for the flour—that is, the Saturday evening after I had unloaded it." Here was a complete separation of the Glass flour from the mass. When Glass called for his flour, and offered to pay his freight (which the proof shows he did), he was entitled to have same delivered to him, and, appellant Carpenter failing to deliver same, appellee had the perfect right to institute this suit by replevin. The vendors did not undertake to stop the flour *in transitu*, and, if they had, there was no showing that Glass was insolvent, and that he would not have complied with his contract of purchase. There is no doubt in my mind but what the judgment is right upon the facts as found by the jury, and it should be affirmed.

RIDDICK, J., concurs in the dissenting opinion.

---

67 142
78 561
d79 183

67 142
85 202
85 337

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

Opinion delivered November 4, 1899.

1. PLEADING—AMENDMENT—CONTINUANCE.—A complaint against a carrier alleged that plaintiff was negligently carried past her destination, and put off at the next station. After the issues were joined and the jury impaneled, plaintiff, over defendant's objection, obtained leave to amend the complaint by adding that the conductor was intoxicated and insulting to plaintiff at the time she was carried beyond her station. Defendant asked for a continuance on the ground of surprise, which was refused. *Held*, that the amendment was proper, but, as it introduced a new element of damages, defendant was entitled to a continuance. (Page 144.)

2. EVIDENCE—COMPETENCY.—In an action against a carrier for transporting a passenger beyond her destination, where plaintiff returned by a local freight train when by waiting an hour longer she could have returned on a passenger train, evidence as to the unpleasant conditions on the freight train and of plaintiff's annoyance thereat is inadmissible. (Page 145.)

3. SAME.—In an action for carrying a passenger beyond her destination, evidence concerning the sad plight of plaintiff's son, about whom she was then much distressed, was inadmissible. (Page 146.)

Appeal from Saline Circuit Court.

ALEXANDER M. DUFFIE, Judge.

*Dodge & Johnson*, for appellant.

Appellee should not have been permitted to make the amendment, setting up a new cause of action, without giving appellee additional time. Newm. Pl. & Pr. 704, 705; 22 Barb. 116. The court should have given appellant additional time on the ground of surprise. 62 Cal. 443; 77 Mo. 26; 6 How. Pr. 336; 5 Abb. 203; 52 How. Pr. 193; 7 Rob. (La.) 111; 34 Barb. 291–295; 33 N. Y. 69; 39 Cal. 555; 6 Abb. N. Cas. 378; 23 Ark. 543, 545; Sand. & H. Dig., 5839. The court erred in the admission of evidence as to the condition of the caboose of the local freight on which appellee returned. The verdict was excessive.

*T. J. Oliphant* and *Hill & Auten*, for appellee.

Appellant's motion for a continuance was informal. The evidence complained of was competent, as throwing light on the disputed question of whether the train stopped at appellant's station, and, also, upon the credibility of appellee's statements compared with those of the railroad employees. 42 Ark. 542; 25 *id.* 380. The verdict is not excessive. 58 Ark. 136.

WOOD, J. The appellee alleged that she was a passenger on appellant's train going from Little Rock to Mabelvale, and that she was negligently and carelessly carried by said station, Mabelvale, and was put off at the station of Alexander. She sets out how she was inconvenienced thereby, and for this, and the distress of body and mind incident thereto, she claimed damages in the sum of $2,000. The appellant answered, denying the allegations of the complaint, and alleging that the train did stop at Mabelvale, but that appellee, through negligence and carelessness, did not alight at said station, although having ample time to do so.

The parties announced ready for trial on the issues thus joined, and a jury was impaneled and sworn, whereupon the plaintiff asked leave to amend her complaint by interlining the

following: "That the conductor of said train was intoxicated and abusive, and thus negligently and wantonly run said train past said station of Mabelvale, and was abusive and insulting to plaintiff upon arriving at Alexander, and jostled and insulted her at that time;" and the abuse of said conductor and his treatment of her caused a "nervous shock, and she was made sick thereby." The defendant objected to the above amendment being made, "because it set up a new cause of action and additional elements of damage, * * of which new cause of action the defendant had no notice, and was not prepared for trial." The court overruled said objections, and allowed the amendment to be made, to which ruling "the defendant objected and excepted. Defendant thereupon stated to the court that it was surprised by said amendment, and that it was not prepared for trial upon said complaint as amended, and asked that the case be continued, and it be given proper time to make its defense to said new cause of action, and that the defendant believed, if given proper time, it could make a good defense to said complaint as amended. This the court refused, and ordered the trial to proceed *at once*; to which ruling the defendant objected, and saved its exceptions.

The amendment was proper. The effect of it, however, was such as to introduce an additional element of damages, and perhaps to change the action from one merely upon the contract to an action *ex delicto*. *Fordyce* v. *Nix*, 58 Ark. 136. Under the original complaint, no proof except as to actual damages growing out of a breach of the contract was allowable. Under the complaint as amended, new and original elements of bodily pain and mental anguish were proper to be considered in determining the amount of damages. Likewise the amended complaint made a case for vindictive damages. *Fordyce* v. *Nix*, *supra*. Such a radical change from the issues as formulated by the original pleadings, produced by one of the parties just before entering upon the proof, was well calculated to surprise his adversary. The court erred in not granting a continuance or postponement to allow appellant to prepare to meet these new and original phases of the case. The motion for continuance was verbal, and perhaps not full

enough to meet the requirements of good pleading. But the court was sufficiently advised by the statement of appellant, set forth in the bill of exceptions, as to the grounds of its surprise, and its inability, at that juncture of the proceedings, to meet the issues presented by the amended pleadings. It informed the court also that it believed it could present a good defense, if time were given to prepare for it. Appellant was certainly entitled to time. It could not be said that ordinary prudence would have anticipated this change in the issues. It would have been unfair and unjust to press appellant into the trial, because it did not name and could not then name witnesses, other than the railway employees, by whom it expected to rebut the case as made, at the "eleventh hour," by the complaint of appellee. The very object of time under such circumstances is to make inquiry concerning names of witnesses, and to find out if there be witnesses who would establish the contention of appellant as made by its answer to the new matter.

It is said in a Missouri case that the term "surprise" denotes "an unforeseen disappointment in some reasonable expectation, against which ordinary prudence would not have afforded protection." *Fretwell* v. *Laffoon*, 77 Mo. 26. Here is a "change of front" on the eve of battle, without any fault that we can see on the part of appellant, which was greatly prejudicial to appellant's interests, and which it alleges it would be able to meet, if only proper time were given, and which no reasonable prudence could have forestalled. There were other passengers on the train besides appellee. These must have seen the conductor, and doubtless knew something of his condition. Appellant should have been given the opportunity to disprove the alleged misconduct of its conductor by witnesses not in its employ, if it were possible to do so. Forcing the defendant (appellant) to go to trial "at once" under the circumstances, it seems to us, was an abuse of the court's discretion.

In the complaint, as amended, appellee seeks to hold appellant liable for damages caused by carrying her beyond her destination, and for alleged indignities to which she was subjected as she debarked from the train at Alexander. It was

shown that appellee returned of her own volition from Alexander to Mabelvale on a local freight train. She could have returned, by waiting about an hour longer, on a regular passenger train. She was permitted, over appellant's objection, to testify concerning the condition of the freight train, and her return thereon, as follows: "There was some bunks on one side—I suppose it was—some place there was two men lying there covered up and asleep; and there was others sitting around in there smoking and chewing tobacco and spitting ambeer, when I went in there, and I stood, and didn't want to go in there at all, but for the sake of my boy, of course, I would go to try and get him free as soon as possible, and I went in there, and I didn't see anywhere to sit down at all, and I stood up, and there was tobacco and ambeer, and there was three or four smoking. These men were lying there. They snored awhile, and then they rose up, and sat up on the bed. I felt almost afraid in there. I stood over near the door. I never was in a crowd like that before in my life." This testimony was wholly irrelevant. Not being responsive to any issue made by the pleadings, it was error to admit it, and it was prejudicial, for it was calculated to make the jury believe that the inconvenience and annoyance which she suffered by reason of such unpleasant environments was a proper element of damage. Indeed, after the admission of such evidence, over the appellant's protest, the jury were not at liberty to discard it, and we would not be warranted in saying that their verdict was not in some measure influenced by it. No doubt these conditions, which she here graphically portrays, were abhorrent to the acute sensibilities of any refined and delicate lady. But it must be remembered that her touch with these was produced by the keen anxiety which the mother felt for her wayward and afflicted son, and in that sense it was of her own choosing. Certainly the railway company had no connection, remote or proximate, with her unfortunate dilemma. The same may be said of her testimony concerning the sad plight of her boy,—that he was in jail at Little Rock, and that he had been paralyzed ever since he was three years of age. None of the above testimony was relevant, and it is impossible to tell to what extent the verdict was influenced by it.

Appellant does not urge here any objections to the charge of the learned circuit judge, and we therefore will not consider the objections to same reserved at the trial. As the judgment must be reversed, and the cause remanded, for the errors indicated, we pretermit any discussion on the excessiveness of the verdict.

Reversed.

BATTLE, J., not participating.

---

## PACIFIC MUTUAL LIFE INSURANCE COMPANY v. WALKER.

Opinion delivered November 4, 1899.

1. EVIDENCE—AGENT'S STATEMENT.—Where it is a question whether the acceptance by an insurer of an order drawn on insured's employer was payable out of his wages for a certain month or generally, evidence of a witness that he heard a man, having the same surname as the special agent of the insurer who countersigned the policy sued on, say that, if employees had no wages due out of which to pay such orders, his company held the orders until they did have money due, is inadmissible, because (1) it was not shown that the man who made the statement was the insurer's agent, and (2) if his identity were conceded, it was no shown that he had authorty to bind the insurer by such an admission. (Page 151.)

2. INSTRUCTION—NOTICE OF NON-PAYMENT.—In an action on a policy of insurance, where the defense was that the policy stipulated that no claim should be payable unless the premiums were paid, and that plaintiff gave defendant an order on his employer payable out of his wages for June, when he had no wages due for that month, an instruction that if insured remained in his employer's service, and the insurer gave him no notice that the order was not paid, he could recover, notwithstanding its non-payment, is erroneous, since, if he had no funds with his employer at the time the order was due, he had no reason to suppose the order would be paid, and was not entitled to notice. (Page 152.)

3. SAME—ASSUMING UNDISPUTED FACTS.—In submitting to the jury the issues to be determined, the trial court should not request the jury to find as to matters conceded by both sides, but should confine their attention to those matters about which there is a dispute. (Page 153.)

Appeal from Ashley Circuit Court.

MARCUS L. HAWKINS, Judge.

STATEMENT BY THE COURT.

Thos. J. Walker, was, on the 22d day of February, 1896, engaged in the occupation of coal heaver for the Iron Mountain Railway Company, at Wilmot, Arkansas. On that day he procured from the agent of the Pacific Mutual Life Insurance Company an accident policy insuring him against violent and accidental injuries for one year. The policy recites that it was issued in consideration of the representations and warranties contained in the application for insurance, the stipulations in the policy, and also in consideration of an order drawn on the St. Louis, Iron Mountain and Southern Railroad Company. This order on the railroad company authorized its paymaster to deduct from the monthly wages of Walker, and pay to the insurance company, the following sums: $4.65, $4.70, $4.70, $4.70, in four installments. In obedience to this order, $4.65 was deducted from Walker's March wages, $4.70 from April and $4.70 from May wages. This order was not put in evidence, and it is not clear from the evidence whether, by the terms of the order, the remaining installment of $4.70 was to be paid from the June wages only, or whether it authorized the company to pay it from the June and July wages of Walker. Walker was taken sick in May, was sent to the railroad hospital, and remained there about two weeks. When he returned, the railroad company had another man employed in his place, but he still, so he says, remained on its payrolls, and did work as an extra hand for the wages of $1.25 per day. He worked five days in June, sixteen in July, and almost continuously from that time until in January, 1897.

The general auditor of the railroad company testified that Walker's name did not appear on the company's pay rolls after May, and that, as there was nothing due him for the months of June and July, out of which he said the last installment of $4.70 was to be paid the insurance company, his order was considered of no further validity, and dropped from consideration. The railroad company for that reason did not pay the insurance company the last installment. The policy sued on contained this provision: "The four installment payments, as specified in the above order, are premiums for consecutive

and corresponding insurance periods, two, two, three and five months. Every payment made and accepted on account of said order shall be applied to the installments thereof in the order in which they fall due." Then follows a provision that "no claim shall be made under this policy for injuries occurring in any of said insurance periods if the corresponding or any previous installment premium has become due and remains unpaid."

The insurance company claimed that the policy expired the 22d day of September, 1896, that being the ending of the third period of insurance, the 4th installment of the premium not being paid; but it did not notify Walker, nor return his order on the railroad company. About 1st of January, 1897, Walker procured a "lay off' for ten days to visit his mother in Louisiana, and while on that trip received an accidental injury, which resulted in the loss of his left foot and a portion of his leg. He afterwards brought this action to recover the sum of $500, the amount claimed by him as due under the policy. The insurance company denied liability on several grounds, one of which was that the last installment of the premium had not been paid. On the trial of the case the circuit court gave the jury, over objection of the defendant, the following instruction:

"The court instructs the jury that if they believe, from the evidence, that the plaintiff, Thos. J. Walker, has sustained an accidental injury by which he lost his left foot about the time mentioned in his complaint, and that prior to said accident he had obtained in the Pacific Mutual Life Insurance Company an insurance policy to indemnify him against accident, and that it was in force at the time that said accident occurred, and that by the terms of the said policy he was to receive the sum of $500.00 if he by accident received an injury that resulted in the loss of one foot within ninety days after said accident occurred, and that at the time the said policy of insurance was isssued to him he gave the said Pacific Mutual Life Insurance Company an order for all of the premiums due on said policy upon the St. Louis, Iron Mountain & Southern Railway Company, and that at that time he was an employee of said railway system, and that this order for this payment of premiums was to be paid out of his wages as such em-

ployee; and that three installments of said premiums were paid, and that, though plaintiff was continually in the employ of the said railway company up to the time of the accident, said insurance company gave him no notice of the non-payment of the last installment on said premium, and that within the time required by the insurance policy he gave notice of his said injury by accident,—then they will find for the plaintiff in the sum of $500, with 6 per cent. interest from the 1st of April, 1896, to date."

There was a verdict for the plaintiff, from which the insurance company appealed. The other facts sufficiently appear in the opinion.

*Morris M. Cohn*, for appellant.

*Fox & Gray*, of San Francisco, Cal., and *Z. T. Wood*, of counsel.

The statements as to his employment, made by appellee in his complaint, were materially different from his evidence, and the appellant should have been given a new trial on the ground of surprise. 11 Ark. 16, 19; 2 Thomp. Tr. § 2761. Appellee's injury was caused by his own negligence. Being a passenger, he should have kept his seat. 68 N. W. 866; Elliott, Railroads, §§ 1629–1630; 58 Ark. 277–279; 61 Ark. 509; 45 S. W. 1065. He assumed the extra hazards of riding on a freight car. Elliott, Railroads, § 1629. The appellant was under no duty to sue the railroad company for the premiums in order to keep appellee's policy alive, and his failure to make the payments forfeited it. 93 U. S. 24, 30, 31; 104 U. S. 88; 46 Fed. 355; 11 So. 671; S. C. 96 Ala. 570; 19 N. W. 513; 60 Wis. 431; 85 Ky. 677; 125 Ind. 189; 58 Md. 463; 96 U. S. 544; 104 U. S. 252. The first instruction for appellee was erroneous, because it assumed that it was the duty of the insurance company to give appellee notice of the non-payment of the June premium, and also because it assumed that said premium was payable out of any balance due on any other month. 85 Ky. 677; 45 S. W. 539, 543; 104 U. S. 88; 93 U. S. 24, 30, 31; 2 Joyce, Ins. § 1106. Appellant, having changed his occupation to one more hazardous, is bound by the

clause in the policy reducing the amount recoverable in such case. 2 Biddle, Ins. § 710; 58 Ark. 277; 45 S. W. 1005. It was error to refuse the second instruction asked by appellant. 2 Biddle, Ins. §§ 895, 896.

*Geo. W. and Jas. C. Norman*, for appellee.

The evidence sustains the verdict. The application for new trial on the ground of surprise is insufficient. 2 Ark. 45; 33 Ark. 91; 29 Ark. 225. Appellant should have complained at the time and not waited until he was moving for a new trial to allege surprise. 26 Ark. 496; 55 Ark. 567; 57 Ark. 60; 2 Ark. 33.

RIDDICK, J., (after stating the facts.) This action was brought upon a policy of insurance against accidental injuries. One of the defenses against the action is based on the contention that a certain installment of the premium agreed to be given as a consideration for the policy was not paid. The plaintiff, Walker, gave the insurance company an order on the railroad company, of which he was an employee, for the payment of this installment, it being specified therein that the same should be deducted from his wages. The insurance company contends that by the terms of this order the payment could only be made from the wages of plaintiff for the month of June, 1896; that he had ceased to be an employee of the company before that month; that therefore the company owed him no wages for that month; and that the order was not paid, and could not be collected. To show that the payment of this installment was not confined to the June wages, the plaintiff introduced a witness, who, over the objection of the defendant, was permitted to testify as follows:

"I heard a man by the name of Murphy, who was the agent of an accident insurance company, say that his company took orders for the premiums, and the railway company paid these orders out of the wages of its employees when they had anything coming to them, and that they held these orders till the employee had the money to their credit, and that then the railway company paid the order, and charged it to the employee;

but I do not know whether this man Murphy was an agent of the defendant in this case or not."

The only basis for the admission of this testimony is the fact that the policy sued on appears to have been countersigned by one "Frank Murphy, special agent." There is nothing to show the identity of these two Murphys. But, even if it be admitted that it was Frank Murphy, the special agent of the defendant insurance company, who made the statement, still it was clearly incompetent, for it does not appear that in making the statement he was acting for the company, or had power to bind it by such admissions. If a principal was bound by statements made in every casual conversation of his agent, it would be hazardous to send out agents, and few could afford to employ them. This testimony should have been excluded, its admission being error of the most palpable kind.

The next question arises on the exception by defendant to the action of the presiding judge in giving to the jury the instruction copied in the statement of facts. It will be seen, by an examination of that instruction, that the jury were told, in substance, that if Walker was continuously in the employ of the railway company from the issuance of the policy up to the time of the accident, and if the insurance company gave him no notice of the non-payment of his order upon the railway company, he could in that event recover, even though the last installment due on the premium had not been paid. Now, it is by no means clear that the railway company had money of Walker in its hands out of which, by the terms of the order, the last installment could have been paid. On the contrary, there was evidence tending to show that the railway company owed Walker nothing. But, under the law as stated in this instruction, if Walker had collected and used every cent due him by the railway company, yet, if the insurance company failed to notify him of the non-payment of his order, it would be treated as a payment. There seems to be little justice in such a rule, for it is reasonable to suppose that Walker knew what the railway company owed him, and if he left nothing to pay his order, he knew that his order would not be paid, and in that event was not entitled to notice of its non-payment. Certainly, under no reas-

onable view of the law would Walker be allowed to hold the insurance company responsible for the non-payment of his order when he left no funds out of which it could be paid. *McMahon* v. *Travelers Insurance Co.*, 77 Iowa, 229; *Bane* v. *Insurance Co.*, 85 Ky. 677.

If, however, the railroad company retained funds in its hands belonging to Walker, out of which to pay this last installment, and the insurance company either failed to present the order, or, if presented and not paid, failed to return it to Walker, and made no effort to notify him of its non-payment, there would be grounds for holding the company liable, just as if the order had been in fact paid. If wages were due Walker from the railway company for the month upon which the order was drawn sufficient to pay the order, then, in the absence of any complaint or notice from the insurance company to the contrary, he might well presume that the order he had given it for the premium had been paid, or that the insurance company treated the order as a payment, and would not insist upon a forfeiture for non-payment of the premium. Having acted in a way that would naturally lead the insured to believe that his premium had been paid, the company should not, under such circumstances, be allowed to insist on a forfeiture for non-payment. *Lyon* v. *Traveler's Insurance Co.*, 55 Mich. 141; *National B. Association* v. *Jackson*, 114 Ill. 533; *Eury* v. *Insurance Co.*, 89 Tenn. 427.

Now, the instruction did not submit the question to the jury as to whether the railroad company had funds in its hands due Walker for wages for the month upon which the order was drawn, but permitted a finding against the insurance company on account of its failure to return the order and notify Walker of its non-payment, although he may have withdrawn all funds due him by the company, leaving nothing to pay his order, and it was therefore, in our opinion, erroneous and prejudicial to the rights of appellant.

As this case must be retried, we will call attention to another defect in this instruction relating to its form. With the exception above noted, it submits to the jury about every possible issue that could have been raised in the case. Few of

these questions were disputed on the trial, and the incorporation of all of them in a single instruction tended to make it of unusual length, and more or less confusing to the jury. For instance, this instruction submits to the jury the questions whether Walker, prior to his injury, had taken an insurance policy; whether, by the terms of the policy, he was to receive $500 for an accident causing loss of foot by dismemberment; whether he gave an order on the railway company for the payment of the premium; and whether these installments of this premium were paid. These and other questions which were not disputed at the trial, and about which there was no conflict in the evidence, were submitted to the jury, along with the disputed questions of fact. The province of the jury is to determine questions of fact about which there is conflict, and it is unnecessary to submit to them questions about which there is no dispute, and which are conclusively established by the evidence. *Catlett* v. *Ry. Co.*, 57 Ark. 461. By doing so in this case, the other points were obscured and clouded by an excess of verbiage. When necessary to refer to the undisputed facts, the presiding judge can state them to the jury as facts in the case which they must take as established. For instance, in this case the jury could have been told that the suit was based upon an insurance policy issued to Walker by the defendant company, and the terms of the policy bearing on the case could have been explained to them. They could have been further told that Walker gave an order on the railway company for four several sums to cover the premium, and that the first three of these installments had been paid, and that about them there was no dispute. After disposing of these and other undisputed facts, the judge could have submitted to the jury the questions about which there was conflict, and upon which they were asked to decide. In this way long and complicated instructions can be avoided, and the matter presented to the jury in a way that they cannot fail to understand the questions to be decided.

This defect, being one of form only, would not ordinarily be ground for reversal, but we have referred to it because we consider it to be of the highest importance in jury trials that they should comprehend exactly what they are asked to decide,

and they cannot do this unless the questions are clearly pointed out to them by the charge of the presiding judge.

There are other points discussed, but the views of the court about them sufficiently appear from what has been said. For the errors indicated, the judgment is reversed, and the cause remanded for a new trial.

---

## SUTTON *v.* STATE.

Opinion delivered November 11, 1899.

LARCENY—UNEXPLAINED POSSESSION.—A conviction of larceny will be set aside where a boy who was in lawful possession of the property when the same was alleged to have been stolen was not called as a witness at the trial, nor any testimony offered as to how possession passed from him. (Page 156.)

Appeal from White Circuit Court.

HANCE N. HUTTON, Judge.

*Grant Green*, *R. A. Dowdy*, and *Roberts & Roberts*, for appellant.

There is no proof that appellant acquired possession of the mule by stealing it. There must be a felonious intent, to constitute larceny. Sand. &. H. Dig., § 1694; Bish. Cr. Law, 427. The unexplained possession of the mule, even if it had been proved to have been stolen, was not sufficient. 34 Ark. 443; 43 Ark. 39; 54 Ark. 621; 55 Ark. 244; 58 Ark. 576. The court erred in excluding evidence tending to prove an alibi on the part of defendant. 34 Ark. 720; 33 Ark. 316; 43 Ark. 289; 43 Ark. 99; 12 Ark. 782.

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

The evidence is legally sufficient. 58 Ark. 576; 34 Ark. 443. The statements of defendant's father respecting the alibi were not admissible in evidence. They are not part of the *res gestæ*. 43 Ark. 99; 64 Miss. 329–333; 43 Ark. 289.

BUNN, C. J. There is no proof that the mule and trappings alleged to have been stolen were in fact stolen. The boy in lawful possession of the property when the same is alleged to have been stolen was, for some reason unknown to us, not called as a witness in the case, and there is no other testimony as to how possession passed from him. This testimony is a necessary link in the chain, and should have been produced, if possible, and, if not possible, the proper explanation should have been given, and the next best evidence adduced.

Reversed and remanded.

---

67 156
73 602
74 534
75 507

## EASTERN ARKANSAS HEDGE FENCE COMPANY *v.* TANNER.

Opinion delivered November 11, 1899.

1. CONTRACT—PARTIAL PERFORMANCE—RECOVERY.—One who has entered into a contract to build a hedge fence for another, to be paid for in installments conforming to the growth of the hedge, has a right, after making partial performance, to abandon the further performance of the contract where the latter has refused to pay the installments due, and to collect for the work already done at the contract price. (Page 158.)
2. MECHANIC'S LIEN—HEDGE FENCE.—One who has built a hedge fence upon another's land is not entitled to a mechanic's lien on the land, under Mansf. Dig., § 4402, giving to every mechanic, builder, artisan, workman, laborer or other person who shall do or perform any work or labor, or furnish any material, machinery or fixtures for any building, erection or other improvement, upon land "a lien upon such building, erection or improvement, and upon the land belonging to such owner or proprietor upon which the same is situated." (Page 158.)

Appeal from Lonoke Chancery Court.

THOS. B. MARTIN, Chancellor.

*Norton & Prewett*, for appellants; *Jno. J. & E. C. Hornor*, and *Trimble & Robinson*, of counsel.

The failure of appellees to perform their part of the contract authorized appellants to treat it as rescinded. 38 Ark. 174. The contract was severable. 1 Beach, Mod. Law of

Cont. §§ 731, 733. Appellant was entitled to judgment for the work done. 41 S. W. 763. The language, "other improvements," is broad enough to cover the improvement made by appellants. Sand. & H. Dig., § 4731. The mechanic's lien law should be liberally construed. 30 Ark. 568; 32 Ark. 69; 49 Ark. 478. The appellees, being the defaulting parties, appellants are entitled to their lien, the same as if the work were completed. 15 Am. & Eng. Enc. Law, 78; 120 Mass. 58. Equity has jurisdiction to enforce this lien. 30 Ark. 568; 56 Ark. 544.

BUNN, C. J. This is a suit, originally at law, on two promissory notes; answer setting up failure of consideration; amended complaint claiming mechanic's lien, and cause transferred to equity; and, upon the pleadings and exhibits and depositions of witnesses, the cause was tried, and the chancellor dismissed the amended complaint for want of equity.

The plaintiff had contracted to plant and set a hedge fence of bois d'arc for Tanner Bros., and they (Tanner Bros.) were to perform certain duties by way of trimming, pruning and cultivating the hedge while the same was growing to completion. The contract was one to be performed in installments or periods conforming to the growth of the plants and the seasons, and the payments by the defendants were to be made by installments, or periodically, as the work progressed. When payments were due for any of the work done, if not made in cash, notes were given. Such were the notes sued on, given in January, 1892, and one due in March and the other in November next following.

The defendants, having made one or two of the early payments, gave the two notes for the next, and when these became due and had remained unpaid for some time, the plaintiff declined to work further on the contract, because defendants had failed to make the payment, according to the terms of the contract and in July, 1895, about two and a half years after the last of the two notes became due, brought this suit for the work they had done under the contract.

The contract was evidently a divisible one, in the sense that it contemplated periodical part performance on the part of

the plaintiff, and corresponding payments by installments on the part of the defendant, as well as a continuous cultivation, dressing and care of the hedge by them, as the owners, until the hedge should be considered completed or "grown," in the common acceptation of the term.

A majority of us are of the opinion that the giving of the notes in issue, and other evidence, show that up to the time the last one was due, and for some time after, there was no complaint of the defectiveness of plaintiff's work, but that the sole trouble then was that defendants were unable to raise the money to pay off the notes; and that the conduct of defendants during this period was such as to induce the plaintiffs to believe that their work was satisfactory, and no objection would be made to it, and that no new developments were afterwards made to show that defendants had been misled in the acts of approval of plaintiff's work. We think, therefore, that defendants failed to show a partial failure of consideration of the two notes sued on, and in so far the judgment should be reversed. The plaintiff had a right to abandon the further performance of its contract after the defendants had utterly failed and refused to comply with their part, and to collect for work it had done, at the contract price, which is the object of this suit. 1 Beach, Modern Contracts, §§ 731, 733; *Berry* v. *Diamond*, 19 Ark. 264; *Weigel* v. *Boone*, 64 *ib*. 228.

We think the claim of mechanic's lien is not well founded. While the statute in force at the time of performing this work (Mansf. Dig., § 4402) recites that "every mechanic, builder, artisan, workman, laborer or other person who shall do or perform any work or labor upon or furnish any material, machinery or fixtures for any building, erection or other improvement upon land, including contractors, sub-contractors, material furnishers, mechanics and laborers, under or by virtue of any contract, express or implied, with the owner or proprietor thereof, or his agent, trustee, contractor or sub-contractor, upon complying with the provisions of this act, shall have * * * * a lien upon such building, erection or improvement and upon the land belonging to such owner or proprietor upon which the same is situated," yet, since only an acre can be the subject of the lien

given, we do not think the act contemplated a lien on a piece of land of the mere linear dimensions, to secure the payment for such improvement, for such a construction of the act would work incalculable damage to the owner under certain circumstances. Besides, the expression "other improvements," according to a familliar rule of construction, can only refer to improvements of a character similar to those immediately before mentioned.

The decree as to the debt is reversed, and judgment is rendered for the plaintiff against defendants, Tanner Bros., on the two notes; and in other respects the decree is affirmed.

---

## JOHNSON v. SHATTUCK.

67 159
75 390

Opinion delivered November 11, 1899.

1. USURY—BONUS TO BROKER.—Where a money lender agreed to lend $2,000 at 8 per cent. interest, and took a note for that amount, due five years after date, and the borrower received only $1,850, the residue being retained by certain brokers, not shown to have been agents of the lender, no usury is shown. (Page 161.)

2. SAME—MISTAKE.—Where by mistake notes drawing interest at a lawful rate were made to fall due a year too soon, and thereby one of the interest notes given for an amount larger than intended, the loan was not rendered usurious. (Page 162.)

Appeal from White Chancery Court.

THOS. B. MARTIN, Chancellor.

*S. S. Wassell* and *Jos. W. House*, for appellant.

Shattuck & Hoffman and Rives were the agents of the mortgage company, and the first loan was usurious. Interest could not be deducted for more than one year in advance. 60 Ark. 288. The usury was not purged by the second transaction, and appellee took subject thereto. 41 Ark. 331. Further, on the questions of usury and agency, see 54 Ark. 43; 51 Ark. 544.

*Rose & Coleman*, for appellees.

The parties who secured the loan were not the agents of appellee, and the bonus or commission paid to them was lawful. 57 N. W. 311, 51 Ark. 544.

BATTLE, J. This action was instituted in the White chancery court by A. R. Shattuck, as trustee, and A. L. Richardson, against A. T. Jones and his wife, Anne Jones, for the purpose of foreclosing a mortgage which he executed on the 24th of December, 1892, to secure the payment of certain notes. The defendants answered that the notes were void for usury.

The facts, as we glean them from the evidence adduced at the hearing, are, substantially, as follows: In 1887 A. T. Jones applied, through Shattuck & Hoffman, to the British and American Mortgage Company, Limited, for the loan of $2,000. The mortgage company agreed to loan him the $2,000 for five years at eight per cent. per annum interest until paid, and he executed his note for the $2,000 and eight per cent per annum interest thereon from maturity until paid, bearing date the 12th of February, 1887, and payable on the 1st day of December, 1892, and six notes for the installments of interest which were to accrue before the maturity of the note for the principal, and a mortgage to secure the payment of the notes. Jones testified that he received only $1,850, and that $150 was reserved by Shattuck & Hoffman and J. F. Rives, Jr., and that he borrowed the money from Shattuck & Hoffman, and Rives was not his agent. At the maturity of this loan, Jones was unable to pay, and again applied to Shattuck & Hoffman for a new loan, to pay the amount due on the old; and they secured a loan for $2,000 from A. L. Richardson, one of the plaintiffs, two hundred dollars of which was to become due on the first day of December, 1893, two hundred on the first of December, 1894, two hundred on the first of December, 1895, two hundred on the first of December, 1896, and $1,200 on the first of December, 1897. Separate notes were given for each of the installments, each due and payable at the time when the installment for which it was given became due, and bearing ten per cent. per annum interest from maturity until paid, and a note was given for the interest that accrued on each December before the

maturity of the note for $1,200; that is to say, for the interest which accrued on the first day of December, 1893, and on the first day of each of the Decembers in 1894, 1895, 1896, and 1897, making five notes in all, and each bearing ten per cent per annum interest from the time the interest for which it was given accrued until paid. A mortgage was executed to secure the payment of these notes. It declared that, if default was made in the payment of any of them at its maturity, the whole of them, at the option of Richardson, should become due and payable. Other facts not stated are sufficiently indicated in the opinion which follows. A decision was rendered for the amount due on the notes according to the terms of the mortgage, providing that, if this amount was not paid by a day stated, the property mortgaged should be sold to pay the same; and the defendants appealed.

There was no usury in the first loan, nor in the notes and mortgage executed to the British & American Mortgage Company, Limited, to secure the same. Admitting that the mortgage company agreed to loan Jones $2,000, and took his notes for that amount and 8 per centum per annum interest thereon until paid, and that Jones received only $1,850, and Shattuck & Hoffman and Rives held the remainder, $150, there was no usury committed. He did not agree to pay, and the company did not consent to take, more than eight per cent, per annum on $2,000,—that is $160,—for interest, annually. Jones admits that he received $1,850. It was lawful in this state to take any rate of interest not exceeding ten per cent. per annum. Ten per cent. per annum on the $1,850 would be $185. The company was to receive only $160, lacking $25 per annum of making as much as it could lawfully take on the $1,850.

But appellants insist that the one hundred and fifty dollars retained by Shattuck & Hoffman and Rives was a part of the consideration paid for the first loan, and that, added to the eight per cent per annum interest which he agreed to pay, rendered that loan usurious. This contention is based upon the assumption that Shattuck & Hoffman and Rives were the agents of the British & American Mortgage Company, Limited, in

making the loan, and that the one hundred and fifty dollars were compensation to them for the services rendered to the principal. But the assumption is not true. Jones did not know in what relation Shattuck & Hoffman and Rives stood to the mortgage company. He knew that he applied to them to secure a loan, and that he received $1,850. He exhibited a statement in which it is shown that he was indebted to Shattuck & Hoffman in the sum of one hundred and twenty dollars, and to Rives in the sum of thirty dollars, and testified that these sums were taken out of the $2,000, which the Mortgage Company agreed to loan to him. The evidence shows that a part of the business of Shattuck & Hoffman and Rives was to secure loans of money for persons desiring to borrow; that Jones applied to them, and that Shattuck & Hoffman, as his agents, applied to the mortgage company for a loan of $2,000 to Jones, and received that amount for him; that he executed notes therefor and interest thereon to the mortgage company; and that Shattuck & Hoffman and Rives, or either of them, were not its agents for any purpose. The appellants attempted to show, by circumstantial evidence, that they were, but the evidence adduced for that purpose is entirely consistent with that which shows the contrary. Hence we find that the payment of the $150 to them, in addition to the eight per cent. interest, did not constitute usury.

The second loan was for $2,000 at ten per cent. per annum interest. It was made by A. L. Richardson, plaintiff, in 1892. No commission or expense of any kind was charged to Jones, or paid by him, on account of it. The papers evidencing and securing it were incorrectly written. The notes were correctly described in the mortgage, but in writing the notes the first note was dated December 24, 1892, and was made due on the first of December, 1892, and all the other notes, following the first note as a guide, were, each, made to fall due one year too soon, and the note for interest for the fractional year was given for about two dollars too much. The error in the amount was caused by a mistake in the calculation of interest. We think that the evidence clearly shows that there was no agreement to pay, nor intention to receive, more than ten per cent.

per annum in the contract for the last loan, and that all appearances to the contrary in the writings evidencing the contract was the result of mistake, and that the contract, as intended to be made was not, usurious.

Decree affirmed.

67 163
f78 266
78 270

## STATE v. BACH LIQUOR COMPANY.

Opinion delivered November 11, 1899.

1. WITNESS—PRIVILEGE.—An infant over the age of 18 years, called to testify against a saloon-keeper indicted for selling liquor to him without the written consent of his parent or guardian, is privileged to refuse to answer where his answer would tend to establish his guilt of another crime, namely, procuring liquor without informing the saloon-keeper that he was a minor. (Page 166.)
2. SELLING LIQUOR—EVIDENCE.—Evidence that a minor drank beer in defendant's saloon, that he carried no beer in there with him, and that there was no one in the saloon at the time except the bartender, is not sufficient to sustain a conviction of selling liquor to such minor. (Page 169.)
3. NEW TRIAL—SURPRISE.—It was not error to refuse the state a new trial in a criminal case on the ground of surprise, in that the witness upon whose testimony the indictment was found claimed his constitutional privilege of not incriminating himself, if the state's attorney failed to use due diligence to ascertain before trial whether the witness would claim his privilege and to make application for time to obtain other witnesses. (Page 169.)

Appeal from Jackson Circuit Court.

FREDERICK D. FULKERSON, Judge.

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

The witness *alone* can make the objection that his answer to a question would tend to incriminate him. 13 Ark. 360. Unless witness had failed to inform the vendor of the liquor of his minority, he was guilty of no offense in buying it. Sand.

& H. Dig., § 1814. Witness and the appellant were "*concerned* in the commission of a crime or misdemeanor," within sec. 2909, Sand. & H. Dig., and hence were protected by said statute from having their testimony used against themselves. 13 Ark. 307; 45 Am. St. Rep. 127; 20 Ark. 106; 14 Ark. 539; 27 Am. St. Rep. 378. Further, on the privilege being a personal one, see:—33 N. E. 656; Clark, Cr. Prac. 546 n.; McKelvey, Ev. 305.

*M. M. Stuckey*, *Jos. M. Stayton* and *Gustave Jones*, for appellees.

As to privileges of witnesses, see: 13 Ark. 310; 29 Am. & Eng. Enc. Law, 839. The answer to the question asked would have subjected witness to persecution, under secs. 1814, 1816, Sand. & H. Dig. Cf. sec. 1812, *ib.*

BATTLE, J. On the 11th day of July, 1899, the appellee, a corporation, was indicted by a grand jury of the Jackson circuit court for selling liquor to Ira Erwin, a minor, without the written consent of his parent or guardian. The indictment contains two counts. In the first count the offense was alleged to have been committed as follows: "The said Bach Liquor Company, on the 1st day of June, 1899, in the county and state aforesaid, did unlawfully sell and give away, and be interested in the sale and giving away of, ardent liquors, to-wit: one gill of whiskey to one Ira Erwin, a minor, without the written consent of his parent or guardian of the said Ira Erwin, against the peace and dignity of the State of Arkansas." In the second count it was alleged to have been committed as follows: "The said Bach Liquor Company, on the 1st day of June, 1899, in the county and state aforesaid, did unlawfully sell, and be interested in the sale of, ardent, malt and fermented liquors, to-wit:, one gill of beer, to Ira Erwin, a minor, without the written consent of the parent or guardian of the said Ira Erwin, against the peace and dignity of the state of Arkansas."

The defendant was arraigned, and pleaded not guilty. A jury was empaneled to try the issue joined. In the trial it was admitted that "the Bach Liquor Company is a corporation duly

organized under the laws of the State of Arkansas for the purpose of selling liquor;" that Adam Bach is its president, "and Alex Lockard is secretary and treasurer;" and "that it owns the Dixie Bar in Newport, Jackson county, Arkansas."

Ira Erwin, a witness in behalf of the state, testified that he was nineteen years old; and that the defendant did business at the "Dixie Bar." He was then asked: "State whether or not, at any time within twelve months before July 11, 1899, * * you bought any liquor there?" He refused to answer the question, because he could not do so without incriminating himself; and the court refused to compel him to answer, "because it tends to incriminate him of a different and distinct offense, that of purchasing liquor, he being a minor over the age of eighteen years." The witness further testified that within the twelve months immediately preceding the 11th of July, 1899, he drank beer at the "Dixie Bar," in the defendant's saloon; that there was no one in the saloon at the time except the bartender that he could remember, and that on that occasion he did not carry any beer in there with him. There being no other evidence adduced, the court directed the jury to return a verdict of not guilty, which they did; and the court rendered judgment accordingly.

The attorney for the state moved to set aside the verdict for a new trial upon the ground, among others, that he was surprised by the refusal of Ira Erwin to answer the question propounded to him; that the indictment was based upon his testimony; that he (the attorney) had no reason to believe that the witness would refuse; that at the time of the trial he did not know of any other witnesses by whom he could prove that the defendant had sold beer to Erwin, but he had since then discovered witnesses by whom he could make such proof; that he had used due diligence to procure all available testimony for the state, and had failed to find out the newly discovered witnesses, for the reason that the indictment was filed in court on the 11th day of July, 1899, and the trial was on the next day, and in the meantime he was occupied in the trial of the accused in other cases. The motion was denied, and exceptions were saved.

The attorney for the state contends that the judgment of the circuit court should be reversed for the following reasons:

First. Because the court erred in failing to compel the witness, Erwin, to answer the question propounded to him.

Second. Because the court erred in directing the jury to return a verdict of not guilty.

Third. Because it erred in refusing to grant a new trial on account of the newly discovered testimony.

*First.* The defendant insists that the witness could not lawfully be compelled to answer the question which he refused to answer, because the constitution of the state declares that no one shall be compelled "in any criminal case to be a witness against himself." Const. 1874, art. 2, § 8. The effect of this prohibition, in the absence of a statute, is to prevent the compulsion of any one to give testimony in a criminal case which could be used to convict him of a crime. In *Quarles* v. *State*, 13 Ark. 310, this court said that the effect of a similar clause in the constitution of 1836 was to prohibit "any law by which a witness in any prosecution shall be compelled to disclose criminal matters against himself, so long as it might remain lawful that such disclosures could be afterwards produced in evidence against him, in case he, in turn, should become the accused party; otherwise, the power to compel self-accusation would still remain in the legislature, to be exerted in this indirect manner." Such is the effect of the constitution of this state now in force. But the attorney for the state says that the testimony of the witness which the state sought to elicit by the question propounded could not have been used against him in any criminal prosecution, and for that reason he should have been compelled to answer. He says so because a statute of this state provides as follows: "In all cases where 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*."

In *Quarles* v. *State* the court held that this statute is constitutional, and that "where two persons are concerned in the

commission of a crime (as in gaming), one of them may be compelled, under it, "to give evidence on the trial of an indictment against the other, because by the provision of the statute the testimony given by such witness shall in no instance be used against him in any criminal prosecution for the same offense, and thus he is protected from self-accusation, and his common law and constitutional privilege [is] secured to him." In so holding the court said as to the privileges of a witness under the statute: "When the course of examination would lead to any inquiry as to any matter materially connected with any crime or misdemeanor other than that which was the subject of direct inquiry before the court—as when such matter might be indispensable for the elucidation of some material matter already produced in evidence by the witness and directly involved in the issue—the witness could claim his privilege as to such matter as fully as if he had been enquired of in chief touching such other crime or misdemeanor."

In *Pleasant* v. *State*, 15 Ark. 624, the defendant was indicted for an assault with intent to commit rape. A witness in the trial was asked a question which might have implicated him in the compounding a felony, and thereby discredited him. The court said that, if this was the object, "though the question might be put, the witness was privileged from answering" it, but, had the witness been an accomplice of the defendant in the alleged assault, he, not being indicted, could have been compelled to testify on the trial of the defendant, and his testimony could not have been used against him afterwards; "but, if he chose to disclose his connection with another and distinct offense, he would not be protected; and therefore could not be compelled to do it."

The word "concerned" in the statute is used in the sense of the word "participants;" for it is he who is implicated in the commission of an offense that is protected by the statute against his own testimony. Substituting "participants" for "concerned," the statute reads as follows: "In all cases where two or more persons are jointly or otherwise participants in the commission of any crime or misdemeanor, either of such persons may be sworn as a witness in relation to such a 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." In relation to what crime shall he be sworn? Manifestly, the crime in the commission of which he participated with the defendant in whose trial for which he is sworn. In what criminal prosecutions is he protected against his testimony? Obviously, criminal prosecutions for the offense of which the defendant was accused, and in relation to which he was sworn to testify,—"the same offense." His protection is limited. He is not protected against the use of his testimony in other prosecutions. To the extent of the protection offered by the statute, he can be compelled to testify as to facts criminating himself; but beyond this he cannot be required to go in that direction, without violating the constitution.

In this case the statute under which the defendant was indicted is as follows: "Any person who shall sell or give away, either for himself or another, or be interested in the sale or giving away of any * * * liquors * * * to any minor, without the written consent or order of the parent or guardian, shall be deemed guilty of a misdemeanor," etc. Sand. & H. Dig. § 1812. The offense against the prosecution for which the witness, Erwin, sought to protect himself by refusing to testify is defined by the statutes as follows: "It shall be unlawful for any minor, over the age of eighteen years, to procure from any saloon * * * attache thereof, any * * * liquors, * * * without first informing said saloon * * * keeper or attache, from whom he or she shall make such purchase, that he or she is a minor. *Id.* § 1814. "Any minor violating this act shall be deemed guilty of a misdemeanor," etc. *Id.* § 1816. The offenses defined by the two statutes are separate and distinct; and, under the constitution and laws of this state, a witness in a prosecution against a defendant for the former offense cannot be required to make disclosures which might be used to prove a link in the chain of evidence necessary to convict him of the latter offense. 1 Greenleaf, Evidence (16 Ed.), § 469d.

The state in this case endeavored to prove by the witness that he purchased beer from the defendant, which is one fact

necessary to prove to convict the witness of the latter offense. It was his privilege to refuse to answer the question by which the state sought to elicit evidence to establish that fact, on the ground that by so doing he would criminate himself.

*Second.* The court did not err in instructing the jury to return a verdict of not guilty. The evidence adduced was not sufficient to establish a sale of beer, or a sale or gift of whiskey. It could raise only a strong suspicion, and suspicion is not proof.

*Third.* The court did not err in refusing to grant the state a new trial on the ground of newly discovered evidence. The attorney for the state ought to have known that the witness could not have been compelled to answer the question which he refused to answer, and ought to have endeavored to ascertain, before going into trial, whether he would do so, and, ascertaining that he would, made application to the court for time to procure other witnesses. The court, we believe, under the circumstances, would have granted the additional time. He failed to use diligence.

Judgment affirmed.

RIDDICK, J., dissents.

---

## HAYS v DICKEY.

Opinion delivered November 11, 1899.

1. PLEADING—EFFECT.—Where, in an action for money had and received by an administrator to recover the amount of a note collected by defendant for the benefit of plaintiffs' intestate, defendant alleged in his answer that intestate, before maturity and for value, transferred and delivered said note to defendant, such answer is in effect a plea of payment. (Page 172.)

2. NEGOTIABLE NOTE—POSSESSION AS EVIDENCE OF TITLE.—One who holds a note which has been indorsed to him by the payee "for value" is presumed *prima facie* to be its owner, and such presumption is sufficient to overcome the burden assumed by him in a plea that he has paid for the note. (Page 172.)

Appeal from Clark Circuit Court.

JOEL D. CONWAY, Judge.

STATEMENT BY THE COURT.

This is a suit by A. B. Dickey, as administrator of the estate of Charity A. Robinson, deceased, against John Hays upon an account which contained among other items the following:

"1895. To rents of upper place for 1895 from John Hays, $325.00."

Hays answered denying that he was indebted to the administrator in any sum, and by way of cross-complaint alleged that appellee's intestate, Mrs. Robinson, at the time of her death was indebted to him in the sum of $348.31 (exhibiting his account), for which he asked judgment. A reply was filed by the administrator to the cross-complaint, in which he disclaimed any knowledge of the matters set up therein.

There was a jury trial, verdict and judgment in favor of the administrator for $86.51, and this appeal was prosecuted.

*Greeson & Tompkins*, for appellants.

The failure of the administrator to call appellant to prove the facts about the note raises the presumption that it would have been against him. 19 Am. & Eng. Enc. Law, 70, 338; 55 Ark. 386. Possession of personal property is *prima facie* evidence of title. 11 Ark. 279; 42 Ark. 310; 1 Greenl. Ev. § 34 and note; 55 Ark. 63. The endorsement in full transferred the title to the note. 19 Am. &. Eng. Enc. Law, 79; 4 *id.* (2 Ed.) 266 b; 2 Wall. 121. The burden is on the one who assails the right of the endorsee in possession. 19 Am. & Eng. Enc. Law, 79, n. 3; 13 Ark. 161; 3 Kent's Comm. §§ 77, 79; 63 Ark. 92.

*J. H. Crawford*, for appellee.

There being no plea of payment, proof of same was inadmissible. 33 Ark. 307. The burden of proving it is on the one making the plea. 32 Ark. 593; 64 Ark. 466.

WOOD, J., (after stating the facts). The only ground urged for reversal here is that the court erred in refusing to instruct the jury as follows: "If you find from the evidence that the item of $325, as charged in plaintiff's complaint, was represented by a note given to C. A. Robinson, and that the same was duly indorsed and transferred before maturity to John Hays, it is *prima facie* evidence of title in him, and the presumption is that he took it for value;" and in giving the following: "If the jury believe that John Weeks rented from the plaintiff's intestate the upper place for $325, and gave to her his note therefor, and that she immediately transferred the same to defendant, then the defendant must account to plaintiff for same, and the burden of proof is upon defendant to show payment therefor."

The item charged in the account is for the purchase money of this note. The testimony bearing on the note is as follows:

John Weeks: "I rented what is known as the 'Upper McLain Place' for the year 1895. I made a contract with Mrs. C. A. Robinson, and gave a note to her for $325 to cover it. She transferred it to Mr. Hays, and I paid him. It was then delivered to me, but since that time I let him have it, and am told it is lost."

Tom Hays: "I remember the execution of the note mentioned by John Weeks. Mrs. Robinson, Mr. Weeks and my father came to the store, and I wrote the note at their dictation. Mr. Weeks signed it, and then on the back of it Mrs. Robinson signed the indorsement, 'I hereby transfer and assign the within to John Hays, for value.' The note was then handed to my father, and we made no entry of it on the books of the store, as we were not instructed to do so. I did not see it again until after it was paid, when Mr. Weeks gave it back to my father, and in some way we have misplaced it."

Hays in his answer alleged "that said C. A. Robinson in her lifetime, before maturity and for value transferred, assigned and delivered said note to this defendant."

The testimony of Tom Hays shows that the note was endorsed by Mrs. Robinson: "I hereby transfer and assign the within to John Hays for value," and was handed to his father.

The answer of Hays, *supra*, was substantially a plea of payment; for, if he paid value for the note when it was transferred to him, the note was thereafter his property, and he was not indebted to the administrator for same. The fact that the note was indorsed to Hays "for value," and delivered to him, undoubtedly raised the *prima facie* case that he had paid for same, and was the owner thereof. *Hutchinson* v. *Phillips*, 11 Ark. 279; *Titsworth* v. *Spitzer*, 42 Ark. 310. This status of the answer and the proof meets every requirement of the law to the effect that there must be a plea of payment before proof of same can be admitted, and, after such plea, that the burden is upon him who pleads payment to show it. *Robinson* v. *Woodson*, 33 Ark. 307; *Mann* v. *Scott*, 32 Ark. 593; *Blass* v. *Lawhorn*, 64 Ark. 466.

It follows that the court erred in its charge. The judgment is therefore reversed, and the cause remanded for new trial.

---

67 172
f77 126

## JOHNSTON v. MILLER.

Opinion delivered November 18, 1899.

1. GAMBLING—DEALING IN MARGINS.—Evidence that an alleged indebtedness was for advances made in furtherance of dealings in margins on cotton is not sufficient to prove the transaction a gambling one, under Sand. & H. Dig., § 1634, providing that "the buying or selling, or otherwise dealing in what is known as futures, either in cotton, grain, or anything whatsoever, with a view to profit, is hereby declared to be gambling." (Page 176.)

2. SAME.—The fact that a broker purchased 500 bales of cotton, to be delivered in the future, for one whom he knew to be financially unable to pay for them at the time the contract was to close, and the further fact that the buyer notified the broker that he was buying the cotton merely for the profit he might make out of the transaction, are not sufficient to show a knowledge on the broker's part that the transaction was a speculation on the turn of the market, without actual delivery being contemplated. (Page 180.)

Appeal from Crawford Circuit Court.

JEPHTHA H. EVANS, Judge.

*Oscar L. Miles*, for appellant.

By sending the order to appellant, appellee conferred upon him the right to deal according to the rules and usages of the New York Cotton Exchange, and such rules and usages enter into the contract of sale in this case. 149 U. S. 481. The burden was on appellee to show that the contract was a gambling transaction, and that both parties so understood the transaction. *Ib.* The appellee is bound to repay appellant for his necessary losses and expenditures incurred in the performance of the agency. *Ib.* Further on the point that the gambling intent must be mutual, see 79 Ill. 351; 36 Fed. 54; 6 Mo. App. 269; 108 U. S. 269; 30 Fed. 197.

*E. B. Pierce*, for appellee.

The question in all such cases as this is the intention of the parties. 47 Ark. 194; 110 U. S. 511. The circumstance that appellant was willing to purchase cotton to the value of $25,000 merely upon the order of a stranger who had deposited only $500, and about whom he knew nothing, raises a strong presumption that no actual purchase and delivery of cotton was contemplated. 3 S. W. 152; 8 Am. & Eng. Enc. Law, 1008. The case at bar does not fall within the rule announced in 149 U. S. 481, because in that case the evidence failed to show that either party intended the contract as a wagering or gambling transaction. In an illegal transaction, the agent can recover neither advances or commissions. 141 U. S. 490; 11 U. S. 499, 510; Story, Ag. §§ 330, 340; 56 Ark. 307. Appellee was the real vendor, and one of the principals in the transaction. 38 N. J. Eq. 229; L. R. 7 H. L. 530. As to application of usages of board of trade, as between the broker and his customer, see: L. R. 7 H L. 802, 828.

BUNN, C. J. This is an action in the Crawford county circuit court, by the appellant, R. J. Johnston, against the appellee, R, J. Miller, for services rendered and money paid out at his request, amounting to the sum of $618.75. The cause was submitted to the court sitting as a jury, and upon the facts

in evidence the court held the law to be with the defendant, and adjudged accordingly, and the plaintiff appealed.

This is a suit, in brief, in which the defense is a dealing in futures, or that the contract was a wagering contract. The defendant, Miller, resided in Arkansas, and authorized the plaintiff, Johnston, a cotton broker in New York City, to buy for him a certain number of bales of cotton, to be delivered in the future, or, as the defendant claims, not in fact to be delivered, but that the differences in values or margins should be kept up until the time set for the pretended delivery, and then the contract to be closed on settlement of this difference, the expenses, and so forth.

The complaint is as follows, viz.: "Comes the plaintiff, R. J. Johnston, and complaining of the defendant, R. J. Miller, says: That on the——day of ———, 1895, the plaintiff, R. J. Johnston, was doing business in the city of New York, as a broker, cotton factor, and commission merchant, and that on that day defendant, in the regular course of business, became indebted to the plaintiff in the sum of $618.75; that defendant became so indebted to the plaintiff for labor done, services rendered, and for money paid out by plaintiff during the month of ——, 1895, at the instance and request of defendant; that such sum is now due and unpaid. Wherefore plaintiff prays that he have judgment for said sum of $618.75, and his costs in this behalf laid out and expended."

And the defendant answered as follows, viz.: "(1). Now comes the defendant, R. J. Miller, and for his answer to plaintiff's complaint says that he denies that he is indebted to the plaintiff in the sum of $618.75, or in any other sum, and denies that said plaintiff, during the month of ———, 1895, or any other months, rendered him any service, performed any labor for him, or advanced any money for defendant, at his instance and request. (2.) The said defendant says that the claim presented against him by said plaintiff is a false charge, made solely for the purchase of future cotton sold, in which the said R. J. Johnston was never authorized to make advancements or perform any labor for said defendant, and any advancement so made or labor so performed were without authority, and the

same was for a simple speculation in cotton market results, and never contemplated any delivery of cotton, but was simply a wager, contrary to law, and cannot be enforced, because against public policy and contrary to law. (3.) That any advancements so made by the plaintiff were made on his own responsibility and for his own benefit, and without the knowledge or authority of said defendant, and any losses accruing, if any, were caused by carelessness, negligence and lack of skill on the part of said plaintiff. (4.) Said defendant further says that, even if said advances had been made and labor performed for defendant at defendant's request, as alleged by plaintiff (all of which said defendant specifically denies), and if said transaction was not contrary to law and against public policy, the said plaintiff could not recover from said defendant, because, under that theory of the case, said plaintiff was combining within himself the opposite interests of a purchasing agent purchasing from himself without the knowledge or consent of his principal."

It is unnecessary to discuss this last proposition, as the evidence shows the relation of plaintiff to defendant, and the true character of the transaction all through. Whether the contract was a legitimate or illegitimate one, whether it was allowable under or prohibited by the law, it is manifest, in so far as the services rendered and money expended, the value of the same is established by the evidence, and is correctly stated. There is no question on that point, except that it is contended by appellee's counsel that, by reason of the delay of plaintiff in closing out the deal after being instructed to do so, great loss accrued to defendant. The telegram from defendant to plaintiff reached the latter on Sunday evening, and he obeyed it on Monday as soon as the exchange opened, as is shown in the evidence. This can hardly be considered an unreasonable delay, especially in view of the fact that plaintiff had been for some days previously endeavoring to get instructions from defendant but without success.

The evidence shows that this contract was of such a nature that it was not possible for defendant to cease to perform his part of it at any time, and at any stage, and thus relieve him-

self of liability, for in attempting to do so he would probably repudiate the responsibility the plaintiff had properly assumed for him, and such a course would greatly damage plaintiff. The truth is there is really but one question at issue in this case, and that is, whether or not the contract was in fact one made in violation of law, or contrary to public policy, as alleged in the defendant's answer, especially in the second paragraph thereof.

Was the contract in violation of the laws of this state, or contrary to its public policy? Whether or not it was contrary to public policy need not be discussed here, for the question is altogether one of positive law in this state, for we have a statute (Sand. & H. Dig.) on the subject which reads as follows, viz.: "Sec. 1634. The buying or selling or otherwise dealing in what is known as futures, either in cotton, grain, or anything whatsoever, with a view to profit, is hereby declared to be gambling." And the next section of the Digest makes "dealing in futures" a misdemeanor, and fixes the punishment; and it thus devolved upon the courts to declare what is "dealing in futures," under this act.

In *Fortenbury* v. *State*, 47 Ark. 188, which was the first case in this court in which said statute was construed, we said (quoting from the syllabus): "The act of March 30, 1883, to prohibit dealing in futures is not in restraint of trade. It does not prevent contracts for future delivery, when entered into in good faith and with an actual intention of fulfillment, but is intended to suppress mere speculations upon chances, when the grain, cotton, or stocks dealt in exist only in the imagination, and where no delivery is contemplated, but the parties expect to settle upon the difference in the market."

In *Preston* v. *Cincinnati, C. & H. V. R. Co.*, 36 Fed. Rep. 54, it was held that a mere dealing on margins in the board of trade is not sufficient to show a gambling transaction.

It makes little difference what may be the express terms of the contract, for it is the real intention of the parties in carrying it out that becomes the subject of inquiry. Whether a real or fictitious delivery is to be made is what we are endeavoring to discover, for this makes the contract lawful or unlaw-

ful, as the case may be; and this question, of course, can only be determined by the evidence—by the facts in each case.

The evidence in the case at bar shows, substantially, that the defendant, a citizen of Arkansas, desiring to purchase some cotton futures in the city of New York, to be delivered on a future day, entered into a correspondence with plaintiff on the subject, and this correspondence resulted in an agreement between them that plaintiff would buy 500 bales of cotton for defendant, to be delivered in December following, and this was accordingly done, the defendant depositing $500 in the local banks for the purpose of the purchase. This purchase was made under the rules and regulations of the New York Cotton Exchange, which are in conformity to the statute law of that state on the subject of dealing "in futures," the plaintiff being a member of said cotton exchange, and shows that he acted in all things strictly in accordance with its rules and regulations, and the only grounds to conclude that he did not, if there are any, are the facts and circumstances attending the transaction. There does not appear to be any controversy as to whether the New York law is in conflict with ours, so as to render it contrary to our policy to enforce the New York statute. They are substantially the same, so far as we can see. Nor does there seem to be any contention that the rules of the cotton exchange are in conflict with the statute law of that state. This narrows the inquiry to whether or not the parties, taking advantage of the mere letter of the law, have violated its spirit in fact.

At the conclusion of the testimony, the plaintiff asked the court to make the following findings of fact, which the court, in a sense, declined to do, viz.:

"(1.) R. J. Johnston, the plaintiff, was a cotton factor and broker, doing business in the city of New York, as a member of, and on the floor of, the New York Cotton Exchange. All business done by the said Johnston was done in strict conformity with the rules and regulations of the New York Cotton Exchange, and the business done by the said Johnston, as agent of the defendant, R. J. Miller, was done in all respects in

strict conformity with the rules and regulations of the New York Cotton Exchange.

"(2). R. J. Miller is a wholesale grocer, doing business in the city of Van Buren, Ark. On the 30th day of September, 1895, the said R. J. Miller telegraphed to the said R. J. Johnston, in the city of New York, to buy for him (Miller) 500 bales of cotton for future delivery in the month of December, 1895. This telegram gave no specific instructions to said Johnston, but only embodied the request of Miller that Johnston buy for him the said cotton for future delivery in said month of December. This telegram was received by Johnston in the city of New York, and was an order to purchase at the discretion of said Johnston the cotton required. Several other telegrams passed to and fro between the said Miller and the said Johnston, and finally, on October 12th, the said Miller wired positive instructions to said Johnston to buy 500 bales for future delivery in the month of December. This telegram was received by Johnston, and on the opening of the market, the 12th day of October, 1895, he bought on the floor of the New York Cotton Exchange, as a member of the New York Cotton Exchange, and from a member of said exchange, for the account of the said Miller, the 500 bales of cotton for future delivery in the month of December, as instructed by Miller.

"(3.) That said Miller, at the time of telegraphing his first order to Johnston, placed in the Citizens' Bank, of Van Buren, Ark., $500 to the credit of said Johnston, to be used by the said Johnston, according to the rules of the New York Cotton Exchange, as a margin for the purpose of covering the possible loss from a decline in the market. The cotton market, after this purchase, fluctuated, rising first and then falling. As the market rose, Johnston telegraphed Miller the situation of the market; as it declined, he again telegraphed Miller the situation of the market. On the 17th of October, Johnston wired Miller that the decline was sharp, and to please deposit an additional margin. This margin he had a right to call for, under the rules of the New York Cotton Exchange. Miller did not reply to this telegram. On October 18th, Johnston again telegraphed Miller that the break was on, to

please deposit additional margin. Miller did not reply to this telegram. On October 19th, Johnston again telegraphed Miller that cotton was declining rapidly, and to please deposit additional margin, and to have the bank telegraph the amount. October 19th was a Saturday, and on Saturday the New York Exchange closes at noon. On October 20th, at night, Miller telegraphed Johnston to sell the 500 bales of December cotton when the margin was exhausted. This telegram reached Johnston on the morning of the 21st, and on Monday morning, as soon as the cotton exchange opened, the said Johnston sold the said cotton for Miller, because on that morning the market had declined to a point much below what was necessary to exhaust the margin which Miller had placed to Johnston's credit originally. The margin was not exhausted on October 17th, and was not exhausted on October 18th, and was not exhausted on October 19th, when the cotton exchange closed at 12 o'clock noon. When the cotton was sold on the instruction of Miller on the morning of October 21st, a loss of $617.65 was incurred by Johnston for Miller's account.

"(4.) The New York Cotton Exchange is a corporation regularly created by an act of the legislature of the state of New York, specifically authorized to deal in cotton and other commodities, both for present and future delivery. The by-laws of the New York Cotton Exchange, fixed by that body in pursuance with the act of the legislature granting its charter, are all authorized by the law of that state, and do not contravene any principle of law or public policy there in force.

"(5.) The rules of the New York Cotton Exchange required that R. J. Johnston, in making this transaction for the account of R. J. Miller, or, in fact, any patron of his, made himself responsible for all losses which might be incurred by reason of any transaction which the said R. J. Johnston made for any customers of his, and in this case the said R. J. Johnston actually lost, without fault on his part, the sum of money sued for, while carrying on the transaction authorized by his principal, R. J. Miller."

Instead of finding as asked by the plaintiff, the court found as follows, to-wit: "The court finds, from the evidence, the

facts to be that the parties to the transaction out of which this suit grows did not, at the time of entering into the agreement, intend, the one to deliver, and the other actually to receive, the 'five hundred Decembers' ordered to be bought, but only contemplated a settlement by margins or differences, or by some method other than by actual delivery and receipt of the cotton, which actual delivery and receipt of cotton was never contemplated by the parties to the transaction."

The findings of fact which the plaintiff asked the court to make appears to us to be a concise and fair statement of the facts in evidence, and we cannot do better than to adopt that statement as substantially correct, which we do to avoid an unnecessary recital of the evidence. Nor do we conclude that the trial court found any objection to the correctness of this statement, but it seemed to have been the theory of the court that it would be better to state only its conclusions upon the facts, which he did as stated above.

The facts show that the plaintiff did nothing except in apparent strict conformity to the rules and regulations of the cotton exchange. Neither does it appear from the testimony that he at least was intending to do otherwise than to conform to those rules and regulations, whatever the defendant may have intended. *Williams* v. *Tiedemann*, 6 Mo. App. 269; *Roundtree* v. *Smith*, 108 U. S. 269; *Bangs* v. *Hornick*, 30 Fed. Rep. 97.

It was sought to be shown that plaintiff intended to violate the law by the fact that he had knowledge of the financial inability of the defendant to pay for as much as the value of 500 bales of cotton at the time the contract should close. But that fact in a case like this argues nothing; for, if the contract was in fact one of actual delivery, the defendant would have had the cotton itself to pay its value at the time or the purchase price thereof, and his financial ability, aside from this, would only have to be sufficient to pay the difference between what he had agreed to pay and what the cotton was really worth when the transaction was closed.

Again, it is contended that the statement of plaintiff, in his correspondence with defendant, that he would make some

money out of the transaction was a circumstance indicating knowledge on the part of plaintiff that the whole thing was a mere gambling scheme. That circumstance could lead to no such conclusion, for the mere making of money is never an evidence that the method of making it is unlawful.

Our attention is called to the doctrine of *Phelps* v. *Holderness*, 56 Ark. 300. The evidence in that case showed plainly that Holderness was merely speculating on the margins, and never expected any real delivery to be made. This is what Miller says of himself in the case at bar, but the intention of Holderness in the one case, and that alone, could not have bound Phelps, nor can the intention of Miller in this case bind Johnston. Nor was the Phelps–Holderness case decided on any such doctrine. But the court in that case found that "Phelps was privy to the gambling contract—a *particeps criminis*"—and can recover no losses incurred in forwarding the transaction. Quoting from the record of the testimony, this court said, also, in that case: "Holderness testifies that it was never his intention to receive or deliver any cotton. The correspondence shows that Phelps was willing to buy or sell at his own risk an unlimited quantity of cotton for Holderness, without any inquiry as to his financial ability to meet the obligation he might enter into, provided only Holderness would put up the necessary 'margins.' That is a circumstance tending to show that he did not understand Holderness' offer to deal through him in 'futures' upon 'margins' as a *bona fide* proffer to buy cotton for actual delivery." His willingness to buy an unlimited amount was the real circumstance. In that case there was little or no direct evidence going to show what Phelps' understanding of the matter was, or what his intention was, and little as to the rules under which he managed 'futures' transactions for others, and, of course, any circumstance that would throw light on his intention would be admissible; but such a circumstance could possibly have little or no weight at all to contradict or overturn other direct evidence of the broker's methods of dealing, which at least show his intent. In the case at bar Johnston shows how he was dealing in this matter, and upon what principle; and it is impossible for us to conclude that the principle upon

which he dealt—the rules and regulations of the cotton exchange—if honestly adhered to, would lead to an infraction of the law. There is nothing in the evidence to show that he was doing anything else than adhering to these rules, and every presumption is in favor of the conclusion that he was acting in good faith; for otherwise he would not only lose the protection of the law, but his position as a member of the exchange. These are some, but not all, of the facts that differentiate this case from that of Phelps against Holderness.

The testimony of Johnston as to the rules and regulations of the New York Cotton Exchange, and his conduct of the business thereunder, is as follows, viz.:

"Interrogatory 9. If you state that you bought for R. J. Miller, of Van Buren, Ark., 500 bales of cotton in October, 1895, for December delivery, please state whether or not this transaction was made on your part in strict conformity to the rules of the New York Cotton Exchange. A. The cotton bought for Miller on October 12, 1895, was in strict conformity with the rules of the New York Cotton Exchange. Interrogatory 10. Was it your purpose, in engaging in this transaction as the agent of R. J. Miller, to violate any rule of law, good morals, or public policy? A. As the agent of Miller in buying the cotton for him, it was not my purpose to violate any rule of law, good morals, or public policy. Interrogatory 11. In buying and selling this cotton for the said R. J. Miller, was it not your understanding that actual receipt of the cotton was contemplated by Miller in the month of December? A. In buying and selling the cotton for Miller, cannot say what his intention was as to receiving the cotton in the month of December, but it was my understanding, and the rules of the New York Cotton Exchange contemplate delivery of cotton on every contract by the seller, and the receiving of cotton by the buyer, and the seller of the cotton, under the rules of the exchange, would be compelled to deliver the cotton to me, as Miller's agent, if Miller instructed me to receive it, when I made demand for the cotton on the last day of the month. Interrogatory 12. Do you, in buying and selling cotton for future delivery, ever make any contract other than those which

are recognized by the rules and regulations of the New York Cotton Exchange? A. In buying and selling cotton for future delivery, I never make any contract other than those which are recognized by the rules and by-laws of the New York Cotton Exchange. Interrogatory 13. Do the rules and regulations of the New York Cotton Exchange recognize any contract except for selling and purchasing cotton to be actually delivered? A. They do not. Interrogatory 14. Was it or not your understanding, at the time you bought the 500 bales of cotton for the account of the said R. J. Miller for December delivery, that said cotton was by the said Miller to be actually received. A. I had no understanding with Miller as to whether he intended to receive the cotton. Interrogatory 15. Why did you sell on October 21st the cotton which you had bought for Miller? A. I sold the cotton which I had bought for Miller on October 21st under his instructions to do so by his telegram, night message, dated October 20, 1895, when his margin was exhausted. Interrogatory 16. Is it not true that the 19th day of October was on Saturday, and that, at the time the New York Cotton Exchange closed on Saturday, the margin of Mr. Miller was not exhausted, and is it not true that it was at your discretion as to whether or not, inasmuch as the margin was not exhausted, you would close out the cotton? A. At the closing of the market on Saturday, October 19th, Mr. Miller's margin was not exhausted, and I had no authority or right by law, or under the rules of the exchange, to close his contracts without notifying him in advance that I intended to do so at a certain time. Interrogatory 17. How many bales of cotton per day did you handle, on an average, during the cotton season of 1895? A. During the cotton season of 1895, I handled, on an average, about 13,000 bales of cotton per day. Interrogatory 18. Were not all of these purchases and sales of cotton made in conformity with the rules and regulations of the New York Cotton Exchange? A. They were. Interrogatory 19. Did you, or not, at the time you bought the cotton for R. J. Miller, understand that the said Miller would accept the cotton on the day it was to be delivered to him according to the terms of your purchase? A. Had no understanding with Miller as to

whether he would receive the cotton, but if he did not close the contracts out before the seller tendered delivery, I would have had to take the cotton for his account."

His answers on cross-examination were all to the same effect. There is nothing in conflict with this testimony as to the manner of dealing. It was sought to throw the burden of proof on the plaintiff to show affirmatively that his dealings were legitimate. We think plaintiff has done so, but the burden is not on him. *Bangs* v. *Hornick*, 30 Fed. Rep. 97.

Upon the facts as found by it, the court found that the contract was a gambling or wagering contract, and rendered judgment accordingly. In this there was error, in the opinion of a majority of us, and therefore the judgment is reversed, and the cause remanded.

---

## WHITE v. STOKES.

67 184
72 610
72 611
72 613
67 184
f 84 320
67 184
86 404
67 184
f89 43
89 453

Opinion delivered November 18, 1899.

1. IMPROVEMENTS—PRACTICE AS TO RECOVERY.—Under Acts 1883, p. 106, § 1-4, by which it is provided, in substance, that an occupant of land who has made improvements thereon in good faith, claiming the land under color of title, may recover the value of such improvements, it is contemplated that there shall be antecedent litigation to recover the land from such occupant before he can claim the value of his improvements. (Page 187.)

2. PLEADING—ANSWERING OVER AS WAIVER.—Error in overruling a demurrer to a complaint on the ground that the complaint does not state a cause of action is not waived by answer. (Page 188.)

3. COLOR OF TITLE—WHAT IS NOT.—A bond for title is not color of title on which to base a claim for improvements made by the occupant. (Page 188.)

4. GOOD FAITH—WHAT IS NOT.—One who made improvements upon land after he had been informed by his attorney that he was not the owner of such land cannot claim to have acted in good faith in making the improvements. (Page 189.)

Appeal from Craighead Circuit Court in Chancery.

FELIX G. TAYLOR, Judge.

STATEMENT BY THE COURT.

In the year 1876, Dick White died intestate, unmarried and without issue, seized and possessed of the lands in controversy in this cause. He left surviving him, his father, William White, and appellants, who are his brothers and sisters and persons standing in the title of brothers and sisters who are dead. The land is not an ancestral estate, but a new acquisition. In 1892 William White sold the land to the appellee, D. H. Stokes, for $200, making him a bond for title undertaking to convey it in fee simple upon payment of the purchase money. Stokes at once went into possession under this contract, and began the improvements which are the subject-matter of this action. During the fall and winter of 1892–3 he cleared twenty acres of land, erected most of the buildings, and made other improvements. In April, 1893, William White made him a warranty deed, purporting to convey an absolute title to the land. In the autumn of 1893 the question of Stokes' rights under this deed began to be discussed in the community, and he sought the advice of lawyers, who told him that by his purchase he had acquired only an estate for the life of William White. Afterwards appellee made the remainder of the improvements claimed by him. William White died February, 1894. In January, 1895, Stokes brought this action, alleging that he had made the improvements under color of title, believing that he owned the land; that his grantor, William White, had no title, and that appellants claimed title; and asked that he have judgment for the improvements, and that the same be enforced as a lien on the land. The appellants have not demanded the premises, nor in any way disturbed Stokes in the possession or enjoyment thereof. The appellants demurred to the complaint, but their demurrer was overruled. They then answered with a denial of the facts alleged in the complaint. The decree of the court was for Stokes, giving him judgment for $401.75, and ordering it enforced against the land.

*Will H. Cate* and *Allen Hughes*, for appellants.

This action would not have been maintainable before the act of 1883. 8 Wheat. 1, 75; 10 Am. & Eng. Enc. Law (2d

Ed.) 542. Even in equity, betterments could be used at the utmost only as a set-off against rents and profits, but never for the purpose of acquiring title. 42 Ark. 118; 6 Paige, 390, 404; 3 Ohio, 327; 15 Am. Dec. 347. Under the act of 1883, no claim for betterments can be interposed until the tenant is ousted. 33 N. Y. Eq. 171, 178. Betterment acts, being in derogation of common law, must be strictly construed. 10 Am. & Eng. Enc. Law, 251; 3 Suth. Dam. §999; 3 S. W. 746; 3 Ohio St. 463. Further, to the effect that the action for improvements is premature if brought prior to a possessory proceeding on behalf of the owner, see: 140 Ind. 186; 22 Fla. 378; 16 Fla. 338; 27 Kas. 634; 23 Gratt. 266, 294; 82 Mo. 172, 179; 183 Pa. St. 271; 36 Ind. 349; 32 Ind. 431. The error in overruling a general demurrer is not cured where the complaint was not at all a cause of action. 65 Ark. 495. Color of title is that which, in appearance, is title, but which, in reality, is no title. 47 Ark. 528. The instrument relied upon to give color of title must purport to convey title. 18 How. 56; 102 U. S. 461; 1 Am. & Eng. Enc. Law (2d Ed.) 859. A bond for title is a mere executory agreement to convey title, is not color of title. 1 Am. & Eng. Enc. Law, (2d Ed.) 859; 50 Ark. 484, 491; 6 Wall. 116; 25 Ga. 181; 21 Ia. 475; 68 N. W. 171; 1 Sawy. 15, 20; 50 N. W. 95; 4 Sawy. 529; 56 Am. Dec. 326; Sedg. &. W. Tr. Tit., § 697; 62 Ill. 507; 31 Ark. 344; 59 Ark. 144; 35 Cal. 346; 45 N. W. 398; 15 N. W. 665; 33 N. W. 326. If appellee can recover at all, he can recover only the *enhanced value* of the premises, less the rents. The cost of the betterments is not the measure of the recovery. 1 Sawy. 15, 20; 81 Pa. St. 430; 10 Am. & Eng. Enc. Law, (2d Ed.) 545; 101 Ill. 242, 272; 33 Ark. 490, 496; 32 S. W. 398; 2 Am. Dec. 721; 14 S. W. 343; 15 Am. Dec. 142, 147; 85 Va. 448; 1 S. W. 499; 84 Pa. St. 333; 74 N. C. 603; 3 Oh. St. 463; 83 N. C. 406; 81 Pa. St. 430; 64 Tex. 491; 39 Ga. 328; 3 Litt. (Ky.) 399; 4 Gill, 87; 74 Miss. 459: 19 Wis. 219; 113 Ala. 126; 76 Ia. 81; 99 Ill. 541; 145 Ill. 238, 251; 9 Am. St. Rep. 805; 9 Bush, 717; 60 Ga. 466; 92 Va. 245; 16 B. Mon. 420; 61 N. Y. 382, 397; 53 N. W. 577; 63 N. W. 28; 4 S. E. 468; 14 S. E. 685; 37 Fed. 756; 53 Fed. 895; 18 Ia.

261. Appellee knew the facts, and hence is not a purchaser in good faith, notwithstanding his belief as to his legal rights. 64 Miss. 129; 4 Met. (Ky.) 323; 4 W. Va. 562.

HUGHES, J., (after stating the facts.) A majority of the court are of the opinion that the demurrer to the complaint in this case should have been sustained. There are many authorities upon which this conclusion may be sustained. According to these authorities, the occupant of land without title cannot maintain an original action for the value of improvements made thereon by him until possession is demanded by the owner, or until an action is brought which, if successful, will oust him.

The pertinent sections of the act under which this action was brought (Acts 1883, p. 106, § 1–4) are as follows:

"Section 1. That if any person believing himself to be the owner, either in law or equity, under color of title, has peaceably improved any land, which upon judicial investigation shall be decided to belong to another, the value of the improvements made as aforesaid and the amount of all taxes which may have been paid on said land by such person, and those under whom he claims, shall be paid by the successful party to such occupant, or the person under whom or from whom he entered and holds, before the court rendering judgment in such proceedings shall cause possession to be delivered to such successful party.

"Section 2. That the court or jury trying such cause shall assess the value of such improvements in the same action in which the title to said lands is adjudicated; and on such trial the damages sustained by the owner of lands from waste, and such mesne profits as may be allowed by law, shall also be assessed, and if the value of the improvements made by the occupant and the taxes paid as aforesaid shall exceed the amount of said damages and mesne profits combined, the court shall enter an order as a part of the final judgment providing that no writ shall issue for the possession of the lands in favor of the successful party until payment has been made to such occupant of the balance due him for such improvements and the taxes paid; and such amount shall be a lien on the said lands, which

may be enforced by equitable proceedings at any time within three (3) years after the date of such judgment.

"Section 3. That in recoveries against such occupants no account for any mesne profits shall be allowed unless the same shall have accrued within three (3) years next before the commencement of the suit in which they may be claimed.

"Section 4. That in any such equitable proceedings the court may allow to the owner of the lands as a set-off against the value of such improvements and taxes the value of all rents accruing after the date of the judgment in which it has been allowed."

It appears from the language of the act, as we construe it, that it was not intended that it should apply to a case where the occupant was not disturbed in his possession, nor until some proceeding was commenced to oust him. The act seems to contemplate antecedent litigation to recover the land, before the occupant can claim the value of his improvements. In other states the right to maintain such an action is denied, and it is held that it is premature if brought prior to a possessory proceeding by the owner. *Fish* v. *Blasser*, 146 Ind. 186; *Asia* v. *Hiser*, 22 Fla. 378; *Barton* v. *National Land Co.*, 27 Kas. 634; *Graeme* v. *Cullen*, 23 Gratt. 266.

An error in overruling a demurrer to a complaint on the ground that the complaint does not state a cause of action is not waived by answer, if there is no cause of action stated in the complaint. *Thompson* v. *Brazile*, 65 Ark. 495.

A majority of the court are also of the opinion that the plaintiff had no color of title, when most of the improvements were made, as he had only a bond for title when they were made. Color of title is defined to be that which in appearance is title, but which in reality is no title. *Teaver* v. *Akin*, 47 Ark. 528; *Wright* v. *Mattison*, 18 How. 56.

A bond for title does not purport to convey the title to the obligee. It is an executory agreement to make title in the future, upon performance of certain conditions. *Id.* See *Hershey* v. *Thompson*, 50 Ark. 484; 1 Am. &. Eng. Enc. Law, (2d. Ed.) 859; *Osterman* v. *Baldwin*, 6 Wall. 116. Without further citations, suffice it to say, we think this is the reason-

able doctrine, supported by the weight of authority, though not before this directly decided in this state.

As to the improvements made after the occupant had obtained a deed to the land, which was color of title, we think it appears from the testimony that, before these improvements were made, the occupying tenant had notice that his vendor had no title; and therefore it cannot be said that such improvements were made by him in good faith, as he could not have believed that he was the owner of the land. He at least was put upon inquiry, and might easily have learned that he had no title. In order to have acted in good faith, some diligence was required of him after he was put upon notice. He could not shut his eyes, and say he believed in good faith that he had title, when he was informed that he did not have.

Reversed, and complaint dismissed without prejudice.

RIDDICK, J., concurred in the judgment only.

---

## MOORES v. WINTER.

Opinion delivered November 18, 1899.

1. TRESPASS—SHERIFF'S LIABILITY FOR DEPUTY'S ACTS.—Trespass is the proper action, in those states wherein the common law prevails, against a sheriff for an unlawful seizure and sale under process, by his deputy, of the chattels of a stranger; and if the sheriff is declared against personally, and not as sheriff, it is competent to prove that he was sheriff, and that his deputy, as such, committed the trespass. (Page 194.)

2. SAME—PARTIES DEFENDANT.—One whose goods are unlawfully sold under process against another may sue in trespass the officer who committed the tort and those who advised and encouraged it. (Page 194.)

3. TORTS—VENUE.—For a common-law tort, a personal action may be maintained against the wrong doer in any state where he is found and served with process. (Page 194.)

4. HARMLESS ERROR—REFUSAL TO SET ASIDE DEFAULT JUDGMENT and to permit defendant to answer is not prejudicial error if the court offered to allow him a new trial on condition that he pay the costs of the term caused by him. (Page 195.)

5. CONFLICT OF LAWS—LIMITATIONS.—The general rule is that where an action is brought for a common-law tort the statute of limitations of the forum governs, without regard to where the cause of action accrued. (Page 195.)

6. SAME.—It is only where both the parties to an action on a common-law tort resided in the state in which the cause of action accrued during the full period of limitation that the statute of limitations of that state can be pleaded in bar of an action not barred in the state of the forum. (Page 196.)

7. TRESPASS—SUFFICIENCY OF PROOF.—To sustain an action of trespass *vi et armis*, it is only necessary to show that the plaintiff had possession of the goods, or a general or special property in them, and a right to immediate possession. (Page 196.)

Appeal from Miller Circuit Court.

JOHN H. CRAWFORD, Special Judge.

STATEMENT BY THE COURT.

On April 21, 1896, appellee, Joseph Winter brought suit in the Miller circuit court against appellants, Chas. H. Moores and W. A. Payne. He alleged in his complaint that Moores was sheriff of Bowie county, Texas, and Payne was his deputy; that, under an order of attachment issued out of the county court of Bowie county, Texas, in a cause then pending in said court, wherein A. F. Shapleigh Hardware Company was plaintiff and Sam S. Faulk was defendant, appellant Payne seized and took from the possession of appellee the personal property described in this complaint; that appellant was the owner and in possession of all of said property, and no part thereof was the property of said Faulk, nor liable to seizure under said attachment; that appellant Payne thereafter sold said property, and applied the proceeds of said sale to the payment of the claim of Shapleigh Hardware Company against said Sam S. Faulk; that in making said seizure and sale appellant Payne acted under the advice and direction of appellant Moores, and with his approval and consent, and that thereafter appellant Moores ratified and confirmed the act of appellant Payne in making such seizure and sale; that the property so seized and sold was of the value of $309.22; that by the act of the general assembly of Texas, approved January 20, 1840, it was enacted that "the common law of England (so far as it is not inconsistent with the con-

stitution of this state) shall, together with such constitution and laws, be the rule of decision, and shall continue in force until altered or repealed by the legislature," and that the common law of England was in force in the state of Texas at the times mentioned in the complaint; and that appellee had a cause of action against appellants under the laws of Texas for the wrongs and injuries complained of in the complaint. He prayed judgment for his damages in the sum of $309.25.

Appellants, by their answer, admitted the seizure and sale, pleaded not guilty, also pleaded the statute of limitation of Texas and the statute of limitation of Arkansas.

At a subsequent term of the court, on leave of the court, appellee amended his complaint by making J. G. Kelso and W. H. Tilson defendants. Subsequently the action was dismissed as to Kelso, and Tilson was duly served with process, but failed to answer. A demurrer was interposed to the plea of the statute of limitation of Texas, which was sustained. A trial was had, and appellee recovered judgment against appellants for $298.02. Motion for new trial was filed, and overruled as to Moores and Payne, and sustained as to Tilson, on condition that he pay all costs of the term, and upon his failure to pay the costs the motion was overruled as to Tilson also.

In addition to the testimony embraced in the abstract made by appellants, we submit the following: After the court had passed upon the instructions tendered by plaintiff and defendants, plaintiff's attorneys stated to the court that defendant Tilson had failed to file any answer in this action, "and thereupon defendant's counsel stated that he supposed that defendant Tilson had an answer in, and said Tilson stated to the court that, being a Texas attorney, he understood that the answer filed by the original defendants had been taken as his answer, and adopted by him as such, and he was not aware that it was necessary for him to file a separate answer, nor necessary for him to adopt of record the answer of the other defendants filed herein." The answer tendered by Tilson denied the liability, and pleaded the "Arkansas statutes of limitation as to him."

The evidence shows that appellee purchased from H. R. Webster, trustee, a stock of jewelry in Texarkana, Tex., known

as the "Faulk stock of goods," which had been recently owned by Sam S. Faulk, who conducted a jewelry store at that place; that appellant Chas. H. Moores was sheriff of Bowie county, Texas, and appellant W. A. Payne was his deputy; that suit was filed in the county court of Bowie county, Texas, by Shapleigh Hardware Company against Sam S. Faulk, and a writ of attachment was issued in said suit, and levied on a portion of said stock of jewelry by appellant Payne; that defendant Tilson was the attorney of Shapleigh Hardware Company in said suit. He signed, as attorney for the hardware company, an indemnifying bond to the sheriff, and directed Payne to levy on enough of "that Faulk stock of goods" to satisfy the claim of Shapleigh Hardware Company, which amounted to $216.99, exclusive of costs. Tilson was present when Payne made the levy, and saw him seize the goods. There were two separate levies made, and Payne gave Winter receipts for the goods covered by each levy. These receipts described the goods levied on, and stated the price for each article. The first levy was for $255.79, and the second was for $53.50. Winter protested against these levies at the time each was made, and claimed the goods seized as his own. These levies were made respectively on the 6th and 10th of January, 1894. The goods were afterwards sold to satisfy the judgment rendered in that suit.

*T. E. Webber*, for appellants.

It was error for the court to refuse to allow defendant Tilson to file an answer or to adopt that of the other defendants. Sand. & H. Dig., §§ 5769, 5770, 5772; 29 Ark. 372; 42 Ark. 57; *id.* 503; 58 Ark. 504; *id.* 612. The sheriff was not responsible for the alleged trespass of his deputy. 127 U. S. 507; S. C. 32 L. R. A. 203; 69 Tex. 192. The action against a sheriff or other public officer for acts done by him by virtue of or under color of his office is local, and is governed by the statute of limitations in force there. 2 Add. Torts, 834; Bliss, Code Pl., (3d Ed.) 284–6; § 5685. Sand. & H. Dig., subdivision *second*; 1 Sayle's Civil Stat. (Tex.), p. 1194, §8; Webb's Pollock, Torts, 239; 27 S. Car. 456; S. C. 13 Am. St. Rep. 653; 1 Jacob's Fish. Dig. Tit.: "Action on Suit, 8," p. 68; 19 L. T. (N. S.) 770; 38 L. J. Q. B. 113; 9 B. & S.

343; 4 L. R. Q. B. 225; 2 Pars. Cont. 89; 1 How. 170; S. C. 11 Law. Ed. 89 note; 2 Kent's Comm. 454, *459 and *460 note; Story, Confl. Laws, 201, 202; 65 Ark. 34; 62 Am. Dec. 605; 17 Cush. 15; 54 Am. Dec. 700; 7 Laws. Rights, Rem. & Pract. § 3735; 47 Ark. 58. The Texas statute of limitations having barred this action, this bar may be pleaded, and will be enforced here. 7 Lawson, Rights, Rem. & Pract. § 3732; 55 Miss. 153; S. C. 30 Am. Rep. 510; 22 Am. Dec. 363; 15 Gray, 221; 13 L. R. A. 56; Story, Conf. Laws, § 582; 11 Wheat. 371; 3 Am. & Eng. Enc. Law, 584. This is, in effect, an action of trover, to maintain which the plaintiff must have a right both to the property and to the possession of it. Bish. Non-Cont. Law, §§ 397, 399. It is purely an action *ex delicto*. Cooley on Torts, 95; Webb's Poll. Torts, 4. In trover, the measure of damages is the value of the property at the time of conversion; but where assumpsit is brought only the amount for which the goods sold is recoverable. 3 Pars. Cont. 194–5; Ang. Lim. §§ 72, 137; Bish. Cont. §§ 186, 782; 2 Beach, Cont. 1676 8; Cooley, Torts, 90–95. While the code abolishes forms of action, the distinction between trespass and trover still exists. 48 Wis. 660. Further, on the distinction between trover and assumpsit, and to the effect that trover concerns the *right* and not the *remedy*, see: 37 Ark. 35; 38 *ib.* 113; 43 *ib.* 375; 48 *ib.* 301; 56 *ib.* 592; 58 *ib.* 136; 115 U. S. 620. The Texas statute of limitation bars plaintiff's *right*.

*Scott & Jones*, for appellee.

The common law of England prevails in Texas. The sheriff's act was a trespass, and this is an action *de bonis asportatis*. Webb's Pollock, Torts, 421; 15 Ark. 459; 17 Ark. 508, 511. Appellee had his choice of suing in tort or bringing replevin. 52 Ark. 128. The action for tort is personal, and follows the person of the wrong doer, so that he may be sued wherever found. The right does not depend upon any local statute. Rorer, Interstate Law, 198–203: Webb's Pollock, Torts, 239–40. On appeal, the question is whether the court erred in overruling the motion for new trial. 17 Ark. 292, 336. Payment of costs may be made a condition precedent to the granting of a new trial. 22 Ark. 174; 25 Ill. 152: S. C.

Am. Dec. 789. Amendments will not generally be allowed for the purpose of pleading limitation. 8 Fed. 428. Nor to change the issues. 54 Ark. 444. Tilson, having commanded and approved the trespass, was equally guilty with the trespassers. 49 N. E. 556. The giving of the bond of indemnity rendered him guilty of trespass for the wrongful seizure. 5 Denio, 90; 3 Wall. 1; 15 N. W. 389; 23 Ark. 131; 15 Ark. 452; 36 Ark. 268; Wood's Mayne, Dam. § 519. A sheriff is responsible for a trespass, done by his deputy under color of office. 1 Hill. Torts, 150; 6 Cal. 78; 19 Mo. 369; 6 Bac. Abr. 156. Plaintiff's is a common law right of action. On questions of limitation, the *lex fori* governs. Rorer, Interstate Law, 230, 232; 18 Ark. 384, 395; 1 Smith's Lead. Cas. 1027; 3 Sawy. 233; 103 U. S. 11; Cooley, Torts, 470.

HUGHES, J., (after stating the facts.) "Trespass is held to be the proper action against the sheriff for an injury done by his deputy to the person or property of another. And in trespass against a sheriff, in which he is declared against personally, and not as sheriff, it is held competent to prove that the defendant was sheriff, and that his deputy, as such, committed the trespass." 2 Hilliard, Torts, p. 208, § 21; *Poinsett* v. *Taylor*, 6 Cal. 78. "A sheriff is responsible for a trespass done by his deputy." 2 Hilliard on Torts, p. 208, § 21.

It is shown by the evidence that the common law of England prevails in Texas, under statute of that state; and, this being an action *de bonis asportatis* (Webb's Pollock on Torts, § 421), it follows that the plaintiff had a cause of action at common law.

Under the *fi. fa.* against Faulk the sheriff was a trespasser if he seized and sold the goods of Winter, the appellee, though assured that they were the property of the plaintiff. He could only take the goods of the defendant in the execution. *Overby* v. *McGee*, 15 Ark. 459; *Oliver* v. *State*, 17 Ark. 511. The appellee had the right to sue in trespass the person who committed the tort and those who advised or encouraged it, or to bring replevin for the property. *Willis* v. *Reinhardt*, 52 Ark. 128.

For a common-law tort—which this is—a personal action

may be maintained against the wrongdoer in any state where he is found and served with process. 2 Rorer, Interstate Law, 198 to 203. This is purely a personal action, and is transitory. Webb's Pollock on Torts, 239–240.

We are of the opinion that when Tilson offered to file his answer, before the case went to the jury, he should have been allowed to do so, upon terms imposed by the court; and that when he made the refusal of the court to permit him to do so a ground of his motion for a new trial, and the court granted his motion for a new trial on condition that he should pay into court the costs of that term of court, the court exercised a discretion it possessed in refusing his motion unless he complied with the condition. Granting the motion would have necessitated a new trial, which probably would have caused costs to accumulate to an amount equal to the costs of the term at which the case had already been tried. The appellant, Tilson was in default for not having answered, and judgment went against him by default, or for want of an answer. The issues in the case were tried as to Moores and Payne, and all the evidence was heard as to the accrual of the right of action and the value of the goods taken by the sheriff. As to Tilson the judgment was by default, and the jury assessed the damages upon the evidence. The costs were ordered paid into court, and, had Tilson paid them, and had there been no new trial, the court had the power to tax the costs, and distribute properly the money paid in, and would doubtless have done so, causing Tilson to pay his costs of the term only. There was judgment against Moores and Payne. We therefore think that no reversible error appears in this. Costs may be required to be paid, as a condition to the granting of motion for a new trial, but the costs only caused by the defendant or party granted the new trial on such condition should be exacted. *Brooks* v. *Hanauer*, 22 Ark. 174.

The appellant insists that the two-years statute of limitations of Texas bars this action. The action was brought after two years had expired from the date of the trespass, and, had it been brought in Texas, where the trespass was committed, it would have been barred under the Texas statute of limitation.

But the action was brought in Arkansas, where the plaintiff had his residence, and had been a citizen for twenty years, and within three years after the cause of action accrued. "The recovery must be sought and remedy pursued within the time prescribed by our own law—the *lex fori*—without regard to the place where the cause of action or its merits originated." *Blackburn* v. *Morton*,18 Ark. 384, 395. "When, however, the action is for a tort at common law, the statute of the *forum* governs." Rorer, Interstate Law, 232; *Nonce* v. *Richmond & D. R. Co.* 33 Fed. Rep. 429; Cooley on Torts, 470; *Dennick* v. *R. Co.* 103 U. S. 11. The merits of a cause are determined by the law of the place where it arose; the mode of procedure and remedy by the law of the forum or place where the action is brought, including the statute of limitations. The evidence shows that the appellee was a citizen of this state when he brought this action, and had been for twenty years. If the two years statute of limitations of Texas could be said to have extinguished plaintiff's right of action in that state, it could have no such operation in this case, as it is only when the parties to the action reside in the state where the law extinguishes the cause of action during the full period of limitation, so that it has actually operated on the parties and on the case, that the statute of limitation can be pleaded in bar of an action in a foreign jurisdiction. Story, Conflict of Laws, p. 578; *Finnell* v. *Southern Kan. R. Co.*, 33 Fed. Rep. 427 (opinion by Judge Thayer.)

To sustain an action of trespass *vi et armis*, it is only necessary to show that the plaintiff had possession of the goods, or a general or special property in them, and a right to the immediate possession. *Huddleston* v. *Spear*, 8 Ark. 406; *Warner* v. *Capps*, 37 Ark. 32.

Appellant contends that there was no proof showing the value of the property taken by the deputy sheriff. We think there was. It was shown that the deputy sheriff gave receipts showing the articles taken, and the value of each, amounting in the aggregate to $358.25. Casteel, a witness for appellant, estimated the value of the articles taken to be $210. which, with interest to the date of the trial, would have amounted to about $240. The judgment was for $298.52.

We think the evidence was competent, and was for the jury, and we cannot disturb the verdict.

The judgment is affirmed.

BUNN, C. J., (dissenting.) It is not exactly clear from the the complaint whether the appellee, who was plaintiff in the court below, intended to sue Moores as an individual or in his official capacity as sheriff. If this suit is intended to be one against Moores as an individual, then there arises a question of some difficulty, and it is this: How can the appellant be held responsible for a trespass committed by another or others, but which he did not personally commit, and which he personally had nothing to do with, and knew nothing of, so far as the record shows, until it was committed. As an individual he had no deputy, although he might have an agent or a servant who, acting in the scope of his agency or service, might have involved the principal or master. But an official deputy is neither an agent nor a servant of a sheriff, for he has a fixed character by law. Whatever may be the present doctrine as to the liabiliiy of the principal for the torts of the agent, or of the master for those of the servant, one individual is not responsible for the acts of another, unless some such relation is established between them as that of principal and agent or master and servant, or else a direct complicity in the act itself. This being true, it follows by reason that when a plaintiff elects to sue one as an individual, he must confine himself to the conditions and relations which make the individual responsible as a defendant in his suit.

In the opinion of the court in this case it is stated, in substance, that "in trespass against a sheriff, in which he is declared against personally, and not as sheriff, it is held competent to prove that the defendant was sheriff, and that his deputy, as such, committed the trespass. And it is not necessary to prove that the defendant directed his deputy to seize the particular property in question;" citing 2 Hilliard on Torts, § 21, pp. 208 and 209, from which the foregoing statement is extracted. Mr. Hilliard cites *Poinsett* v. *Taylor*, 6 Cal. 78, in support of the doctrine of the text. On an examination of the California case, I find it founded on the following state of facts:

The plaintiff filed his complaint against the defendant, as sheriff of San Joaquin county, for trespass in seizing certain goods of plaintiff. A demurrer and answer being filed, the plaintiff filed an amended complaint, declaring against the defendant by name, and not as sheriff, to which the defendant pleaded the general issue. On the trial the plaintiff proved the property to be his, and then offered to prove that the defendant was sheriff, and that his under-sheriff took the property, and sold it on an execution against a third person, put in his hands by the defendant. This testimony was ruled out, on the ground that the issue to be tried was that made by the amended complaint and the answer thereto, and that the plaintiff could only show, as the case then stood, that the defendant himself actually took the property, or directed some other person to take the specific property. So far as it went, the trial court in that case ruled exactly as I contend that he should have ruled in case there was nothing else to effect his ruling as a final determination of the case. But on appeal to the supreme court of that state the lower court's ruling was reversed, but how and why? The court in delivering its opinion said: "Under any aspect of the case, the rulings of the court below were erroneous." It was unnecessary for the plaintiff to declare against the defendant as sheriff, although even this is sufficiently stated in the *first count* of the declaration. If the defendant had been only a *private individual*, it was competent for the plaintiff to prove that Webster, who committed the trespass, was agent or servant, and acting under his commands. The defendant also, in his answer, *assumes the responsibility of the act of his deputy, treats it as his own, and justifies it.* The judge trying the case should have let in all the evidence." No authority is cited. It is probable that the court was right on the pleadings and evidence in that case; for, even under our practice, the complaint against the individual might have considered as amended so as to suit the evidence, especially when the first paragraph of the complaint was held to be a sufficient declaration agaiust the sheriff in his official capacity any way. It is easily seen, I think, that that case is no authority for the position that in a suit against one individually, which

is a transitory action, you can let in testimony to connect the defendant with the act complained of by showing him to have been a public officer, and that his legal deputy, as such, with process in his hands and by virtue of the same, committed the trespass, and in that way only connect the defendant with the commission of the act complained of. It is not denied that in such case the court might consider the complaint amended to suit the evidence, but such amendment must necessarily be construed as making the action against the defendant in his official capacity, and then the action would not be transitory, but local only. The doctrine of the California court that defendant might prove that Webster was the agent or servant of the defendant, and acting by his commands, establishes nothing, for it does not mean that the plaintiff might, in such case, prove that Webster was the deputy of the defendant, and as such was acting under his commands, for a deputy is no such unimportant person as that implies. In many respects a deputy does not act under the commands of the sheriff, but by virtue of the process in his hands, and otherwise in his discretion. It is true, the sheriff is civilly responsible for all damage done by his deputy in his official capacity, but that is another question, only to be solved in a suit directly against the sheriff in his official capacity. I take it, therefore, that this suit was intended to be against Moores as sheriff of Bowie county, Texas, for otherwise he could not be connected with the trespass. I take it also that he was merely found in Arkansas, while still domiciled in Texas; and as a suit against him as sheriff I will discuss the case in that aspect.

Unlike Arkansas, Texas has no statute fixing the venue of suits for trespass and damages against sheriffs by name, but section 1198, Revised Statutes, 1879, of that state, sub-division 8, reads thus: "Where the foundation of the suit is some crime or offense or trespass, for which a civil action in damages may lie, in which case the suit may be brought in the county where such crime or offense or trespass was committed, or in the county where the defendant has domicile." According to this, no action for trespass is transitory by the laws of Texas, and the common law has been changed in that respect, for one charged with having committed trespass must be served in the

county in which the trespass was committed, or else in the county where he is domiciled or residing at the time of the service of summons upon him; and not where he may be found, as is said in reference to service of summons in transitory actions. In this state a sheriff can be sued in his official capacity for acts done under color of his office in the county where the cause of action arose, or some part of it. Sec. 5685 of Sand. & H. Dig. Actions in either state against a sheriff, as such, are therefore local, and not transitory, and this action should not have been instituted against Moores, as sheriff, in this state, and, if it was really against him, the judgment should be reversed. The Texas law should govern in each case; and not only so, the judgment against him as sheriff should have been reversed under our law, and the judgment against him as an individual was not sustained by competent testimony, and therefore should have been reversed.

---

## WHITEHEAD v. HENDERSON.

67 200
f89 319
f90 174

Opinion delivered November 18, 1899.

SUBROGATION—SECURITY HELD BY SURETY.—A creditor has the right, in case of default by his debtor, to avail himself of a security given by the debtor to his surety to indemnify the latter against liability for the debt. (Page 205.)

Appeal from Washington Circuit Court in Chancery.

EDWARD S. MCDANIEL, Judge.

STATEMENT BY THE COURT.

The appellee filed his complaint in the Washington county circuit court on the 12th day of June, 1897, against W. Gollaher, V. A. Gray, Sarah C. Wilks, W. S. Pollard, administrator of R. C. Wilks, deceased, and J. E. Whitehead, and alleged that, on the 11th day of March, 1896, he loaned R. C. Wilks $200, due on or before —— day of ——, 189—, with interest at 10 per cent. per annum, and that defendant, W.

Gollaher, signed said note as surety; that said R. C. Wilks and his wife, Sarah C. Wilks, on said date executed and delivered to W. Gollaher their deed of mortgage on certain lands, describing them, to secure the payment of said note. Said mortgage was in usual form, and provided that, if note was not paid, then that Gollaher or his assignee could sell, etc. That after maturity of said note plaintiff sought collection of same, and that W. Gollaher represented to plaintiff falsely and fraudulently that his mother, E. J. Gollaher, had money which would be paid within sixty days, and that he did not desire to foreclose said mortgage, and offered to execute to plaintiff a new note for the amount due on the note of R. C. Wilks; and that on the 1st day of April, 1897, W. Gollaher, E. J. Gollaher and V. A. Gray executed to plaintiff their note for $220, the amount due on Wilks' note at that date, which said $220 note was accepted by plaintiff, and in consideration of receiving said note, signed by said parties, he on said date, by his written indorsement, transferred said note executed by R. C. Wilks to W. Gollaher; that, prior to the expiration of sixty days, the defendants, W. Gollaher and E. J. Gollaher, left the state, not leaving enough property to satisfy their creditors' claims. Alleges that V. A. Gray is insolvent. That in a few days after the execution of said $220 note there appeared on the margin of the record of said Wilks' mortgage the following indorsement: "For value received I hereby transfer this mortgage and the note given to A. G. Henderson for $200, signed by R. C. Wilks and W. Gollaher to J. E. Whitehead for value received. Attest: H. L. Crouch, clerk. [Signed] Wesley Gollaher." That neither the $200 or $220 note have been paid to plaintiff. That the transfer of the mortgage and note by the said Gollaher to Whitehead was without consideration and void, and done with fraudulent intent to collect note from Wilks without paying same to plaintiff. That Whitehead had properly advertised for sale under said mortgage. Prayed that Whitehead be enjoined from selling lands under said mortgage, that the transfer of note and mortgage to Whitehead be canceled, that plaintiff be subrogated to rights of Gollaher for judgment for amount of his debt and foreclosure of mortgage.

A temporary restraining order was issued. On the 3d day of August, 1897, J. E. Whitehead filed his separate answer to the complaint, and stated, in substance, that it was true that Wilks and Gollaher had executed to plaintiff their note as alleged, and that Wilks and wife executed the mortgage. Denies any knowledge or information as to the representations or statements made by Gollaher to plaintiff. Alleges that, at the time W. Gollaher, E. J. Gollaher and V. A. Gray executed their note to plaintiff, E. J. Gollaher had money loaned out, and at said time she was solvent, and had property subject to execution sufficient to satisfy plaintiff's claim, and after the execution of said note, E. J. Gollaher collected in large amounts of money. That he had no knowledge or information that W. Gollaher or E. J. Gollaher expected to leave the state. Denies that the transfer of the note and mortgage by W. Gollaher to him was without consideration and void. Denies that it was done with fraudulent intent to collect the note from Wilks without paying same to plaintiff; and denies that plaintiff was the owner of the note at said time. Alleges that plaintiff, by his written indorsement, had transferred said note to W. Gollaher without recourse, and that defendant purchased said note and mortgage from W. Gollaher, and paid full consideration for the same by deeding a certain house and lot in the city of Fayetteville, and he made said note a part of his answer.

On motion of defendant, T. H. Humphreys was appointed as special administrator of W. Gollaher, and the cause as to W. Gollaher revived in name of such administrator. None of the other defendants filed answer.

The decree of the court was as follows: "This cause is submitted upon the complaint, answer and depositions heretofore filed, and the court, after hearing the evidence and being advised, doth find: that the plaintiff, A. G. Henderson, on the 11th day of March, 1896, loaned R. C. Wilks, now deceased, and Sarah C. Wilks, his wife, the sum of $200, due twelve months after date, at the rate of ten per cent. per annum; that said defendant, W. Gollaher, signed said note as security; that at said time the said R. C. Wilks, now deceased, and said defendant, Sarah C. Wilks, executed a mortgage to Wesley Gol-

laher upon the following real estate" (here follows a description of the property); "that said mortgage was executed to said W. Gollaher to indemnify him as surety on said note to plaintiff, A. G. Henderson, and with power of sale therein; that after maturity of said note the defendants, W. Gollaher, E. J. Gollaher, and V. A. Gray, well knowing that each of them expected to leave the state, with the fraudulent intent to cheat, hinder and delay their creditors, did execute to this plaintiff a promissory note for $220, the amount due on said original note with the interest thereon; that said note was dated April 1st, 1897, due sixty days after date, signed by W. Gollaher, E. J. Gollaher and V. A. Gray; that plaintiff accepted such note upon the false and fraudulent representation of W. Gollaher, and transferred said original note of $200 to the said W. Gollaher; that, prior to the expiration of the said sixty days, said W. Gollaher, E. J. Gollaher and V. A. Gray left this state, without leaving enough property therein to satisfy this plaintiff's claims and claims of this defendant's creditors; that, at the time of the execution of the said $220 note, the defendants, W. Gollaher, E. J. Gollaher and V. A. Gray, were making preparations to leave the state, not leaving enough property therein to satisfy these creditors; that the said defendants are insolvent; that, soon after the transfer of the original $200 note, the said defendant, W. Gollaher, transferred said note and mortgage on the record [naming book and page] of Washington county, Arkansas, to the defendant, J. E. Whitehead; that, at the time of the transfer of the said defendant, W. Gollaher, to the defendant, J. E. Whitehead, said note was past due; that the same, nor any part thereof, has ever been paid by any of the said defendants; that neither the original $200 note, nor the $220 note has been paid. The court finds that on the 6th day of October, 1897, the plaintiff filed his complaint at law against E. J. Gollaher, Wesley Gollaher and V. A. Gray in the Washington circuit court on the $220 note, and that said suit was pending in said court till the final decree in this court, and was then dismissed. That said transfer of the mortgage and note by the said Wesley Gollaher to the said J. E. Whitehead was fraudulent and void, and done

with the fraudulent intent to collect said note from R. C. Wilks, without paying the same to this plaintiff; that the said J. E. Whitehead had knowledge of the fraudulent intent of the said W. Gollaher, and participated in the fraud. And the court further finds that the conditions of said mortgage have been broken, and that the said defendant, Wesley Gollaher, had the right, under the power of sale in said mortgage contained, to sell the property so mortgaged to the satisfying of the debt of the said plaintiff. It is therefore considered, adjudged and decreed that the said transfer from the said W. Gollaher to the said J. E. Whitehead be, and the same is hereby, canceled, set aside and held for naught; and the defendant, J. E. Whitehead, be, and he is hereby, perpetually restrained from selling said lands under said mortgage; that the plaintiff, A. G. Henderson, be, and he is hereby, subrogated to all the rights and privileges of the said W. Gollaher; that said plaintiff recover of and from the said defendant, J. E. Whitehead, and estate of W. Gollaher all his costs," etc.

*J. E. Whitehead* and *L. W. Gregg*, for appellant.

The evidence as to conversations or transactions with the deceased defendants was inadmissible. Const. Ark., schedule, § 2; Sand. & H. Dig., § 2914; 48 Ark. 133; 51 Ark. 550; 54 Ark. 186. Mere financial embarrassment of a vendor does not render his sale void. 9 Ark. 482, Fraud is never presumed. 9 Ark. 482; 11 Ark. 378; 17 Ark. 146; 38 Ark. 419. If the means of information as to the facts of a transaction are alike accessible to both parties, they must be deemed to have relied upon their own knowledge. 31 Ark. 170. In such a case, if either party is deceived, he must suffer the result of his want of care. 27 Ark. 244; 11 Ark. 58; 7 Port. (Ind.) 537; 22 Ark. 435; Adams' Equity, 179, 187.

*W. L. Stuckey* and *Nathan B. Williams*, for appellee.

The decree is sustained by sufficient competent evidence, and will not be reversed on the facts. 43 Ark. 307. The creditor is entitled to the benefit of whatever securities the surety may hold from the debtor. 1 Story, Eq. § 502. A surety has no right to have the original debt assigned to

him after paying it. *Ib.* §§ 499, 502. The mortgage or bond can only be held for the purpose given. Brandt, Sur. & Guar. § 191.

WOOD, J., (after stating the facts). We will not uselessly encumber the record by discussing mere matters of fact. After carefully considering the evidence, we are unwilling to disturb the findings of fact by the learned chancellor, not being convinced that such findings are clearly against the weight of such of the evidence as was competent and proper for him to consider. On the question of fraud, and the appellee's participation therein, we have experienced some difficulty in determining on which side the balance leaned, and therefore we deem it a good case in which to let the chancellor's finding prevail. We find no error of law. The principles of law applicable to the facts, as found by the court, are elementary. We need only to mention one which perhaps has not before been passed upon by this court. "The general doctrine," says the Supreme Court of the United States, "that a creditor has a right to claim the benefit of a security given by his debtor to a surety for the latter's indemnity, and which may be used if necessary for the payment of the debt, is not questioned. The security in such case is in the nature of trust property, and the right of the creditor arises from the natural justice of allowing him to have applied to the discharge of his demand the property deposited with the surety for that purpose, if required by the default of the principal." *Chamberlain* v. *St. Paul, &c., R. Co.* 92 U. S. 299, 306; 1 Story, Eq. Jur. § 502, and authorities there cited.

Affirm the judgment.

BATTLE, J., absent.

67 206
f 84 306
67 206
f78 503
78 504
f78 573

## DUDLEY E. JONES COMPANY v. DANIEL.

Opinion delivered November 18, 1899.

ELECTION OF REMEDIES — WHEN NOT BINDING. — By suing to collect the purchase money, a vendor is deemed to have elected to waive a condition in the sale whereby title to the thing sold was reserved in himself until paid for; but if such election was made without fault, and in ignorance of a material fact, as that one of the vendees, and the only solvent one, was an infant and not bound by the contract, it is not binding, where no other person's rights have been affected thereby. (Page 207.)

Appeal from Lee Circuit Court.

HANCE N. HUTTON, Judge.

STATEMENT BY THE COURT.

In October 1892, the Dudley E. Jones Company, of Little Rock, delivered to Nat Smith, of Haynes, Arkansas, a "Sailer Patent Cotton Elevator," under a written agreement with him that the elevator should remain the property of the company until fully paid for. Smith executed notes for the purchase price, but, not being able to pay them at maturity, he in 1893 executed renewal notes, which notes were signed by himself and his son, W. N. Smith. These notes, as well as those first executed, recited that they were given for the purchase price of a "Sailer Patent Cotton Elevator, which is to remain the property of Dudley E. Jones Company until fully paid for."

Smith placed the elevator in a gin house on land held by him under a contract of purchase from one Geo. B. Daniel. He afterwards surrendered the lot to Daniel, and sold him the improvements he had made thereon, including the elevator, and Daniel now holds the same. The notes given by the Smiths to the Dudley E. Jones Company were not paid, and in January, 1896, the company brought an action on the note against the two Smiths. Nat Smith made no defense, but W. N. Smith at the January, 1896, term of the court set up as a defense the fact that he was a minor at the time he signed the notes. The

filing of this answer, so the agreed statement of facts states, was the "first information that plaintiff or its attorneys had of the fact of the infancy of W. N. Smith."

Nat Smith was insolvent, and, upon the filing of the answer by W. N. Smith, the plaintiff dismissed its action on the notes without asking for judgment against either of the defendants. Afterwards the company brought this action of replevin against Daniel to recover the elevator.

The presiding judge, over the objection of plaintiff, instructed the jury that the action on the note was "an election by plaintiff to make and regard the transfer of the elevator by plaintiff to Nat Smith as an absolute sale, and the verdict must be for defendant."

There was a verdict and judgment in favor of the defendant, from which the plaintiff appealed.

*McCulloch & McCulloch*, for appellant.

Consistent co-existing remedies may be prosecuted simultaneously or consecutively. 7 Enc. Pl. & Pr. 362–3. An election made in ignorance of material facts is not binding. 7 Enc. Pl. & Pr. 366; 65 Ark. 278; 48 Ark. 426; 28 S. W. 870.

*Fletcher Rolleson*, for appellee.

In conditional sales, with reservation of title, an action for the purchase money is an election and a confirmation of title in the purchaser. 25 Atl. 446; 18 L. R. A. 187; 60 Ark. 140, 4 L. R. A. 145; 18 N. Y. 552; 45 Ohio St. 169; 135 Mass. 172. See also on confirmation: 52 Ark. 145; 65 Ark. 383; 64 Ark. 215. Appellant was not ignorant of any fact which gave him a right of replevin, and cannot on that ground claim that their election is not binding. 52 Ark. 458, 467; 14 N. W. 266. The fact that the remedy selected proves fruitless does not avoid the act of election. 4 L. R. A. 145; 9 N. Y. S. R. 796; 65 Ark. 383; 7 App. D. C. 192; 19 So. 366. Nor does the fact that it was dismissed before judgment. 67 N. W. 516; 20 So. 890; 60 Ark. 140. Further, that the election was binding, see 17 S. W. 1030; 5 Big. Estop. 673; Herm. Est. 1177; 82 Md. 212; 8 So. 870; 12 N. W. 906.

RIDDICK, J., (after stating the facts.) The question pre-

sented by this appeal is, whether the plaintiff, by its action upon the notes executed for the purchase money of a "Sailer Patent Cotton Elevator," waived the condition expressed in the notes that the elevator should remain its property until the purchase money was fully paid. Now an action for the price of an article cannot be maintained until the title has passed to the vendee. Benjamin on Sales (Bennett's 7th Ed.) 795. An action by the vendor for the price is an admission that the title has passed. In this case it was a condition of the contract that the title should remain in the plaintiff company until the price was paid. Under the contract, upon a failure to pay, plaintiff might reclaim the property, or waive the condition and sue for the price; but it could not recover the price, and also retake the property. Two inconsistent courses being therefore open, it was necessary to elect which it would pursue, and, electing to pursue one course, it would, as a general rule, be debarred from the other. *Cox* v. *Harris*, 64 Ark. 213; *Bailey* v. *Hervey*, 135 Mass. 172.

But to this rule there is the exception that an election made without fault, and in ignorance of material facts, is not binding when no other person's rights have been affected thereby. *White* v. *Beal & Fletcher Grocer Co.*, 65 Ark. 278; *Watson* v. *Watson*, 128 Mass. 152.

It is admitted by the agreed statement of facts in this case that one of the defendants, Nat Smith, at the time of the commencement of the action on the notes, was insolvent, and so remained until his death; that the plaintiff company did not know that W. N. Smith, the remaining defendant, was a minor at the time of the execution of the notes sued on until he set up that defense in his answer; and that, so soon as it became aware of this fact, the company, within a month after its commencement, dismissed the action upon the notes, without asking judgment against either of the defendants. In other words, the company at the time it elected to bring suit on the notes was ignorant of the material fact that one of the defendants—the only one not shown to be insolvent—was not bound by the notes. Under these circumstances, if the rights of other parties were not affected by its election, it was not bound thereby,

and could dismiss its action on the notes, and bring suit for the property.

Counsel for appellee contends that the rights of defendant Daniel were affected by plaintiff's election, but that question was not submitted to the jury, and the evidence bearing on it is not sufficient for us to treat it as conclusively established.

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

---

67 209
74 24

67 209
d78 219

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

Opinion delivered December 2, 1899.

1 MASTER AND SERVANT—VICE PRINCIPAL.—A yard foreman, having control over a switch crew, with authority to report them for neglect or refusal to work, but without authority to employ or discharge them, is, as to the members of such crew, a vice principal, under act of February 28, 1893, providing "that all persons engaged in the service of any railroad corporations, foreign or domestic, doing business in this state, who are entrusted by such corporation with the authority of superintendence, control or command of other persons in the employ or service of such corporation, or with the authority to direct any other employee, are vice principals of such corporations, and are not fellow servants with such employees." (Page 213.)

2. CONTRIBUTORY NEGLIGENCE—EMERGENCY.—In an action to recover for the killing of plaintiff's intestate in a railway accident the court properly instructed the jury that if they believed that, at the time intestate "jumped from the car, the appearances of danger to him were sufficient to justify a person of resonable firmness and prudence in believing that his safety required him to jump from the car in order to escape the impending danger, then the fact that his death resulted from injuries received in making such jump will not defeat the plaintiff's right to recover in this action; and this is so notwithstanding that the jury may further believe that deceased might have escaped unhurt, had he made no effort to leave said car." (Page 215.)

3. MASTER AND SERVANT—RISKS ASSUMED.—While an employee assumes all the risks ordinarily incident to the service he enters, he does not assume a risk created by the negligent act of the master, and only such risks as he knows to exist, or may know by ordinary care. (Page 217.)

4. NEGLIGENCE—MOVING DAMAGED CARS RAPIDLY.—Evidence that, while a wrecked car was being moved at the rate of five or six miles an hour, an employee riding thereon under the supervision of a vice principal was killed in a collision between the car and a semaphore pole standing near the track, and that there was reason to apprehend that the car would careen far enough to strike the semaphore pole, is sufficient to support a finding that the railway company, through its vice principal, was guilty of negligence. (Page 218.)

Appeal from Lonoke Circuit Court.

JAS. S. THOMAS, Judge.

*Dodge & Johnson*, for appellant.

The instructions given for appellee, proceeding upon a theoretical case of *fellow-servant* or *vice-principal*, not borne out by the record, are abstract and misleading. 63 Ark. 684. The case is plainly one of assumed risk. Even if a *vice-principal* had been present, unless through some act or conduct of his he had relieved the servant of the duty to observe and protect himself against dangers, it would have created no liability. 59 Ark. 478. It is not the duty of a servant to obey where obedience will subject him to a *latent* danger. The second, third and fourth instructions for appellee are erroneous. The railway company was not an insurer of the safety of its machinery and appliances. 41 Ark. 392; 45 Ark. 324; 48 Ark. 463. The employee assumes the risk of all such dangers as are incident to the employment, open to his observation and with knowledge of which he is chargeable in the exercise of reasonable care. 46 Ark. 567; 60 Ark. 442; 48 Ark. 347; 79 Me. 405; 40 Ia. 341; 39 Minn. 523; S. C. 41 N. W. 104; 53 Mich. 125; S. C. 18 N. W. 584; 67 Mich. 632; S. C 35 N. W. 708; 81 Mich. 435; S. C. 46 N. W. 111; Bailey, Mast. Liab. 160; Wood's Mast. & Sev. § 376; 58 Ark. 178; 56 Ark. 237; 58 Ark. 338; 22 N. W. 221; 40 Ia. 341; 39 Minn. 523; 54 N. J. Law, 411; 42 Mich. 525; 122 U. S. 189; 27 Minn. 367; 2 Am. & Eng. R. Cas. 158; 56 Tex. 482; Pierce, Railroads, 379; 2 Thomp, Neg. 1009[15]; 11 Am. & Eng. R. Cas. 201; 52 Mich. 40; 33 Mich. 133; 45 Mich. 219; S. C. 7 N. W. 791; 49 Mich. 466; S. C. 13 N. W. 819; *Id.* 184; 62 Ia. 629; 21 Am. & Eng. R. Car.

593; 139 Mass. 580; 79 Me. 397; Beach, Cont. Neg. § 138; 140 Mass. 201; 31 Am. & Eng. R. Cas. 281; 6 S. W. 434; 54 Ark. 394; 2 Am. Neg. Rep. 578; 27 Minn. 367; 34 Minn. 94; 41 Minn. 289; 47 Minn. 361; 35 S. W. 260; *ib.* 879; 37 S. W. 659; 94 Mo. 206; 86 Mo. 463; 77 Mo. 511; 119 Mo. 322; 40 S. W. 174; 66 Tex. 732; 72 Tex. 159; 78 Tex. 439; 86 Tex. 96; 35 S. W. 879; 68 N. W. 1057; Cooley, Torts, 522; Wood, Mast. & Serv. §§ 326–335; 2 Th. Neg. 1008; McKinney, Fellow Serv. § 30; 47 N. W. 182; 63 N. Y. 449; 16 Atl. 280; 62 N. W. 624; Bailey, Master's Liab. 169, 170–1; 42 Neb. 793; 46 Neb. 556; 36 N. E. 44; 4 So. Rep. 701; 52 Ia. 276; 7 Atl. 284; 33 N. E. 510; 11 Atl. 659; 41 Ark. 542. The verdict is excessive. 57 Ark. 378; 57 Ark. 320; 56 Fed. 250.

*Marshall & Coffman*, for appellees; *Trimble & Robinson*, of counsel.

Signals are given under the rules of the master, and the giving of them in this case did not affect the grade of deceased as a servant. 36 S. W. 432. Deceased was not guilty of contributory negligence in acting upon the reasonable appearance of danger and jumping from the car. 36 S. W. 491; 55 Ark. 248. Deceased can not be said to have assumed the risk of the negligence of his vice-principal. Bail. Mast. & Serv. 264; 21 So. 440. The knowledge which will defeat a servant's right of recovery must be of the *danger*, and not of the *defect* (53 Ark. 128; *ib.* 465, 467); and it must be a knowledge of the *specific danger in question*, and not of danger *in general*. 42 Wis. 583. On this point, and upon the general question of assumed risks and knowledge of the servant, see: 19 Pac. 191; 18 N. E. 209; 9 N. E. 608; 16 Pac. 146; 42 Wis. 583; 31 Pac. 283; 49 N. W. 655; 30 Cent. Law Journ. 462 n.; 82 Fed. 720; 87 Fed. 849, 854; 41 N. E. 1037; 44 N. W. 884; 35 Atl. 305; 88 Fed. 44. Under the circumstances of the case deceased had a right to rely upon his superior's judgment and obey his order. 40 N. E. 700; 27 Pac. 728; 104 Mo. 114; 58 Mo. App. 27, 68. The servant has this right so to rely upon the master in all cases where the danger is not so obvious that no

prudent man would obey the order. 5 Rap. & Mack's Dig., Ry. Law § 435, p. 238, and cases; 18 L. R. A. 827; 17 *id.* 602 n; 14 Fed. 564; 96 Mo. 207; 129 Ind. 327; 2 Sh. Neg. 97 n. 5; 44 N. E. 876; S. C. 59 Ill. App. 32; 66 N. W. 271; 162 U. S. 93; S. C. 56 Fed. 700; 30 L. R. A. 814; 16 *Id.* 819 n.; 40 Mich. 424; 24 L. R. A. 717. The negligence of the vice-principal was in ordering the servant into a situation of danger. 45 S. W. 56; 5 Rap. & Mack's Dig., Ry. Law, §§ 435, 441; 23 N. E. 675; 27 Pac. 701; 12 Fed. 600; S. C. 17 *ib.* 67. The verdict is supported by the evidence and must stand. 83 Mo. 481.

*Dodge & Johnson*, for appellants, on motion for rehearing.

Where the defect or danger which caused the injury is patent, or is of such a nature that the servant can apprecia e and see it at least as well as the master, the risk is one which the servant assumes. 150 Mass. 423; S. C. 41 Am. & E. R. Cas. 327; 157 Mass. 418; 32 N. E. 464; 112 Mo. 220; 20 S. W. 436; 77 Wis. 51; 45 N. W. 807; 31 Am. & Eng. R. Cas. 199; 103 U. S. 370; 17 Atl. 7; 17 N. Y. S. Rep. 715; 17 N. Y. 552.

*Marshall & Coffman*, for appellee, on motion for rehearing.

The danger was a latent one. 63 Fed. 530. The agent does not assume a risk which is not so apparent as to render his act imprudent. 40 L. R. A. 781–2, 788; 54 Ark. 389. The servant is not held to have assumed a latent risk, merely because he had equal opportunities with the master for knowing of it. 41 L. R. A. 130, 131.

BUNN, C. J. Thomas Dalton, an employee of the appellant company, was killed by the falling of a semaphore pole near its tracks in its yards in North Little Rock on the 6th of November, 1895, and the appellee, John W. Touhey, was appointed administrator of his estate, and brought this suit against the company for the benefit of the widow and children of the deceased, laying the damages at $15,000. The defendant answered, putting in issue all the material allegations

of the complaint. A jury trial was had, resulting in a verdict of $8,000 for plaintiff, and defendant appealed.

The allegations as to negligence in the complaint are as follows, viz.: "Plaintiff says that the defendant so carelessly and negligently caused and allowed its cars to be and remain in a defective and unsafe condition as aforesaid, and so carelessly caused and allowed its said semaphore pole to stand too near its track, and so carelessly and negligently, by and through its foreman as aforesaid, caused its cars to be moved while in such condition, well knowing the same, and his said intestate not knowing it, and in such a careless and negligent manner, as to cause the death of his said intestate, as aforesaid." In this there are two distinct charges of negligence; one in having the pole too near the track; and the other in permitting its cars to be moved as they were on the track in such condition as that in which they were at the time.

The first question raised is whether or not C. Streetor, the foreman of the crew in charge of the wrecked cars, was a fellow servant with the others of the crew, among whom was the deceased, or was a vice-principal to the company. The testimony of Streetor affecting the question is substantially as follows, viz.: He states that on the 5th November, 1895, he was engine foreman in the defendant's yards in North Little Rock; that there were three damaged cars brought into the yards at that time, and that he received a switch order between 9 and 10 o'clock that evening with regard to these cars, but that he could not tell [remember] from whom the list came. His switch crew consisted of Ryan, Harmon and Dalton, and the engineer Phillips, and a fireman whose name he could not remember; that these men constituted his switching crew in the yards, and were working under him. The duty of witness and this crew was to do any work needed in the yards, switching and moving cars, including damaged cars, to and from the tracks in the yard to the repair shops. That he did not have power to employ these men, and only reported them when they failed or neglected or refused to do their work. That all the crew saw the condition of the damaged cars, when they went to move them to the repair shops, and that he called his crew's atten-

tion, and warned them to be careful, so that no one might get hurt in handling them, for there were no drawbars on the ends of these cars, and one of them extended out on one side so far that it would not clear a car on the track beside the one they were on [that is track No. 11], the projection being about a foot [meaning farther than usual], caused by the telescoping of one car into and over another. That there were three of the damaged cars (two baggage and one mail car), and these were in a train,—first one of the cars, and then two, one in and on the other,—these making the projection, and all were pushed by an engine and tender behind. Witness had informed his crew that they were going to get the three cars and put them on No. 8 track [the repair track], and he said also that they had made room for these cars on this track before they went after the cars on the other track; that, as they were going up the main track, Dalton and the others of the crew were talking about the wreck in which these cars had been wrecked the day before, and asking how each would have felt had he been in it. In the midst of this conversation, which made all of them somewhat nervous, we infer, in view of the very bad condition of the cars upon which they were then riding, the foreman, Streetor, who was sitting on the front platform of the front car, told Dalton, seated on a step below him, to move and give him room as he might have to jump at any time. These two were on the side of the semaphore pole, and the others were on the other side and elsewhere.

From this testimony, which is undisputedly true, it is impossible to escape the conclusion that, in the control and management and running of these cars and the labor of this crew, Streetor was not a fellow servant with the others, but a vice principal. Under the old rule the principal test—the one most relied on and most frequently called into requisition—was whether or not the one employee had the authority to employ and discharge the others, and under that rule Streetor would have, very probably, been held to be a fellow servant with the others, for he says himself that he had no power to employ or discharge the others of the crew. But, even before the passage of the "fellow servant act," this court, in the case of *Bloyd* v.

*Ry. Co.* 58 Ark. 66, had advanced a step towards abandoning the old rule, and made a test of the relation existing between servants and the master and servants quite different—a test quite in keeping with the spirit of the fellow servant act, which had already passed when the Bloyd case was decided, but had not been passed when the cause of action in that case accrued. The first section of the fellow servant act, approved February 28, 1893, and which governs the case at bar, reads as follows, viz.: "That all persons engaged in the service of any railroad corporations, foreign or domestic, doing business in this state, who are entrusted by such corporation with the authority of superintendence, control or command of other persons in the employ or service of such corporation, or with the authority to direct any employee, are vice-principals of such corporations, and are not fellow servants with such employees." Certainly Streetor was such a person as in the act described as a vice-principal, for he had either superintendence, control or command of the others, and the authority to direct them in their work.

This being true, it follows that there was no reversible error in the giving of the first, second and third instruction asked by the plaintiff, which in effect submitted the question to the jury on the evidence.

Quoting from the testimony of Streetor further: "I do not suppose I had finished my sentence [referring to his direction to Dalton to move so as to leave him room to jump as aforesaid] until Dalton said he would get off right away; and, just as he was getting off, the second car hit the semaphore pole, and the semaphore pole hit him. There didn't seem to be any time from the time he jumped until the pole struck him. It was all done in a second's notice. The front car had passed the pole. This was the car that the other was driven into [meaning the car that struck the pole]. The entire car had not passed [meaning, I presume, the front car.] It was the side of the second car that hit the pole. The second and first cars were telescoped into each other. [I presume the meaning is the first and second, counting as they would be going forward. They were now going backwards.] The first and second cars were not full length. We were only hauling

about 2½ cars by one being telescoped into the other; these cars were about the length of a car and a half. I don't remember whether they had four tracks or not. It was 15 feet back on the side of these cars that the pole was struck. The cars were kind of creaking, as any wrecked cars would do." On this and similar evidence on this point, the court gave the fourth instruction asked by the plaintiff, which reads as follows, viz.: "If the jury believe that at the time the deceased jumped from the car the appearances of danger to him were sufficient to justify a person of reasonable firmness and prudence in believing that his safety required him to jump from the car in order to escape the impending danger, then the fact that his death resulted from injuries received in making such jump will not defeat the plaintiff's right to recover in this action; and this is so notwithstanding that the jury may further believe that deceased might have escaped unhurt had he made no effort to leave said car." This instruction propounds a doctrine of universal application to cases of passengers, and has been recognized by this court, whenever necessary, to the exoneration of passengers from the charge of contributory negligence when acting in emergencies. *Railway Co.* v. *Murray*, 55 Ark. 248; *Railway Co.* v. *Maddry*, 57 Ark. 306.

So far as I have been able to ascertain, we have not been heretofore called upon to consider it as applied to employees' cases. It is evident that there is or may be a difference between the two classes of cases. A passenger, in his proper place on a train, is more or less helpless to protect himself from injuries resulting from the running of the train is somewhat at the mercy of the carrier, while the same is not usually true, not always true, at least, as to an employee, for he is a factor, or may be, in operating the train, and besides is by training and habit better able to protect himself than a passenger, and withal has by his contract assumed many risks that a passenger does not assume. Moreover, a carrier is bound to exercise the greatest care to protect a passenger, while a master is only required to exercise ordinary care to protect his servant. But, in cases where these differences do not intervene to affect the very right of them, then there does not seem to be any good reason in

making a substantially different rule in the one case from that applied in the other.

In other jurisdictions, the following statement is very generally supported as the proper rule, viz.: "While it is a general rule that the servant has no claim on the master for damages for an injury received by voluntarily assuming to do something which the master did not employ him to do, yet in the case of emergency he may, of his own volition, step outside of the line of his usual duties; and if this departure is only such as the necessities of the case fairly and reasonably call for, keeping in view the character of the work he is called upon to do, it will not of itself defeat a recovery of damages in case he is injured. Whether he is guilty of negligence is a question for the jury, and his conduct must be tried in the light of all the surroundings." *Barry* v. *Hannibal & St. Joseph Ry. Co.* 98 Mo. 62; *Smith* v. *W. & T. Ry. Co.* 41 Am. & Eng. Ry. Cases, 320; *Austin & N. W. Ry. Co.* v. *Beatty*, 73 Tex. 592; *Wynn* v. *Central Park, N. & E. Ry Co.* 133 N. Y. 375.

This rule is substantially the same as that of a passenger, where the servant is without fault; and the instruction under consideration is not erroneous, but substantially correct.

The deceased, like the foreman and probably the others of the crew, had grown somewhat nervous over the appearance of the wrecked cars, and began to be fearful of some injury from them, and on a suggestion from the foreman to move on his seat so as to make room for him (the foreman), as it might soon be necessary for him to do so, concluded that it was safer to get on the ground, did so, and was injured by an unforeseen occurrence. The jury had good ground to exonerate him from the charge of contributory negligence.

It is contended that the doctrine of "assumed risks" is to be applied to this case, and, when so applied, would defeat a recovery by the plaintiff. The doctrine of "assumed risks" may be thus epitomized, viz.: "*Where one voluntarily enters into a contract of hiring with a railroad company, he assumes all the risks and hazards ordinarily and usually incident to such employment, and will be presumed to have contracted with reference to such risks and hazards.*" But, while an employee as-

sumes all the risks incident to the service he enters, he does not assume a risk created by the negligent act of the master, and only such risks as he knows to exist or may know by ordinary care. It is unnecessary to cite authorities in support of these elementary propositions.

The sole question of any difficulty of solution in this case is therefore one of fact which the jury has settled; that is, whether or not the defendant, acting through its vice principal and representative, was guilty of negligence as charged in the complaint, and, if so, was that negligence the proximate cause of the death of Dalton. Some of us are of the opinion that the defendant did not exercise the necessary care in measuring the distance from the track to the point where the semaphore pole was erected, and that it was negligent in erecting the same so near to the track as that it was struck and knocked down by this car,—a fact of itself showing that it was too near, as it appears to them. Let that be as it may, the other act of negligence charged is more apparent, that is, the act of running these wrecked cars at the rate of five or six miles an hour, when it was a matter of apprehension to the foreman as well as to the deceased, and perhaps the others, that they were liable to collapse and fall upon them on the front platform at any moment. If there was apprehended danger of the wrecked cars falling towards the front, there was equal reason to apprehend that they would fall laterally or careen so much as possibly not to pass objects along the side of the track. The apprehension was felt in the one case the more sensibly because the personal safety of the parties was directly involved, but the apprehension of the danger of the wrecked car careening, although it did not develop altogether as apprehended, was nevertheless the moving cause of the deceased's jumping to the ground. Under the circumstances this could not be attributed to him as contributory negligence.

These are considerations that might reasonably have influenced the jury in arriving at their verdict. So that we do not feel authorized to disturb the verdict.

The judgment is therefore affirmed.

RIDDICK, J., dissenting.

BATTLE, J., absent.

# COFFIN v. BLACK.

Opinion delivered December 2, 1899.

1. CONTRACT—AGREEMENT TO BUILD PRACTICAL RAILROAD.—A branch railroad which is operated between certain points, and carries passengers and freight at all times except when the track is overflowed by high water, and which is as good as other branch roads in the state, is a substantial compliance with an undertaking to build a practical railroad between those points, though it has neither turntables nor Ys. (Page 222.)

2. SAME—WAIVER OF PERFORMANCE.—Where an action on a note payable on condition that the payee should build a practical railroad between certain points was defended on the ground that the payee, in certain particulars set forth in the answer, had failed to perform his contract, a failure in a particular not set forth in the answer will be considered waived. (Page 222.)

Appeal from Randolph Circuit Court.

JOHN B. MCCALEB, Judge.

STATEMENT BY THE COURT.

This was an action brought in the Randolph circuit court, June 2, 1897, by Maxwell Coffin against Bunk Black, J. T. Turner, and William De Clerk, on a promissory note given by them, in words and figures as follows, to-wit: "Pocahontas, Ark., May 1, 1896. Six months after date, we, or either of us, promise to pay to Maxwell Coffin, or order, the sum of $300; provided, the said Coffin by that date, or within a reasonable time thereafter, builds, equips, and operates, or causes to be built, equipped, and operated, a practical standard-gauge railroad from Hoxie, in Lawrence county, Ark., to the east bank of Black river, opposite the town of Pocahontas, Randolph county, Ark.; and provided, further, that at the completion and operation of said road as aforesaid, or within a reasonable time thereafter, the said Coffin issues and delivers, or causes to be issued and delivered, to the undersigned paid-up capital stock in said road to above amount; otherwise, this to be void.

[Signed] Bunk Black, J. T. Turner, Wm. De Clerk." The complaint alleged performance of the conditions of the note on the part of plaintiff, and refusal to pay on part of the defendants.

Defendants answered in three paragraphs, to each of which the plaintiff demurred, in words and figures as follows (omitting caption) to-wit: "Comes the plaintiff, by his attorneys, and demurs to defendant's amended answer herein, as follows, viz.: To paragraph one, because it does not state facts sufficient to constitute a legal defense to plaintiff's cause of action. To paragraph two, because the facts therein set out do not constitute a legal defense to plaintiff's cause of action. To paragraph three, because the specifications therein set out are not responsive to the terms of the contract, as set out in plaintiff's complaint, and are not necessary to complete a practical railroad, as set out in said contract."

The court sustained the demurrer to paragraphs one and two, and overruled it as to paragraph three, which is in words and figures as follows, to-wit: "For further cause of defense defendants deny that the said Coffin has built, or caused to be built and equipped, the kind of railroad described in said contract or mentioned in said complaint, and deny that a railroad of any kind has yet been built and equipped between the points mentioned in said contract and complaint, and that in many material respects plaintiff has failed to perform the things imposed upon him in said contract, as follows, viz.: (1.) Plaintiff has not built a practical road; the same being submerged and rendered impassable during ordinary high water conditions, not being above overflow. (2.) The roadbed is incomplete and unfinished, in the sense of the contract sued on; the building thereof being stopped before it was elevated above the ordinary overflow. (3.) The Black river terminal has never been provided with the necessary Ys, turntable, tanks, machine houses, etc., necessary to the completion of a practical railroad, as contemplated in said contract. Defendants say their signature to said contract was obtained by false representations; that there is a failure of consideration, a non-compliance with the terms of said contract on the part of plaintiff,"—with prayer for judgment.

To the overruling of the demurrer to paragraph three, plaintiff, by attorneys, at the time excepted; and the issue as made by plaintiff's complaint and said paragraph three of defendant's answer was submitted to a jury, which, after a hearing, returned a verdict for the defendants, on which judgment was rendered.

*Coffin & Ponder* and *Cockrill & Cockrill*, for appellant.

Appellant should have been allowed to prove by expert testimony that the road was a '*practical railroad.*' 57 Ark. 387, 394; *ib.* 521–3. *Practical* means "capable of use," "useful." Webst. Dict.; Stand. Dict.; Cent. Dict.; Crabb's Eng. Syn.; 54 Tex. 294. Substantial compliance with the terms of the contract was sufficient to entitle appellant to collect the subscriptions. 1 Elliott, Railroads, 178, 179; 82 Ill. 93; 47 Ohio St. 276; 20 *Id.* 190; 28 S. C. 134; 21 N. E. 981; 3 Jones' Law, 517; 8 Nev. 68; 121 Mass. 29; 84 Mo. 263; 67 Ind. 99; 68 Ill. App. 351; 8 R. I. 564; 24 Mich. 389; 37 Ia. 503–512. The building of the depot from three hundred to five hundred feet from the bank of Black river was a sufficient compliance with the contract to build "*to* the east bank." Stand. Dict., word '*To*'; 64 Ark. 627; 82 Tex. 553; 42 Am. & Eng. R. Cas. 232; 3 Jones, Law, 517. '*To the bank*' is quite different from '*to the river.*' 3 Sumn. 171–9; 13 How. 381–427; 14 Pa. St. 174; 6 Mass. 435; Winf. Adj. Words, "Shore." It was error to admit testimony to extend or vary the terms of the contract. 18 Ind. 68; 34 N. H. 124; 1 Cook, Stock & Stk. Hldrs. §§ 137–8; 1 Gr. Ev. §§ 275, 277, 282; 64 Ark. 653. The second instruction for appellee was erroneous. Ell. Rys. § 117; 47 Ohio St. 276; 79 Ill. 555.

*Bunk Black*, *J. T. Turner* and *Wm. De Clerk*, appellees, *pro se*:

There is no error in the second instruction. The evidence supports the verdict. The contract calls for the completion, equipping and operation of the road *to the east bank of Black River*. "*Equip*" means "*to furnish for service.*" Webst. Dict. The *equipment* of the road included the furnishing of necessary tanks, turntables and "Ys."

HUGHES, J., (after stating the facts.) The principal contention of the appellees in this case is that the appellant failed to construct its road so that it was above high water; that in time of high water in Black river the roadbed was submerged in places so that the road could not be operated at all times, and was therefore not a "practical road," in the sense of the contract. The evidence is that the road was built from Hoxie in Lawrence county to a point opposite the town of Pocahontas in Randolph county,—to a point within from three to five hundred feet of the east bank of Black river,—and that it was operated and carried freight and passengers between those points for the greater part of the time, and at all times except when the track of the road was overflowed in time of high water. It appears also from the evidence that the overflows on other roads in the state frequently cause those roads to suspend, of necessity, the operation of the roads for 40 or 50 days, and that the road built by the appellant was as good as the branch roads generally of the St. Louis, Iron Mountain & Southern Railway. So far as the interference with the operation of this road is concerned, we are of the opinion that the evidence shows that there was a substantial compliance with the contract and agreement of the appellant to build a practical road, in the sense in which the contract was made, and understood by the parties. It appears that its operation was suspended for a much shorter time by reason of high water than the operation of other roads had been suspended by reason of overflows from high water. A reasonable and fair construction of the contract and the evidence in relation to the road and its operation shows, in our opinion, that there was a substantial compliance by the appellant with his agreement and undertaking.

But the appellant contends that there was a failure to comply with the contract to build a "practical road," in this, that the road was not built to the east bank of Black river, but only to a point within from 300 to 500 feet of said east bank of Black river, and that plaintiff had failed to construct the necessary turntables, Y's, etc. Turntables and Y's were not within the contract.

The question of failure to build the road to the east bank

of Black river, if we concede, which we do not, that building of it within from three to five hundred feet of the east bank of Black river was a failure to comply with the letter of the contract substantially, yet this was waived by the third paragraph of the defendant's answer, which is copied in the statement of facts. The specifications of the grounds upon which the answer relies shows that the fact that the railroad was not built nearer the east bank of Black river than from three to five hundred feet is not one of the grounds relied upon.

Reversed and remanded for a new trial.

---

## DANIEL v. ST. LOUIS NATIONAL BANK.

Opinion delivered December 2, 1899.

1. BILL OF EXCEPTIONS—PRESUMPTION.—It will be presumed that a bill of exceptions duly certified by the trial judge contains a true statement of the evidence which it purports to set out. (Page 226.)

2. NEGOTIABLE INSTRUMENT—PAYMENT.—Where a bank sent a note to another bank for collection, and the latter, having funds of the maker on deposit sufficient to pay the note, and being instructed by the maker to pay it, charged the amount of the note to the maker, and credited it to the sender of the note in the regular course of business, it constituted a payment, though the latter bank failed the next day, and returned the note without indorsement or accounting for the collection. (Page 227.)

Appeal from Fulton Circuit Court.

JNO. B. MCCALEB, Judge.

*Charles A. Phillips*, for appellant.

The transfer of the note to the appellee bank by the President of the Mammoth Springs Bank was invalid, and hence the latter was still the legal owner of the paper. 14 Mass. 178; 18 W. Va. 212, 228; 1 Boone, Bankg. § 101; 7 Ala. 273; 1 Cook, Corp. 716; 4 Th. Corp. §§ 44–46; 62 Ark. 33; 34 S. W. 89. Until it is shown that some officer or agent of the bank was duly authorized to make such transactions, the pre-

sumption is that it was the duty of the board of directors, and that the only duty of the president was to preside at the meetings. 22 Gratt. 51; 108 U. S. 198; 8 Wheat. 357; 37 N. Y. L. 98; 69 Fed. 131. Even if part of the $600 had been paid before the Mammoth Spring Bank had authority to receive same, such payment was a consideration, such as would have supported the subsequent receipt. Clark, Cont. 191, note 139. The appellee was not a purchaser of the note for value. 14 Am. St. Rep. 810; S. C. 71 Wis. 309; 37 N. W. 421. Payment to the agent with instructions to apply to principal's debt extinguishes same, regardless of what disposition the agent makes of the fund collected. 7 N. W. 457; 1 Dan. Neg. Inst. 643; Byles, Bills, 151.

*Sam H. Davidson*, for appellee:

The allegation of indorsement and of appellant's indebtedness to appellee thereby is a sufficient allegation of ownership. 2 Am. & Eng. Enc. Law, 315. This question of the sufficiency of the allegation on this point cannot be raised for the first time on appeal. 49 Ark. 277; 30 Ark. 25; 56 Ark. 263; 56 Ark. 444; Leath. Notes on Ark. Stat. § 1051; Sand. & H. Dig., § 257. The bank president had power to endorse the paper in the hands of the bank. 24 C. C. A. 597. The appellee was a *bona fide* holder, notwithstanding when the note was discounted the proceeds were only credited to the indorser. 21 S. W. 523. Payments made by the maker of a negotiable promissory note before its maturity are made at his risk. 18 Am. & Eng. Enc. Law, 198; 22 Ind. 232; 1 Morris (Ia.) 48. Payment to the payee or indorsee of a note, who has not possession of it, will not protect the maker against the claim of the *bona fide* holder thereof. 64 Ga. 544; 23 Kas. 428; 20 Pick. 545; 8 Tenn. 737; 18 Am. & Eng. Enc. Law, 190. Payment by check does not extinguish a claim unless accepted as payment thereof. 18 Am. & Eng. Enc. Law, 167[4]. The attempt to make the affidavits of bystanders part of the record must fail because the terms and requirements of the statute are not followed. 56 Ark. 600, 601; 57 Ark. 1. The failure of the owner to present the note at the bank where it is made payable does not absolve the maker, even though he had the funds to meet it on deposit there, and

they were lost through a subsequent failure of the bank. 44 N. J. Law, 638; 80 N. Y. 100; 18 Am. & Eng. Enc. Law, 199.

HUGHES, J. The St. Louis National Bank sued Daniel, the appellant, upon the following note, to-wit:

"$1,000. Mammoth Springs, Ark., April 28, 1897. Ninety days after date, I promise to pay to the order of the Bank of Mammoth Springs one thousand dollars, at the Bank of Mammoth Springs, Arkansas, for value received, with ten per cent. interest from maturity until paid. F. M. Daniel.

Indorsements: "Bank of Mammoth Springs. H. G. King, President.

"Received on the within note $400.00, this July 31, 1897. J. W. Meeks, attorney for R. G. Dun & Co."

And on the back of the note appears this indorsement: "Pay Bank of Mammoth Springs, or order. St. Louis National Bank."

The appellant pleaded payment. Judgment was rendered for appellee against appellant for four hundred dollars, and he appealed.

The appellee admitted that four hundred dollars had been paid to it on the 31st of July, the amount being credited on the note; but contends no other payment was ever made to it, or to any one for it, who was authorized to receive it.

The evidence on the part of appellant tends to show that on the 20th of July, 1897, the appellant sent through the mail to the Bank of Mammoth Springs for collection the note, the payment of which is in controversy, and that it was received by the Bank of Mammoth Springs about 11 o'clock on the morning of the 21st of July. King, the casher of the Bank of Mammoth Springs, testified that "on or about July 21st Mr. Daniel came into the bank, and paid $600 on account of this note. This amount was credited to the account of the St. Louis National Bank. * * * * The $600 paid by Mr. Daniel was paid a few days before the maturity of the note. * * * I don't think I credited the note with this payment. The note was in the collection case at the time. He did not pay the note in full. The note was in my hands for collection. The custom of banks dealing with each other is,

when we make collections we credit them, and when we send collections they credit them to us. This $600 was paid and receipted as a credit to this note, and we gave a receipt to that effect. This $600 was paid in three different installments, $200 each. One was on the 21st, while this note was in our collection case for collection. They were all close together. The $600 was credited to the account of the St. Louis National Bank. This account would sometimes show a credit and sometimes a debit. The St. Louis Bank is holding considerable quantity of our securities, and I consider that any claim they have against the Bank of Mammoth Springs will be amply covered by these collaterals."

F. M. Daniel, the appellant, testified: "I am defendant in this suit. I executed this note to the Bank of Mammoth Springs. I had no notice of the St. Louis National Bank holding this note prior to the bank closing. This note was given to the Bank of Mammoth Springs, and payable there. I paid there $600 on this note, and got a receipt for it, which is as follows: 'July 21st, 1897. Received of F. M. Daniel $600, as part payment of his note of $1,000 payable to the Bank of Mammoth Spring, and due July 30, 1897. Bank of Mammoth Spring, by H. G. King, President.' I paid this $600 at different times; $200 on July 21st, and the remainder a short time before. I had money in the bank, and wrote checks on the bank, and told them to put it on this note, and the whole $600 was charged to me, I suppose. Mr. King told me that these checks were all charged up to me on July 21st. I had no notice of the sale of this note to the St. Louis National Bank until the day after the bank failed. When I asked Mr. Reed or some of them where my note was, they said that the St. Louis National Bank had it. I then asked about the $600 I had paid, and they said that was all right. I had no thought beforehand of the bank failing. I afterwards paid the remaining four hundred dollars to Mr. Meeks, and told him that I had paid the $600. The bank is closed, and I have not got my checks yet."

On the cross-examination of King, the cashier of the Bank of Mammoth Spring, he testified that he had the $600 paid him

by Daniel and the note for collection at the same time on the 21st. It is contended by the appellee that there was no such testimony, and that this is improperly in the record. But it appears regularly in the bill of exceptions certified by the judge, and no effort has been made to correct the record in this behalf, and we must take it as correct. We cannot go outside upon assertion merely to the contrary.

The evidence shows that the Bank of Mammoth Spring failed on the 22d of July, and that it returned the note to the St. Louis National Bank, without credit of this $600, and that the same was not paid to the St. Louis National Bank.

The defendant (appellant) asked the following instructions, to-wit:

"The court instructs the jury that if you find from the evidence that the Bank of Mammoth Spring, and the plaintiff, the St. Louis National Bank, were correspondents, and on the 21st of July, 1897, the defendant had in the hands of the Bank of Mammoth Spring six hundred dollars, with instructions for that amount to be paid on the note against him held by the plaintiff, and that you further find that at the same time the Bank of Mammoth Spring had received the defendant's note for collection, and that the Bank of Mammoth Spring, on the 21st of July, 1897, charged up the six hundred dollars to the defendant, and entered to the credit of the St. Louis National Bank, the plaintiff, the said six hundred dollars in their usual course of banking business as correspondents of said St. Louis National Bank, then you would be authorized to find for the defendant;" which was refused by the court, to which the defendant excepted.

A majority of the court is of the opinion that the court committed error in refusing to grant this instruction. Until the note was sent to the Bank of Mammoth Spring for collection, it was not the agent to receive payment for the St. Louis bank, but it was its agent for collection after the receipt of the note on the 21st of July, 1897, and if, after its receipt for collection by the Bank of Mammoth Spring on the said 21st of July, 1897, the Bank of Mammoth Spring had six hundred dollars of Daniel's money, which he had directed to be paid on this

note, and at the same time had the note on the 21st, and charged up to Daniel the amount, and credited the National Bank of St. Louis with said six hundred dollars in the usual course of business between the two banks as correspondents, we are of the opinion that this constituted payment by Daniel to the St. Louis National Bank.

We think there was testimony in the case which called for the submission of these questions to the jury.

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

BUNN, C. J., (dissenting.) The judgment of the court below is reversed by the majority of this court, because that court erred in refusing to give the following instruction, to-wit:

"The court instructs the jury that if you find from the evidence that the Bank of Mammoth Springs, and the plaintiff, St. Louis National Bank, were correspondents, and that on the 21st of July, 1897, the defendant had in the hands of the Bank of Mammoth Springs six hundred dollars, with instructions for that amount to be paid on the note against him held by the plaintiff, and that you further find that at the same time the Bank of Mammoth Springs had received the defendant's note for collection, and that the Bank of Mammoth Springs, on the 21st day of July, 1897, charged up the six hundred dollars to the defendant, and entered up to the credit of the St. Louis National Bank, the plaintiff, the said six hundred dollars in their usual course of banking business as correspondents of said St. Louis National Bank, then you would be authorized to find for the defendant."

There are several things in this instruction which, if announced as rules of law, would lead to remarkable consequences. In the first place, it is announced that the fact of being a correspondent of the St. Louis National Bank would authorize a verdict for the defendant under the circumstances of this case; that is to say, such a fact would be sufficient to bind the plaintiff by the acts of the Mammoth Springs Bank as its agent to collect said note. It is manifest, I think, that all that could or should have been said by the court in an instruction on the subject was that if the jury should find that

the defendant paid at the Mammoth Springs Bank, and to that bank to be applied to the note in question, the said sum, or any part thereof, at the time or after the receipt by the Mammoth Springs Bank of the note in question, then they should find for the defendant to the extent of such payment. Even this would have been in a violation of a rule laid down by this court, to be referred to later on, and when, therefore, I say that such was all the court should have given by way of instruction on the subject, I don't mean that even that is strictly the law, but only that, the verdict of the jury and judgment of the court being based on that theory, it was all that the defendant could ask, since the jury, in giving its verdict for $400 only, evidently found that the last two hundred alleged to have been paid was in fact paid, after the reception of the note for collection by the Mammoth Spring Bank at 11 o'clock a. m. of the 21st July, and therefore was paid when said bank was in fact the agent of the plaintiff to collect the note, and for that reason should be deducted in favor of defendant from the $600 claimed by the plaintiff.

The $400 for which the judgment was given, according to defendant's testimony, was paid some days before the arrival of the note for collection—before the Mammoth Spring Bank became the agent of the plaintiff in any sense, unless we say, as the refused instruction seems to say, that a business correspondence constitutes the one the agent of the other correspondent.

These payments by the defendant, it appears, were not payments in money, but by checks on the Mammoth Springs Bank, in which the defendant had funds on deposit to his credit, for in his testimony he says: "Q. What was the amount of the payment on the 21st. A. I think it was $200, but am not positive. I differ from Mr. King (president of the Mammoth Springs Bank) as to the amount of the payments I made. He thought there was three $200 payments, but my recollection is that there were two $100 checks and two $200 checks. I had money in the bank, and wrote checks on the bank, and told them to put it on the note, and the whole $600 was charged to me, I suppose." So, then, no actual money was paid, but the defendant merely drew his

checks on this bank against funds he had in it, and directed the amounts so drawn to be credited on or to said note. This strange transaction is more or less explained by the further testimony of defendant that he still thought, when making these payments, that the note was owned by the Mammoth Springs Bank, the original payee, and never knew that it belonged to the plaintiff, or had been assigned to any one, until the Mammoth Springs Bank had closed its doors.

When the payments amounting to $400 were made, the Mammoth Springs Bank was the depository of the defendant—his agent. The question is, when did that agency cease? A receipt was given by the president of that bank to the defendant for these payments, as they were made, as follows: "July 21st, 1897, received of F. M. Daniel $600 as part payment of his note of $1,000, payable to the Bank of Mammoth Springs, and due July 30th, 1897." [Signed] "Bank of Mammoth Springs, by H. G. King, President." So, after all, the credits were not given to defendant on his note except that of 21st July—that is, as credits on the note or to be applied on the note—unless the bank book entries otherwise indicated, the exact language of which we have not. H. G. King, the president of the bank, and the person who seems to have dealt for the bank in the matter, says he did not enter this credit of $600 upon the note, because there was yet $400 due on it.

When the Mammoth Springs Bank received the note for collection, on the 21st July, it had this indorsement on it: "Pay Bank of Mammoth Springs or order." [Signed] "St. Louis National Bank." This constituted the authority of that bank to collect the note. King says further that on the morning of the 23d of July, "I returned it to the St. Louis National Bank." And it appears elsewhere that it then had no additional indorsements on it—of payment or otherwise. In other words, notwithstanding what was said as to the appropriation of payments, none of them were indorsed as credits on the note, and the plaintiff was not informed of them. It is, of course, not to be denied that the Mammoth Springs Bank is liable to the plaintiff for any money the former had actually collected for the latter. And neither can it be denied that the defendant is

entitled to credits on his note of amounts actually paid by defendant to it, whether directly made or through its duly authorized agent, but have such payments been made, and in a manner recognized by the rules of law regulating commercial transactions of the kind? The legal principles governing such cases appear harsh at first blush, and yet they are a necessity. The defendant never once thought, when making the alleged payments, to ask where the note was, or to whom it belonged at the time. He assumed that it was still the property of the local bank—the original payee. He paid the several amounts not in money, but by checks on this same bank, and against funds he then had therein. It is unnecessary to ask why he did not pay the $600 all at once. Nor need we advert to the fact that the bank was then in the throes of death, for its doors were closed on the morning of the 23d of July, 1897.

But enough as to the facts, except to say that the defendant, being a depositor in the bank to the extent at least of this $600 up to the afternoon of the 21st, would have lost the same by the failure of the bank within the two succeeding days, unless his deposits could be made to pay his debt to the plaintiff, as is sought to be done in the defense to this suit. Under the rule laid down in *Jenkins* v. *Shinn*, 55 Ark. 347, the Bank of Mammoth Springs was defendant's agent up to the afternoon of the 21st, in all things respecting the payments he had made to be appropriated to the payment of the note. How stands it afterwards? In *L. R. & Ft. S. Ry. Co.* v. *Wiggins*, 65 Ark. 385, we said: "An agent, having authority merely to accept payment at maturity of notes due his principal, has no implied authority to alter the contract by accepting payment of a note before its maturity." I quote from the syllabus.

Besides, the mere drawing of checks on the Mammoth Springs Bank was not payment to plaintiff, but a request to the Mammoth Springs Bank to pay this much on the note, for a third party cannot make the agent of his creditor the payee of his debts, and hold his creditor bound by such an arrangement. There was no money paid by defendant, nor check on solvent

bank given by him, for the plaintiff. *Henry* v. *Conley*, 48 Ark. 267.

The instruction asked and refused does not reflect the law of the case made, in my opinion, and was properly refused.

BATTLE, J., absent.

---

## PACE v. ROBBINS.

67 232
70 71
67 232
74 92

Opinion delivered December 2, 1899.

HOMESTEAD—BURDEN OF PROOF.—Where a debtor seeks to claim a tract of land more than 80, but not exceeding 160, acres in area exempt as a homestead, the burden is on him to show that its value does not exceed $2,500. (Page 233.)

Appeal from Marion Circuit Court in Chancery

BRICE B. HUDGINS, Judge.

*W. F. Pace*, for appellant.

The homestead allowed outside of a city, town or village can embrace no more than 160, nor less than 80, acres, and must not exceed in value the sum of $2,500. Const. of Ark. art. 9, § 4. To constitute a "family," within the meaning of the homestead law, there must be a condition of dependence, and not a mere aggregation of individuals. Thomp. Hom. & Ex. §§ 45, 46. He who seeks the benefits of the homestead law must bring himself strictly within its terms. 34 Ark. 111; 55 Ark. 449.

WOOD, J. This suit was brought by appellant to uncover certain real estate, consisting of 138½ acres, and to subject same to the payment of appellant's debt; he being a judgment creditor.

The answer set up that the land in controversy was a homestead, but failed to allege that it did not exceed in value the sum of $2,500, and there was no proof as to the value of the alleged homestead. The court found that the land men-

tioned in the complaint was a homestead, and not subject to appellant's debt, and dismissed his complaint.

Upon the pleadings and proof, the court erred in finding that the entire tract in controversy was exempt from appellant's debt. Inasmuch as the tract of land contained more than eighty acres, the burden of proof was upon the appellee to show that the land did not exceed the sum of $2,500, in order to have the entire tract declared exempt under the claim of homestead. This court held, in a suit to set aside a fraudulent conveyance of personal property, that it was incumbent upon the one claiming the property as exempt from execution to show such fact. *Blythe* v. *Jett*, 52 Ark. 547; Waples, Homestead and Ex, § 865. There is no reason for a different rule as to real estate.

The creditor having shown a *prima facie* case of fraudulent conveyance of a tract of land, it devolved upon the debtor, if he would overcome the *prima facie* case of fraud on the ground that the land was his homestead, to show his exemption. Here the conveyance, unless of a homestead, is clearly shown to have been fraudulent. It was to Mrs. Rebecca Dobbins, mother of J. A., and wholly without valuable consideration. J. A. Dobbins says: "The plaintiff's demand against me was a debt where I was security for one Chaffin, and I did not intend to pay the debt if I could help myself." Under these circumstances, the burden was upon appellees, under their claim of homestead, to show it. Wait, Fraud. Conv. and Cred. Bills, § 166; *Graham* v. *Culver*, 3 Wyo. 639, S. C. 29 Pac. Rep. 270.

The decree of the Marion circuit court is therefore reversed, and the cause is remanded, with directions to enter a decree in favor of appellant, subjecting all of the land, except eighty acres to be selected by appellees, to the payment of appellant's debt, unless appellees show that the whole tract is worth less than $2,500, and therefore exempt.

BATTLE, J., did not sit.

67 234
f78 290

# WILLIS v. STATE.

Opinion delivered December 2, 1899.

1. EVIDENCE—DECLARATIONS OF CONSPIRATOR.—The declarations of a conspirator, made after the conspiracy has ended, are inadmissible against his co-conspirators. (Page 235.)

2. INCOMPETENT EVIDENCE—EFFECT OF EXCLUSION.—Where two defendants were jointly tried for the same crime, and the court erroneously admitted against one defendant incompetent testimony tending to implicate both, but excluded it as to the other, and directed the jury not to consider it as affecting him, the conviction of the latter will not be set aside, if he did not ask for a severance in the trial. (Page 235)

Appeal from Scott Circuit Court.

STYLES T. ROWE, Judge.

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

The parties being co-conspirators, the statements complained of were admissible against all the defendants. 92 N. Car. 732, 737, 747; Und. Cr. Ev. § 491; 12 Tex. App. 65; 45 Fed. 872; 32 Ark. 220; 2 McClain, Cr. Law, § 998. At least as against Lingo, the testimony was not prejudicial, as the court told the jury not to consider this evidence against him. 66 Ark. 16.

WOOD, J. This is an appeal from a conviction of robbery and burglary. The appellants were jointly indicted and jointly tried. No objection was urged to the indictment or the procedure. There was evidence to justify a verdict of guilty for both offenses against each of appellants. The fourth ground of the motion for new trial is as follows: "Because the court erred in permitting the witness Mobly to testify to conversation had with Tom Fuqua in the absence of the defendants, or either of them." Mobly testified as follows: "During the day of June 12, 1899, I saw Tom Fuqua, my brother-in-law, and Henry Willis at several different times in private conversation, and

when I would happen to go near where they were talking they would drop the conversation. Fuqua came to my house an hour before dusk, and changed some of his clothing. He remarked that he was going to have some money before morning, and I said, "Why, what is the matter?" and he said, "We are going to have some fun tonight." About dusk that evening Fuqua and Willis came to my house horseback. Tom took off his collar and tie, threw them in the yard, and told my wife to get them. Fuqua came to my house the next morning, and says, "We made a pretty good haul last night," and took a $10 bill out of his pocket and showed it to me. The next morning following this Fuqua told me that he must leave; that they had Willis under arrest, and would have him next. He left. At the examining trial, Willis said to me, 'Do you know where Tom Fuqua is?' and I said, 'No.' Willis said, 'If you do, for God's sake do not give him away.' My conversations with Fuqua were in the absence of both Lingo and Willis, except when Willis and Fuqua came to my house about sundown." All this evidence of what Fuqua said after the alleged offenses had been committed and the conspiracy had ended was improper, and should have been excluded as to Willis as well as Lingo. The acts and declarations of any conspirator in furtherance of the common enterprise are admissible against any or all the others, but such acts or declarations must be done or said while the conspiracy is in progress, not before it has begun or after it has ended. 1 Greenl. Ev. § 184a; Bradner, Ev. 514; 1 Taylor, § 527; *Gill* v. *State*, 59 Ark. 422, and authorities cited. The court excluded it as to Lingo, and, inasmuch as he did not ask for a severance in the trial, he cannot complain. We must assume that the jury obeyed the directions of the court not to consider the testimony as affecting him. The error was prejudicial to Willis, and entitled him to a new trial.

We find no other reversible error in the record. The judgment of the circuit court is therefore affirmed as to Lingo, and as to Willis it is reversed and remanded for a new trial.

67 236
o82 533

67 236
87 392

67 236
90 339

# SPRINGFIELD FURNITURE COMPANY v. SCHOOL DISTRICT NO. 4 OF FAULKNER COUNTY.

Opinion delivered December 2, 1899.

1. SCHOOL DISTRICT—CONTRACT.—A contract for the purchase of school furniture made by two only of the three directors at a special meeting held without notice to the third director is invalid, as also are the warrants issued to pay therefor. (Page 238.)
2. SAME—RATIFICATION OF INVALID CONTRACT.—Where a school district accepted and issued warrants for school furniture illegally purchased for it by two of its directors without the concurrence of the third director, and used it for more than a year, without offering to pay for its use, or to return it, and without taking any steps to annul the contract, the school district will be held to have ratified the contract, and will be denied any relief in equity. (Page 238.)

Appeal from Faulkner Chancery Court.

THOS. B. MARTIN, Chancellor.

STATEMENT BY THE COURT.

On the 30th day of June, 1897, the appellee filed a complaint in the Faulkner chancery court against the appellant and the county treasurer of Faulkner county, alleging that on June 23, 1896, A. K. Pearson, Gus Powers and W. M. Johhson were directors of plaintiff school district. That on said day the appellant made a pretended contract with said district through two of the directors, A. K. Pearson and Gus Powers, for the sale of school desks for $156.80, and received two school warrants in payment, signed by Pearson and Powers. That the warrants were registered with the county treasurer in January, 1897. That there was no meeting of the directors of the district at the time the contract was made and warrants issued, but that on a day shortly prior to June 23d there had been a meeting of the directors, at which meeting the proposition to buy desks had been considered, and it had been decided not to buy. That Johnson, one of the directors, did not sign the contracts or warrants, and knew nothing of either the contract or

warrants until they had been signed. That no meeting of the three directors was held, and no notice of a meeting was given, and, in fact, there was no meeting, but Pearson and Powers acted separately. That the desks were delivered to Pearson and Powers, who paid the freight on them, and took them to the plaintiff's schoolhouse. That said desks are in plaintiff's possession, many of them unpacked, and all in perfect condition, and plaintiff here and now offers to return them into court for the Springfield Furniture Company. Praying that the treasurer be enjoined from paying the warrants, and that they be declared null and void and canceled.

There was a temporary injunction issued on the day complaint was filed. The Springfield Furniture Company answered, alleging that the purchase was authorized by a regular meeting of the directors of the plaintiff district. That at said meeting a majority of the directors were present, and all had been legally notified of the meeting. That plaintiff accepted said furniture, used the same, and made no offer to return same for more than one year after accepting.

The testimony shows that in June, 1896, Pearson, Powers and Johnson were the directors of the district. That about one week before Pearson and Powers made the contract with the Furniture Company all the directors were present at a meeting when it was decided not to buy the desks. That Johnson did not know of the subsequent meeting held by Powers and Pearson, and was not notified of the meeting, and did not hear of the contract until about a week after it had been made. That Pearson and Powers held a meeting June 23, 1896, made and signed a contract for the purchase of forty desks, signed the warrants and received the desks at the depot during the second week in July, took them to the schoolhouse, and put up twenty six of them, and the district used them one year in the school. After using the desks one year, they were taken down and stored in the upper part of the schoolhouse. No offer was made to compensate the company for the use of the desks, nor was any offer made to return them, except the statement in complaint.

*J. H. Harrod*, for appellant.

Where a party seeks equitable relief, he must offer to do equity. 55 Ark. 98; 32 L. R. A. 220; 34 *id.* 548; 99 U. S. 253.

WOOD, J., (after stating the facts.) As the contract of purchase was made by only two directors, and not at a regular meeting, nor at a special meeting upon notice to the third director, it is not binding. *School District* v. *Bennett*, 52 Ark. 511. Likewise the warrants were also invalid. Nevertheless, under the circumstances, the school district was not in an attitude, at the time of filing its complaint, to repudiate the contract and refuse to pay for the desks. The proof shows that the district accepted the desks, and used twenty six of them for about one year, and did not offer to recind the contract and to return the desks until the bringing of this suit. The director Johnson testified that he "never knew anything about a contract having been made *for about a week after it was done.*" The contract was entered upon June 23, 1896. The suit was brought June 30, 1897. The testimony of Johnson shows that he knew the desks had been received, and that a portion of them were being used in the schoolhouse. It is shown, therefore, that all the directors knew of the contract, and that the desks had been received, and were being used, yet no action was had by the board to annul the contract and cancel the warrants for more than a year. Such conduct must be taken as an acquiescence by the school district in the unauthorized contract made by two of its directors; for, all the directors having notice, the district is bound in the same manner and under the same rules as an individual would be bound. The contract was not *ultra vires*. Johnson, the only director not notified in the beginning, after having notice of what was done, took no steps, so far as this record discloses, to have the board rescind or repudiate the unauthorized act of the other two directors. "If a party calls upon a court of chancery to put forth its extraordinary powers, and grant him purely equitable relief, he may, with propriety, be required to submit to the operation of a rule which always applies in such cases, and do equity in order to get equity." *Fosdick* v. *Schall*, 99 U. S. 253.

The school district can not insist upon the relief sought.

It has not even proposed to make compensation for the use of the property while in its possession. Nor did the chancellor impose any terms whatever as a condition for granting the relief prayed.

The decree is therefore reversed, and the complaint is dismissed here for want of equity.

BATTLE, J., not participating.

---

## HUFFSTEDLER v. KIBLER.

Opinion delivered December 2, 1899.

67 239
d69 5

1. ADMINISTRATION—HOMESTEAD AS ASSETS.—The homestead of a decedent is assets in the hands of his administrator to pay debts as to which it is not exempt from execution. (Page 241.)

2. PROBATE COURT—JURISDICTION.—The probate court has jurisdiction to order a sale of a decedent's homestead to pay claims duly probated against decedent as guardian, which are a charge against the homestead, under Const. 1868, art. 12, § 3, providing that the benefit of the homestead therein provided for shall not be extended to persons indebted for trust funds. (Page 242.)

Appeal from Randolph Circuit Court.

JNO. B. MCCALEB, Judge.

*S. A. D. Eaton*, for appellants.

The land was the homestead of the appellant's ancestor at the time of his death. 41 Ark. 309; 55 Ark. 55; 56 Ark. 621. The sale by the administrator was void, because: *First.* The probate court had no jurisdiction to order the sale of the homestead to pay debts. 47 Ark. 454; Fr. Void Jud. Sales, 35; Thompson, Hom. & Ex. 546. The administrator was not even a proper party. 35 Ark. 24. *Second.* Even if such sale would be made to pay certain privileged debts, it would not be made to pay others not so privileged, but which are mingled with the privileged ones. 52 Ia. 620; 89 N. Car. 396; 30 Minn. 84: *ib.* 259.

*P. H. Crenshaw*, for appellees.

The probate court had jurisdiction. Sand. & H. Dig., § 110; 18 Ark. 334; 113 U. S. 604; 39 Ark. 577; 23 Ark. 604; 33 Ark. 658; 45 Ark. 495; *ib.* 229; 49 Ark. 76; 51 Ark. 361. It would not have altered the rights of the parties if the guardian had chosen to settle by note and judgment had been rendered thereon. 45 Ark. 108; 46 Ark. 43; 51 Ark. 84.

BUNN, C. J, This is a suit, originally in ejectment, by Laura K. Huffstedler and Donald B. Alcorn, children and heirs at law of Hamlet F. Alcorn, deceased, to recover the lands mentioned from appellees, Nancy M. Kibler and her husband, M. H. Kibler, and Columbus McIlroy; and subsequently in the progress of the cause, at the instance of defendants, it was transferred to the equity docket, and the chancellor dismissed the bill for want of equity; and plaintiffs appealed.

Hamlet F. Alcorn died in 1873, seized of an estate in fee in the southeast fractional quarter of section 31, township 20 north, range 1 west, in Randolph county, Arkansas, and occupying the same as his homestead. He left surviving him the plaintiff, Laura K. Huffstedler, by his second wife, and Donald B. Alcorn, by his third wife. The first wife of Hamlet F. Alcorn was Margaret, the daughter of Fielding Stublefield, who died in 1862, leaving the following children by her said husband, to-wit: William L., known as "Lawrence;" Margaret A., known as "Ann;" Joseph; and Israel, known as "James." They were living during the pendency of this suit in the trial court, and Hamlet F. Alcorn became their statutory guardian after their mother's death. These children inherited from their grandfather, Fielding Stublefield, a certain interest in his real estate, and this had been sold by a commissioner of court for the purpose of partition between them and the other heirs of their deceased grandfather, and the proceeds coming to them were paid over to their father and guardian, who became responsible therefor as such, and had this fund in hand when he died in 1873. Hamlet F. Alcorn had occupied the land in controversy for a long time, until a little while before his death, which occurred at the house of a neighbor. It does not appear that he had abandoned the land

as his homestead. Indeed, that it was his homestead until his death is not seriously controverted. O. G. Fry became his administrator, and in due course, by order of the probate court, sold his homestead land to pay the debts owing to his said wards, which were duly probated against his intestate's estate. These debts, together with expenses of administration, were substantially all that were probated against the estate, so far as the record shows. The plaintiffs in this suit claim the land in controversy as heirs of their father, Hamlet F. Alcorn; contending that the sale of his homestead by his administrator to pay debts was illegal and void. The defendant, M. H. Kibler, purchased the land at the administrator's sale, and conveyed the same afterwards to his wife, Nancy M. Kibler, and she to McIlroy, and they claim that the administrator's sale was legal, because it was to pay debts from which the homestead was not exempt. This is the sole question in this case.

It is contended by appellants that a chancery court, and not the probate court, would have been the proper tribunal in which the privileged debts should have been adjudicated; that the homestead was not assets in the hands of the administrator, and therefore was not subject to sale by order of the probate court,—citing *McCloy* v. *Arnett*, 47 Ark. 445, in which the sale was ordered to pay ordinary debts, and therefore it is not in point in this case. In *Gilbert* v. *Neely*, 35 Ark. 24, also cited by appellants, it is said by this court (after discussing the subject of the construction of the homestead provisions in the constitution of 1868): "The widow and minor children, if there were minor children, did not, upon the death of the husband and father, succeed to a right more extensive, except as to the condition of occupancy, than he possessed,"—citing Thompson on Homesteads, § 547.

Now, what was the right of the father in that case, and what was the right of the father in the lands in the case at bar, as against the privileged debts? The constitution of 1868, by which the rights of the parties in both cases are fixed, expressly provided that the benefit of the homestead should not be extended to persons indebted for trust funds (art. 12, § 3.) Alcorn in his lifetime could not have pleaded his homestead as exempt from

the payment of these fiduciary or trust debts. Neither could his widow and minor children, if there were such, have claimed the homestead as exempt from the payment of such debts. That is the plain meaning of the decision last cited. The real estate of a decedent is assets in the hands of his administrator to pay his debts, except lands exempted as a homestead; but, in order to make the exception, the lands must be exempt.

This leaves only the question of the proper tribunal to adjudicate the privileged debts. Under the law now existing—the law of the remedy (and this, in this respect, has not materially changed)—the probate court has exclusive original jurisdiction in all matters relating to the probate of wills and testaments, the estates of deceased persons, executors, administrators, guardians and persons of unsound mind and their estates, and in the settlement and allowance of accounts of executors, administrators and guardians. Now, in the matter referred to in this record, the accounts of the wards were presented to the administrator of the estate by the guardian for allowance, and were by him allowed, and were duly probated. It would be impossible for the administrator or the probate court to pass upon these claims in behalf of minors against their deceased guardian without ascertaining the relation existing between them, and, that relation being shown, the claims are necessarily such as are freed from the claim of homestead exemption. The probate court in this matter was passing upon the character of the debt, not of the land. A plain and adequate remedy is in the probate court to ascertain what a debt is for, and the relation which existed between the parties to it. That being true, we see no reason why the sale by the probate court should be disturbed. Of course, such sale might be set aside for fraud, or on some other equitable ground, in a direct proceeding in equity, but nothing of that kind appears here.

Affirmed.

BATTLE, J., absent.

## AUTEN v. MANISTEE NATIONAL BANK.

Opinion delivered December 9, 1899.

1. PROMISSORY NOTE—LIABILITY OF INDORSER.—To a bank sued as indorser of a note it is no defense that demand and protest of the note was not made if the failure to make demand and protest was due to such bank's negligence, the note having been sent to it for collection. (Page 248.)

2. BANK CASHIER—AUTHORITY.—The cashier of a national bank has authority to indorse negotiable paper owned by the bank, and the bank is not relieved from liability as indorser of a note by reason of the cashier's fraud unless the indorsee had notice of such fraud. (Page 250.)

3. NEGOTIABLE INSTRUMENT—PLACE OF DEMAND.—Where a bank designated as the place of payment of a note which it has indorsed has become insolvent, demand of payment may be made and notice of nonpayment given to the bank examiner in possession. (Page 251.)

Appeal from Pulaski Circuit Court.

JOS. W. MARTIN, Judge.

*Cockrill & Cockrill*, for appellant.

Without the allegation of the notice of dishonor, or of facts which show an excuse, the complaint alleged no cause of action against the indorser. Wood's Byles, Bills & Notes *306. The collecting agent does not assume the responsibility of doing anything more than making demand upon the maker and notifying the principal of the result. 1 Morse, Banks, § 232; 1 Dan. Neg. Inst. § 331; Story, Bills, § 232; 5 Mason, 366. The sending of the note to the indorser bank for collection by it is evidence that it was not looked to for payment. 117 Ill. 100; 71 Mo. App. 451. Knowledge of appellant as to nonpayment of the note did not dispense with the necessity of notice of dishonor by the holder. Benj. Chal. Bills and Notes, 182; Story, Bills, §§ 376–7; 3 Pet. 87; 7 Pet. 291; 16 S. & R. 157. The indorsement of the appellant having been for accommodation, there is no presumption that the cashier communicated it to the bank. 65 Ark. 543; 37 Atl. 550; 35 Atl. 1053; 50 N. E. 1079. Where the notary's certificate of protest mis-

describes the note, the burden is on the holder to show such fact, and explain it. 1 Comst. 413; 12 Barb. 245; 1 Comst. 413; S. C. 2 Seld. 19. The notice of dishonor must be such as to apprise the indorser of the dishonor of the identical note in question. Story, B. & N. § 349; 23 Wend. 626; Chitty, Bills, 501; Byles, Bills, 204; Mees. & Wels. 437; 11 Wheat, 436; 11 M. & W. 809; 1 Comst. 415; 9 Peters, 33; 5 Seld. 279; 9 Ala. 631; 19 Hun, 518; S. C. 75 Am. Dec. 361. Borrowing money is out of the usual course of banking business, and the one who loans it must, at his peril, see that the officer or agent of a national bank, who offers to borrow money for it, has special authority to do so. 152 U. S. 346; 13 C. C. A. 47; S. C. 65 Fed. 573; 21 C. C. A. 319, 323; S. C. 75 Fed. 296, 300; 55 Fed. 465; Ball, Nat. Banks, 54; Mechem, Agency, §§ 291, 285. The directors of national banks are the proper ones to manage its affairs. Rev. Stat. U. S. § 5145. The performance of these duties cannot be delegated. 1 Morse, Banking, §§ 116, 117; 3 Story, 411, 425; 12 R. I. 164. In the business of banking, re-discounting commercial paper is only a method of borrowing money. 8 Wheat. 338; 104 U. S. 277; 14 Fed. 662; 15 Johns, 358, 392; 17 N. Y. 507, 515; 26 Ohio St. 141, 151; 157 Mass, 548, 550; 2 Harr. (N. J.) 191, 206, 207, 209, 211; 52 Md. 78, 129; 42 Md. 581, 592; 14 Ill. App. 566, 570; 48 Mo. 189; 23 Minn. 198; 20 Kas. 440, 446, 447, 450, 451; 3 McLean, 587, 589; 8 C. C. A. 320; 76 Fed. 339, 341, 344; 1 Batty, 273; 8 Wheat. 338; 104 U. S. 271; 15 Johns. 358, 392; Bouvier's Dict. *Discount*; Webst. Dict. *Discount*; Ency. Dict. *Discount*; 50 Conn. 167; 28 W. Va. 653; 9 Metc. 306, 314; 28 W. Va. 653; 63 Ark. 413; 23 Minn. 198; 52 Md. 82; 62 Ky. 216; 157 Mass. 548. Any attempt by the cashier to negotiate appellant's notes was a criminal offense and a nullity. Sand. & H. Dig., § 1004; 62 Ark. 33; Rev. Stat. U. S. § 5209; 164 U. S. 347; 9 Wall. 362. The cashier's mere assumption of authority to bind the bank raises no presumtion that he really possessed such authority. 4 Thompson, Corp. §§ 4880, 4882; 62 Ark. 33; S. C. 34 S. W. 89; 152 U. S. 346; 5 Wheat. 326; 21 How. 356; 7 Wall. 666; 130 U. S. 416; 2 Mor. Corp. § 608. The protection

which commercial usage throws around negotiable paper can not be used to establish the authority of an agent to issue or indorse it. 7 Wall. 666, 676; 1 Dan. Neg. Inst. §§ 273, 279; 109 N. Y. 512, 525, 526; 62 Ark. 33; 93 Ky. 525; 95 U. S. 557; 5 Denio, 567; 89 Va. 290. Even if the board had delegated the cashier to run the bank, his authority would not have extended to the borrowing of money or indorsing of paper for that purpose. 47 N. J. Eq. 357; 7 Wend. 31; 5 Wend. 567; 152 U. S. 346. There was no ratification by the directors of the act of the cashier. 152 U. S. 346; 143 Mass. 250; 12 Allen, 493; 141 U. S. 132. Nor do the facts show that the appellant ever received any of the proceeds of the notes. 69 Fed. 131; 66 Fed. 34; S. C. 13 C. C. A. 313; 66 Fed. 694; S. C. 14 C. C. A. 61; 65 Fed. 573; 3 Dill. 44; 58 Fed. 638. Further on the question of satisfaction see, 54 Ia. 86; 3 Dill. 403; 95 U. S. 557; 36 Kas. 284; 113 Mass. 291; 152 U. S. 346, 352; Mechem, Agency, § 148; 150 Mass. 209; 7 Gray, 287; 109 Mass. 214; 128 Mass. 503.

*Dodge & Johnson*, for appellee.

There was no error in the refusal of the court to give the first, second, third, fourth and tenth instructions asked by appellant, as to re-discounting and the notice a purchaser is bound to take of an agent's authority. All these points have been decided adversely to appellant's contention in another case precisely like this, to which it was a party. 174 U. S. 125, 144–149, citing to the point that the directors might have empowered the cashier or president to indorse paper: 141 U. S. 132; 101 U. S. 181; 104 Mich. 521; 106 Mich. 367; 26 Wis. 663; S. C. 7 Am. Rep. 107; 40 Neb. 501; S. C. 24 L. R. A. 263. See also same case, 27 U. S. App. 603; 49 U. S. App. 67. Where the notary's certificate describes a note as bearing 8 per cent., instead of 10, the variance was not material. 4 Am. & Eng. Enc. Law (2 Ed.), 381. Service of the notice of protest upon the examiner in charge of the affairs of appellant bank was sufficient. 94 Tenn. 624; S. C. 28 L. R. A. 492; 57 Cal. 327; 4 Duer, 212; 3 Rand. Com. Pap. 278; 7 Mo. App. 318; 15 Me. 270; 14 La. 494; 15 La. 51; 11 Gratt. 260; 12 Ind. 225; 28 La. Ann. 48. Only foreign bills of exchange need to

be protested. 3 Rand. Com. Pap. §§ 1142, 1143; Sand. & H. Dig., § 4288; 9 Ark. 45; 8 Wheat. 326, Parsons, Bills & Notes, 643g; 6 How. 23; 8 How. 234; 4 Am. & Eng. Enc. Law, 379. We have no statutory requirements as to recitals of the certificate of protest, and it is not necessary that it recite the notice of dishonor. 3 Rand. Com. Pap. § 1666; Sand. & H. Dig., §§ 2884–5; 57 Cal. 327; 1 Kelley, 306; 11 Ind. 253. It was the duty of appellant to give notice of protest or have it done. Morse, Banks, 352. Failing to do so, it became liable for the amount. 5 Minn. 523; 47 N. Y. 570. Appellant should have notified appellee of dishonor of the note. 8 Metc. 79; 7 How. (Miss.) 656; 7 Sm. & M. 592. A notary's authority to give notice will be presumed from his possession of the paper. 20 Ala. 322; 28 Mo. 339; 18 Johns. 230; 15 Barb. 326; 26 Me. 45. Appellant's acts amounted to a waiver of demand and protest. Pars. Bills & Notes, 582; 12 Wend. 489; 13 Barb. 163; 4 E. D. Smith, 458; 1 Stark. 116; 7 Cal. 753; 11 Ind. 323; 2 Dan. Neg. Inst. 143; 32 Oh. St. 526; 15 Ark. 422. If appellant's contention that the notes were not genuine be true, the indorsers thereon would be liable without proof of demand or notice. 12 L. R. A. 434; 1 Pars. Bills & Notes, 444; 2 Vt. 193; 2 Dan. Neg. Inst. § 113; 1 *id.* § 669; 39 Ark. 47. All presumptions are in favor of the correctness of a notary's actions. 2 Dan. Neg. Inst. § 964; 1 Swan, 420; 43 Me. 144, 27 Grat. 674; 34 Ia. 466. Further, that protest was properly made and notice properly given, see: 2 Dan. Neg. Inst. §§ 965, 972, 998, 1000, 1002, 1005, 1016, 1017; 31 Ill. App. 78; 29 Mo. App. 518; S. C. 24 Mo. App. 420; 2 La. Ann. 964; Tied. Com. Pap. § 337; 3 Rand. Com. Pap. § 1243; 82 Ky. 231; 2 Law. Dic. 409; 6 How. (Miss.) 217; 3 Keyes, 343; 55 N. Y. 465; 13 So. 336; 40 Cent. L. J. 450; 39 S. W. 725; 11 Wheat. 173, 177.

BUNN, C. J. This is a suit by the appellee against the appellant, as the indorser on two promissory notes; the one drawn by the McCarthy & Joyce Company, payable to the appellant, at its office in Little Rock, on the 10th of February, 1893, dated July 19, 1892, for the sum of $5,000, with 8 per centum per annum interest from date until paid, and indorsed

James McCarthy and Geo. Mandlebaum, secretary and treasurer. The First National Bank of Little Rock, the drawee, in due course of trade assigned and transferred said note, for value, by indorsement, to the appellee National Bank, of Manistee, Michigan, and the latter thereby became the owner thereof. This note was presented for payment at the First National Bank of Little Rock in due time after maturity, payment refused, and the same was duly protested before suit.

This suit is also on a second note, made to the order of George R. Brown, on October 10, 1892, for $4,000, with 10 per cent. interest from maturity until paid, due and payable at the First National Bank of Little Rock, Arkansas, ninety days after date, by the Press Printing Company, Geo. R. Brown, president, the same falling due January 11, 1893. This second note was duly indorsed by Geo. R. Brown, the payee, to the First National Bank, waiving demand and protest, and by it indorsed and transferred for value to appellee bank before maturity. In due time it was sent by appellee to appellant bank for collection, it being made payable at its office or place of business. The appellant thus became the agent of the appellee to collect the note, although it was liable thereon, as the immediate indorser, to appellee. The First National Bank of Little Rock, the appellant here and defendant in the court below, thereby was made to occupy, or rather chose to occupy, two antagonistic positions, the one as indorser and conditionally responsible for the payment of the note, and the other as the agent of the appellee to collect the same, and, peradventure, from itself. Appellant, after a delay of twelve or fifteen days, returned the note to the appellee, with notification of its nonpayment.

Upon this state of case, the defendant asked the court to give the following instruction, No. 11, to-wit: "If the plaintiff is excusable for not making demand and giving notice of dishonor to the defendant bank at the maturity of the Press Printing Company note, it was its duty to do so as soon as the cause of the delay ceased to operate, and if it neglected to do so, the defendant bank is discharged."

This instruction the court refused to give, but in its gen-

eral charge on its own motion gave the following on the subject, to-wit: "6. The indorser of commercial paper is not, like the maker, absolutely bound to pay the paper upon which his name appears. The indorser's liability is conditioned to pay if the maker, on due presentment at maturity, fails to pay, and upon due notice of such default by the maker being given the indorser [as set forth in other instructions.] 7. So, in this case the defendant bank would be liable only on such presentment and notice, unless you may find, as to one of the notes (the Press Printing Company note), that at the time of maturity, and when payment should have been made, it was in the hands of the defendant bank, as the agent of plaintiff, for collection, and the defendant bank failed to make such presentment and demand, and returned it to the plaintiff bank without having taken such steps. The defendant bank in such case would not be discharged of liability by reason of a failure to present for payment growing out of its own failure to discharge its duty to the plaintiff bank, and notice to it would be waived." In refusing to give the instruction asked by defendant and in giving the instruction quoted, the defendant argues that the court erred, and makes this error a ground for its motion for new trial.

The defendant contends that "it is not the usage to send a note to the obligor for collection from himself;" citing *Am. Exch. Nat. Bank* v. *Metropolitan Nat. Bank*, 71 Mo. App. 451, and *Drovers' National Bank* v. *Anglo-American Packing & Provision Co.*, 117 Ill. 100. In the former it is held: "If a bank, receiving paper for collection payable at a distant place, sends it by mail to the payer for collection, it is guilty of negligence, and this, too, though the payer is the only bank in the place, and though it is customary thus to send paper for collection, since the custom is unreasonable, and though the bank payer failed within the time the forwarding bank had under the law to forward the paper, as the forwarding bank in fact forwarded it in a shorter time."

This particular question is not a question in the case at bar, as was the question in the Missouri case, between the principal and its collecting agent, for neglect of duty as such on the collector's part, but the question here is one between the owner

of the note and an immediate indorser. The agency of the latter is only incidentally involved. This indorser claims to be discharged because of the non-protest of the note, claiming that it was not responsible for the failure to make demand and protest. It was not sued for failing to make demand and protest as against the other indorser, but sued as an indorser; and its only defense is that no demand and protest for the failure of itself to pay is shown. The object of demand is payment; the object of protest is to notify all interested that payment has been refused. It would seem to be a useless procedure to notify one who has made, or ought to have made, the demand, and been refused, that such was the fact. It is true that it is said by many authorities, and that is doubtless the law, that it is negligence *per se* on the part of the holder of a note to send it to one of the obligors for collection; but it is only negligence in the holder in so far as he has appointed an improper agent to collect the note, for the delinquent agent ought not to be heard to plead his own failure to do his assumed duty as agent; and, besides, the question of negligence does not arise when the person who is such agent, and also an obligor, is sought to be bound in the latter capacity only. It is not a question of negligence, but of notice, which is always necessary in order to bind an indorser, unless there has been a waiver, express or implied. The instruction of the court put this question to the jury properly, and there was no error in that regard.

The case of *Drovers' Bank* v. *Anglo-American Packing & Provision Co.*, 117 Ill. 100, was where the P. & P. Company gave the bank a certified check of Kieldsen, on Rice & Messman, bankers of Cadellac, Mich., for collection. The collecting bank failed to collect, and the Bank of Cadellac failed. The suit was brought by the P. & P. Company against its agent, the Drovers' Bank, to hold it responsible for negligence in not making demand, etc., and their failing to collect before the payee bank failed. The collecting bank was held liable, because it had sent the check directly to the bank primarily liable for collection, and not to a proper agent to see to the collection. That was a suit for negligence in the agent. The suit at bar is against the Little Rock bank as one of the obligors on the

note. It pleads, not diligence, but want of notice of protest and non-payment for its defense.

The next question is whether or not the Little Rock bank is bound for the acts of its cashier, Denney, in negotiating these notes. The facts are that this bank received these two notes; whether by purchasing the same, or for its own accommodation, it is really impossible to say, nor does it matter, in our view of the case. The cashier, Denney, had had business conferences with the representatives of the appellee bank, which seemed to have money to loan, in the usual course of banking business, and the Little Rock bank required money, as its officials represented, to enable it to meet its demands in removing the cotton crop. Whether this was the real reason or not, it does not matter, so far as parties who did not known or have reason to know, the contrary are concerned.

The appellee bank paid the Little Rock bank the money on the two notes in question, and by direction of the latter deposited the amount with the New York bank to its credit. In due time, the appellee demanded the payment of the two notes, and payment was refused. It then sued the appellant bank as one of the indorsers on each of the two notes, and the real beneficiary of their sale to the appellee. And the defense is that Denney, the cashier, had no authority to bind his bank in such a dealing. On this point the court below gave its instruction No. 2, and also for plaintiff No. 4, in which we see no error.* See also recent case of *Auten* v. *United States National Bank*, 174 U. S. 125.

---

*Instruction No. 2, given by the court on its own motion was as follows: "(2) As to the authority of Cashier Denney to bind the defendant bank by indorsement of the note, I say to you that to the outside world and to parties dealing in good faith the cashier of a national bank is the duly-authorized agent of the bank to make such an indorsement for the bank, and the plaintiff bank had a right to deal with him as such; and the defendant bank would not be relieved of liability by reason of an improper or fraudulent indorsement made by the cashier, Denney, unless the plaintiff bank had notice of such bad conduct or dishonest dealing of the cashier with his own bank."

Instruction No. 4 requested by plaintiff, and given by the court is as follows: "(4) It matters not what the reasons may have been,—the reasons or inducements actuating W. C Denney, cashier of the First National bank, defendant herein, in negotiating or discounting the notes in contro-

That the president or other official of the Little Rock bank should have successfully schemed to divert the Little Rock bank's funds to its credit in the New York bank to his own use by making use of his official authority cannot be introduced to defeat the claim of the Manistee Bank in this action. It had parted with its money in due course of trade, paid it out on the direction of the appellant bank; and certainly a misuse or misapplication of it afterwards by the fraud and chicanery of the officials of the appellant bank ought not to prejudice the appellee bank, if it is innocent; and there is nothing to show the contrary.

It is contended by the defendant that demand and notice upon Armstrong, the federal examiner in possession of the insolvent bank, was irregular, and not sufficient to bind the bank. Armstrong was not, it is true, an officer or agent of the corporation, but was by operation of law in charge of its books and other papers, to the exclusion of all others. There was, therefore, no other person upon whom to make the demand at the place appointed in the note. See 2 Randolph, Commercial Paper, § 1083, by analogy. Besides, the taking possession by the examiner was notice to all the world that no payment would be made, unless afterwards in the course of admininistration.

This disposes of the essential questions.

The judgment is affirmed.

---

versy. If you find from the evidence that said Denney was cashier of the First National bank, and was dealing with the public as its duly-authorized officer, and that plaintiff had no knowledge that W. C. Denney, cashier, was engaged in defrauding the First National bank, and that it, in good faith, dealt with him as an authorized officer of that bank, then the court instructs you that Denney's acts were such as are within the scope of his authority as such cashier, and the defendant bank would be bound by his acts."

## FARMERS' & MECHANICS' SAVINGS COMPANY v. BAZORE.

Opinion delivered December, 9, 1899.

1. CONFLICT OF LAWS—PLACE OF CONTRACT.—The fact that the local agent of a foreign loan company wrote to an applicant for a loan the terms upon which his company would make a loan, and that such terms were accepted in this state by the applicant, does not constitute the loan an Arkansas contract if the application was made subject to the approval of, and was approved by, the board of directors and the general attorney of the loan company in the foreign state. (Page 258.)
2. LOAN—VALIDITY.—A loan valid under the laws of the state where it was executed is valid in this state, though, if executed here, it would be usurious. (Page 259.)
3. USURY—WHO MAY PLEAD.—One who buys his partner's half interest in a tract of partnership land, and as a consideration therefor assumes all of the partnership debts, among which is a debt secured by mortgage on the land, cannot plead usury as to his partner's half interest in the land. (Page 260.)
4. CONTRACT—LOCI CONTRACTUS.—A loan executed in another state will not be an Arkansas contract, though it is secured by land lying in this state. (Page 260.)

Appeal from Boone Circuit Court in Chancery.

BRICE B. HUDGINS, Judge.

STATEMENT BY THE COURT.

The appellees executed to the appellants their promissory note, which reads as follows:

"Springfield, Mo., Sept. 20th, 1894.

"Sixty months after date, I promise to pay The Farmers' & Mechanics' Savings Company, of Springfield, Mo., $2,500, for value received, with interest from date at the rate of six per cent. per annum, payable in monthly installments, on the fourth Saturday of each month; and I promise to pay said company sixty monthly dues of $50 every month, as stockholder in said company, upon fifty shares of stock, which I agree to carry until the loan is fully paid, with all the penalties of said stock, according to the by-laws and prospectus of said com-

pany. I further agree to pay said company the sum of $25 every month (for) sixty months, being the premium for this loan. [Signed] "T. E. WILSON, MARY E. WILSON,
"A. D. BAZORE, MARY A. BAZORE."

At the same time they executed to C. E. Boyden, as trustee, their deed of trust upon lands in Boone county, Arkansas, to secure the payment of said note.

The appellees brought the bill in equity to cancel said deed, alleging that said note and deed were usurious and void, stating that the said contract was executed in Boone county, Arkansas; that they had paid on the principal sum of $2,500, six hundred dollars as dues on stock in said company, and $388.75, interest and premium, and that the sum of $1,900 is now due and owing on said $2,500 principal. They charge that the company corruptly charged and demanded and exacted more than ten per cent. per annum, and that said deed of trust was a cloud upon their title to the lands conveyed, and prayed that the deed of trust and note be canceled, and that they have judgment for costs.

The defendants denied that the contract was usurious, and denied all allegations and charges of the complaint, and said that said contract was not executed in Boone county, Arkansas, but that, on the contrary, it was executed in the State of Missouri. They then, for further defense, filed a cross-bill, in which they state:

"Before plaintiffs could borrow from defendant corporation the said plaintiffs, T. E. Wilson and A. D. Bazore, were compelled to become, and did become, stockholders in defendants' company. And defendants say that said plaintiffs, on the first day of September, 1894, subscribed for fifty shares of stock of said company, with a view of borrowing from said company, and as a part of said transaction of said loan. Defendants say that twenty-five shares of stock were taken, upon which to borrow the sum of $2,500, as required by the by-laws of said company, and the other twenty-five shares were taken by said defendants as investment stock. Defendants say that, by the terms of said subscription and by-laws of said company, the plaintiffs agreed and promised to pay, and to become obligated to pay, as monthly dues on

said stock, on the 4th Saturday of every month, for a period of sixty months, the sum of $50, being $1.00 per month for each share. Defendan's further say that, having so subscribed for said stock, the said plaintiffs filed with the board of directors of said corporation, at Springfield, Mo., their written application for the loan of $2,500, payable sixty months after date. That said application for a loan was acted upon, approved and accepted by the said defendant company at Springfield, Mo., by and through a vote of its board of directors. That thereupon the said plaintiffs delivered to the defendant corporation at Springfield, Mo., the promissory note in said petition described, and delivered to defendant corporation and C. E. Boyden, at Springfield, Mo., the deed of trust in said petition described, and said note and said deed of trust were by said corporation and trustee accepted and received at Springfield, Mo. And defendants say that the said sum of $2,500 was by said corporation paid to said plaintiffs at Springfield, Mo., and the same was by them there and then accepted and received.

"Further answering, the defendant says that, by the terms of said contract, note and deed of trust, the said principal sum was due and payable sixty months after date, and the said plaintiffs had obligated themselves to pay $50 each month upon said stock, and had agreed to pay interest on said sum at the rate of 6 per cent. per annum, payable monthly; that is to say, promised and agreed to pay as interest the sum of $12.50 per month for sixty consecutive months, and also promised and agreed to pay defendant the sum of $25 per month as a premium for said loan for a period of sixty consecutive months. Defendants say that no part of said principal sum was due and payable, except at the option of the plaintiff, until the expiration of the sixty months, when at said period the value of said shares of stock are applied as a lump payment upon said debt, and the money so paid by the plaintiff as dues, interest and premium were used by defendant corporation, and used to enhance the value of the plaintiff's stock. Defendant further says that for the months of September, October, November and December, in 1894, the months of January, February, March and April, in 1895, plaintiffs paid as dues on

said fifty shares of stock the sum of $50 each month, and during the same period paid the sum of $100 as premium on said loan, and on July 10th, 1895, executed and delivered their certain notes for the payment of $100 dues, $25 interest, $50 premium and $5 fines, or a total of $180. Defendants say that on said July 10th, plaintiffs withdrew 25 shares of their stock from their company, and the withdrawal value of said shares at said time was applied, by the direction of plaintiffs, as follows: (1.) The payment of said note for $180, being the dues, interest and premium for the months of May and June, 1895, and the $5 fines, aforesaid. (2.) To the payment of the dues for the month of July, 1895, on the said remaining twenty-five shares, and six other shares not included in said loan; total, $31. (3.) To the payment of interest for the month of July on said loan of $2,500, and to an additional loan of $600, $15.51, and the balance of said withdrawal, together with cash payment of $11, was applied to the payment of the July premium on the said $2,500 loan and on the said $600 loan. Defendants further say that for the months of August, September, October, November, and December, 1895, and January, 1896, said plaintiffs paid monthly dues on said stock of $25 each, and no more. During the same period said plaintiffs paid the monthly sums of $12.50, as interest on said loan, and no more, and during the same period plaintiffs paid the sum of $25 per month premium on said note, and no more,—making a total payment on dues, interest and premium on said twenty-five shares of stock, and the said loan of $2,500, the sum of $912.50. That, at the time of the institution of this suit, there was payable, but not then due, on said note and said deed of trust the sum of $2,500, and there was due and payable and unpaid the sum of $50 for dues on said stock for the months of February and March, 1896, and there was at the said time due and payable and unpaid on interest the sum of $25 for said two months, and there was due and payable and unpaid at said time the sum of $50 as premium for said two months, making a total of $125, exclusive of fines. And the defendants say that, exclusive of fines, there is now due the defendant corporation by plaintiff the following sums: $2,500 principal debt, pay-

able but not due, and the sum of $150 as dues on the said twenty-five shares of stock, $150 as premiums on said loan, and $75 as interest on said loan. Defendants say that, among other provisions of said deed of trust, it is provided that if default is made in the payment of said note, or any part of it, or any of the interest thereon, when due, or any of the dues as stockholders, when due according to the by-laws of the said party of the third part, then this shall remain in force, and the whole of said indebtedness become due and payable according to the by-laws of the party of the third part. Defendants say that plaintiffs have violated conditions of said deed of trust, and plaintiffs are now in default for 6 months past. Defendants state that should the present value of said shares of stock be applied on said principal debt, there would still be due and payable to the defendant corporation the sum of $2,400. Defendants further state that, after the execution of said note and deed of trust, the defendant T. E. Wilson purchased the interest of said Bazore in said property, and, as the sole consideration of said conveyance, assumed and agreed to pay said $2,500 as due defendant corporation, and promised and agreed to pay dues, interest and premium on said stock and loan. Therefore, filing this as an answer as well as cross-bill, defendants pray judgment for $2,875, with interest, and that the equity of redemption be foreclosed, and said property be sold to pay said debt, interest and premium, with privilege accorded said defendant Wilson before sale to repay said debt by applying the value of his stock thereon, and paying the balance in cash, and for such further relief as this court may see meet and proper, and for this your defendant will ever pray."

To this cross-bill the plaintiffs filed an answer, which, amongst other things, denied the allegations of the cross-bill as to (1) the application for the loan and the action of the board of directors thereon; and (2) the delivery of the note and deed of trust and the payment of the money to plaintiffs in Missouri, but alleging the fact to be that all of said transactions took place in Arkansas.

The court decreed that the note and mortgage were usur-

ious and void, and canceled them, and quieted the plaintiff's title to the land.

*T. J. Delaney*, of Missouri, for appellant.

The contract was a Missouri contract. The place of its performance is in Missouri, and the security is only an incident of the debt. Hence the law of Missouri must govern it. 22 S. E. 521, S. C. 91 Va. 706; 11 So. 107; 60 Ark. 278. The law of the place where a contract is approved governs it. 68 Fed. 467; 52 Mo. App. 357; 1 Dan. Neg. Inst., § 865; 13 Pet. 101. Even if the contract be considered as an Arkansas contract, the company being a mutual one, the plea of usury is not available to appellees. 96 Ga. 803, S. C. 22 S. E. 585; 47 Ark. 58; 56 Ark. 354; 96 Ga. 206; S. C. 22 S. E. 701. Nor could Wilson, in any event, invoke the plea of usury as to the half interest he acquired from Bazore for a nominal consideration. 7 Hill, 391; 49 N. Y. 373; 39 Mo. 445; 123 Ill. 510; 32 Ark. 346; 5 S. W. 287.

*De Roos Bailey* and *Arthur N. Sager*, for appellees.

The contracts are Arkansas contracts; because:

(1) The negotiations were carried on here. (2) The proposition of appellant was accepted here. 60 Ark. 276; 44 Ark. 234. (3) They were actually executed here, and, in the absence of a designated place, contracts are presumed to be made with reference to the place of execution. 3 Am. & Eng. Enc. Law, 546[5]; 8 Bush, 193; 2 Har. & J. (Md.) 191; 14 B. Mon. 558. (4) The notes and deed of trust were delivered here. 3 Am. & Eng. Enc. Law, 547; 3 Daly, 288; 13 Fed. 198; 15 Mich. 94; 20 N. H. 140. Delivery to the recorder and recording under instructions of appellant was delivery to it. 81 Ill. 137; 13 Mo. 360; 4 Wis. 537; 12 Pick. 141; 15 Mich. 94; 20 N. H. 140. (5) The money was secured by Arkansas real estate, and used thereon. 2 Am. & Eng. Enc. Law, 331; 17 Wis. 63; 1 Dan. Neg. Inst. § 894; Whart. Con. of Laws, §§ 510, 368; 6 Paige, 627; 9 Allen, 78; 11 Gray, 38; 8 Am. & Eng. Enc. Law. 654; 1 Biss. 337. (6) The appellant was doing business in this state, and should be amenable to its laws. 39 S. W. 656; 116 N. C. 882; 34 S. W. 235.

The contracts are usurious in both Missouri and Arkansas, and are governed by the law of the place where made. 3 Am. & Eng. Enc. Law, 546[6]; 13 Pet. 65; 10 Wheat. 283; 3 Durn. & E. 425; 22 Ia. 194, 198; 11 Ind. 117. Under the law of Missouri, if the premium paid by the borrower be not freely and openly bid by him, the exaction will be treated as interest, and, if in excess of that allowed by law, will constitute usury. 62 Mo. App. 277; R. S. Mo. 1889, § 2812, art. 9, ch. 42; Thomp. B. & L. Assns. 191, 192, 188; Endl. Build. Assns. 95, 409, 410, 411; 95 Pa. St. 122. As bearing on the question of usury in contracts of foreign companies, see: 25 S. W. 620; *ib.* 622; 68 Tex. 287; 81 Tex. 369; 22 Tex. 128; 26 S. W. 39.

HUGHES, J., (after stating the facts.) The contention here seems to be mainly upon the question whether the contract was a Missouri or an Arkansas contract. The appellee does not contend that the contract was usurious under the laws of both Missouri and Arkansas. The pleadings and evidence show that it was a building and loan contract, and that the appellees, after taking and agreeing to mature $2,500 stock, or, rather, 50 shares of stock, borrowed of the company, upon their written application therefor, $2,500, to be re-paid in 60 months, with interest payable monthly at the rate of 6 per cent. per annum, and agreeing to pay the company 60 months' dues, of $50 each month, and a premium of $25 every month for 60 months, when the stock was to mature. It appears that the company was organized under the statutes of Missouri, authorizing the organization of such building and loan associations, and by and under which statutes and the by-laws of said association, in evidence, such building and loan associations, by their board of directors, were authorized to hold "stated meetings, at which such sums of money as they may determine shall be offered for loan to all the members in open meeting. The shareholders who shall bid the highest for the preference or priority of law shall be entitled to receive a loan whose amount shall not exceed the number of shares of stock held by such shareholder multiplied by the par value thereof." Section 2812. Rev. Stat. Mo., 1889. The loan in

this case seems to have been in accordance with this section and said by-laws. Section 2814. *id.*, provides that "no premiums, fines, or interest on such premiums that may accrue to the said corporation according to the provisions of this article shall be deemed as usurious. And the same may be collected as debts of like amount are now by law collected." So it seems that, under these statutes and by-laws, this company was empowered and authorized to make its organization and become incorporated; to loan money and purchase real estate; to do a building and loan business; to charge interest on money loaned at a rate not higher than ten per cent.; to take mortgages; and to provide for premiums to be paid for loans, and for monthly dues to be paid the company, all upon the money loaned,—and that such should not be usurious, and might be collected as other debts. See above article, and chapter 90, Revised Statutes of Mo. tit. "Interest." So, if this was a Missouri contract, it appears that it was not usurious under the Missouri law, but was valid there; and if valid there, it is valid here, as a contract valid where made is valid everywhere. The *lex loci contractus* governs the validity and construction of a contract.

Was this a Missouri or an Arkansas contract? The note is dated at Springfield, Mo.; and while the place of its date does not afford an absolute presumption that the contract was made and to be performed there, it is, according to some authorities, *prima facie* evidence of these facts, and, without proof to the contrary, the *prima facie* showing prevails in such cases, as in all cases.

The proof shows that there was some conversations had with Newman, the agent of the company to sell stock of the company, in Boone county, Arkansas, by the appellee Wilson, and some negotiations with him preliminary to making application for the loan; that the application was made to the board of directors of the company in Springfield, Mo., and was there passed upon and accepted, subject to approval of the general attorney of the board at Springfield, Mo., who there approved it, before the loan was or could have been consummated; that Newman had no authority to contract for loans. The contention that, because Ellis, the manager for the county, wrote to

Wilson in Boone county, Arkansas, the terms on which the company would make the loan, and Wilson wrote him from Boone county, Arkansas, that he accepted his proposition, the contract was therefore made in Arkansas, and was an Arkansas contract, we think is not tenable, considering the evidence that the contract was not binding on the parties until submitted tc and approved by the board of directors, and then approved by the general attorney for the company, all which was done in Springfield, Mo.

In a quitclaim deed for his interest in the property in controversy made by Bazore to Wilson, there was a provision that Wilson should pay all accounts of the firm in which they were partners; and, if this includes the note to the Farmers & Mechanics' Company, Wilson could not be heard to plead usury as to Bazore's half interest. *Pickett* v. *Merchants' National Bank*, 32 Ark. 346. He paid only a nominal sum for Bazore's interest, and the property was quite valuable, worth several thousand dollars. It is unnecessary to determine whether this contract was usurious under the laws of Arkansas, if it had been an Arkansas contract.

The land upon which the deed of trust was given cuts no figure in the case, as the security was only an incident to the debt.

We think the contract was a Missouri contract, valid under the laws of Missouri, and valid here, and that the learned chancellor below erred in holding it to be usurious and void. The decree is reversed and remanded, with directions to enter a decree for amount due, and foreclosing the appellant's mortgage. *Rector* v. *Southern Building & Loan Association*, 98 Fed. 1007.

## SNELL v. CUMMINS.

Opinion delivered December 9, 1899.

ATTACHMENT LIEN—ABANDONMENT.—Where an attachment, levied on real estate, was subsequently sustained, but no sale under the attachment was made, the attachment will be considered abandoned, though the land was sold under execution based upon a money judgment; and a lien upon the property acquired after the levy of the attachment, but before rendition of the judgment on which the execution was based, will take precedence over the execution sale. (Page 262.)

Appeal from Arkansas Chancery Court.

JAS. F. ROBINSON, Chancellor.

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

An attachment is a lien upon the property of the defendant subject to execution from the time of the delivery of the writ to the sheriff. 56 Ark. 292; 39 Ark. 97; 29 Ark. 85. The fact that the judgment was rendered for the debt before the attachment was sustained and execution issued is no waiver of the attachment lien. Waples, Attach. 511. Parol evidence is sufficient to authorize a *nunc pro tunc* judgment. 40 Ark. 230; 51 Ark. 323. The burden of proof is on him who claims protection as a *bona fide* purchaser. 56 Ark. 537; 50 Ark. 322.

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

Confirmation of the report of sale by the court was necessary to give valid title. 52 Ark. 146. One not a party to a judgment by default certainly can claim no rights thereunder. Black, Judg. §§ 84, 87; 29 L. R. A. 593; 41 Ark. 42; 7 Ark. 445. The first clauses in a deed will prevail over the later ones; and the deed will be construed most strongly in favor of the vendee. 27 Ark. 523; 15 Ark. 703; 3 Ark. 18; 26 Ark. 128. The attachment should have been served by giving a copy to the occupant. Sand. & H. Dig., § 336. The levy was void for non-compliance with the statutes as to levying.

Waples, Attach. 258; 3 Ark. 509; 7 N. H. 399; Shinn, Attach. §§ 52, 207, 412. Possession of a mortgagee is notice of his rights. Waples, Attch. 494; Jones, Mortg. §§ 461, 600; 13 Bush, 635; 49 Ark. 279; 52 Ark. 385; 56 Ark. 55; 16 Ark. 543; 30 Ark. 111. The mortgage takes precedence of the attachment in this case. Jones, Mortg. §§ 461, 600, 19. The delay in serving the writ postponed the lien in favor of Lewis. Waples, Attach. 282–3; 27 L. R. A 374. Neither the issuance nor service of an attachment affects prior rights or equities. 52 Ark. 252. Further, on the effect of delay upon the attachment lien, see: Drake, Attach. §§ 194, 236, 262; 27 L. R. A. 374.

WOOD, J. The Bruce-Beine Hat Company, on August 8, 1891, had an attachment issued from the circuit court of Arkansas county against one Quertermous, and it is alleged that the same was levied on certain real estate August 14, 1891. On September 19, 1891, a judgment *in personam* was rendered against Quertermous, and execution stayed until January 1, 1892, when an execution was issued, and the lands sold by the sheriff February 20, 1892, when the Bruce-Beine Hat Company, receipted the sheriff in full for the full amount of the claim. On September 19, 1892—nearly seven months thereafter—the attachment was sustained, but it does not appear that there was any order of sale under said attachment, or that there was any sale made. And, this being the case, of course it does not appear that any deed was made and approved and confirmed by the court. Appellant claims under the judgment.

On August 1, 1891, Quertermous executed a mortgage on the same lands mentioned *supra* to one Alva Lewis. The mortgage was filed for record August 11th, 1891. This mortgage was afterwards foreclosed. Appellees claim under the mortgage, and this controversy between appellant and appellees is to determine who has the title. It appears, therefore, that the lien of the attachment was not followed up, and title perfected under it, by a sale of the land under the attachment by order of the court, and by having the sale reported to and confirmed by the court. *Freeman* v. *Watkins*, 52 Ark. 446. The pleadings and proof justify the conclusion that the lien of the attachment was

abandoned, and that the Bruce-Beine Hat Company, the original judgment creditor, chose to rely upon the lien of the judgment and the sale and deed made under the same. It is clear that the mortgage was prior to the judgment lien, and that those claiming under it, as against one claiming under the judgment, have the superior title.

The decree of the circuit court is therefore correct. We need not go into other questions.

---

## FITZGERALD v. LA PORTE.

Opinion delivered December 9, 1899.

TRIAL—VIEW—INSTRUCTION.—In an action to recover for work done in a building under agreement to perform same in a workmanlike manner, an instruction that on a view of the premises the jury were not to base their verdict upon their examination, and that the impressions made upon their minds by such examination do not constitute a part of the evidence in the cause, was properly refused. (Page 265.)

Appeal from Pulaski Circuit Court.

R. J. LEA, Judge.

STATEMENT BY THE COURT.

Wm. La Porte agreed with appellants, Edward Fitzgerald and J. F. Callahan to lay the tiling and do the marble work in St. Andrews' Cathedral at Little Rock for a price named, the work to be performed in a "good and workmanlike manner." He performed the work, and brought this action to recover a balance of $284.40, which he claimed as due for the performance of the work. The defense to the action was that the work was not done in accordance with the terms of the contract.

The presiding judge during the progress of the trial sent the jury, in charge of a deputy sheriff, to view the premises, the deputy being directed to show the jury the place where the work was done. Before the jury retired for that purpose, they

were instructed by the presiding judge as follows: "You are to go to the Cathedral, and see the work done by the plaintiff and the place where it was done, to enable you the better to understand the testimony given before you in the case, and to determine what weight shall be given to the testimony, and you are to determine, from the testimony in the whole case and the view you make, whether the work was done in a good and workmanlike manner." This instruction was objected to by defendants, who requested the following instruction: "You are instructed that a view of the work in question is not for the purpose of furnishing evidence upon which to base your verdict, but to enable you better to understand and apply the evidence given in court. And you are instructed not to base your verdict in any degree upon such examination itself, and that the impressions made upon your minds by an examination of the premises do not constitute a part of the evidence in the cause." This request to instruct was refused. There was a verdict for plaintiff for $167, and judgment rendered thereon. The defendants appealed.

*Cockrill & Cockrill*, for appellants.

If there was no substantial compliance, on part of appellee, with his contract, he cannot recover. 64 Ark. 34. It was error for the court to refuse the eleventh declaration of law asked by appellant, touching what would be a substantial compliance with the contract. 31 Ark. 684, 689; 14 Ark. 530. A view is not *evidence*. 26 Cent. Law Journal, 436; 45 *ib.* 51; 45 *ib.* 196; 42 L. R. A. 368, note; 13 Enc. Law, 369; 27 Ia. 503; 52 Ind. 117; 49 Cal. 607; 29 Minn. 41; 59 Wis. 364; 34 W. Va. 466; 84 Ia. 663; 7 Ohio Cir. Ct. 136; 30 Ark. 328, 350.

*Fulk, Fulk & Fulk*, for appellant.

Appellants have, by their conduct, accepted the work. The eleventh instruction asked by appellant, being amply covered by other instructions given, was properly refused. 46 Ark. 152. A view is properly part of the evidence. Whart. Ev. § 346; 71 Ill. 361; 134 Mass. 499; 148 Mass. 407; 137 Ill. 385; 42 L. R. A. 387–393. If the refusal of appellant's instruction on this point was error, it was not prejudicial. 83 Mich. 45. The

testimony being conflicting, the verdict must stand. 50 Ark. 511; 57 Ark. 577.

RIDDICK, J., (after stating the facts.) This case is now before us for the second time. A fuller statement of the facts can be found by reference to the first decision. *Fitzgerald* v. *La Porte*, 64 Ark. 34.

The main contention of appellants in this appeal is that the presiding judge erred in refusing to instruct the jury that the examination of the work and view of the premises by them was not evidence in the case, and that they should not base their verdict in any degree upon such examination. There is considerable conflict in the decisions of the different courts on this point. But we are of the opinion that the view of the premises by the jury is a species of evidence, and must necessarily operate to some extent upon the minds of the jury. The verdict must be supported by other evidence than the view, and a verdict depending upon a view alone could not be upheld, but we do not think the court erred in refusing to tell the jury that they must not base their verdict in any degree upon such an examination. If the jury were not allowed to base their verdict in any degree upon the facts ascertained by the view, there would be little advantage in allowing a view to be made. If that was the rule, a view would be almost certain to prejudice one side or the other; for the jury, after having seen the work itself, could hardly eradicate the impression thereby made upon their minds, so as to render their verdict without reference thereto. The statute permits the view by the jury to enable them better to understand the testimony, and for the reason that it may tend to enlighten their minds with reference to the issues of fact involved in the case. We think it was evidence, to be considered by the jury in connection with other facts in the case. *Benton* v. *State*, 30 Ark. 349; *Tully* v. *Fitchburg R. Co.*, 134 Mass. 503; *Smith* v. *Morse*, 148 Mass. 407; *People* v. *Thorne*, 42 Lawyers' Rep. Ann. 398, note. On this, as well as on other points discussed, we think the charge of the presiding judge was correct. Certain instructions asked by the defendants were refused, but the points involved were substantially covered by other instructions given to the jury.

It is not our province to pass upon the weight of evidence. The evidence was conflicting, and on the whole case we are of the opinion that the judgment should be affirmed.

It is so ordered.

BATTLE, J., absent.

---

## HAMPTON v. STATE.

67 266
f90 386

Opinion delivered December 16, 1899.

1. INDICTMENT—QUASHAL—PRACTICE.—Finding a second indictment on the testimony on which the first was based, without retaking the testimony, is an irregularity merely, and not ground for reversal of a judgment of conviction, though between the finding of the first and second indictments a member of the grand jury which found the first indictment had been excused, and another juror substituted. (Page 267.)

2. SAME—REMOVAL OF MORTGAGED PROPERTY.—Under Sand. & H. Dig., § 1868, making it a misdemeanor to remove mortgaged property from the county wherein the mortgage lien was created and exists, an indictment for removing mortgaged property from the county wherein the mortgage was recorded is not demurrable as failing to allege an offense within the local jurisdiction of the court; Sand. &. H. Dig., § 2082, providing that where the place of the crime is not named in the indictment, it shall be considered as charging the same as committed within the local jurisdiction of the court. (Page 268.)

3. WHERE MORTGAGE CREATED.—A lien by virtue of a mortgage may be created and exist, although the mortgage is not recorded; the statutory provision that a mortgage "shall be a lien on the mortgaged property from the time it is filed in the recorder's office for record, and not before," having reference only to its effect as to third persons. (Page 268.)

4. NEW TRIAL—TESTIMONY OF JUROR.—Under Sand. & H. Dig., § 2269, providing that "a juror cannot be examined to establish a ground for a new trial, except it be to establish as a ground for a new trial that the verdict was made by lot," testimony of a juror to show misconduct of another juror was properly excluded. (Page 272.)

Appeal from Desha Circuit Court, Watson District.

ANTONIO B. GRACE, Judge.

*C. H. Harding* and *W. S. & F. L. McCain*, for appellant.

The indictment fails to allege a valid lien, because the mortgage is not alleged to have been recorded. Sand & H. Dig., § 5090. Before record, a chattel mortgage is not a lien. 1 Jones, Mort. § 11; 9 Ark. 112; Sand & H. Dig., § 5091; 43 Ark. 378. When a juror separates from his fellows, the burden is on the state to show the absence of any injury therefrom to defendant's case. 44 Ark. 119; 12 Ark. 782; 33 Ark. 317; 20 Ark. 36; 35 Ark. 118. It was error for the court to refuse instructions 1 and 2 asked by appellant. Intent is an element of this crime, and the burden is on the state to prove it. 32 Ark. 239; 49 Ark. 150; 54 Ark. 283. The grand jury had no right to find the indictment upon previous evidence. Sand. & H. Dig., §§ 2050, 2051, 2058, 2070.

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

It was not necessary for the indictment to allege the recording of the mortgage. 65 Ark. 80. Where the separation of the jury occurs while the panel is being selected, the burden is on the defendant to show prejudice therefrom. 44 Ark. 119; 66 Ark. 545. The jurors themselves cannot be examined for the purpose of impeaching their own verdict. 13 Ark. 317; 29 Ark. 293; 59 Ark. 132. The court's instructions covered those refused to appellant.

BUNN, C. J. This is an indictment and conviction for removing mortgaged property, and the defendant appealed to this court.

The first objection of defendant insisted on here is that the indictment was not found upon any evidence. The facts upon which this objection is based are, as alleged by defendant, that, the indictment first found for the same offense having been quashed for some irregularity by the court, the matter was referred back to the grand jury for reconsideration. In the meantime, one of the grand jury had been discharged for good cause shown, and another competent person substituted in his place. On the second consideration of the subject by the grand jury as then constituted, the testimony was not retaken, but the testimony as already taken down before the grand jury

before the change in its composition, and upon which the first indictment was found, was used, and upon this testimony the indictment upon which defendant was tried was found. This irregular way of finding an indictment is not to be commended, and is not approved, but, unless other showing of prejudice to the defendant is made, we do not consider the error such as would justify a reversal of the judgment herein.

The motion to quash the indictment having been overruled, the defendant then demurred (1) because the indictment does not show that said alleged offense was committed within the jurisdiction of the court; (2) because the facts stated in the indictment do not constitute a public offense. This demurrer, as to both grounds, was overruled, and the defendant took his exceptions to the ruling of the court therein.

The indictment alleges the offense of removing from the county wherein the mortgage is alleged to have been recorded certain personal property described in the mortgage. The indictment charges that the defendant removed the property from the county wherein the mortgage was recorded. Under the statute, the particular crime consists in removing the mortgaged property from the county wherein the mortgage lien was created and exists. The allegation as to the place of record was improper, but it was only surplusage at last; for, where the venue is not laid in an indictment, the offense will be consided as having been alleged to have been committed within the local jurisdiction of the court in which the indictment is found, as will be referred to further on.

This disposes of the objection raised by the first ground of demurrer. And this also substantially disposes of the objection raised by the second ground of demurrer, in part; but the defendant's counsel contend that the mortgage, being unrecorded, created no lien upon the property, and that, therefore, it was no crime to remove the property as charged. This contention makes it necessary to go somewhat into detail, both as to the facts and the law applicable thereto.

The facts are substantially as follows, to-wit: On the 31st March, 1899, the defendant, being indebted to one W. H. Burnett in the sum of $175 or other large sum, agreed to give him

a mortgage on his cotton crop for the year and certain personal property to secure the payment of said indebtedness; and on that day he, Burnett and a notary public all met at the store-house of Burnett, which we infer was in Dumas, where the case was tried, and the defendant had the live-stock to be included in the mortgage, and he then and there executed and delivered the mortgage to Burnett, after acknowledging the same before said notary public. Sometime afterwards another creditor of the defendant was pressing him for his debt, and, at the instance and solicitation of the defendant, Burnett paid off that debt, the defendant agreeing to secure him for the sum so paid out by Burnett for him; and then, taking the property upon which this additional security was to be given, he goes to the store-house of Burnett with it, and there he, Burnett, and the same notary public, after consultation over the matter, concluded to have the additional debt and additional security inserted in the mortgage, and the acknowledgment, to that extent, of the defendant was taken orally by said notary public, and this economical manner of making a mortgage, and taking an acknowledgment of the execution of the same, it is contended, renders the recording of the mortgage irregular and void, and, for the sake of the argument, we admit that it does, although we do not pass upon the question in fact.

In this way it is contended that the mortgage was never recorded, and upon that the further and real contention is that there was no lien on the property, since only a recorded mortgage creates a lien on the mortgaged property. The argument in support of that contention is this: That at common law a mortgage, of itself, created no lien; that, upon default of payment of the debt when due, the mortgagee became the absolute owner of the mortgaged property; that our statutes have made no change in this rule of the common law, and have made the record of the mortgage, and that alone, the basis of the lien; and that, without this recording, there is no mortgage lien. The only statute strictly applicable to this subject reads as follows, viz.: "Every mortgage, whether for real or personal property, shall be a lien on the mortgaged property from the time it is filed in the recorder's office for record, and not before." The conten-

tion is that a mortgage unrecorded, not being a lien at common law, and not having been made so by statute, is no lien at all. But is it true that a mortgage created no lien at common law? It is true that at first, in courts of law, a mortgage was not considered a lien on the property mortgaged; but from almost the very beginning courts of equity began to oppose this dictum of the common law courts, and to assert that a mortgage was only a lien on the mortgaged property, and nothing more, in favor of the mortgagee, and, what was tantamount to it, that the mortgagor had the right of redemption after default, and that this right constituted an interest and estate in the property, of which he could not be deprived by forfeiture, but only by judicial determination and foreclosure. The controversy between the two jurisdictions soon grew to be strongly acrimonious, and so continued until the reign of James II, when the controversy was finally settled, and the theory of the equity court—that which has since prevailed in England and the American states—was held to be the true rule; that is, that the mortgagee has the legal title to the property, but only to a limited extent, and after default his legal right is a mere remedy, and that only, extending no further than as an aid in the collection of the mortgage debt, and that in so far courts of equity are to respect this legal right in control of the property and enforcement of the mortgage contract by foreclosure or otherwise. But the right of redemption, and the title growing out of it, were fixed rights, and had been from the beginning, however much the principle had been controverted. The only case to be cited in the English reports in which the old theory of the law courts were revived in after times was the case of *Casborne* v. *Scarfe*, 1 Atkins, 603, in 1737. But the defeat of the party reviving the old controversy was so signal, it is said, that no case of the kind has occurred since. But that a mortgage of itself creates a lien is so generally understood, and has so entered into our legislation and jurisprudence, that we are forced to the conclusion that all enactments of the legislative departments and all decisions by the courts are made with this theory in view, and that the act of the legislature quoted above had reference

solely to the lien as affecting third parties, and the declaration of the courts that a mortgage, though unrecorded, is good between the parties, is the same as saying that it is as good between the parties in all respects and in all its incidents, when unrecorded, as it would be as to third parties when recorded. There was therefore no error in overruling the demurrer as to its second ground.

In this connection, it is contended by defendant's counsel that the decision of this court in the case of *State* v. *Barnett*, 65 Ark. 80, should be overruled, as announcing a doctrine unsupported by authority; citing the cases of *Main* v. *Alexander*, 9 Ark. 112, and *State* v. *Harberson*, 43 Ark. 378. In the first of these two cases, the syllabus on the subject reads: "A mortgage is good between the parties, though not acknowledged and recorded, but, under our registry act, it constitutes no lien upon the mortgaged property, as against strangers, unless it is acknowledged and recorded as required by the act, even though they may have actual notice of its existence." That was a case between parties to the mortgage and third parties or strangers to it. Therefore it is not applicable to the facts of the case at bar; nor are any comments of the courts on the rule, as applied to that case, where third parties are involved, to be regarded as any authority to a case like this one, where no third parties are involved. The case of the *State* v. *Harberson*, 43 Ark. 378, was an indictment under the act of 1875, viz.: "Any person or persons who shall hereafter remove beyond the limits of this state, or of any county wherein the lien may be recorded, property of any kind, upon which a lien shall exist by virtue of any mortgage, deed of trust, or by contract of parties, or by operation of law, or who shall sell, barter or exchange or otherwise dispose of any such property without the consent of the person or persons in whose favor such lien shall have been created or exists by law, or who shall secrete the same, or any portion thereof, shall be deemed guilty of felony, and subject to an indictment, and, upon conviction thereof, shall be sentenced to hard labor in the jail and penitentiary house of this state for the period of not less than one nor more than two years, at the discretion of the jury trying the same." The

crime, under that act, consisted in removing from the county wherein the lien may be recorded the property upon which the lien existed. The language of the act evidently led the court in that case to the opinion that there must be a record of the lien, or else the offense did not exist.

The case of *State* v. *Barnett*, 65 Ark. 80, arose under the act on the subject approved March 7, 1893, (Sand. & H. Dig., § 1868), which is amendatory of the said act of 1875, and reads thus: "It shall be unlawful for persons to sell, barter, exchange or otherwise dispose of, or to remove beyond the limits of this state, or of the county in which a landlord's or laborer's lien exists, or in which a lien has been *created* by virtue of a *mortgage* or deed of trust, any property of any kind, character or description, upon which a lien of the kind enumerated above exists." We have italicized the distinguishing words. In the amendatory act, the crime consists in removing the property from the county wherein the lien was created and still exists. The change in the language is, of itself, very significant. At all events, the two cases were based upon two distinct statutes, and therefore there is not necessarily any conflict in the two decisions.

It is contended that one of the jurors in this case, contrary to the orders of the court, separated from his fellow jurors, and therefore the verdict should be set aside. It is charged that the panel was being made up, but not completed, when the court took a recess, probably for the night, and charged the selected jurymen not to separate, but that one or more of them did separate from the others. It does not appear that the order of the court was made at the instance of the defendant for any special reason, but only on its own motion. The court can use its discretion to permit the jurymen selected to separate before the panel is made up and sworn, and it would seem that it could as reasonably excuse a disobedience of its order against separation as it could make the order on its own motion in the first instance; but, without ruling on this point, the testimony offered by the defendant to show the separation and misconduct of the jurymen involved was the testimony of the jurymen themselves. The court refused to admit the testi-

mony, and this refusal is made one of the grounds of the motion for a new trial. There was no error in this. Section 2269, Sand. & H. Dig., reads thus: "A juror cannot be examined to established a ground for a new trial, except it be to establish as a ground for a new trial that the verdict was made by lot." No other testimony was offered on the subject. See *Wilder* v. *State*, 29 Ark. 293.

Another ground of the motion for the new trial was that the court refused to give instructions numbered 1 and 2 asked by the defendant, which are as follows: "No. 1. The jury are instructed that, before they can convict the defendant of the charge in the indictment, they must find from the evidence, beyond a reasonable doubt, that he removed said property from the county with the fraudulent intent to cheat the said W. H. Burnett of the debt secured by the mortgage. No. 2. The jury are instructed that, if they find the defendant removed said property from the county for any other purpose than a fraudulent purpose, but for business or honest purposes, then they will find for the defendant, or, should they entertain a reasonable doubt as to whether his purpose was honest or fraudulent, they will give the defendant the benefit of the doubt and acquit."

These two instructions were intended to cover the proviso clause of section 1868, defining the crime, which reads as follows: "Provided, such sale, barter, exchange, removal or disposal of such property be made with the intent to defeat the holder of such lien in the collection of the debt secured by mortgage, laborer's lien or landlord's lien."

The court refused these instructions, but in lieu thereof gave the following on its own motion, to-wit: "If you find from the evidence that defendant removed the property mentioned in the mortgage from Desha county to Ashley county, without fraudulent intent, and in good faith to procure hands to work in his crop, or for any other honest business purpose, and return to Desha county without unnecessary delay, then you should find the defendant not guilty."

The court made the following addition to instruction No. 6, asked by defendant, and, so amended, gave it, to-wit. "No. 6. The jury are instructed that the allegation in the indict-

ment 'with the fraudulent intent' is a fact to be established by the testimony beyond a reasonable doubt, the same as any other material allegation in the indictment. Such intent, however, need not be proved by direct testimony, but may be established by circumstantial evidence, as in case of any other disputed fact."

It is contended that the two instructions refused were expressed in better language than the substituted instructions, and so much so that the refusal to give them was a reversible error, notwithstanding the giving of the substituted instructions. Under the general rule that one is presumed to have intended the consequences of his own acts, it is sufficient to charge that the act was committed feloniously, if a felony is charged, and the good motives of the act are left to be shown in evidence as a defense or in mitigation. The indictment in this case was all-sufficient in this respect. It is evident, however, that the instructions which are the subjects of this particular controversy were intended to apply to the evidence, under the peculiar proviso of the statute. It is contended that the refusal of the two instructions, and the giving of the others in lieu thereof, threw the burden too much on the defendant to show his honest purpose in removing the property as he did. Our view of it is, however, that the court instructed on the particular facts set up in the defense, and in so doing we think the jury were fairly presented with the law of that part of the case, and therefore there was no error.

The only remaining question is one of fact, whether or not the venue was proved. Proceeding upon the presumption that the mortgage was not in fact recorded, it appears that no venue was laid in the indictment; for the place of record is stated therein, and not the place where the lien was created and exists. This defect in the indictment is cured by statute (section 2082, Sand. & H. Digest), in which it is provided that where the place of committing the crime is not named in the indictment, it shall be considered as charging the same as committed within the local jurisdiction of the court.

The testimony as to the place where the mortgage was executed,—where the lien was created,—is more or less indefi-

nite. The mortgagee and notary public who took the acknowledgment say that the mortgage was executed at Burnett's store, and the notary says that not only did he take the acknowledgment, but that he wrote the mortgagor's name to the mortgage, he being unable to write, and only made his mark, which was witnessed by the notary public. The real indefiniteness of the testimony consists in failing to state expressly where Burnett's storehouse was. That point, however, does not seem to have been controverted anywhere in the argument, nor to have been called particularly to the attention of the witnesses or to the court. The almost necessary inference from all that was said is that this storehouse was in Dumas, the lawful place of holding the circuit court of Watson district of Desha county, or, at least, in the district. This point being established, there is no real difficulty as to the proof of the venue.

HUGHES and RIDDICK, JJ., dissent .

RIDDICK, J. I am of the opinion that the presiding judge, in refusing to give instruction number one asked by defendant, committed prejudicial error. An allegation in the indictment was that the defendant removed the mortgaged property "with the felonious intent to defeat the said W. H. Burnett, the holder of said mortgage lien, in the collection of the sum of $175.95, the amount due the said W. H. Burnett on said mortgage debt on said 12th day of March, 1899, and secured by mortgage as aforesaid." This allegation was material, and the testimony bearing on it was conflicting. It was therefore important for the jury to clearly understand that this allegation that the defendant removed the property with the intent to defeat Burnett in the collection of his mortgage debt must be established by the evidence beyond a reasonable doubt before they could convict the defendant.

It was a matter of vital importance to the defendant that the jury should fully comprehend this; otherwise, they might convict upon proof of the removal only, without being satisfied of the felonious intent. Appreciating this danger, and endeavoring to avoid it, his counsel asked the circuit judge to give the following instruction: "The jury are instructed that,

before they can convict the defendant of the charge in the indictment, they must find from the evidence, beyond a reasonable doubt, that he removed said property from the county with the fraudulent intent to cheat the said W. H. Burnett of the debt secured by the mortgage."

This instruction was correct, but the judge refused to give it, and the instruction he gave on this point does not, in my opinion, present the question so clearly to the jury. The instruction he gave tells the jury that "the allegations in the indictment 'with the fraudulent intent' is a fact to be established by the testimony beyond a reasonable doubt, the same as other material allegations in the indictment." Now, although the language used is rather awkward, a lawyer would understand that the judge, by the phrase "the allegation in the indictment 'with the fraudulent intent,' " meant the allegation that the removal of the property was made to defeat Burnett in the collection of his mortgage debt. But jurors are not lawyers, and, as the language of the law is not always that current in every day life, they do not always readily comprehend it. The object of the instructions is not to present to the jury questions of law or questions concerning the meaning of legal terms, but to present questions of fact for their decision. For this reason, instead of telling the jury in a general way that "the allegation in the indictment 'with the fraudulent intent' is a fact to be established beyond a reasonable doubt," he should have told them, as asked by defendant, that, before defendant could be convicted, it must be shown beyond a reasonable doubt that he removed the property with the intention to defeat Burnett in the collection of his debt, and that if, after consideration of all the evidence, they still had a reasonable doubt on that point, they should acquit. He did not do this, but forced the defendant to trial with only a general statement of the law with reference to "the allegations in the indictment with the fraudulent intent," leaving it for the jury to determine what those allegations were to which he referred. Now the awkward language used in this instruction is doubtless due to an error in copying, and is probably no fault of the learned trial judge, but, leaving out that defect,

the charge is too general. Cases are often tried on general instructions of the kind given in this case, and when the defendant asks for none more specific no error is committed. We say in such a case that if the defendant desired clearer and more definite instructions he should have asked them, and if he was prejudiced by the failure of the judge to give them the fault rests upon his own shoulders.

But there is no room to apply that well-established rule in in this case, for the defendant did ask other more definite and clearer instructions than those given. He, in effect, asked the judge to point out specifically to the jury the allegation referred to by the words "the allegations in the indictment 'with the fraudulent intent'," but this request was refused. It therefore becomes a question here whether a defendant, upon a charge of felony, can be compelled to rest his case on instructions referring only in a general way to the allegations in the indictment, or whether he has the right to have the questions in dispute specifically pointed out and presented to the jury. I think that he has such a right, and that it is of the highest importance that questions of fact should be specifically stated to the jury, and not by the use of general terms left for them to speculate upon and pick out by the use of their own knowledge of the law and the facts.

I have not forgotten that the circuit judge gave another instruction on his own motion in which the facts were referred to. In this instruction the judge tells the jury that if it is shown that defendant removed the property for honest purposes, intending soon to return it, they should acquit. But this instruction leaves out the idea that the burden is on the state, and that the facts referred to must be established by the evidence beyond a reasonable doubt. Without further explanation, this instruction might leave the impression that it was for the defendant to establish that his intentions in removing the property were honest.

Though the instructions given may, abstractly considered, be correct, still, for the reasons given, I think that neither of them clearly cover the points presented by the defendant in the instruction asked by him. I am therefore of the opinion that

the refusal to give that instruction was error, for which the judgment should be reversed, and a new trial ordered.

HUGHES, J., also dissented, for reasons stated by him in an oral opinion.

---

67 278
170 282

## CASH v. CASH.

Opinion delivered December 16, 1899.

1. EVIDENCE—ADMISSION OF INFAMY.—The admission of plaintiff that she has been convicted of petit larceny dispenses with the necessity of record proof to establish her incompetency to testify. (Page 281.)
2. MARRIAGE—PRESUMPTION.—The presumption of law being that a marriage is legal, the burden to show its illegality is upon the party who attacks it as illegal. (Page 281.)
3. CONFLICT OF PRESUMPTIONS.—Proof that a former husband was living and undivorced five years before his wife remarried does not overcome the legal presumption in favor of the validity of the second marriage, the presumption of legality of the second marriage being stronger than the presumption that the former husband is still living. (Page 281.)
4. WIDOW'S ALLOWANCE—APPRAISEMENT.—The allowance to a widow of specific articles of her husband's estate not exceeding $150 in value, based upon the appraisement made for the administrator, instead of upon an appraisement made at the instance of the widow, according to the requirements of Sand. & H. Dig., §§ 74, 75, is an irregularity merely, and not prejudicial to the administrator. (Page 281.)
5. SAME—ALTERNATIVE JUDGMENT.—Under Sand. & H. Dig., §§ 74, 75, providing for setting aside specific articles to a widow and children, it is improper to enter an alternative money judgment against the administrator unless it is shown that the specific articles are not in the hands of the administrator at the time the judgment is rendered. (Page 283.)

Appeal from Pike Circuit Court.

*Will P. Feazel*, Judge.

STATEMENT BY THE COURT.

John H. Cash died intestate in Pike county in 1897, and appellant administered upon his estate. At the October term, 1897, of the probate court, Caldonia Cash, claiming to be the

widow of deceased, filed her two petitions. In the first, in behalf of herself and her four minor children, she alleged that the personal estate of decedent did not exceed in value $800, and prayed that $300 in value of the same be vested in her and said minors. In the second, in behalf of herself alone, she alleged the solvency of said estate, and that she was the widow of decedent, and prayed an additional allowance of $148.50 in specific articles named.

These petitions were granted, and the administrator appealed to the circuit court. In the circuit court the administrator answered both petitions, and alleged that said Caldonia was never lawfully married to said John H. Cash. The two petitions in the circuit court were consolidated and tried as one cause at the February term, 1898, and the court found that the estate of defendant was solvent, and that the said Caldonia had been legally married to John H. Cash, and was his widow. The court adjudged that the widow and minors were entitled to $300 worth of personal property (not described either in the petition or in the judgment), and that the widow recover an additional $148.50 worth of personal property, specifically described in the judgment; after which the judgment proceeded as follows: "It is by the court considered, ordered and adjudged that the plaintiff have and recover of and from the defendant, Geo. A. Cash, as administrator of the estate of John H. Cash, the sum of $300, with 6 per cent. interest from the 12th day of October, 1897, and that the plaintiff, Caldonia Cash, do have and recover of and from the said Geo. A. Cash, as administrator, the sum of $150, with 6 per cent. interest from the 12th day of October, 1897; provided, that if the defendant shall, within ten days from this date, deliver to the plaintiff the property above ordered to be delivered, this alternative judgment shall be satisfied in full, and, if only a part of said property be so delivered within said ten days, this judgment shall be satisfied to the extent of the value of the property so delivered." Appellant filed his motion for a new trial, which was overruled, exceptions saved, a bill of exceptions duly signed and filed, and appellant thereupon appealed to this court. The motion for a new trial raised all questions that will be discussed in appellant's brief.

At the trial it was admitted that the plaintiff, then Caldonia Karr, on December 11, 1879, was lawfully married to one Miles Hankins, and that on January 8, 1890, she was again married in due form of law to John H. Cash.

James L. Townsend, for defendant, testified: "After the death of John H. Cash I visited Caldonia Cash, and was accompanied by George A. Cash, D. W. Cash and W. P. Hammons. I asked her if she had been divorced from Miles Hankins. She said, 'No,' but that he had left her about five years prior to her marriage to Jno. H. Cash, and that she had not heard from him since he left her." D. W. Cash, George A. Cash and W. P. Hammons corroborated the testimony of Townsend.

The plaintiff, Caldonia Cash, to sustain her cause, offered to introduce herself as a witness. The defendant objected to her being sworn on the ground that she had been convicted of petit larceny, and examined her as to the truth of said charge; and she admitted that in Pike county, Arkansas, a few days before, she had been convicted and fined on a criminal charge against her for petit larceny. The court ruled that she was a competent witness, and that her infamy arising from a conviction for larceny could only be established by a certified copy of the record of her conviction. She testified: "Miles Hankins, my former husband, left me in the Indian Nation about October 15, 1884. He said some day he would come back after me. I had not seen or heard from him for over five years at the time of my marriage to Jno. H. Cash." This was all the testimony.

The court declared the law to be that the burden of proof was on the defendant, Geo. A. Cash, to prove that at the time of the marriage of Caldonia to Jno. H. Cash the said Hawkins was alive. Otherwise, the finding of the court would be (and in this case, for want of proof, was) in favor of the plaintiff, Caldonia Cash,—to which ruling defendant excepted.

*J. H. Crawford*, for appellant.

The alternative judgment was unnecessary, as appellee could have brought replevin for the property vested in her by

the judgment. 3 J. J. Marsh. 308. Appellee, by reason of her infamy, was incompetent to testify in her own behalf. The burden was on appellee to show the death of her first husband. The alleged desertion took place in the Indian Territory, and the presumption is that the common-law period, and not that fixed by our statute, as raising the presumption of death should govern. 30 Ark. 230; 2 Greenl. Ev. § 278f; 24 Ga. 494.

*Murry & Callaway*, for appellee.

The infamy of a witness can be proved only by the record of conviction. The burden is on the one who attacks a marriage to show its illegality. Bish. M. & Div. §§ 457–8; 1 Greenl. Ev. § 35. The presumption of legality is stronger than the presumption that the former husband still lives. 55 Am. Rep. 883; 52 Am. St. Rep. 180; 22 Ark. 89–90.

HUGHES, J., (after stating the facts.) Caldonia Cash admitted on the trial of the cause that she had been, but a short time before the trial, convicted of petit larceny, and this admission, made against her interest, dispensed with further proof of the fact. Having been convicted of petit larceny, she was incompetent to testify, as there is no proof she had been pardoned.

It is in evidence that she married in due form of law Jno. H. Cash. The court properly held that the presumption of law is that this was a legal marriage, and that the burden to show its illegality was upon the party attacking the validity of the marriage on the ground of illegality to show it by evidence. It is not presumed that the appellee violated the law. The presumption that the marriage was legal is stronger than the presumption that Miles Hankins, to whom she was first married, was living at the time of the second marriage. Her marriage is presumed to have been "lawful, innocent and not criminal." *Halbrook* v. *State*, 34 Ark. 518.

The judgment of the court allowing the appellee $148 at appraised value in articles selected by her, belonging to the estate, and articles worth $300 according to appraised value, was correct, but seems to have been based upon the appraisement made for the administrator, instead of an appraisement made at

the instance of appellee, according to the requirements of section 74, Sandels & Hill's Digest. This was irregular. But was it prejudicial?

The pertinent sections of the statute are as follows:

"Sec. 3. When any person shall die leaving a widow and children or widow or children, and it shall be made to appear to the court that the personal estate of such deceased person does not exceed in value the sum of three hundred dollars, the court shall make an order vesting such personal property absolutely in the widow and children, or widow or children, as the case may be; and in all cases where the personal estate does not exceed in value the sum of eight hundred dollars, the widow or children, as the case may be, may retain the amount of three hundred dollars out of such personal property at cash price.

"Sec. 4. When any person shall die, leaving children but no widow, the court shall, upon application made to him for said children, appoint appraisers and cause to be made appraisement of the personal property of the estate for the purpose of the vestment of such property, as provided by section 3.

"Sec. 74. Any widow desiring to avail herself of the provisions of sections 3, 4 and 74 [73], shall, within thirty days after the death of the deceased, cause to be made an appraisement of all the personal property of the estate by three disinterested householders of the county, whose duty it shall be to view and appraise all the personal property of the estate except such articles as are reserved as the absolute property of the widow by section 73, and shall make a full and complete list of the same, describing each article and the value thereof, and showing the total value of the appraisement, which shall be signed by them, or any two of them, and attach thereto an affidavit reciting that they are not of kin to the widow or the deceased, and not in any way interested in the estate, and that they have to the best of their abilities appraised the property to them shown, and each of said appraisers shall receive for his services the sum of one dollar for each day he may have been engaged in making said appraisement, to be paid by the person for whose benefit the same was made, and the list of appraisement shall be immediately filed with the clerk of the

county court of the county; *provided*, no widow or children of any deceased person shall ever be barred of any of the benefits of sections 3 and 73 by failure to make appraisement, or file list of the same within the time specified in this section.

"Sec. 75. In addition to the property specified in section 73, the widow, when the the estate is not insolvent, may take such personal property as she may wish, not to exceed the appraised value of $150, and the executor or administrator shall deliver to the widow such articles as she may select, not exceeding the value aforesaid, and shall take her receipt therefor, which shall be a good voucher in the settlement of his accounts."

Was it proper to render the alternative judgment in this case. The widow was certainly entitled to $150 worth of property at appraised value, and in specific articles selected by her; but, if not selected by her; and not delivered to her, upon a selection by the administrator, could she have judgment for money sufficient to cover the value of property not delivered to her? The evidence does not show whether the property was in hands of the administrator, or had been sold or disposed of, at the time the judgment was rendered. If on hand, it seems the court ordering it delivered to the widow might enforce its judgment by proper orders. The judgment of this court is that the administrator should have obeyed the order of the court by delivering to the appellee the $148, and the $300 of personal property in specific articles at appraised value. The alternative judgment for the money value of the property was improperly given.

The judgment of the court below is affirmed, with this modification: that there shall be no judgment in the alternative, but judgment only for delivery of the property as indicated at appraised value, to be selected by the appellee; and it is so ordered.

## UNION COMPRESS COMPANY v. NUNNALLY.

Opinion delivered December 16, 1899.

1. BAILMENT—NEGLIGENCE.—A compress company is liable for want of care in keeping cotton stored with it for compression if it expected either to charge storage for the cotton or to get compensation for keeping same in the way of charges for compression. (Page 286.)

2. SAME.—When a bailment is reciprocally beneficial to each party, the bailee is answerable for want of ordinary care. (Page 287.)

Appeal from Miller Circuit Court.

JOEL D. CONWAY, Judge.

STATEMENT BY THE COURT.

Appellee seeks by this action to recover for damage to sixty bales of cotton, which, he alleged, were delivered to appellant in December, 1896, to be taken care of and safely and securely kept for plaintiff. It is alleged that the damage was occasioned by the cotton being left on the platform of appellant unsheltered and exposed to the rain for a period of six months. The damage was laid at $1,000.

The answer denied negligence and liability, and any damage to plaintiff, and denied that defendant was engaged in the business of receiving cotton on storage. It alleged that defendant had no facilities for such business, and had not held itself out as engaged in any such business, but that its sole business was compressing cotton; that plaintiff was not charged anything for storage on cotton, nor did it contract to store said cotton under cover of shelter; that, had defendant been authorized to compress said cotton, in due course of business after arrival and delivery the cotton would have been compressed in two or three days after arrival; that if any damage occurred to plaintiff, it was produced by his own neglect in neglecting to have said cotton compressed and disposed of. It alleged that the plaintiff had allowed said cotton to remain upon said platform, the same having been as other cotton delivered and placed upon its open

platforms; that he neglected to notify it to compress same; and that, if said cotton was damaged, this was because said cotton was left on its platforms for an unreasonable time. The appeal is from a judgment for $524.70.

The instructions given by the court were as follows:

"First. If you believe from the evidence that the plaintiff, S. H. Nunnally, shipped the sixty bales of cotton in controversy to the defendant, Union Compress Company, under an express or implied contract to pay the usual customary storage charges thereon, then the said defendant was bound to take such care of said cotton as a prudent person would take of his own cotton so as to protect it from injury by rain and weather, notwithstanding you may further find from the evidence that defendant declined to demand or receive any charge for storing or handling said cotton when it was turned over to plaintiff."

"Second. If you believe from the evidence that the plaintiff, Nunnally, shipped to the defendant, Union Compress Company, the sixty bales of cotton in controversy without any understanding or agreement between the parties as to the charges thereon, and that the defendant received and receipted for said cotton, expected and intended to compress same, and make the usual charge for such compression, then the defendant was bound to take the same care usually exercised by a prudent person in caring for his own property of similar kind and situation."

"Third. The jury are instructed that a bailee without hire is responsible only for fraudulent or gross neglect, and in this case, unless the jury find that the defendant was a bailee for hire, they will find for the defendant.

"Fourth. The bare delivery of property by one person to another for keeping, and damage thereto while in the bailee's hand, are not sufficient for a recovery of said damage by the bailor. But, to enable the bailor to recover, it must appear from a preponderance of evidence that there was a contract of bailment, either express or implied, whereby the bailee should be paid for his services as bailee, and further that said bailee was guilty of negligence as to the property placed in his charge, whereby said property was damaged."

"Fifth. Before the jury can find for the plaintiff, they must find from a preponderance of the evidence that there was a contract, express or implied, between the plaintiff and defendant that for a consideration moving from the plaintiff to the defendant said defendant was to receive and safely keep said sixty bales of cotton, and unless they so find their verdict should be for defendant."

Objection is urged here only to the first and second of the above instructions.

*Morris M. Cohn*, for appellant; *Scott & Jones*, of counsel.

Appellee knew the character of appellant's business and the facilities it had for storage, and his loss is the result of his own fault. 61 Am. Dec. 234–6; Wade, Notice, § 8; 23 Ark. 735, 744, 745. There was no understanding or contract between the parties as to charges. Both parties must agree to a contract.. Wald's Poll. Cont. 2a; 2 App. Cas. 666, 692; 46 N. Y. 467, 469–470; 17 Ark. 78; 5 Ark. 256, 258; 11 Ark. 689, 690.

*Williams & Arnold*, for appellee.

The evidence sustains the verdict. 23 Ark. 61. The bailment was for hire, and appellant was bound to use the same care and attention with respect to its keeping as a reasonably prudent man would bestow upon his own property of the same kind and similarily situated. 61 Ark. 302; 127 N. Y. 500; 3 Am. & Eng. Enc. Law (2 Ed.) 746[2]; 52 Ark. 364. Even a gratuitous bailee is liable for gross negligence. 61 Ark. 302; 23 Ark. 61.

WOOD, J., (after stating the facts.) There was evidence from which the jury might have concluded that the compress company received the cotton, and expected to charge storage for same. There was also proof to justify the conclusion that the compress company received the cotton with the expectation of getting its compensation for keeping same in the way of charges for compressing. In either event, the appellant would be a bailee for hire. We will not discuss the evidence in detail, but a finding that the compress company was not a gratuitous bailee is certainly abundantly supported by the evidence.

The bailment was reciprocally beneficial to the bailee and bailor, and the bailee was answerable for a want of ordinary care, or for ordinary neglect. *St. Louis S. W. Ry. Co.* v. *Henson*, 61 Ark. 302; 3 Am. & Eng. Enc. Law, p. 746.

The instructions were warranted by the proof, and they are substantially correct. They at least contain no error prejudicial to appellant. The judgment is affirmed.

---

## IRBY *v.* SOUTHERN BUILDING & LOAN ASSOCIATION.

Opinion delivered December 23, 1899.

FINDING OF CHANCELLOR—CONCLUSIVENESS.—On appeal from a decree of foreclosure of a mortgage, a finding of the chancellor that a certain party joined in the execution of the mortgage is conclusive if the mortgage, introduced at the trial, is not copied in the transcript. (Page 289.)

Appeal from Lawrence Circuit Court in Chancery.

RICHARD H. POWELL, Judge.

*Appellants pro se.*

The mortgage was void, because the equitable owner did not join in the granting clause. 53 Ark. 53; Sand. &. H. Dig., § 4945; 47 Ark. 114. Signing the relinquishment of dower did not estop her to claim her title. 53 Ark. 564; Big. Estop. 448 *et seq.* Aside from the mortgage, no lien existed, there being none by subrogation. 44 Ark. 507; 47 *id.* 118. Appellee's failure to reply to the plea of set-off made to their cross-bill entitled appellant to judgment. Sand. & H. Dig., § 5761; 25 Ark. 86; 51 Ark. 368, 370.

*Cockrill & Cockrill*, for appellee.

There was no intention on the part of Irby to give the property to his wife; hence her interest only amounted to a dower right. 47 Ark. 111; 40 Ark. 62; 42 Ark. 503; 54 Ark. 499. Appellants are estopped to set up that Mrs. Irby is the owner of the property. 55 Ark. 85; 62 Ark. 316, 319; 136

Ind. 99; 100 U. S. 578; 33 Ark. 465, 468; 86 N. Y. 222; 7 Am. & Eng. Enc. Law, 18[2]; Big. Estop. 561. Appellee has a lien by subrogation, if not by mortgage. 84 Ala. 507, 511; Harris, Subrog. 744; 58 Ohio St. 86; 24 Am. & Eng. Enc. Law, 290; 72 Miss. 1058; 34 S. W. 1001; 35 Atl. Rep. 897; 2 Perry, Tr. 837. The question as to the appellant's right to a judgment because of appellee's failure to reply to his allegations of set-off can not be raised for the first time on appeal. 33 Ark. 1071; 47 Ark. 493, 496. No set-off could properly be pleaded in a suit to foreclose a mortgage. 22 Ark. 227, 228; 40 Ark. 75; 14 N. J. Eq. 467; 32 *id.* 225; 54 Ark. 224.

BUNN, C. J. This was originally a bill to enjoin the sale of certain mortgaged real estate in Black Rock, Lawrence county, because of certain defects and irregularities in the execution of the mortgage. The defendant and mortgagee filed its answer and cross-bill, denying the allegation of the complaint, and praying a foreclosure of their mortgage, and the plaintiff then answered the cross-complaint, and pleaded set-off by way of several items of credits claimed by them. Upon the pleadings and evidence, the chancellor dismissed the bill, found the sum of $696.10 to be due on the mortgage debt, decreed foreclosure of the mortgage, and the plaintiffs appealed.

Appellants' complaint was founded on the contention that the mortgaged property was in truth the property of the wife, the defendant S. J. Irby, and not the property of the husband and obligor on the note, the defendant E. T. Irby, and that the mortgage created no lien thereon, because she had not joined her husband in the execution of it, but only in the relinquishment of her dower interest in the property.

The circumstances of the execution of the mortgage were substantially these, viz.: "The defendant was a building and loan association, and the defendant E. T. Irby applied to it to borrow $500, for the purpose of paying off the purchase money of the land in controversy, and to make some improvements thereon; and it was represented in this application, as well as in the mortgage, as contended by defendant and not denied, that the lot involved was the property of the husband, subject to the payment of the purchase money, as the deed had not been exe-

cuted, and it was held under a title bond. The defendants attempt to show by evidence that the borrowed money was expended for other things than for the payment of the purchase money of the lot. Be that as it may, soon after obtaining this money the purchase money due on the lot was paid, and they say the deed was made by the vendor, not to E. T. Irby, the husband, but to S. J. Irby, the wife, which was contrary to the representations as contended by the defendant. The appellants say that the representation to the effect that the husband was the owner was a mistake on their part; that the title bond was in fact to the wife. The title bond was not exhibited in evidence. It is claimed by them that, while the mortgage on its face appeared to be a conveyance of the husband's property, the fact was that it was the property of the wife, or would be when paid for. Therefore the mortgage was ineffectual as a lien on the property. Such is the substance of the contention, as we understand it. There is no proof to sustain this contention of appellants. The appellee alleged in the answer and cross-complaint that the wife joined in the execution of the mortgage or deed of trust, and exhibited the mortgage, with its answer and cross-complaint, in support of the allegation. The chancellor found that to be a fact. The appellants fail to make said mortgage a part of the transcript, and it is not before us. We are bound to conclude therefore that the chancellor's findings are correct.

The chancellor, in considering the evidence as to the mortgage debt, and the set-off pleaded in the answer to the cross-complaint, and all questions involved therein, found that the appellants were indebted to the appellee in the sum of $696.10, and we see no reason to disturb the finding. This disposes of all the material questions in the case.

Decree affirmed.

67 290
179 600

## LANE v. STATE.

Opinion delivered December 23, 1899.

1. CONTINUANCE—COUNTER AFFIDAVITS.—The statement of facts which are expected to be proved by an absent witness cannot be contradicted by counter affidavits or other testimony, for the purpose of defeating a motion for continuance; but testimony may be heard for the purpose of showing a want of diligence in procuring the testimony of an absent witness, or a want of good faith in making the application for a continuance, or an improbability that the proposed testimony can be obtained. (Page 292.)

2. SAME—GOOD FAITH OF APPLICATION.—When a continuance is asked by the defendant in a criminal case upon the ground that defendant has been informed by one H. that an absent witness, S., if present, would testify to certain facts, it is competent for the state to prove by H. that he had never given such information, for the purpose of determining whether the application was made in good faith or not. (Page 293.)

3. SAME—PROBABILITY OF OBTAINING ABSENT WITNESS.—It is not an abuse of discretion to refuse to continue a cause for the absence of a witness where there appears no reasonable hope of finding him. (Page 293.)

Appeal from Pulaski Circuit court, First Division.

ROBT. J. LEA, Judge.

*Wm. J. Duval*, for appellant.

The court should have either granted a continuance or permitted the affidavit as to what would be the testimony of the absent witness to be read, as evidence, to the jury. 50 Ark. 108.

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

The court properly exercised its discretion in overruling the motion for continuance.

BATTLE, J. The defendant, M. B. Lane, was indicted by a grand jury of the Pulaski circuit court for murder in the first degree, committed by killing Letha Lane on the 25th day of November, 1898, by shooting her with a gun. The indict-

ment was filed in court on the 7th day of January, 1899. On the 14th of March following, the cause was continued on motion of the defendant, and was set for trial on the 29th of May, 1899. On the day set he filed another motion and an affidavit for continuance, based upon the absence of one Florence Simons. The motion, which was sworn to, alleged that the defendant could not safely go to trial, on account of the absence of a witness whose name is Florence Simons; that he had used due diligence to obtain the evidence of the witness by having subpœnas for him issued and placed in the hands of the sheriff; "that said witness has not been served, as sheriff was unable to find him; that the evidence of said witness is material to the defense of this case, and that said witness is not absent by the consent, connivance or procurement of the defendant; that said witness, if present, as defendant believes, will swear to the statements and facts as herein set up, and that defendant believes said statements and facts to be true; * * * * that he cannot prove these facts by any other witness; that he believes, if the continuance is granted, that this evidence can be procured;" that "Florence Simons would swear, if present, that he was a railroad man, and was an extra man on the road at the time of the homicide; on the morning of November 25, 1898 (the time of the killing), he was standing in front of deceased's restaurant, and saw the defendant go in the front door with a gun, and immediately afterwards saw Virgil Wright go running in the side door; and saw the two men scuffling for the possession of a gun, and during the scuffle heard the gun discharged, and immediately thereafter discharged the second time." Immediately after the motion for continuance the following statement is set out in the bill of exceptions in this case: "The defendant, through his attorney, J. B. McLaughlin, alleged as one ground for continuance the absence of one witness, named Florence Simons. It was claimed that said witness was not in the state of Arkansas; that due diligence had been made to find him. When last heard of, he was in Louisville, Kentucky, and interrogatories had been sent to said city for him to answer. At the time set for taking them he could not be found. If he [was] present, it was alleged he

would swear: [Here follows a statement of what he would swear, which is the same as that contained in the motion].

"Counsel for defendant stated to the court that he had never seen or spoken to said witness, Florence Simons, but derived his information from one W. T. Harper, who resides in Argenta. Whereupon said Harper was subpœnaed, sworn and testified as follows: 'I know one Florence Simons. I saw him on November 25th, the day Mrs. Lane was killed. Simons said he expected to hear of some trouble from Lane, as he had seen him the night before go into the restaurant, where the killing occurred, with a shotgun in his hands. Simons did not see the killing. Mr. McLaughlin is mistaken when he says I told him Simons saw the difficulty. Simons told me he saw Lane the night before the killing, but not on the morning it happened. He did not tell me he saw Virgil Wright, or any one else, go in the restaurant with the gun." Counsel for the defendant was unable to make any showing to the court as to the probability of ever finding said witness.

"The state introduced the testimony of the night foreman in charge of all extra men and also the day foreman, both of whom testified they knew the men who worked under them, and that they had charge of the extra men on the day and night of November 25, 1898, and that no man by [the] name of Florence Simons worked for them. They never knew or heard of such a man. He may have worked under a different name.

"Said testimony was taken on the hearing of the motion for contiuance. The court, having heard all the testimony, overruled the motion for continuance."

The defendant insists that the court had no right to hear evidence controverting the truth of his motion. The contention is partly correct. The statement of facts which are expected to be proved by an absent witness cannot be contradicted by testimony or counter-affidavits for the purpose of defeating a continuance; for the statute which regulates the postponement of trials in criminal prosecutions, so far as it is applicable, provides that no continuance shall be granted in civil cases on account of an absent witness, if the adverse party will admit that the absent witness, if

present, would testify to the statement contained in the application for a continuance,—thereby prohibiting the defeat of the application, so far as it relates to the testimony of the absent witness, by counter-affidavits, or in any other manner, except by admitting that the witness, if present, would testify as the appellant believes he will. But, as to facts showing diligence and the like, the case is wholly different, and the same reasons do not apply. Counter-affidavits or other competent evidence may be admitted and heard for the purpose of showing the want of diligence in procuring the testimony of an absent witness, or the want of good faith in making the application for a continuance, or the improbability that the proposed testimony can be obtained. *State* v. *Rainsbarger*, 74 Iowa, 196; *State* v. *Bailey*, 94 Mo. 311; *Cushenberry* v. *McMurray*, 27 Kas. 328; *Lascelles* v. *State*, 90 Ga. 375; *State* v. *Bevel* (Iowa) 56 N. W. Rep. 546; Anonymous, 3 Day, 308; *McGee* v. *State*, 31 Texas Crim. Rep. 71.

Continuances in criminal as well as in civil cases are, as a general rule, within the sound discretion of the trial court; and a refusal to grant a continuance in a criminal case is never a ground for a new trial unless it is made to appear that such discretion has been abused to the prejudice of the defendant.

The defendant in this case, through his counsel, endeavored to show his good faith in asking for a continuance by saying that he had been informed by one Harper that Simons would testify what he expected to prove by him. Harper thereupon testified that he had not given the information. The presumption is that the defendant made the best showing within his power. He was not required to show the source of his information, but, having done, so, it was competent to ascertain whether he had been informed as he alleged, for the purpose of determining whether the application was made in good faith. The result of the investigation made in this case was sufficient to induce the court to believe that it was not.

More than four months had elapsed after the indictment was filed in court before the trial in this case. The defendant admitted, when his application was before the court, that Simons, the absent witness, was not within the state, yet he

states in his application that the diligence used to procure his testimony was the issuing of a subpœna for him and the placing of the same in the hands of the sheriff. He, however, stated to the court that he had used due diligence to find him, but without success; that when last heard from he was in Louisville, Kentucky; and that he had sent interrogatories to that city for him to answer, but at the time set to examine him he could not be found. It is further stated in the bill of exceptions, in this connection, that the "counsel for defendant was unable to make any showing to the court as to the probability of ever finding said witness." Surely it is not the duty of the court to continue a case on account of an absent witness when there is no reasonable hope of finding him. This cause had been continued, on the defendant's application, for more than two months; and in that time, it seems, he had been unable to discover anything to show even a probability of the discovery of the place of his abode. It does not, therefore, appear to us that the trial court abused its discretion in refusing the continuance, to the prejudice of the defendant.

The defendant was arraigned and pleaded not guilty to the indictment. He was tried and convicted of murder in the first degree. The trial court refused to grant him a new trial, but rendered judgment against him according to the verdict. He insists that the court erred in doing so, because the evidence was not sufficient to sustain the verdict. But, after a careful reading and consideration of all the evidence as it appears in the transcript before us, we find that it is sufficient to sustain it in this court.

The judgment of the circuit court is, therefore, affirmed.

67 295
77 6
77 293
67 295
83 322
67 295
80 271
80 272
82 337
67 295
90 227

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

Opinion delivered December 23, 1899.

1. PERSONAL ACTION—VENUE.—An action for a personal injury against a railroad company, being transitory, may, under Sand. & H. Dig., § 5692, be brought in any county in this state through or into which the road passes, though the cause of action arose in another state or territory, if both parties are domiciled in this state. (Page 299.)

2. SAME—LAW GOVERNING.—In actions *ex delicto* for injuries to persons or property, the right to recover, and the limit of the amount of the judgment, are determined by the laws of the place where the injury was done. (Page 301.)

3. JUDICIAL NOTICE—ACT OF CONGRESS.—The courts of this state will take judicial notice of the act of Congress extending the application of a specified part of the statutes of this state to the Indian Territory. (Page 302.)

4. COMMON LAW—PRESUMPTION.—In the absence of evidence to the contrary, the common law is presumed to be in force in Kansas. (Page 302.)

5. FELLOW SERVANTS—NEGLIGENCE.—A fireman on a locomotive engine and a switchman on the train attached are fellow servants at common law, within the rule which holds the master not liable for an injury to his servant caused by the negligence of a fellow servant engaged in the same business, provided there was no negligence in the employment of the latter or in his retention. (Page 302.)

Appeal from Crawford Circuit Court.

JEPHTHA H. EVANS, Judge.

*Dodge & Johnson* and *Oscar L. Miles*, for appellant.

The court below had no jurisdiction over a cause of action arising in the Indian Territory. There is no such thing as comity except between equals. See Webst. Dict. *Comity*. Hence there can be no concurrent jurisdiction between the state court and the federal court for the Territory. 18 Wall. 317; 11 Otto, 129; 9 How. 238. The burden was on the appellee to show both that the accident was the result of negligence of the

master, and that it was not the result of a risk which he had impliedly assumed, as one of the usual and ordinary hazards of the business. Wood, Mast. & Serv. § 382; Thomp. Neg. 1053; Shearm. & Redf. Neg. § 99; 46 Ark. 569. The master's duty of inspection extends only to such defects as are visible and open to ordinary observation, in the case of a foreign and loaded car offered for immediate transit. 22 C. C. A. 268; 116 U. S. 642; 135 Mass. 201; 100 N. Y. 462; 26 Pac. 297. Even if the injury was caused by negligence, it was the negligence of the car inspector, who was a fellow-servant of appellee. 109 U. S. 478; 46 Ark. 569; 51 Ark. 479. Plaintiff, having elected to bring his suit in Arkansas, is bound by the Arkansas rule upon this point. 16 Peters, 511; 12 Otto, 14; 17 Otto, 102. The injury having occurred while appellee was engaged in violating the rule of the company, his recovery is bound by his own contributory negligence. 90 Ala. 68; 55 Wis. 50; 90 Ala. 32; 106 Mo. 74; 40 Ia. 341; 16 S. W. 229; 80 Ga. 427; 110 Mo. 387; 38 W. Va. 206. The employee is presumed to have known of the general rules of his employment. 70 Tex. 226; 16 S. W. 229; 9 Am. & Eng. R. Cas. (N. S.) 759. The appellant discharged its duty to furnish safe instrumentalities, etc., so far as concerns this case, when it placed an adequate supply of links and pins on the train, in order that the servants might replace broken ones; and the presence of the defective link was due to the negligence of a fellow-servant. 27 N. E. 952; 139 Miss. 445; 109 N. Y. 496; 46 N. E. 624; 156 Mass. 13; 160 Mass. 152; *id.* 557; 135 Mass. 209.

*Geo. A. Grace*, for appellee.

This is a transitory action, and the court below had jurisdiction. 62 Ark. 254; 54 Ark. 459; 63 Ia. 70; 65 Ia. 727; 31 Minn. 11; 145 U. S. 593; 20 S. W. 819; 103 U. S. 11; 49 Ga. 106; 84 N. Y. 48; 60 Miss. 977; 50 Ark. 155. Appellant's duty of inspection was the same in regard to foreign cars as to its own. 56 Ark. 594, 602; 160 U. S. 70; 16 S. Car. 216; 157 U. S. 72, S. C. 15 Sup. Ct. Rep. 491; 100 N. Y. 462; 53 Am. Rep. 296; 116 N. Y. 401; 109 Ill. 314, 322, 325; 94 Mo. 468; 44 Am. & Eng. R. Cas. 523; 1 Shear. & Redf. § 196; 2 *id.* § 459; 9 Fed. 337.

The car inspector was not a fellow-servant of the fireman, by the law of the Indian Territory. 116 U. S. 642; 149 U. S. 368, S. C. 13 Sup. Ct. Reporter, 914; 150 U. S. 349; 152 U. S. 684; 58 Ark. 66, 78; 56 Fed. 1009; 70 Fed. 219; 76 Fed. 349, 352; 56 Fed. 994. The law of the place where the cause of action arose, and not the *lex fori*, controls. 160 Mass. 571; S. C. 39 Am. St. Rep. 514; 94 Wis. 70; 29 Kas. 632, S. C. 11 Am. & Eng. R. Cas. 243; 10 Lea, 35, S. C. 11 Am. & Eng. R. Cas. 180; 97 Ala. 126, S. C. 18 L. R. A. 433; 89 Tenn. 235; 61 Ia. 441; 27 S. Car. 456, S. C. 13 Am. St. Rep. 653; 12 Am. & Eng. Enc. Law (2 Ed.), 1018; 146 U. S. 657, S. C. 13 Sup. Ct. Rep. 224, 229; 1 How. 28; 7 Wall, 53, 64; 105 U. S. 24, 29; 103 U. S. 11; 145 U. S. 593, S. C. 12 Sup. Ct. Rep. 905. The question of contributory negligence was for the jury. 130 U. S. 649, S. C. 9 Sup. Ct. Rep. 647; Beach, Cont. Neg. § 450; 8 Allen, 441; 150 U. S. 349; 48 Ark. 333, 348; 30 Minn. 231; 92 Fed. 567; 54 Fed. 481, 483. It was for the jury to say whether the appellant, by the use of ordinary care, could have discovered the defect in the link. 53 Ia. 595, S. C. 35 Am. Rep. 243. The link was admissible in evidence. 62 Ark. 538; 138 Ill. 103, 108, 110, S. C. 27 N. E. 1085; 3 Am. St. Rep. 448, 449.

BATTLE, J. William M. Brown instituted this action against the St. Louis, Iron Mountain & Southern Railway Company, in the Crawford circuit court, to recover damages caused by injuries received by him in the Indian Territory. The plaintiff recovered a judgment against the defendant for six thousand dollars. To set aside this judgment, the defendant prosecutes an appeal to this court.

The plaintiff alleged, in his complaint, that the defendant was a corporation, created and organized under the laws of the states of Missouri and Arkansas; that the Kansas & Arkansas Valley Railway Company was a corporation organized under the laws of this state; and that he (the plaintiff) was, on the 19th day of September, 1895, and long before and ever since that day, a white man, and a citizen of the United States, and of the State of Arkansas. He further alleged that sometime prior to the 19th of September, 1895, the St. Louis, Iron

Mountain & Southern Railway Company leased from the Kansas & Arkansas Valley Railway Company its railway, which extended from Coffeyville, in the state of Kansas, through the Indian Territory, and into Crawford county, in this state, to the town of Van Buren, and had maintained and operated the same at all times since the lease; that the plaintiff was in the employment of the former company as a fireman on the railway leased by it, and, while so engaged, on the 19th of September, 1895, at Ross station, in the Indian Territory, the defendant, by carelessly and negligently operating one of its trains on which he was working, threw him to the ground and injured him by running the wheel of the engine in the train over his right foot, to his great damage. The defendant answered and denied all allegations as to negligence, but said nothing as to the companies named being corporations, or the lease, or the plaintiff being a white man, and a citizen of this state.

The injury of which the plaintiff complained was received under the following circumstances: In 1890 the defendant employed plaintiff to labor as a fireman on one of its locomotives on the railway leased by it from the Kansas & Arkansas Railway Company. He was constantly engaged in the performance of this work until the 19th of September, 1895, when at Ross station, in the Indian Territory, the train of the defendant on the leased railway, on the engine of which he was serving as fireman, ran on a side track to allow a passenger train to pass. Two cars being already on the side track, the engine of the former train pushed them ahead of it until the train hauled by it was fully on the side track. After the passenger train had passed, the other train backed out on the main line, over the way it had come, and pulled the two cars, which it had pushed ahead of it, as it moved out. A brakeman made an effort to detach them (the two cars) from the engine by uncoupling, while the train was moving, but he failed to do so, and signalled to the engineer to stop, and he obeyed; and as he did so one of the links used in coupling the cars composing the train broke, and the train at this place of junction separated into two parts, and the part in the rear moved up the track. The

two cars were then separated from the engine, and the engineer moved the remainder of the train back. As he did so, plaintiff was sitting on the end of the pilot beam, cleaning out the engine from the front end. The two parts into which the train was divided collided. Plaintiff fell from the pilot beam, and a wheel of the engine ran across his right foot, taking off the great toe and the two next to it.

The defendant insists that the Crawford circuit court did not have the jurisdiction to hear and determine any cause of action based upon the injury of plaintiff, because the injury was done in the Indian Territory, and the United States court in that country had jurisdiction to try whatever cause of action accrued to him on account of it. But it is in error. Actions for personal injuries are transitory, and not local, and may be brought against railroad companies in any county where the law provides for suing them, and where service of summons can be effectively made. Under the statute of this state (Sand. & H. Dig., § 5692), an action against a railroad company for an injury to person or property upon the road of the defendant may be brought in any county through or into which the road upon which the cause of action arose passes. The road upon which the cause of action in this case arose passes into Crawford county, and the circuit court of that county, if the defendant was properly served with summons, had jurisdiction to try it; the cause of action being transitory, and the domicile of both parties being in this state. *Eureka Springs Ry. Co.* v. *Timmons*, 51 Ark. 459; *St. L. & S. F. Ry. Co.* v. *Brown*, 62 Ark. 254; *Bruce* v. *Cincinnati R. Co.*, 83 Ky. 174.

The right of plaintiff to recover in this action depends upon the liability of the defendant to pay damages on account of the breaking of the link which caused the separation of the train. Upon this part of the case the trial court instructed the jury, over the objections of the defendant, as follows: "It is the duty of the defendant to use reasonable care to provide and keep in reasonably safe condition for use by its employees the cars and appliances, including links used by them in its service. A violation of this duty is negligence. This duty is violated, so far as this case is concerned, only when a link is

used which is so defective as to be reasonably liable to break and cause injury; and defendant must have known this, or, if it did not know it, as an ordinarily prudent and careful person ought to have known it, and thereafter unreasonably failed and neglected to repair it or obviate the defect,—in such case, and in such case only, is there negligence of the defendant. If you find negligence on the part of the defendant, as thus explained, and that the injury to the plaintiff complained of proximately resulted therefrom, you will find for the plaintiff, if he at the time was in the exercise of reasonable care." According to this instruction, was the defendant liable to the plaintiff for the damages he suffered on account of the breaking of the link?

The train upon which the plaintiff was injured was made up at Coffeyville, in the state of Kansas. There were twenty cars and a caboose in the train, and all of them, except four, belonged to other companies—were foreign cars. Only four belonged to the defendant. The broken link was not furnished by the defendant, and did not belong to it, but came into the train with one of the foreign cars. All these cars were inspected at Coffeyville before they were made a part of the train. But the pins and links which were used in coupling them were not examined by the inspector. It was not his duty to do so. The switchmen made up the trains, and it was their duty to put only sound links and pins in the train. It was made their duty, because in making up trains they are compelled to handle them in coupling the cars; and they were furnished with pins and links amply sufficient to supply all deficiencies.

The links used by the defendant in the operation of its trains were made by skilled and experienced manufacturers, under a contract which required them to make each link of a minimum tensile strength of 50,000 pounds to the square inch. When they were made, they were inspected and tested by the manufacturers, and then they were shipped to the defendant, and were again inspected by its employees. These links were furnished the trainmen, and they were required to keep them, in adequate numbers, on the train, and to substitute one of

them for any defective or broken link which appeared in the train. This was specially made the duty of the brakemen.

According to the evidence, the defendant was diligent in providing means to guard against accidents caused by defective links. The injury received by plaintiff on the 19th of September, 1895, was caused by a link which was in defendant's service only a few hours, and in that time drew twelve or fourteen cars about seventy-four miles; and yet there was evidence tending to prove that there was a break in it at the time it came into the possession of the defendant, and that it was not discovered until after the accident. The failure to make the discovery in time was no fault of the defendant, unless the negligence of its employees whose duty it was to examine the link before using it can be imputed to the master.

In all actions *ex delicto* for injuries to person or property (to which class this belongs), the right to recover, and the limit of the amount of the judgment, are determined and governed by the laws of the place where the injury was done. *Carter* v. *Goode*, 50 Ark. 155; *Northern Pacific Railroad Company* v. *Babcock*, 154 U. S. 190. The injury in this case was done in the Indian Territory. The common law was in force in that country at that time. Congress, by an act entitled, "An act to provide a temporary government for the Territory of Oklahoma, to enlarge the jurisdiction of the United States court in the Indian Territory, and for other purposes," approved May 2, 1890, provided that chapter 20 of Mansfield's Digest of the Statutes of Arkansas shall be extended over and put in force in the Indian Territory, so far as it is applicable, and not in conflict with any act of Congress. (Public Acts of the First Session of the 51st Congress, p. 94, § 31). The chapter twenty referred to provides that "the common law of England, so far as the same is applicable and of a general nature, and all statutes of the British Parliament in aid of or to supply the defect of the common law, made prior to the fourth year of James the First (that are applicable to our form of government), of a general nature and not local to that kingdom, and not inconsistent with the constitution and laws of the United States, or the constitution and laws of this state, shall be the rule of

decision in this state, unless altered or repealed by the general assembly of this state." No evidence of the passage of the act of May 2, 1890, was adduced, but it is our duty to take judicial notice of its enactment. *Bayly* v. *Chubb*, 16 Gratt. 284; *Coughran* v. *Gilman*, 81 Iowa, 442; *Mangun* v. *Webster*, 7 Gill, 78; Constitution U. S., art. 6; 1 Greenleaf on Evidence (16 Ed.) § 490.

In the absence of evidence to the contrary, the common law is presumed to be also in force in Kansas, where the train on which the plaintiff was employed at the time he was injured was made up. *Norris* v. *Harris*, 15 Cal. 226; *Thorn* v. *Weatherly*, 50 Ark. 237; *Peel* v. *January*, 35 Ark. 331; *Eureka Springs Ry.* v. *Timmons*, 51 Ark. 459. According to the common law, the master is not liable for an injury to his servant, caused by the negligence of a fellow servant engaged in the same business, provided there was no negligence in the employment of the latter or in his retention. He is not liable, because the servant took into account and assumed all the risks and hazards ordinarily incident to his employment when his wages were fixed. Holding that the exemption of the master from liability was based upon this principle, this court, in *Railway* v. *Triplett*, 54 Ark. 296, said: "Where one servant is shown to have been injured by another, the question is, not whether the two servants were fellow servants in any technical sense of the term, but whether the injury was within the risk ordinarily incident to the service undertaken;" and, if so, held that "there is no common-law liability on the part of the employer; if not, there is such liability; and the injury, except as it bears on the above is not one of grades or departments."

Following this rule in *St. Louis Southwestern Railway Company* v. *Henson*, 61 Ark. 302, this court held that the master was not liable for injuries to a bridge foreman that were caused by the negligence of an engineer, both of whom were in its service, but in different departments. The plaintiff in that case was "foreman of a bridge and building gang," who were employed by the defendant to repair bridges, culverts and trestles. He was furnished with cars, in which he lived and boarded the men working under him. These cars were moved

from time to time to the different places on its road where the work of the plaintiff and his men was needed. At one time when it was moving these cars and plaintiff was on board of them, one of its trains, through the negligence of the engineer operating the same, collided with them and seriously injured the plaintiff. In speaking with reference to these facts, this court, through Justice Wood, said: "The plaintiff and the engineer whose negligence caused the collision were in different departments of the company's service. The former belonged to the bridge and building department, and the latter to the transportation department. Neither was under the control of the other. But the fact that they belonged to separate departments is of no consequence, further than it may tend to show whether or not the injury complained of was within the risks 'ordinarily incident to the service undertaken.' The danger of the collision of trains growing out of the negligence of engineers is open and palpable, and was reasonably to be anticipated by the plaintiff in the business in which he was engaged. It was certainly but a normal and natural risk for a bridge foreman to assume when he entered upon the service of the company; for these boarding cars in which he lived were constantly on the move, and they were pulled about over the road by the engineers on the various trains. The plaintiff had every opportunity to, and doubtless did, know the manner and method of the movements of these trains. His work necessarily brought him in close contact with these engineers, and he knew that they manipulated the motive power. There was nothing of the master's duty in the work of running the engine. The doctrine announced by this court in *Triplett* v. *Railway Co.*, 54 Ark. 289, applied to the facts of this record, determines the relation of the plaintiff and the defaulting engineer as that of fellow servants."

In *St. Louis, Iron Mountain & Southern Railway Company* v. *Gaines*, 46 Ark. 455, the plaintiff was a brakeman on a train, in the employment of the defendant. The train was composed of cars which were cursorily inspected in transit, at Texarkana, by a person employed by the defendant for that purpose. One of such cars belonged to another company. All the cars were decided by the inspector to be in good and safe condition, and

were allowed to proceed on their way. If any car had not been so decided, it would have been set out on the repair track for repairs. But all passed inspection. After this it was discovered that the spring of the draw-head of the foreign car was broken, and there was evidence to show that the plaintiff was injured by reason of the defect. As to the evidence showing these facts, the court said: "There is no proof that the railroad company, or any of its employees, had any knowledge of any defects in the coupling apparatus of the car or its fastenings prior to the accident. The car did not belong to the defendant, but to a connecting carrier. It was duly inspected on the same day the accident occurred, and pronounced to be road-worthy by being placed in the train. There is no reason to suppose the car inspector was incompetent, or that, on this particular occasion, he performed his duty carelessly. * * * There is not a particle of evidence that the defendant omitted any duty which it owed to the plaintiff.

"Now, notice of the alleged defect, or, what amounts to the same thing, the means of knowledge, which the company failed to use, was a material fact which was necessarily involved in the verdict. Consequently, as no testimony was given from which the jury could infer that the company knew, or might by reasonable diligence have discovered, the defect in time to remedy it and prevent the casualty, the verdict is not supported by sufficient evidence.

"And, even had it been shown that the drawhead was loose or broken before the train was sent out, and that the defect was discoverable upon a proper inspection, yet the plaintiff cannot recover for the negligence of his fellow servant. Here, again, the court committed an error to the prejudice of the defendant; for it refused to tell the jury that the car inspector and the brakeman were fellow servants. They are not only employed and paid by the same corporation, but their separate services have an immediate object—the moving of the trains. Neither works under the orders or control of the other, and each takes the risk of the other's negligence in the performance of his service."

The doctrine of the last mentioned case was reaffirmed in

*St. Louis, Iron Mountain & Southern Railway Co.* v. *Rice*, 51 Ark. 467.

We are aware that some courts have held that an inspector of cars and other employees of a railroad company are not fellow servants. (*Little Rock & Memphis Railroad Company* v. *Moseley*, 56 Fed. Rep. 1009; and notes to *Cincinnati, Hamilton & Dayton Railroad Company* v. *McMullen*, 38 Am. & Eng. R. Cases, 172–174.) The ground upon which this doctrine is based is that it is the duty of a railroad company to provide safe and suitable instrumentalities for its employees to work with, and to keep the same in repair. But the company is not the insurer of the safety of the servant, nor does it guaranty to him that the tools, machinery, and other instrumentalities which it furnishes will not prove defective. It guaranties only that due care shall be used in supplying such appliances and in keeping the same in repair. "Whenever an employee seeks to recover damages for injuries resulting from insufficiency of any of the machinery or instrumentalities furnished by the railroad company, it will not only devolve upon such employee to prove such insufficiency, but it will also devolve upon him to show, either that the railroad company had notice of the defects, imperfections or insufficiencies complained of, or that by the exercise of reasonable and ordinary care and diligence it might have obtained such notice; and proof of a single defective or imperfect operation of any of such machinery or instrumentalities, resulting in injury, will not, of itself, be sufficient evidence, nor any evidence, that the company had previous knowledge or notice of any supposed or alleged defect, imperfection or insufficiency in such machinery or instrumentalities." *St. Louis, I. M. & So. Ry. Co.* v. *Gaines*, 46 Ark. 570.

The inspection of cars on the way to their destination is cursory, and made for the purpose of ascertaining whether they be roadworthy, and can be hauled without unnecessarily imperiling the safety of the trainmen. It is temporary, and is for the purpose of ascertaining whether the cars can be hauled to their destination, and is a part of the "executive details" of the operation of the train; and, like other acts necessary to be performed by the trainmen to haul the train, there is no liability

of the railroad company to its employees for its negligent performance. If care and diligence has been exercised in the selection of competent persons for that duty, a negligence by them in the performance of it is a risk of the employment that the co-employee takes when he enters the service. *Slater* v. *Jewett*, 5 Am. & Eng. R. Cases, 515, S. C. 84 N. Y. 61; *Holden* v. *Fitchburg R. Co.*, 129 Mass. 268. But there is a time when it is the duty of a railroad company to its employees to inspect its machinery and other appliances for the purpose of discharging its obligation to use due care in keeping the same in good repair. It is bound to take notice of the liability of its tools and machinery to decay from age and to wear out by use, and to protect its servants against such contingencies by inspection at reasonable intervals for the purpose of ascertaining what repairs are needed, and for a failure to discharge this duty is liable to the servants for damages. *Holden* v. *Fitchburg R. Co.*, 129 Mass. 268; 3 Elliott, Railroads, § 1278.

The distinction as to the liability of a railroad company for the two inspections, according to the previous rulings of this court as to the common law, which we have attempted to show, were pointed out and recognized in *St. Louis, Iron Mountain & Southern Railway Company* v. *Rice*, 51 Ark. 467. In that case the court said: "The railway company must have its repair shops to maintain its tools, rolling stock, etc., in good repair, and it must have its inspectors, not only at its *termini*, where a general overhauling is had, but at convenient stations along the line to detect such injuries as may have been received *en route*; and, should such company knowingly employ and retain persons incompetent for the performance of this high service, it would be liable to the person injured, though such persons were fellow servants of the inspector. * * * * * While we recognize the liability of the railway company for the willful or negligent default of its chief inspectors, and those deputed to supervise the condemnation of unsuitable tools, rolling stock, etc., we cannot assent to the proposition that every yard inspector on the line of a railroad is a vice-principal. Upon what we conceive to be the soundest principles, and the weight of authority, we hold that the appellee

and the yard inspector were fellow servants, and hence that the appellee had no cause of action against the appellant."

We have not overlooked the fact that the car which was the cause of the injury in this case was a foreign car in transit over the defendant's road. But that does not affect the defendant's liability; for the duty of inspection of cars in transit is the same, whether the car is a foreign one or a domestic one. *St. Louis, I. M. & S. Ry. Co.* v *Gaines*, 46 Ark. 555; *Ballou* v. *Chicago & N. W. R. Co.* (Wis.), 5 Am. & Eng. R. Cases, 480; *Gutridge* v. *Mo. Pac. Ry. Co.*, 94 Mo. 468; *Goodrich* v. *N. Y. Cent. & Hudson River R. Co.*, 116 N. Y. 398; *Sack* v. *Dolese*, 137 Ill. 129; *Baltimore & Potomac R. Co.* v. *Mackey*, 157 U. S. 72.

The switchmen whose duty it was to make up the trains at Coffeyville, and the firemen on the train so made up, were engaged in the service of the defendant, and their labors contributed to accomplish the same result—the moving of the trains. The consequences incident to the use of defective links in the making up trains by switchmen were apparent. The separation of trains by the breaking of such links is of frequent occurrence. The risk of injuries resulting therefrom was ordinarily incident to the employment of the fireman, and was assumed by him. In examining and rejecting defective links in making up trains, the switchmen performed no part of the duty of the master to the fireman, although it was necessary for them to inspect the links already in use, in order to discharge the duties imposed upon them. They (the fireman and switchmen) were therefore, according to the decisions of this court, fellow servants at common law.

But the plaintiff says that the defendant admitted in the trial of this action that, according to the law in force in the Indian Territory, "a car inspector was not a fellow servant with the fireman," and that it is now estopped from showing that this was not the law. It is true that this admission was made, and that this court said in *Kansas & Arkansas Valley Railroad Company* v. *Fitzhugh*, 61 Ark. 341, of a like admission, that the defendant, having made it, could not dispute it in this court, nor assume a position inconsistent with it. But

the admission in this case is not disputed, and there is no reason for doing so, as it is confined to firemen and car inspectors. It was proved, and was not disputed, that it was not the duty of the car inspector to inspect the pins and links used in coupling the cars of a train, and that the switch crew, who make up trains, are required to put only sound links and pins in the train. The railroad company evidently thought that the duty imposed upon the switchmen made it unnecessary for the car inspector to examine the links and pins, and there is no reason why it should not. The switchmen are compelled to handle the pins and links in making up the train, and, to make the examination required, no special mechanical skill was necessary.

There was no evidence that the defendant was guilty of negligence in the employment of switchmen, or in the performance of any other duty to the plaintiff, and consequently there was no evidence to sustain the verdict of the jury.

Reversed and remanded for a new trial.

---

## GAGE v. STATE.

Opinion delivered December 23, 1899.

INDICTMENT—CERTAINTY.—Under the rule that nothing can be taken by intendment or by way of recital to supply the want of certainty in an indictment, an indictment which alleges that the accused, acting as agents and representing the Fire & Marine Insurance Company of West Virginia, unlawfully did insure buildings and receive a sum named therefor, when said company had not complied with the laws of the state in filing a bond, is defective in failing to allege directly that the Fire & Marine Insurance Company of West Virginia was an insurance company. (Page 309.)

Appeal from Prairie Circuit Court, Southern District.

T. P. ATKINS, Special Judge.

STATEMENT BY THE COURT.

The indictment in this case reads as follows: "The grand

jury of Arkansas county, in the name and by the authority of the State of Arkansas, accuses Irvin Bock and H. C. Gage of the crime of misdemeanor, committed as follows, to-wit: The said Irvin Bock and H. C. Gage, in the county and state aforesaid, on the 22d day of October, 1897, then and there acting as agents, and representing the Fire & Marine Insurance Company of West Virginia, unlawfully did insure buildings for Leon Katz, and receive money, to-wit, one hundred and seven and 50-100 dollars, from said Leon Katz, when he was soliciting said insurance, and gave insurance policy to the said Leon Katz, the said company, the Fire & Marine Insurance Company of West Virginia, had not complied with the laws of Arkansas, to-wit, had not executed bond as required by the laws of Arkansas, said bond had not been filed and approved by the auditor, and said acts of said agent was against the statutes in such cases made and provided; against the peace and dignity of the state of Arkansas."

To this indictment the defendant interposed a demurrer in short, which was overruled by the court. To this ruling of the court the defendant excepted.

A trial was had. Defendant was convicted and moved for a new trial. The motion was overruled, to which he excepted, and appealed to this court.

*Hill & Auten* and *W. J. DuVal*, for appellant.

The indictment should have alleged the existence of the insurance company, and the proof should have shown same. The conviction was invalid, for the reason that the record fails to show the election of the special judge.

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

The indictment was sufficient. 16 Ark. 506. The question as to the election of the special judge cannot be raised, for the first time, on appeal. 6 Ark. 227; 19 Ark. 96; 25 Ark. 622.

HUGHES, J., (after stating the facts.) It will be observed that the indictment contains no direct allegation that the Fire & Marine Insurance Company of West Virginia was an insur-

ance company. Nothing can be taken by intendment, or by way of recital, to supply the want of certainty in the indictment. *State* v. *Ellis*, 43 Ark. 93. The judgment is reversed, and the cause remanded for further proceedings according to law.

---

## HALLIDAY v. SMITH.

Opinion delivered January 6, 1900.

ESTOPPEL—INDICTMENT.—Where, for the purpose of laying a foundation for a formal contest as to the existence of a public road, defendant had himself indicted, and was convicted and fined, for obstructing the same, such proceedings do not estop him from subsequently denying that the road was a public highway, in an action brought to restrain him from obstructing such road. (Page 312.)

Appeal from Chicot Circuit Court in Chancery.

JNO. M. ROSE, Special Judge.

*D. H. Reynolds* and *Jno. C. Connerly*, for appellant.

As to the right to an injunction, see 35 Ark. 497; 40 Ark. 83. A judgment establishing a road cannot be collaterally attacked. 47 Ark. 431.

*Rose, Hemingway & Rose*, for appellee.

The order of the county court was obtained through fraud, and is void. 42 Ark. 348; 2 Fr. Judg. § 489; Big. Fraud, 87. The statutory notice was requisite to the validity of the order. 51 Ark. 34; 65 Ark. 94; *id.* 142, 143; 13 Ark. 491; 52 *id.* 312; 55 *id.* 30; 54 *id.* 642; 59 *id.* 487; Sand. & H. Dig., § 4190. It was a taking of property without due process of law. 43 Ark. 545; 5 *id.* 409; *id.* 217; 3 *id.* 536; Ell. Streets and Roads, 233. There never having been any petition to the county court, it had no jurisdiction. Sand. & H. Dig., § 2817; 2 Rap. & Law. Dict. 958; 93 U. S. 283; 55 Ark. 566. Nor did appellee's appearance a year later, to file his protest, validate the order. 58 Ark. 186; 47 Pac. 330; 64 Ark. 108. Nor

can the conviction in the criminal case amount to an estoppel here. 1 Greenl. Ev. § 537; 13 Ark. 217; 15 *id.* 319. At most, it was an admission, and appellee can show it to have been made under a mistake of law. 15 Ark. 62; 1 Greenl. Ev. §§ 204, 205, 206[2], 209; 22 Ark. 496; 23 Ark. 134; 11 *id.* 263; 49 *id.* 300; 17 *id.* 221; 32 *id.* 266.

BUNN, C. J. This is a bill to enjoin the defendant, Benjamin H. Smith, from obstructing an alleged public road, and from interfering, to prevent their free passage along said road, with the plaintiff's employees and tenants.

The complaint stated, among other things, "that there is a public road running from the gate on east bank of Yellow Bayou, near the Yellow Bayou Gin-house, and extending east, by the residence of B. H. Smith, Esq., on the Bellevue plantation, to the Mississippi river, there intersecting the road leading from Linwood to Luna Landing; that this road *has been a public road, and travelled as such for the last thirty years and more, and has been recognized and treated as a public road by the county court and circuit court* of the said county of Chicot."

The answer denied that the road had ever been a public road, and denied also that it had ever been attempted to use and treat it as such until in 1882 or 1883, and denied also that the road at that time was established by the county court, and denied that it has been a public road since that time, and, in fact, put in issue all the material allegations of the complaint.

The orders of the county court of Chicot county, made at its April term, 1882, and January term, 1883, exhibited with the complaint, and the evidence in relation thereto, do not purport to treat said road as a pre-existing public road, and the evidence does not sustain the allegation that it was treated as a public road previously to that time. The said orders of the county court, viewed as an attempt to lay out and establish a new road, do not purport to have been made in compliance with the provisions of the statutes on the subject, either in respect to notice or any other essential particular. They are therefore void, and were without force and effect from the be-

ginning, and are of course subject to collateral, as well as direct, attack, and to be treated as nullities in any case.

The transcript of the proceedings of the Chicot circuit court, exhibited with the bill, show that, after the defendant had entered his remonstrance in the county court against the attempt to make the road a public road, he had himself indicted in the circuit court for obstructing said road, and was convicted and fined. The reason given by the defendant for this strange proceeding, as given in his testimony, is shown thus:

"Question. State, if you remember, why your attorney advised you to submit to an indictment and bring your suit in the chancery court by injunction?

"Answer. He said, if I was indicted, and the cause was brought up, this would settle the whole road case, and I was told by Judge Bradley that the restraining order would be the proper course to pursue, and I told my attorney what Judge Bradley (the then circuit judge) had said, and he made out the papers, and Judge Bradley granted the injunction."

Plaintiff contends that defendant estopped himself by this conduct from denying the existence of the public road. Defendant's acts may have the appearance of admitting the fact that the road was a public road, but, under the circumstances, it was only for the purpose of laying the foundation of a more formal controversy of that fact in the proper tribunal. Besides, what a defendant may do in a criminal court can hardly be pleaded as an estoppel against him. It is plain that whatever defendant did was done in furtherance of his resistance to the establishment of this road. The evidence of the conduct and acts of the parties to this controversy, subsequent to the said orders of the county court, not only do not show an acquiescence on the part of the defendant, the owner of the plantation directly affected, in the use of the public road, but a constant and continual warfare and struggle against the plaintiff and his friends, who as persistently and continuously sought to have the road treated as a public road. There is, therefore, no ground whatever upon which it can be said that this road was ever made or became a public road, in the meaning of the law then in force, either by prescription, by use, by the estab-

lishment by the county court, or by the assent and acquiescence of the owner of the land affected.

There was objection made to the reading of some of the depositions of defendant, one of the grounds being that the same were taken prematurely, that is, before the answer was filed. The complaint was filed September 11, 1890. The answer was filed November 20, 1890. The notice to take depositions was served on plaintiff's attorney on November 24, 1890, and under that notice the depositions of C. C. Martin, J. F. Ward, James McMurry and Joseph Bryan, for defendant, were taken on November 26, 1890. Notice to take depositions on the 27th day of November, 1890, was served on plaintiff's attorney November 24, 1890, and the deposition of H. N. Merriman, the county judge presiding when the said orders were made, was taken thereunder. The deposition of J. H. Worner and possibly some others was taken two or three days before the answer was filed. Without stopping to discuss the materiality of the objection on this ground, the depositions taken not subject to this particular objection fully sustain the defendant's contention. The other grounds of objection do not appear material and prejudicial to plaintiff.

The decree was to the effect that the demurrer to the complaint be sustained, because the plaintiff, showed no legal capacity to sue, and also to the effect that there is no equity in the bill.

There is no provision in the statutes giving a right of action to an individual against another for obstructing a public road, but, without discussing the demurrer to the bill, we find no error in the decree of the chancellor to the effect that there is no equity in the bill itself. The decree is therefore affirmed.

## LEACH v. STATE.

Opinion delivered January 13, 1900.

LARCENY—EVIDENCE.—In a prosecution for larceny of cattle if there was a conflict of testimony as to the ownership of the cattle taken by defendant, it was error to exclude proof that the prosecuting witness had formerly given a mortgage of the cattle alleged to have been stolen wherein they were described as marked differently from the cattle which defendant was proved to have taken. (Page 316.)

Appeal from Lincoln Circuit Court, Varner District.

ANTONIO B. GRACE, Judge.

*D. H. Rousseau* and *J. Bernhardt*, for appellant.

The evidence fails to establish any felonious intent, and is therefore insufficient. 1 Bish. Cr. Law, § 105; 17 Mo. 379. The evidence also fails to identify the property. 32 Ark. 283; 1 Greenl. Ev. §§ 33, 35, 87b; 2 *ib.* § 157. It was error to refuse to permit appellant to cross examine witness Brewer as to what and how many cattle he had mortgaged. 14 Ark. 555; 25 Ark. 380; 42 Ark. 542; 43 Ark. 99; Whart. Cr. Ev § 263; Bish. Cr. Proc. § 625. The venue was not proved.

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

BUNN, C. J. This is an indictment against Robt. Leach for cattle-stealing, tried and determined on a plea of not guilty, in the Varner district circuit court of Lincoln county, resulting in a judgment of conviction, from which the defendant appealed to this court.

The first ground in the motion for a new trial is that the venue was not established by the evidence. Monk Panel, a witness for the state, testified that on one occasion, in company with Drew Conine, he met the defendant with nine head of cattle, which he said he intended to sell to a Mr. Freeman, but, on being informed that Freeman was not at home, thereupon,

after some talk, defendant sold the cattle to Conine, who seemed to be a cattle trader. The price was forty-five dollars for the nine head, and this sum was paid in cash by Conine. Witness did not know that this sale was made in Desha or Lincoln county, but from circumstances he was of the opinion it was in Desha county. The time was 2 or 3 o'clock in the afternoon, and the cattle were being driven by defendant on the public road, between Burnet's store and the ferry. He knew one county line, and, relative to this line, the trade was made in Desha county. Such, at least, is the purport of witness' language as to the place. This witness also testified that defendant at the time said that he had purchased the cattle to sell the same to Mr. Freeman. Drew Conine testified that he did not know whether Burnet's store, where he paid for the cattle, was in Lincoln county or not. The cattle were to be delivered to witness at Ross' Ferry.

Jack Ross testified that the trade was made in Desha county, at Pendleton. Henry Harris, after identifying the occasion, testified that he met some cattle in the lane near his house, and met defendant at his gate, "and he asked me, if I noticed the cattle, and, being answered in the negative, he said, 'Notice them, and see if you know them.' On telling him that I did not know them, he said, 'I want to be right with them." Witness said that this took place in Lincoln county, but that he did not know the district. He said, however, that he paid taxes here (referring to Varner, the place of testifying.) Charles Brewer testified that the nine head of cattle he lost were ranging about two miles from his place in Varner district of Lincon county, and that he was in the habit of seeing them once every week, looking after them. The defendant testified that his father had given him the cattle which he sold to Conine on the occasion referred to by the other witnesses; that the cattle ranged about his father's and his home in Desha county; that they were given to him about a month before he sold to Conine, with the instructions to sell them; that he got the cattle, before he started with them, near the house of King Smith. On being asked if his father gave him nine head of cattle, he said he gave him all he could find. De-

nies that he told Harris that he had bought the cattle. Miles Leach, father of defendant, testified that he had about thirty-five head of cattle on the range near the Johnson place, where King Smith lived, and at the upper end of the Ellis place. The latter is in Desha county, but the Johnson place is in Lincoln county. Witness was indefinite as to language he used in making the gift of the cattle to defendant. King Smith testified to the meeting of himself and defendant. It was in Desha county. The latter had the nine head of cattle. These had ranged about defendant's father's a long time. Defendant told him he was taking them to Freeman to sell them to him. Witness said the cattle belonged to Miles Leach, the father of defendant. He knew nothing about Charlie Brewer's cattle. He lived about three miles from witness. King Smith also says this meeting was in Desha county, or at least that he saw defendant with the nine head of cattle there at or about that time. Nelson Smith, brother of the last, testifies about the same, except that he did not know how many cattle there were. Both of the Smiths say some of the nine were marked as they noticed, but none had an underbit in the left ear. There was some other evidence as to the venue. It is confusing somewhat, for the reason that witnesses may not all have had reference in their statements to the same cattle, and the exact place of the consummation and completion of the trade is a matter of uncertainty. Upon the evidence, however, the jury expressly found that the venue was properly proved as laid.

The next question was that of the ownership of the property in Brewer, the prosecuting witness, and the identity of the property he claimed to have lost, and described in the indictment, with the cattle found in possession of defendant, and sold by him to his co-defendants, Conine and Panel. The proof as to identity by marks was quite unsatisfactory. It was a little stronger by flesh marks as to some of the nine cattle, but unsatisfactory upon the whole. It appears that Brewer, the alleged injured party, had mortgaged a number of cattle to one Nick Smith sometime previously to the finding of the indictment in this case, and it appears also that he had been indicted for removing or disposing of mortgaged property

sometime before this indictment was found. What mortgage or what property conveyed therein, we are not at liberty to say from the testimony adduced. On the trial, Brewer being on the witness stand on cross-examination, after several questions leading up to the desired point, defendant's counsel asked him the following questions: "Is that the same property that you are testifying about [the property he had sold] that was mortgaged to Nick Smith, and mentioned in the indictment against you?" Here the state objected, and the court sustained the objection, and defendant excepts to the rulings, and thereupon made the following explanation of his object in propounding the question and requiring an answer to the same, viz: "Defendant's counsel then announced to the court that their object in propounding these questions to the witness was for the purpose of contradicting his ownership to the property and mark, and that the mortgage to Smith included all his cattle, and they were described as being marked with a crop off the right ear and overbit in left, and that they would prove these facts, and connect it with the issue, and offered to read the mortgage and the indictment at the proper time as evidence." The venue as laid in the indictment, and the identity of the property alleged to have been stolen with that found in the possession of defendant, and afterwards sold by him to his co-defendants, were both established by the verdict of the jury, but both upon very uncertain and unsatisfactory evidence. There was the wavering balance, subject to the least weight on either end, especially as to the identity of the property. Under this state of things, the defendant asked to introduce the mortgage for the purpose of showing that the cattle of the defendant therein described were not described as defendant's cattle in this indictment were described; and in this connection defendant also offered to prove that the cattle in the indictment included all the cattle Brewer owned at the time of the indictment, and to make other proof to connect the mortgaged property with the issue of Brewer's ownership of the property included in this indictment, and thereby to impeach or weaken the testimony of Brewer, by showing that in said mortgage he had represented

himself as the owner of cattle of a certain description, whereas as a witness in this case he was testifying that the cattle alleged to have been stolen from him was of another mark, and that in this way he had made contradictory statements as to these cattle and his ownership thereof. Under the circumstances, we say, we are of opinion that, for this purpose, and this alone, defendant was entitled to this testimony, and in refusing to admit it the court erred. The error was material, and the judgment is therefore reversed, and the cause remanded for a new trial.

---

67 318
82 141

## CASH v. KIRKHAM.

Opinion delivered January 13, 1900.

WITNESS—COMPETENCY—TRANSACTION WITH INTESTATE.—In an action by a physician to recover for medical services rendered to defendant's intestate, plaintiff is not a competent witness to testify as to his attendance on intestate and the value of his services, under Const. 1874, sched., § 2, prohibiting a party from testifying as to "transactions" with an intestate in an action by or against his administrator, unless called by the opposite party. (Page 319.)

Appeal from Pike Circuit Court.

WILL P. FEAZEL, Judge.

*J. H. Crawford*, for appellant.

It was error to permit the plaintiff to testify as to transactions with the appellant's intestate. Sand. & H. Dig., § 2914; sec. 2, schedule, Const. of Ark. 1874; 26 Ark. 476; 51 Ark. 401; 52 *ib.* 550; 54 *ib.* 185–6; 30 Ark. 285, 295. The evidence does not sustain the judgment.

*E. B. Kinsworthy*, for appellee.

When a contract is proved, the surviving party can testify to amount of services and value; for such is neither a transaction with, nor statement of, deceased. 38 Hun, 157. The constitution does not exclude the testimony of parties with de-

ceased persons, except as to transactions which are strictly personal. 26 Ark. 476. The evidence complained of was admissible, because it was as to independent facts of which the party could testify. 65 Wis. 425; 72 N. W. 880; 30 Fla. 424; 38 S. Car. 158; 34 N. W. 506; 43 W. Va. 639; 21 S. E. 175; 59 N. W. 129; 19 S. E. 291.

BATTLE, J. Z. L. Kirkham presented two accounts against the estate of John H. Cash, deceased,—one for one hundred and seventy eight dollars and the other for thirteen dollars,—for allowance. The accounts were principally for services rendered the deceased and his family by Kirkham. They were disallowed by the administrator, and were then filed in the probate court, where they were allowed in full. The administrator appealed to the circuit court, and Kirkham recovered a judgment on them for one hundred and twenty dollars; and the administrator appealed.

Only two witnesses testified in the case: "J. P. Dunn, a witness for the plaintiff, stated: During the last illness of J. H. Cash, deceased, plaintiff attended him as his family physician, but the witness did not know how many times he attended him or the value of his services therefor.

"The plaintiff (over defendant's objection) then introduced himself. He testified that he was the attending physician during the last illness of J. H. Cash, deceased; that he made forty visits at $2 per visit, and cost of operating on the wife of deceased, $25; that the total amount due upon said account was $120. The defendant objected to this testimony of the plaintiff for incompetency, the same being as to transactions with the defendant's intestate, which objection was by the court overruled, and defendant at the time excepted." This was all the evidence adduced.

The only question presented for our decision involves the consideration of the correctness of the circuit court's ruling upon the admissibility of plaintiff's testimony. Was it competent? The constitution of this state declares that, "in actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any

transactions with or statements of the testator, intestate or ward, unless called to testify thereto by the opposite party." The proceeding before us was an action by appellee against the appellant in his capacity of administrator of the estate of John H. Cash, deceased. The testimony of plaintiff tended to prove an implied contract with appellant's intestate. The legal effect of it as a whole, if true, was an implied promise of the deceased to pay the plaintiff the sum of one hundred and five dollars for services rendered. This was a transaction with the deceased, as much so as it would have been had the deceased expressly promised to pay the one hundred and five dollars. The only difference between the two transactions is that in one case the promise was implied, and in the other it was expressed. The testimony should have been excluded on the ground that the plaintiff was incompetent to testify as to such transaction. *Peck* v. *McKean*, 45 Iowa, 18; *Smith* v. *Johnson*, *ib.* 308; *Boyd* v. *Cauthen*, 28 S. C. 72; 3 Jones, Evidence, § 793, and cases cited.

Reversed and remanded for a new trial.

---

## ROWLAND v. McGUIRE.

67 320
70 374

67 320
85 528

67 320
88 404

67 320
f89 23

Opinion delivered January 13, 1900.

1. MARRIED WOMAN—LIMITATION—REAL ACTION.—Though the land of a married woman has been held adversely for more than seven years, her action to recover it will not be barred until three years after her discoverture, under Sand. & H. Dig., § 4815. (Page 322.)

2. JUDICIAL SALE—WHAT IS NOT.—An heir who holds under deed executed by commissioners in chancery appointed to partition lands of an estate among the heirs is not a purchaser under judicial sale, within Sand. & H. Dig., § 4818. (Page 322.)

3. LACHES AS DEFENSE AT LAW.—The defense that the owner of land has lost the right to recover it by remaining silent for a long period of time, and permitting persons claiming it to sell and convey it to divers purchasers, and their vendees to make valuable improvements on the same, cannot be pleaded in an action at law to recover possession. (Page 323.)

4. APPEAL—BRINGING MOTION INTO RECORD.—An alleged error of the trial court in overruling a motion in regard to the costs of the case will not be reviewed on appeal if it was not incorporated in the bill of exceptions. (Page 324.)

5. COSTS—FEE OF GUARDIAN AD LITEM of infant defendant, appointed on plaintiff's application, is payable by the plaintiff, under Civ. Code, § 57. (Page 324.)

Appeal from Randolph Circuit Court.

JNO. B. MCCALEB, Judge.

*S. A. D. Eaton*, for appellant.

It was error to require appellant to pay the fee of the guardian *ad litem*. Sand. & H. Dig. § 787. It was also error to refuse to set-off the judgment for costs against the judgment for betterments. Sand. & H. Dig., § 5861. In the absence of fraud, parties under disability are not estopped. Big. Est. 600; 55 Ark. 423. Courts of equity are governed by the statute of limitations, just as are courts of law. 46 Ark. 25; 46 Ark. 552; 47 Ark. 301. It was not error to refuse the tenth instruction prayed by appellee. 64 Ark. 412.

*P. H. Crenshaw*, for appellees.

The answer set up an estoppel *in pais*, and the cause should have been transferred to equity. 39 Ark. 235; 24 Ark. 431; 33 Ark. 425; 40 Ark. 56; 10 Ark. 211. The limitation statute of five years in judicial sales applies, and the coverture of appellant could not affect that. 46 Ark. 25. Silence may estop. 39 Ark. 131; 33 *ib.* 465; 11 *ib.* 241; 10 *ib.* 212; 51 *ib.* 491.

BATTLE, J. Alice J. Rowland, a married woman, instituted an action against Jane McGuire and others, to recover possession of a certain tract of land described in her complaint. The defendants denied her title and right to the possession of the land, and alleged that they were the owners, and that they and those under whom they claimed and held had held adverse possession of the same for seven years, and for five years under a judicial sale, and said: "As a further defense, defendants say that the plaintiff in this cause has been guilty of gross neg-

lect and laches, and that her claim, if she ever had any, to said land is stale and barred, and that it would be against public policy, inequitable and unjust to permit her, after the lapse of so many years, and so many conveyances of said land having been made, to sue for and recover said land, and disturb innocent purchasers for value in the enjoyment of said land."

The plaintiff recovered judgment for the land and the costs of the action, and the court adjudged that the defendants have a lien on the land for the value of the improvements made and the taxes paid by them in excess of the amount due the plaintiff for rents. The defendants thereupon filed a motion for a new trial, which was denied, and filed a bill of exceptions, and appealed. The plaintiff then filed a motion, in which she asked that the defendants be required to pay the guardian *ad litem* appointed for the minor defendants the fee of twenty-five dollars allowed him for his services in this action, and that the costs paid by her be set-off against the amount allowed to the defendants for improvements. The court overruled the motion, and she appealed from the order of the court refusing to grant her requests.

In the trial, evidence was adduced by the plaintiff tending to prove that the United States sold and conveyed the land in controversy to her father, and that he died, leaving the plaintiff and her two sisters his only heirs, and that the two sisters died, leaving the plaintiff their only heir, and that she acquired, and is the owner of, the land by inheritance. The defendants adduced evidence tending to prove that they and those under whom they claim had held adverse possession of the land for more than fifteen years before the commencement of this action, but the evidence adduced by the plaintiff tended to prove that she was a married woman while the land was held adversely. Under the statute limiting the time for bringing actions for the recovery of lands to seven years (Sand. & H. Dig., § 4815), the plaintiff was not barred from maintaining her action, and did not lose her right to the land. *Hershey* v. *Latham*, 42 Ark. 305; *Batte* v. *McCaa*, 44 Ark. 398; *Rowland* v. *McGuire*, 64 Ark. 412.

No evidence showing that the defendants held under a ju-

dicial sale was adduced. They claim under Kate A. Martin, and produced as evidence a deed executed to her by commissioners in chancery. It is recited in the deed that the commissioners were appointed "to make partition of the lands of James Martin, deceased, according to the respective rights and interest of the several heirs of the said James Martin, deceased, declared by a decree of said court upon the petition of said heirs; and said commissioners, in pursuance of a decree of the September term, 1873, of said court, hereby bargain, grant, sell and convey unto Kate A. Martin the following described lands," and, among other lands described, the land in controversy; but the deed does not show that the land was sold in pursuance of any order, judgment, or decree of a court, and was purchased by Martin. According to a reasonable interpretation of the deed, it was conveyed to her as the part of the lands belonging to her in the division of the lands of James Martin, deceased, among his heirs. The defendants do not insist that there was any sale, unless it was made in this manner, but contend that the execution of the deed by the commissioners was a judicial sale, because the land was conveyed for the purpose and in the manner indicated by our interpretation of it. The contention is untenable.

But the defendants insist that plaintiff has lost the right to recover the land by remaining silent for a long period of time, and permitting persons claiming it to sell and convey it to divers purchasers, and their vendees to make valuable improvements on the same. Assuming this to be true, it is no defense in this action. The right to plead such facts as a defense is subject to the important limitation that it is confined to claims for purely equitable remedies, to which the party seeking to enforce them has no "strict legal right." (*Fullwood* v. *Fullwood*, L. R. 9 Ch. Div. 176; 2 Pomeroy's Equity Jurisprudence (2 Ed.), § 817.) Lord Camden, in *Smith* v. *Clay*, 3 Brown, Ch. Rep. 940, gives the reason for this rule as follows: "A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his right, acquiesced for a great length of time. Nothing can call

forth this court into activity but conscience, good faith and reasonable diligence. Where these are wanting, the court is passive, and does nothing." This is not true as to courts of law, and the defense cannot be properly pleaded in such courts, especially in actions where the plaintiff is seeking to enforce a "strict legal right," as in this case.

Plaintiff's motion to require the defendants to pay the fee of the guardian *ad litem* and to set-off the costs paid by her against the amount allowed defendants for improvements was not incorporated in any bill of exceptions, and was not made a part of the record. The result is, we cannot review the action of the court in denying the same. One of the fundamental rules of appellate procedure is that motions "made during the progress of a cause, and the rulings of the court granting or denying them," in the absence of a statute to the contrary, "must, in order to be reviewed on appeal, be taken up on a bill of exceptions." This rule has its exceptions, but plaintiff's motion is not one of them. See 2 Enc. Pleading and Practice, pp. 273–276 and 3 *id.* pp. 392–396. In this case the ground upon which the court based its denial of the motion to set-off costs paid by the plaintiff against the amount allowed for improvements does not appear. There is nothing to show what amount was due for costs and what costs were paid by the plaintiff. As to the compensation of the guardian *ad litem*, the statute says: "A guardian * * * appointed on the application of the plaintiff to defend for an infant, * * * shall be allowed a reasonable fee for his services, to be paid by the plaintiff, and taxed in the costs." Civ. Code, § 57. The plaintiff is not entitled to relief from this liability by an order of the court requiring the defendants to pay the guardian.

The judgment of the circuit court is therefore affirmed.

67 325
84 525
67 325
81 78

# DOSTER v. MANISTEE NATIONAL BANK.

Opinion delivered January 13, 1900.

1. JUDGMENT—LIEN—PRIORITY.—A judgment is not a lien upon land which the judgment debtor has conveyed in fraud of his creditors, and a junior judgment creditor who first brings suit in equity to uncover such property will acquire a first lien on its proceeds. (Page 328.)

2. FRAUDULENT CONVEYANCE—EFFECT.—Under Sand. & H. Dig., § 3472, declaring that every conveyance of land made with intent to defraud creditor "shall be void" as against them, a fraudulent conveyance is not void absolutely, but conveys legal title, subject to the creditors' right to avoid it for fraud. (Page 329.)

Appeal from Pulaski Chancery Court.

GEO. W. WILLIAMS, Special Chancellor.

*Cockrill & Cockrill*, for appellant.

Appellant did all that the law required of him to assist appellee in its suit; hence he is entitled to share in the proceeds thereof. 137 Ind. 282, 284. Cf. 61 Ark. 199. The rule in this state is that the prior judgment creditor has a lien on property conveyed in fraud of creditors, paramount to that acquired by a subsequent judgment creditor who uncovers the property. 14 Ark. 69; 55 Ark. 116, 123; 57 Ark. 579; 49 Ark. 117; 50 Ark. 108; 33 Ark. 762; 23 Ark. 746, 759; 46 Ark. 542. Such conveyances are, in respect to judgment liens, treated as though they had never been made, and the title is considered as still in the debtor. Fr. Judg. § 350; Bl. Judg. § 423; Fr. Executions, § 207. Appellant's priority being fixed by law, equity will enforce it. 61 Ark. 199; 3 How. Pr. 185; 19 N. Y. 369; 96 Mo. 216; 36 Minn. 494; 67 Pa. St. 434. To the point that the *scire facias* kept alive the lien of appellant judgment, see Sand. & H. Dig., § 4214; 13 Ark. 543, 557; 15 Ark. 73, 88; 45 Ark. 304; 19 Ark. 297. It was unnecessary for appellant to issue an execution which would have been fruitless. 11 Ark. 411, 418; 27 Ark. 637, 641; 56 Ark. 476,

481. Mere delay to sue out process on a judgment does not affect the lien. 18 Ark. 142, 156.

*Dodge & Johnson, Carroll & Pemberton*, and *D. H. Cantrell*, for appellee.

Priority in time is enforced only when the equities are equal, and does not apply to a case where the prior judgment creditor has, by negligence or *laches* sunk his equity below that of a more diligent junior creditor. 31 Ark. 600. This latter took place in the case of *Stix* v. *Chaytor*, 55 Ark. 116. The other cases cited by appellant do not involve any contest between judgment creditors, and are not in point. If, as in 55 Ark. 166, *supra*, the prior judgment creditor's claim could be sunk by *laches*, below the equity of an innocent purchaser, it should be made to yield to that of a more diligent but junior creditor. 29 Ill. 27; 51 Ark. 418; 33 Ark. 328; Bl. Judg. § 455.

WOOD, J. This suit is between judgment creditors of Geo. R. Brown to determine which of them has the superior right to certain lots in Little Rock. Appellant obtained judgment against Brown May 16, 1893, and had *scire facias* issued and served to revive same February 11, 1896, and judgment of revivor was rendered May 25, 1896. Appellee obtained its first judgment against Brown June 7, 1893, and the second May 10, 1895. Execution was issued on these October 29, 1895, and same was returned *nulla bona*. On the same day (October 29, 1895) appellee filed a complaint for itself alone, to uncover certain property, including the lots in controversy alleging that same had been conveyed by Brown in fraud of creditors. On December 21, 1896, appellant filed his intervention in appellee's suit, setting up his judgment lien, alleging that he was willing to *contribute to the expenses of the action*, that Brown was insolvent, and that an execution against him would be of no avail, and asking to be allowed to share in the proceeds of the creditor's bill filed by appellee. Appellee's answer to the intervention of appellant alleged a specific lien on the property by reason of the complaint filed by it, and asked that the rights of appellant under his judgment be

subordinated to its lien. At the time of the filing of appellant's intervention, appellee agreed with him that the assistance of his attorney in the prosecution of the creditors' suit would be waived, and that in the contest between them it would be considered as though appellant had rendered all the assistance that the law would require. Appellant filed a written assumption of his share of the costs. It was understood that all controversy between appellant and appellee as to their respective rights in the proceeds, if any, of the creditor's suit against Brown *et al.* should be postponed until that issue was settled. No execution was issued by appellant until long after the present suit had been brought, and appellant's intervention had been filed. The decree on the original complaint and answer subjected the lots in controversy to the payment of Brown's debt. Of these lots some were conveyed before and some after the rendition of the judgments.

The appellant contends that, as senior judgment creditor, he is entitled to have applied to the satisfaction of his judgment the entire proceeds from any sale that may be had of the lots which were fraudulently conveyed prior to the rendition of the judgment of either party. He grounds his contention upon the following sections of the Digest (Sand. & H.):

"4204. A judgment in the supreme, chancery or circuit court of this state or of the district or circuit court of the United States shall be a lien on the real estate *owned by the defendant* in the county in which the judgment was rendered from the date of its rendition."

"3049. The following described property shall be liable to be seized and sold under any execution upon any judgment, order or decree of a court of record: * * * *
*Sixth.* All real estate, whether patented or not, whereof *the defendant, or any person for his use, was seized in law or equity on the day of rendition of the judgment*, order or decree whereon execution issued, or at any time thereafter."

Appellant also relies upon the following decisions of this court: *Ringgold* v. *Waggoner*, 14 Ark. 69; *Apperson* v. *Ford*, 23 Ark. 746, 759; *Bennett* v. *Hutson*, 33 Ark. 762; *Hershy* v. *Latham*, 46 Ark. 542; *Wormser* v. *Merchants' National Bank*,

49 Ark. 117; *Cohn* v. *Hoffman*, 50 Ark. 108; *Stix* v. *Chaytor*, 55 Ark. 116, 123; *McNeil* v. *Carter*, 57 Ark. 579.

The statute gives a lien from the day of the rendition of the judgment upon the real estate *owned* by the defendant, or whereof *he or any person for his use, is seized in law or equity*. Where a debtor has fraudulently conveyed his real estate before any judgment is rendered against him, or has procured same to be fraudulently conveyed to another, he is not in any sense the owner of such real estate, nor is he thereafter seized in law or equity of such real estate, nor is the grantee seized for his use. The authorities generally recognize the fact that a deed to land, although fraudulently conveyed, carries the title of the grantor. The deed is good *inter partes*. *Meux* v. *Anthony*, 11 Ark. 411; *Millington* v. *Hill*, 47 Ark. 309; *Bell* v. *Wilson*, 52 Ark. 171; Bump, Fr. Conv. §§ 432, 433; Wait, Fr. Conv. §§ 395–99; 8 Am. & Eng. Enc. Law, (1 Ed.), p. 771 and authorities cited by these.

The fraudulent grantee gets a title that he can alienate, and by so doing confer a perfect title upon his alienee, if the alienee be an innocent purchaser for value. This is the doctrine of our own court, and of nearly all the states. *Ringgold* v. *Waggoner*, 14 Ark. 69; *Stix* v. *Chaytor*, 55 Ark. 116, 123; Wait, Fr. Con. § 386; Bump, Fr. Con. § 492, and numerous authorities cited.

Of course, this would not be possible if the conveyance of the fraudulent grantor did not carry the title to the fraudulent grantee. It follows, then, logically and necessarily, that, under this statute alone, the judgment creditor has no lien upon lands fraudulently conveyed by the debtor prior to the rendition of his judgment. This construction certainly conforms to the plain and unequivocal language of the act. Why should we so change and extend it as to make it apply to lands which the defendant at the time of the rendition of the judgment did not own, and of which neither he, nor any one for him, was seized in law or equity? To so construe it would be judicial legislation, and that too with unjust results, because "when the law gives priority, equity will follow it" (*Senter* v. *Williams*, 61 Ark. 189); and, in passing upon the rights of judgment creditors to lands fraudulently con-

veyed prior to the rendition of the judgments, the effect would be to ignore that old and excellent maxim of equity, *Vigilantibus, non dormientibus, æquitas subvenit*, and to declare in favor of those merely prior in time, although ever so unequal in diligence. Such a doctrine would encourage fraudulent judgments. It would impose oftentimes upon the junior judgment creditor the expensive, but still thankless and bootless, task of uncovering assets, which, by his diligence, he had discovered, for the benfit of another, or else the disagreeable experience of seeing the fraudulent debtor concealing and appropriating to his own use assets which justly belonged to his creditors.

But, while the language of the statute itself is plainly against a construction which would lead to such inequitable consequences, appellant, to sustain his contention for a lien, would have us construe section 3472 of Sandels & Hill's Digest as *in pari materia*, and to hold that his judgment was a lien on Brown's estate, just as though the legal title had been all the time in Brown. The section referred to is as follows: "Every conveyance * * * of any estate or interest in lands, made or contrived with the intent to hinder, delay or defraud creditors or other persons of their lawful actions, damages, forfeitures, debts or demands, as against creditors and purchasers, prior and subsequent, shall be void." If the latter statute is to be taken as *in pari materia* with the statute under consideration as between judgment creditors and their debtors, still that cannot aid appellant. Ever since the passage of the 13th of Elizabeth, after which our statute as to fraudulent conveyances was modeled, the word "void," as therein used, has generally been held to mean "voidable." Mew's Eng. Case Law Digest, 338, and authorities collected; Pom. Contr. § 282, and authorities cited; Bump, Frd. Conv. § 451, and authorities cited in note 1.

As we have seen *supra*, such is the view of our own court; and this is undoubtedly correct, for every fraudulent conveyance carries the legal title subject only to defeasance by *creditors and purchasers*. Such conveyance is not *void per se*, even as between the debtor and creditor; much less between creditor and creditor. Even as between the debtor and creditor, if the

creditor condones the fraud, and takes no step to avoid the conveyance, it stands forever as a divestiture of the title of the debtor. Nor will the mere rendition of a judgment in favor of the creditor against the debtor avoid the latter's fraudulent conveyance. The judgment simply fixes the amount of the debtor's liability for which is subject the property *he actually owns, or of which he, or some one for him, is seized and possessed.*

Nor do courts of law annul and set aside fraudulent conveyances. Some process, after judgment at law is rendered, is necessary in order to fix and secure a lien upon property that has been fraudulently conveyed, and to uncover it for the judgment creditor.

In some jurisdictions the creditor has choice of three remedies. "First, he may sell the debtor's land upon execution, and leave the purchaser to contest the validity of the defendant's title in an action of ejectment; or, secondly, he may bring an action in equity to remove the fraudulent obstruction to the enforcement of his lien by execution, and await the result of the action before selling the property; or, thirdly, he may, on return of an execution unsatisfied, bring an action in the nature of a creditor's bill to have the conveyance adjudged fraudulent and void as to his judgment, and the land sold by a receiver or other officer of the court, and the proceeds applied to the satisfaction of the judgment, as, in the case of equitable interests, the debtor's assets are reached and applied." So it is said by the Supreme Court of Minnesota in *Jackson* v. *Holbrook*, 36 Minn. 494; also in *Erickson* v. *Quinn*, 15 Abb. Prac. N. S. 166.

Those states which hold, under statutes similar to ours, that a judgment is a lien upon property fraudulently conveyed prior to its rendition may very properly and consistently adopt the first of the above-named remedies, to-wit: to sell the debtor's land upon execution, and leave the purchaser to contest the validity of the defendant's title in an action of ejectment. But it is apparent that, if the conveyance is to be treated, upon the simple rendition of a judgment, as though it had never been made, and the property, notwithstanding such conveyance, is still the debtor's, then it is inconsistent to say, and idle and

useless to hold, that the creditor may elect to adopt the above remedy, or go into chancery "*to remove the fraudulent obstruction* to the enforcement of his lien by execution, or bring a creditor's bill to have the *conveyance adjudged fraudulent and void as to his judgment.*" For if the property so fraudulently conveyed is nevertheless still *owned and seized by the debtor*, then an execution on the judgment at law will reach it, and there is in fact no *fraudulent obstruction* to the enforcement of his lien *by execution*, and there is no necessity for a creditor's bill to have the *conveyance adjudged fraudulent and void as to his judgment*, because there is nothing that obstructs the enforcement of such judgment at law.

The courts which fall into such glaring incongruities in prescribing the remedies under this statute are no more discriminating, logical and consistent when discussing the principles upon which the rights are founded giving rise to the remedies. All the authorities which hold that a judgment creditor has a judgment lien upon land which has been fraudulently conveyed by the debtor prior to the rendition of the judgment are grounded upon the egregious fallacy that a fraudulent conveyance is not *voidable merely, but absolutely void. Slattery* v. *Jones*, 96 Mo. 216; *Jackson* v. *Holbrook*, 36 Minn. 494; Freeman, Ex. § 136, and authorities there cited; *Jacoby's Appeal*, 67 Pa. St. 434; Bump, Frd. Conv. § 530.

That a lien may be fixed by the levy of an execution on lands which have been fraudulently conveyed by a debtor prior to the rendition of the judgment against him, and that such lien may be made productive by a sale of the property under the writ, without seeking the aid of chancery, as is held by some authorities (*Smith* v. *Osgood*, 46 N. H. 178; *Burnett* v. *Handley*, 8 Ala. 685; 1 Freeman on Ex. § 207), does not at all conflict with the idea that there is no statutory judgment lien on such property. We must discriminate properly between the statutory judgment lien and the lien acquired by virtue of an execution issued under a general judgment, as in the numerous cases cited by Mr. Freeman in note 1 to section 136 of his work on Executions. Mr. Herman in his work on Executions, at page 265, says: "Where the judgment is a

lien on lands, there can be no independent lien acquired by the issue of an execution. But where land is seized by virtue of a judgment, which is no lien, the execution becomes a lien." As was said by the supreme court of Pennsylvania, "A lien is, indeed, a necessary and inseparable incident of seizure in execution, except where the execution is merely instrumental in enforcing a prior and superior lien by judgment. In such case, it never was supposed by the legislature, or the profession, that a judgment and an execution on it had each a distinct and independent lien." *Davis* v. *Ehrman*, 8 Harris, 256. We maintain that there is no statutory judgment lien on lands which have been fraudulently conveyed before the rendition of judgment, the debtor no longer owning, or being possessed or seized of, such property, either in law or equity. Whether liens may be acquired by *executions* on judgments against such debtors, and in various other ways, it does not boot us here to discuss. We do not hesitate, however, to say that the method of attacking a fraudulent conveyance of land by levying an execution on same, and then proceeding to sell same under the writ, leaving the purchaser to contest the validity of the conveyance in an action of ejectment against the fraudulent vendee, is not to be encouraged. It is circuituous and cumbersome, and at last leaves a cloud upon the record title; for a court of law can never cancel and set aside a fraudulent conveyance. As was held by this court in *Sale* v. *McLean*, 29 Ark. 612, quoting from syllabus: "Where a judgment creditor seeks to subject land which the debtor has conveyed fraudulently, the proper practice is to exhaust the process of the court, and apply to a court of equity for aid before a sale.

We are not without abundant and excellent authority to support the construction for which we contend. Sec. 13 of 1 and 2 Vict., c. 110, provides, in effect, that a judgment against any person shall operate as a charge upon all lands "of or to which such person shall, at the time of entering up such judgment, or at any time afterwards, be seized, possessed, or entitled for any estate or interest whatever at law or in equity," etc. The statute under consideration was modeled af-

ter this. In *Beavan* v. *Earl of Oxford*, 6 De G., M. & G. at p. 514, Lord Chancellor Cranworth says: "The question which was reserved for consideration in this case relates to the priority of three judgment creditors of the late Lord Oxford, * * and the point is whether, by virtue of the statute of Elizabeth alone, or by virtue of it combined with the statutes of the present Queen [Victoria], these judgment creditors have or have not a right against the parties claiming under a voluntary settlement executed by Lord Oxford in the year 1838." After holding that a judgment creditor is not a purchaser under the statute of 27th Elizabeth concerning fraudulent conveyances, and not entitled to protection as such against a prior voluntary conveyance, the Lord Chancellor proceeds as follows: "Now, what did the legislature mean to do by that enactment? In the first place, they meant to make the judgment directly operate as a charge, but a charge on what? I apprehend that there was no principle inducing them to mean, and that the words do not represent them as having meant, to give the judgment creditor any right except against his debtor; that is, the judgment was to have the effect of a charge on that which was the property of the debtor. That, I think, is manifest from the words used. The judgment is to operate on land of which the debtor is seized," etc. Other concurring opinions were delivered by the Lord Justices. The case is a very instructive one, and is an early and able vindication of the exact construction for which we here contend. See also *Eyre* v. *McDowell*, 9 H. L. Cas. 619.

In *Dolphin* v. *Aylward*, 4 Eng. & Ir. Appeals, Law Rep. 486, it is held that, "where a voluntary settlement has been made, subsequent judgment creditors of the debtor cannot acquire rights in derogation of it which the settlor himself would not have possessed." At page 500, the Lord Chancellor said: "And it is quite settled that a judgment creditor can take no interest whatever, either legal or equitable, beyond what he acquires from the debtor; such an interest, in fact, as the debtor himself could give, and no other."

Mr. Freeman, in the 4th Edition on his work on Judgments, which is later than the 2d Edition of his work on Exe-

tions, which he cites, says: "In some of the states a judgment is a lien against lands fraudulently conveyed for all purposes, and cannot be displaced in favor of any junior judgment or other lien, the holder of which first proceeds either at law or in equity to seek satisfaction out of the property so conveyed." "But", he continues, "we think the better rule is that one who has not, by levy or otherwise, taken any further steps to obtain satisfaction out of property fraudulently transferred has no lien thereon. * * * On the contrary, the creditor who first proceeds in equity to reach property fraudulently transferred thereby obtains a right to priority, to which the claims of other judgment creditors, whether prior or subsequent, must give precedence." Freeman, Judgments, § 350, p. 640.

*In re Estes*, 3 Fed. Rep. 134, Judge Deady, after a most satisfactory review of authorities pro and con, sums up the whole matter as follows: "In my own opinion, the lien of a judgment which is limited by law *to the property of or belonging to the judgment debtor* at the time of the docketing does not, nor cannot, without doing violence to this language, be held to extend to property previously conveyed by the debtor to another by deed valid and binding between the parties. A conveyance in fraud of creditors, although declared by the statute to be void as to them, is nevertheless valid as between the parties and their representatives, and passes all the estate of the grantor to the grantee, and a *bona fide* purchaser from such grantee takes such estate, even against the creditors of the fraudulent grantor, purged of the anterior fraud that affected the title. Such a conveyance is not, as has been sometimes supposed, entirely void, but is only so in a qualified sense. Practically, it is only *voidable*, and that at the instance of creditors proceeding in the mode prescribed by law, and even then not as against a *bona fide* purchaser." See *In re Estes* etc., 6 Saw. 459. Other authorities are *Rappleye* v. *International Bank*, 93 Ill. 396; *Boyle* v. *Maroney*, 73 Ia. 70; *Howland* v. *Knox*, 59 Ia. 276; *Bridgman* v. *McKissick*, 15 Ia. 260. Black, Judg. § 455; *Smith* v *.Lind*, 29 Ill. 27.

The learned counsel for appellant says that "appellant had a prior and paramount lien over appellee on all lands acquired

by Brown before the rendition of appellee's judgments, although the title was fraudulently taken in the name of other persons," and he contends that this doctrine "is established by numerous cases in this court, beginning with *Ringgold* v. *Waggoner*, 14 Ark. 69, and ending with *Stix* v. *Chaytor*, 55 Ark. 116. With due deference, we think counsel are mistaken both as to what the law is, and what we have decided. Brown, as we have endeavored to show, no longer had any interest, either legal or equitable, in lands after he, as the owner in fee, had fraudulently conveyed them. Nor did he have any equity in lands purchased by him whereof the legal title was taken in the name of another, in order to defraud creditors. This was, in effect, the same as though the legal title had first been taken in the name of the debtor, and thereafter he had transferred same to another to defraud creditors. Hence all we have said applies to such conveyances. But those authorities which hold that a judgment is a lien on the land which the debtor has previously conveyed in fraud of creditors, upon the theory that such conveyance is void, and is to be treated as though it never had been made, leaving the legal title still in the debtor, are not applicable to conveyances where the legal title never has been in the debtor. For, says Mr. Freeman, "if the transfer were treated as void, the title would remain in the person of whom the purchase was made; and this would be of no advantage to the creditors. The transfer must therefore be treated as valid, and as transmitting the legal title to the person named in the deed. This legal title cannot be reached by the levy of an execution against the debtor, because he has never owned it. The creditor must therefore resort to equity, except in a few states where statutes have been enacted to enable them to reach it at law." 1 Freeman, Ex. § 136, p. 137.

The only theory for holding, under the statute, that a judgment is a lien upon lands to which the debtor never held the legal title, but which were purchased by him and the title taken in the name of another to defraud creditors, is that of resulting trusts. But this theory is erroneous. For where a conveyance is made to defraud creditors, a resulting trust never arises in favor of the fraudulent debtor. He has no interest

thereafter that can be asserted either in law or equity. *Heinz* v. *White* (Ala.), 17 So. 185; *Proseus* v. *McIntyre*, 5 Barb. 425; *Vanzant* v. *Davies*, 6 Ohio St. 52; *Cutler* v. *Tuttle*, 19 N. J. E. 549; *Glidewell* v. *Spaugh*, 26 Ind. 319. Where property is conveyed without consideration, with a view of defrauding creditors, no trust will result. 1 Beach, Trusts and Trustees, § 125; 1 Beach, Mod. Eq. Jur. § 217; 1 Perry on Trusts, § 151; *Miller* v. *Davis*, 50 Mo. 572; *Baldwin* v. *Campfield*, 4 Halst. (N. J.) 891.

As to our own decisions, while there are expressions in some of the cases which seem to support the contention of appellant, we can not find that the question we have here, involving the priorities of judgment creditors, has ever been passed upon.

In *Ringgold* v. *Waggoner*, 14 Ark. *supra*, Ringgold filed his complaint in chancery to set aside certain alleged fraudulent conveyances from John W. Waggoner to his brother Edmond P. and from Edmond P. to one Burr. The complaint alleged, in substance, that Ringgold had sued John W. Waggoner at law for debt; that while this suit was pending, and before judgment, Jno. W. sold to Edmond P. the land in controversy, and that Edmond P. in turn sold to Burr, and that all these conveyances were for the purpose of defrauding Ringgold; that Burr had been notified, before getting his deed from Edmond P., that he (Ringgold) had obtained judgment against Jno. W. Waggoner, which was a lien upon the land in question, by reason of the fraudulent conveyance from Jno. W. to Edmond P., and that he intended to have the land sold under his judgment as the property of Jno. W., and that Burr in other ways had notice that the conveyance from John W. to Edmond P. was fraudulent; that, notwithstanding this notice, Burr had colluded with Jno. W. and Edmond P. to enable Jno. W. to defraud his creditors; that, the judgment at law in favor of Ringgold remaining unsatisfied, he had execution issued and levied upon the land as the property of Jno. W. Waggoner, and same was sold under such execution, and he (Ringgold) became the purchaser thereof; and that one Hooper, acting under the authority of Burr, was then in possession. The prayer was for a cancellation of all the conveyances, and

for possession, etc. Burr answered that he was an innocent purchaser. The court, discussing the character of the conveyance from Jno. W. to Edmond P., said it, as "against the complainant, was void, *and the judgment subsequently obtained by him became a lien upon the land as the property and estate of the fraudulent grantor, and the complainant, by his purchase of the land under execution, acquired a valid title to it as against the parties to the fraudulent conveyance.*" Continuing, Chief Justice Watkins said, "the only question in the case is whether the defendant, Burr, is entitled to be protected as an innocent purchaser;" and that was, indeed, true, for, the complaint being in equity to set aside fraudulent conveyances, it was not at all necessary for the decision of the case that the court should decide that complainant's judgment was a *lien* on the land, nor that he acquired a *valid title as against* the parties to the *fraudulent conveyance* by his purchase *under execution*. That was all true, even if the judgment was not *a statutory lien*. The creditor had an equitable lien.

*Stix* v. *Chaytor*, 55 Ark. 116, was also a suit in chancery by a judgment creditor to set aside certain conveyances alleged to be fraudulent. So much of the case as is pertinent here relates to a purchase of land by Chaytor, he paying the purchase money, and having the lands conveyed to his wife in order to defraud creditors. Speaking of this phase of the case, Judge Mansfield, for the court, said: "The purchase in the name of his wife can stand on no better footing; for the law regards it as in effect a conveyance from himself. But where land is thus purchased by a husband and conveyed to his wife in fraud of his creditors, the latter would not be benefited by treating the conveyance to her as void; since the title would then remain in the grantor. And equity will therefore treat the wife in such case as trustee for the benefit of the husband's creditors. Applying this doctrine to the present case, an estate in the lands purchased of Feazel resulted to Chaytor on the execution of the deed to his wife. *The estate which he thus acquired was subject to sale on execution under our statute, and the purchaser would have taken, not only the beneficial interest in the lands, but also the legal title. It follows, necessarily, we*

*think, thal the lands in controversy*, while held by Mrs. Chaytor, were subject *to a lien* existing by virtue of *the plaintiffs' judgment.* * * * Such a lien could not, however, be asserted against *bona fide* purchasers or encumbrancers." Here again it will be seen that it was wholly unnecessary to decide that *an estate* in the lands *resulted to Chaytor* on the execution *of the deed to his wife,* and that such estate *was subject to execution under our statute*, and that the purchaser thereunder *acquired the legal title*, and that the lands, while held by Mrs. Chaytor, *were subject to a lien existing by virtue of plaintiff's judgment.* These were not, in fact, germane to the issue, the only question before the court being, was the conveyance, as between the creditor and his debtor, fraudulent? and, if so, still were certain parties innocent purchasers? If the court meant by these dicta to hold, where a purchase of land is made by a debtor, and the conveyance is made to his wife at his instance in order to defraud creditors, that an estate results to the debtor upon the execution of the deed to his wife, and that a judgment rendered at law after such conveyance is a statutory lien upon such land, then we do not hesitate to declare all such dicta as unsound, and we will not follow them. Where a fraudulent conveyance is set aside by creditors, and the land is thereafter sold to satisfy their claims, should there be any residue after paying their debts, such residue does not go to the debtor, but to his fraudulent vendee. This shows the debtor has no estate in the land upon such conveyance. Bump, Fraud. Conv. § 450, and authorities cited.

We can easily see, as Judge Mansfield says, how the wife, or the fraudulent vendee, is held as a trustee for the *creditors*. But how she could be a trustee, so as to vest any estate, legal or equitable, in the debtor, is an altogether different matter. Probably both of these learned judges, after all, only had in view the *equity* which creditors have by proper proceedings to subject land which has been fraudulently conveyed to the payment of their debts. That creditors have such an equity is unquestioned, but they do not have it by virtue of the statute, but independent of it. Says Mr. Pomeroy, "In carrying out the general principle of trusts for the purpose of working

out ultimate justice, and reaching property where the legal title has been parted with, and is beyond the scope of legal process, a constructive trust is said to arise in favor of judgment creditors with respect to the property of their debtors, which has been transferred with the intent to defraud the creditors of their rights, or of which the legal title is vested in a third person with a like fraudulent intent, or which is of such a nature that it cannot be taken by execution upon judgments in legal actions." Continuing, in the note, he says: "The trust is in reality one in name alone; the creditor's right to reach the debtor's property is in no true sense an *interest* in that property; it is at most only an equitable lien on the property. 2 Pom. Eq. Jur. 1057.

In the other cases cited—*McNeil* v. *Carter*, 57 Ark. 579; *Cohn* v. *Hoffman*, 50 Ark. 108; and *Wormser* v. *Merchants' National Bank*, 49 Ark. 117—not only is the question of priorities not involved, but in each of these there might be said to be some equity remaining in the judgment debtor, bringing the case within the express terms of the statute.

*Hershy* v. *Latham*, 46 Ark. 542, and *Apperson* v. *Ford*, 23 Ark. 746, have no bearing that we can see in favor of appellant's contention. After a careful analysis and comparison of our own cases and all the other authorities at our command, we are of the opinion that judgment creditors have no lien by virtue of the statute upon lands which have been fraudulently conveyed prior to the rendition of their judgments, and that at least the proper, if not the only, remedy for them in such cases is to go into equity to uncover such conveyances, and that the creditor who exercises superior diligence in that regard by first bringing his suit and proceeding to uncover such assets is entitled to the proceeds. This seems to us to be eminently just, for intrinsically one creditor's judgment, fairly obtained, and based on a valid claim, is as meritorious as another. There is no merit in the mere time of rendition, for that depends often only upon the time of maturity of the debt. Besides, the one first in time is not prevented from being first also in diligence.

The chancellor held that appellee was entitled to the pro-

ceeds of the sale of the lands fraudulently conveyed prior to the rendition of the judgment of either party, but for different reasons than those we announce. In the view we have taken, it becomes unnecessary to discuss the reasons of the chancellor. The proceeds of the lands which were fraudulently conveyed after the rendition of the judgments he also gave to appellee, because of its superior diligence in first bringing its suit to uncover same. In this we think he was entirely correct, for the reason stated, and because in other respects the appellee showed far greater diligence. Finding no reversible error, the decree of the Pulaski chancery court is affirmed.

BATTLE and RIDDICK, JJ., dissent.

---

67 340
e71 604
67 340
e76 174
67 340
84 67

## JACOWAY v. HALL.

Opinion delivered January 13, 1900.

1. ESTOPPEL—ACCEPTANCE OF PART OF APPORTIONMENT.—Acceptance by a creditor of a part of the amount apportioned and ordered to be paid on the creditor's probated judgment will not estop such creditor from subsequently procuring an execution to be issued for collection of the balance of the amount so apportioned. (Page 343.)

2. LIMITATION—JUDGMENT AGAINST TRUSTEE.—If an order of the probate court directing the administrator to make a *pro rata* payment upon the claims probated against the estate be a judgment, and its enforcement be barred after ten years, still if no final settlement was made, nor the trust renounced, and the fund remained in the hand of the administrator as a trustee, he would acquire no right to such fund by lapse of time, and the creditors could obtain another order for payment of their claims. (Page 344.)

3. TENDER—SUFFICIENCY.—A tender by an administrator of the amount he had been ordered by the court to pay *pro rata* upon probated claims will be of no avail if he demanded as a condition of payment that the creditors should execute receipts in full of their demands against the estate. (Page 344.)

4. ADMINISTRATOR—ATTORNEY'S FEES.—While attorney's fees may be allowed to an administrator who is wrongfully assailed in the courts, no credit should be allowed him for attorney's fees paid for resisting proper charges against him, as for defending a suit brought against him to compel him to perform a legal duty. (Page 345.)

5. SAME—DEALINGS WITH ESTATE.—An administrator is not allowed to make a profit for himself by buying in claims against the estate or by paying them at a discount. (Page 345.)

6. SAME—INTEREST.—Where an administrator has held funds of the estate in his hands for over 25 years, he should be charged with interest thereon. (Page 347.)

Appeal from Yell Circuit Court, Danville District.

JEREMIAH G. WALLACE, Judge.

*J. C. Hart* and *Rose, Hemingway & Rose*, for appellant.

The chancery court had no jurisdiction to try the case again after its reversal, until the mandate was filed. 10 Ark. 453. The judgment of the probate court ordering a *pro rata* payment was *in rem*; hence it is a valid estoppel against the world. Big. Est. 45, 200, 329 and 600; 16 Mass. 299; 50 Ark. 201; 53 Ark. 514. It was error for the court to overrule appellant's plea of the ten-year statute of limitation as to judgments. A probate allowance is a judgment, within the meaning of that statute. 23 Ark. 169; 48 Ark. 282. This plea can be made by an administrator against creditors. 28 Ark. 19; 48 Ark. 282. The statute commenced to run against creditors' bills in this case at the date of the confirmation of the account by the probate court. 42 Ark. 493; 46 Ark. 38. The statute of limitations runs against the constructive trust arising from the purchase by the administrator of land under execution in favor of the estate. 58 Ark. 91. The right to enforce settlement of claims, as against the administrator, either partial or entire, accrues upon the order of the court directing payment by him. 37 Ark. 159; 38 Ark. 474; 47 Ark. 226; 48 Ark. 282; 46 Ark. 260; 10 S. W. 313; 7 S. W. 557. The order of the probate court as to attorney's fees had the force and effect of a judgment, and the court had no power to modify, alter or vacate it after term time. 12 Ark. 95; 39 Ark. 495; 38 Ark. 457; 36 Ark. 589; 35 Ark. 212; 26 Ark. 94; 31 Ark. 83. Nor can this judgment be collaterally attacked. 35 Ark. 305; 19 Ark. 499; 11 Ark. 519; 12 Ark. 84; 25 Ark. 52. The administrator was entitled to employ counsel to defend these suits, and the estate is liable for the fees of such counsel.

27 Ark. 326, Woerner, Adm. 1145; Schoul. Exrs. 545; 25 Am. Rep. 598; 24 Ala. 259; 12 S. W. 460; 13 Bush, 111, 116. Sections 217 and 219, Sand. & H. Dig., do not apply to this case. 61 Ark. 413; 30 Ark. 314, 321; 38 Ark. 139; 62 Ark. 226; 35 Ark. 267, 276.

*G. S. Cunningham*, for appellee.

Appellant is estopped from prosecuting his appeal. 57 Ark. 638; 64 Ark. 257; 5 Bush, 230; 29 N. Y. Sup. Ct. 794; 12 So. 594; 33 N. E. 1112; 4 Hun, 269; 14 Hun, 420; 8 Reporter, 202; 72 Ill. 341; 68 Ill. 37.

RIDDICK, J. This case commenced in the probate court, and the questions involved arise on exceptions filed by certain creditors to a settlement of W. D. Jacoway as administrator of the estate of Samuel Dickens, deceased. The administration of Dickens' estate commenced in 1867, and, it seems, should have been ended long ago, but by reason of litigation arising out of certain settlements filed by the administrator the administration is yet unclosed. Some of the questions involved in the litigation referred to have been twice before this court, and a fuller history of the administration of this estate, and of the litigation in which the administrator became involved, can be found by reference to former decisions of this court. See *Dyer* v. *Jacoway*, 42 Ark. 186; *Dyer* v. *Jacoway*, 50 Ark. 217.

It is only necessary for us to refer briefly to the history of this past litigation. During the progress of the administration the probate court in 1875, after the administrator had filed his fifth account current, made an order that he should pay upon the debts of the fourth class, which had been probated and allowed against the estate, the sum of 39 cents and 8 mills on the dollar of such debts. Under this order the administrator paid to most of the creditors that proportion of their claims, and took from them receipts in full of all claims against the estate. Two of the creditors, Mrs. J. A. Johnston and A. J. Dyer, who are appellees here, refused to accept the amount offered in full settlement of their claims, and for that reason they were not paid. These parties subsequently filed a complaint in equity in the Yell circuit court, alleging that the said

fifth settlement of the administrator was fraudulent in many respects, and asking that the court set aside and restate said settlement. At the end of this litigation many of the allegations of fraud made against the administrator were overruled, but others were sustained, and the lawsuit resulted in charging the administrator with additional items, amounting in the aggregate to over five hundred dollars. After the case had been remanded to the probate court, the administrator filed in that court what is called his seventh and final settlement, and the questions here arise on exceptions to that settlement. The case was appealed from the probate to the circuit court, and from the judgment of the circuit court both parties appealed to this court.

Counsel for the administrator have devoted several pages of their brief to a criticism of the decree made by the Yell circuit court in chancery in 1893, which decree finally disposed of the questions arising in the action to set aside and restate the fifth settlement of the administrator. But, as that court, we think, had jurisdiction of the case, and as no one appealed from the decree, we consider it unnecessary to notice that portion of the argument, for in our opinion it can have no effect upon the decision of this case.

*Estoppel.* After the probate court had ordered the administrator to pay *pro rata* 39 cents and 8 mills on the dollar, Mrs. Johnston accepted $35 from the administrator upon her claim, and afterwards ordered an execution to be issued for the collection of the balance of this apportionment. Counsel for the administrator now say that by these acts on her part "she and her representatives are estopped." But in what respect they are estopped, counsel do not say. Her representative makes no claim to the $35 paid by the administrator, and there is no contention as to that. As to the balance, certainly an unsuccessful effort to collect a judgment does not estop the party owning it from making other efforts in the same direction. Nor is there any inconsistency in the effort of a creditor to collect from an administrator the sum apportioned to his claim by the probate court in part satisfaction thereof, and a demand by him that the administrator

be ordered to pay other and further sums upon said claim. It is the duty of the probate court from time to time to apportion among the creditors money shown by the settlement of the administrator to be in his hands after payment of expenses. A collection of, or an effort to collect, one of these apportionments does not estop the creditor from showing that there are still other sums due from the administrator. We are therefore unable to see that the circuit court erred in overruling this contention.

*Limitations.* We concur in the ruling of the circuit judge in refusing to sustain the plea of the statute of limitations set up by the administrator. An administrator is a trustee, and pending the administration the funds in his hands are held as such for the creditors and others interested in the estate. It is a general rule that the statute of limitations does not affect the rights of the *cestui que trust*, so long as the trust relation continues. In this case no final settlement had been made, and the administration was in active operation. Although the probate court made in 1875 an apportionment of money shown by the settlement of the administrator to be in his hands, still appellees soon afterwards attacked such settlement for fraud, alleging that they were entitled to still larger sums than those apportioned, and litigation has continued over that matter until the present time. If we should hold that the order of the probate court directing the administrator to make a *pro rata* payment upon the claims probated against the estate was a judgment, and barred after ten years, yet, no final settlement having been made, nor the trust renounced, and the fund in the hands of the administrator being held by him as a trustee, he would acquire no right to it by such lapse of time, and the creditor could obtain another order for its payment. For these reasons we think the circuit court correctly held that the statute of limitations was of no avail in this case.

*Tender.* The appellant also claims that in 1875 he tendered to appellees the full amounts due upon their claims. But the circuit court found to the contrary. It is also admitted by the administrator that he demanded as a condition of the tender that they should execute receipts in full of their demands

against the estate. The sums tendered did not pay the claims of appellees in full, and, even if it was their full *pro rata* of the assets of the estate, still the condition that they should execute receipts in full was one he had no right to impose, and rendered the tender of no avail. *Fields* v. *Danenhower*, 65 Ark. 393. The administrator was entitled to a receipt for the sum paid, but he had not the slightest right to demand of the creditors that they should surrender their right to participate in any further assets of the estate as a condition of receiving money that already belonged to them, and which the court had ordered him to pay.

*Attorney's Fees.* The administrator in his settlement asked an allowance for attorney's fees amounting to $1,457.75, but the circuit court allowed only $650 for this pnrpose. When a settlement of an administrator is wrongfully assailed in the courts, it is just, and in accordance with the decisions, to allow attorney's fees necessarily incurred in defense thereof, but no credit should be allowed for fees of attorneys paid by the administrator in resisting proper charges against him, or in defending a suit brought against him to compel him to perform a legal duty when he is in fault. 11 Am. & Eng. Enc. Law (2 Ed.), p. 1246; Woerner, Adm. (2 Ed.) 1149.

The attorney's fees for which the administrator asks an allowance in this case were paid in defending charges of fraud and misconduct on his part which were in part sustained and in part overruled. In fixing the allowance for such fees, the circuit judge properly took into consideration the rule that the administrator is not entitled to counsel fees paid for defending litigation caused by his own fault. Being familiar with the services rendered, the judge in fixing the allowance could act upon his own knowledge of their value, and we would not overturn his finding thereon, unless clearly erroneous. The amount allowed was, we think, sufficient to cover legitimate charges for attorney's fees, and it is approved. *Harrison* v. *Perea*, 168 U. S. 311–326; *Fowler* v. *Equitable Trust Co.*, 141 U. S. 411–415.

It appears that, with the exception of Dyer and Johnston, the administrator has settled with all the creditors of the es-

tate having fourth class claims. The circuit judge finds that the administrator settled with these creditors at 39 cents and 8 mills on the dollar of their claims, and has their receipts in full of all demands against the estate, though he finds that the administrator had in his hands funds sufficient to pay each of them 45 cents and 3 mills on the dollar, and that they were each entitled to that *pro rata* payment. The administrator contends that, in the absence of any demand on the part of the creditors with whom he has settled, he should be allowed to retain the difference between the amounts he paid and that to which they were entitled. This sum amounted to $557.85, and the circuit judge sustained the contention of the administrator, on the ground that "the administrator settled with the creditors at a time when there was a contention as to the *pro rata* they were entitled to receive." But we do not concur in this conclusion, for, if there was a dispute as to the amount to which these creditors were entitled, it was a matter between the estate and the creditor, in which the administrator had no personal interest. He represented the estate, and, if any thing was gained by the compromise it belongs to the estate, and not to him. An administrator is not allowed to make a profit for himself by buying in the claims against the estate or by paying them at a discount.

This rule was applied in this court in a case where the purchase was made by the administrator out of his own funds, and by borrowing money at high rates of interest, and when the estate was thereby saved from insolvency; the court saying that it was an inflexible rule of equity that all profits made by a trustee in dealing with the trust estate belong to the *cestui que trust*. *Trimble* v. *James*, 40 Ark. 393; *Wolf* v. *Banks*, 41 *ib*. 104; 2 Woerner, Adm. (2 Ed.) 1157; 11 Am. & Eng. Enc. Law (2 Ed.), 982.

It is the duty of the administrator to pay creditors of the estate, as far as the assets in his hands permit; but the rule contended for here would encourage an administrator to delay and thwart the creditor in the collection of his just claim, for by so doing the administrator might force him to a compromise, and so make a profit for himself. The law wisely permits no

such temptation to misconduct on the part of such trustees. We therefore hold that the circuit court erred in allowing the administrator credit for larger sums than were actually paid by him to the creditors. If the compromise was binding on the creditors, the profit goes to the estate, and inures to the benefit of those creditors still having valid claims against it, for the administrator can be allowed credits only for sums actually paid. *Trimble* v. *James*, *supra*, and *Wolf* v. *Banks*, *supra*.

The administrator having held the funds of the estate in his hands for over twenty-five years, he should of course be charged with interest thereon. The ruling of the circuit court on that point does not seem to be disputed, and is affirmed.

There are other questions raised concerning small items, but, as most of them involve questions of bookkeeping rather than of law, we will not discuss them here, but will, if necessary, hand to the clerk directions in regard to the same.

For the errors indicated, the judgment of the circuit court will be reversed, and the clerk of this court will be directed to restate the account in accordance with the views above stated, and report to this court the balance found due from the administrator to the estate.

---

## NELSON *v.* BLANKS.

Opinion delivered January 20, 1900.

GARNISHMENT—PRACTICE.—The proper practice in a justice's court, where a garnishee in an attachment suit has failed to answer satisfactorily the allegations and interrogatories propounded to him, is to institute suit against him, and a personal judgment against the garnishee in the original suit is not authorized. (Page 349.)

Appeal from Ashley Circuit Court.

MARCUS L. HAWKINS, Judge.

*Geo. W. Norman*, for appellant.

The filing of pleas, answer and taking of appeal were ap-

pearances, and waived any defects in the process. 45 Ark. 295; 46 Ark. 251; 38 Ark. 102; 3 Ark. 436; 43 Ark. 545; 4 Ark. 70; 35 Ark. 95; 35 Ark. 276; 1 Ark. 376; 2 Ark. 26; 6 Ark. 552; 38 Ark. 101; 48 Ark. 151; 53 Ark. 235. Appellant has sufficiently complied with the statute. Sand. & H. Dig., § 360.

*Robt. E. Craig*, for appellee.

The personal judgment against the garnishee is void. To obtain a personal judgment against the garnishee, a new action must be commenced against him. 29 Ark. 470; 45 Ark. 275; 48 Ark. 353; *id.* 514; 45 Ark. 271; 49 Ark. 411; 48 Ark. 349; *id.* 353; 60 Ark. 55; 52 Ark. 616; 62 Ark. 130.

BUNN, C. J. This is a suit, originally before a justice of the peace, on a duly verified account owing to the appellant here from one W. E. Kittrell, the defendant in the suit. At the institution of the suit, an order of attachment was issued against said defendant. The appellee, Blanks, was named as garnishee in the order of attachment, and summoned as such, and appeared and answered the allegations and interrogations of plaintiff, which had been duly filed in the meantime, in effect denying that he was indebted to said defendant in any sum, and that he had any property in his hands or under his control belonging to said defendant. Judgment by default was taken against defendant, and, there being no countervailing affidavit in the attachment, the attachment was sustained. Afterwards the cause between the plaintiff and garnishee was continued from time to time by consent until finally, on a day set for hearing, the garnishee failed to appear, and that cause was heard on the evidence taken, and judgment rendered against the garnishee for the sum of $260, and subsequently the garnishee appealed to the circuit court, where the personal judgment against the garnishee on his motion was quashed, and the plaintiff appealed to this court. The only question, therefore, in the case is, had the justice of the peace the authority under the statute to render a personal judgment against the garnishee on his answer to the allegations and interrogatories

and the plaintiff's exceptions thereto, or because the same was unsatisfactory?

By the provisions of section 4420, Sandels & Hill's Digest, the rules of pleading and practice governing the circuit courts as to attachments are made applicable to proceedings in justice's courts, and the provisions of section 333 of the digest are made applicable to this case. So also are sections 358, 359 and 360. A personal judgment against the garnishee under the circumstances was not authorized by any of these sections, or by any statute now in force. This is the view taken in the decisions of this court cited by the appellee's counsel, to-wit: *Giles* v. *Hicks*, 45 Ark. 271; *St. Louis, etc., Ry. Co.* v. *Richter*, 48 Ark. 349; *Penyan* v. *Berry*, 52 Ark. 130.

The proper proceeding, after a garnishee has either failed to answer, or answered unsatisfactorily, is for the plaintiff to file his complaint, and upon that to cause summons to be issued on the garnishee, and thus institute a regular suit against him, on the basis of the judgment against the defendant in the original suit and the allegations and interrogatories of the plaintiff and the garnishee's answer thereto. There was, therefore, no error in the judgment of the circuit court quashing the personal judgment of the justice of the peace against the garnishee and appellee here, and the same is affirmed.

---

## STRICKLIN *v.* STATE.

Opinion delivered January 20, 1900.

ASSAULT—EVIDENCE.—In an indictment for an aggravated assault, evidence that, a few minutes before the assault was committed, the person assaulted went to defendant's house and threatened to kill him, and followed him with a gun, making violent threats, is admissible only in mitigation of the punishment, and not as a justification, where, at the time the assault was committed, the person assaulted had laid down his gun and was going away. (Page 353.)

Appeal from Clark Circuit Court.

JOEL D. CONWAY, Judge.

*C. V. Murry* and *E. B. Kinsworthy*, for appellant.

The court erred in refusing to allow appellant to prove the facts and circumstances immediately leading up to and following the shooting. These facts and circumstances were admissible as *res gestæ*. 43 Ark. 100; 29 Ark. 249; 27 Cal 572. In connection with proof of threats, evidence of previous attacks and affrays is admissible. 11 Tex. App. 288. When there has been a continuous quarrel or difficulty between the parties, the evidence may cover the entire difficulty. 47 Mo. 604. Prior uncommunicated threats are admissible as bearing on motive. 55 Ark. 593; 43 Ark. 289; 60 Ark. 575; 147 Ill. 444; 52 Ala. 1; 26 Ala. 31; 61 Miss. 749; 54 Miss. 430; 62 Ark. 123. The court erred in refusing to give the first instruction asked by appellant. 55 Ark. 593; 52 Ark. 45. In order to justify a shooting as done in self-defense, the danger need not have been real. It is sufficient if the party acted in the reasonable belief of such danger. 13 Tex. App. 561–5; 47 Mo. 604; 55 Ark. 595; *ib.* 132.

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

Mere threats do not justify a killing. 36 Ark. 653. The circumstances show that the shooting was not done in self-defense. 52 Ark. 46; 34 Ark. 469.

BUNN, C. J. This is an indictment for an aggravated assault with a deadly weapon, under section 1476 of Sand. & H. Digest, which reads as follows, to-wit:

"If any person shall assault another with a deadly weapon, instrument or other thing, with an intent to inflict upon the person of another a bodily injury, where no considerable provocation appears, or where the circumstances of the assault show an abandoned and malignant disposition, he shall be adjudged guilty of a misdemeanor, and, on conviction, shall be fined in any sum not less than fifty nor exceeding one thousand dollars, and imprisonment not exceeding one year."

To the indictment the defendant entered his plea of "not guilty," and a trial was had resulting in a conviction and verdict for $100 fine and one hours' imprisonment, and judgment

was rendered accordingly, and from this judgment, motion for new trial being overruled, the defendant appealed to this court.

In the course of the trial, the defendant testified as follows: "My daughter advised me that Gray was coming, and not to go back that way, that he would waylay me. I took her into the house, and looked out and saw Gray (the assaulted person) coming with his gun, and told him not to come closer. He said: 'Don't shoot.' I said: 'Lay your gun down.' I told him that I had come to get a warrant (this was at the J. P's. residence) to have him arrested for the way he had treated me. I told him to lay it (the gun) down. He started to pick it up again, then I made a motion like I was going to shoot. I said: 'Consider yourself a prisoner. I came to get a warrant for you, but the officer is gone, so I am going to hold you to keep you from hurting me.' 'Question. Did he say, I don't want to hurt you?' Answer. 'No sir, Mr. Gray didn't say that.' I said: 'I am going to arrest you for the way you have treated me.' He said: 'You ain't going to do it.' I said: 'I am going to keep you until Mr. Norton (J. P.) comes and get a warrant for you.' About that time Gray commenced abusing me, and said he wouldn't be arrested by me. He said: 'You've got my gun, but I'll get another, and come and kill you.' He kept walking off and abusing me, and I shot him. That is the sum and substance of it." Witness said that, after he shot Gray, he went to Gray's gun, picked it up, and fired it off. He then took both guns into the house, and laid them on the bed. His gun was a musket, while Gray's was a single barrel shot gun. (After being shot Gray remained at Norton's house until he came home.) Witness gave as his reason for shooting Gray that the latter was threatening to get another gun and kill him. From this and his conduct on the morning previously, witness thought he would certainly get killed. In his testimony Gray was uncertain whether he dropped or laid his gun down before or after he was shot. The two acts were so close together in point of time he could not remember. Alice Stricklin, daughter of defendant, in her testimony said Gray put down his gun when her father told him to do so, and the shooting was done afterwards. Gray had got off some

little distance from his gun, then lying on the ground, when Stricklin fired, and after that he took up Gray's gun. Stricklin told Gray to lay his gun down, and he did so. These seem to be the undisputed facts as to the occurrences at the scene of the shooting.

Whether Gray had followed Stricklin to Norton's for the purpose of renewing the difficulty of the morning with him, or for the purpose of killing him, or for any other evil purpose, or had gone there, not knowing that Stricklin was there, merely for the purpose of borrowing a horse to ride to another place, as he states, is a disputed fact.

On the calling of the case for trial, the defendant moved for a continuance because of the absence of Dr. Edward Stone, one of his witnesses, who had been duly subpœnaed, and had appeared at the last term, but was not present at the present term. That this witness would swear "that on the day of the alleged assault, a short time before it occurred, he was at defendant's house when the prosecuting witness, James G. Gray, went into defendant's home, and raised a fuss with the defendant, who ordered Gray to leave the house and made him go away; that a few minutes later the said James G. Gray appeared near defendant's home with a gun, and called to defendant, saying, "Come out of your house; I want to kill you, but don't want to kill a man in his own house;" that defendant then requested said witness (Dr. Stone) to go out and get the said Gray to go away, which he did; that this occurred a few minutes before the assault; that defendant then started to the office of a justice of the peace for a warrant of arrest for Gray, who followed defendant to the justice's house, where the alleged assault occurred; that a few minutes after the alleged assault the said Gray, in the presence of said witness, admitted that when defendant shot him he was threatening to kill defendant; that defendant was not to blame for shooting him; that his (Gray's) temper got away with him, and caused the difficulty; that defendant believes these facts to be true, and he cannot prove them by any witness other than the said Stone."

Other witnesses were presented during the trial for the purpose of proving the same facts substantially, but the trial

court held all testimony as to what occurred previously to, and at a different place from the place of, the assault to be immaterial and therefore incompetent.

It is within the sound discretion of the trial court to refuse a continuance on account of the absence of a witness, and this discretion will not be controlled by us, unless abused; but, as the same point was made in substance by the ruling of the court excluding testimony to the same effect, the question should be disposed of as upon an assignment of positive error, and not merely as a question of abuse of discretion. It is contended that the excluded testimony tended to show a "considerable provocation" for the assault, and therefore should have been admitted for the consideration of the jury in determining whether the acts charged really amounted to the crime of aggravated assault with a deadly weapon. It may be admitted that the conduct of the injured party (if as proposed to be set forth by these witnesses) would be annoying and troublesome in the extreme, but whether or not they constituted that "considerable provocation" written in the law is another question, and that question is to be determined by the circumstances in each case. Let it be admitted that Gray "raised a fuss" at defendant's house, and, after being driven off therefrom, returned with his gun making violent threats against defendant if he would come out, — that, in our opinion, would not justify a deadly assault upon him some considerable time afterwards, when he had gone off at the instance of the defendant through Dr. Stone. The provocation spoken of in the law is manifestly that which arouses to incitement on the occasion, is present and temporary in its effects, and ought not to be a defense when it has ceased, and the revenge or hatred it has called forth alone remain. Let it be admitted that Gray followed defendant to the house of the justice of the peace, knowing full well the object of his (defendant's) going there; and that he (Gray) went with the intent, not only to renew the "fuss," but also to carry out his threats; and yet, if he submitted to the reasonable and lawful demands of defendant by disarming himself, it would be a dangerous thing, we think, to say that his previous conduct, as a provocation,

should be regarded as a justification or excuse for the defendant's shooting Gray afterwards, which in such case could only have been done, as defendant testifies, to prevent Gray's killing him some time in the future. We think, therefore, that the court erred in excluding this testimony, not because it would or should have authorized the jury to find the defendant not guilty of the crime charged, but because the defendant was entitled to the benefit of it as a matter of mitigation or lessening the punishment to be inflicted upon him.

The lowest punishment fixed by law for such offense is a fine of $50 and punishment without minimum limit. We therefore modify the judgment, making the fine $50 intead of $100, and the punishment one minute imprisonment in the county jail, instead of one hour, and with these modifications the judgment is affirmed.

---

## SIXKILLER v. ROGERS.

Opinion delivered January 20, 1900.

DRAFT—APPROPRIATION OF PROCEEDS.—Where a vendee of land before his death drew a draft on a third party in favor of his agent, to whom he sent it for collection, without instructions to apply the proceeds to payment of the purchase money of the land, though such was the vendee's intention, and the agent procured its allowance against the vendee's estate, and then assigned the claim to the administrator thereof, who canceled the allowance, the vendor's heirs were not entitled to have such cancellation vacated, since no relation of trust existed between the vendor and the agent. (Page 357.)

Appeal from Sebastian Circuit Court in Chancery, Ft. Smith district.

EDGAR E. BRYANT, Judge.

*Ben T. Duval*, for appellants.

A constructive trust arose in favor of the appellants, as against Turner, by reason of his preventing them from collecting their demand from the Rogers' estate. Story, Eq. Jur.

§§ 1250, 1251, 1255, 1256, 1258; 2 Pom. Eq. Jur. §§ 1044, 1053; 51 Ark. 351; 1 Lewin, Tr. 180; Perry, Tr. 166; 51 Cal. 158; 43 Vt. 48; 16 Wis. 91; 6 Lans. 368; 113 U. S. 89.

*Jno. H. Rogers, pro se.*

*Ira D. Oglesby*, for appellees.

No constructive trust arose in favor of appellants. 152 Ill. 651. The death of Rogers revoked Turner's authority to collect the draft. Story, Ag. §§ 488, 489; 8 Wheat. 174; Tied. Comm. Pap. §§ 89, 158; 4 Pet. 344; 1 Am. & Eng. Enc. Law, (2 Ed.) 1222 *et seq*; Laws. Cont. § 366; 3 Sandf. Ch. 94. The judgment of the probate court approving the final settlement and discharging the administrator, being prior to this suit, bars it. Sand. & H. Dig., § 140; 34 Ark. 71. The judgment rendered by the probate court probating the claim of Turner & Byrne, having been obtained through fraud, is void. 2 Pom. Eq. Jur. § 919.

*Ben T. DuVal*, for appellants, in reply.

Appellants were entitled to be subrogated to the rights of Turner & Byrne under their probated claim against the estate. Harris, Sub. § 1.

BATTLE, J. Samuel Sixkiller, a Cherokee Indian, died intestate, leaving Francis Sixkiller, his widow, Eliza E. Sixkiller, Emma Sixkiller, Samuel Sixkiller, Fannie Sixkiller, Cora Sixkiller, and Rachael Sixkiller, his children, surviving him. At the time of his death he was in possession of certain real estate in the town of Muscogee, in the Indian Territory. Shortly after his death his widow died, leaving a last will and testament, by which she devised this real estate to Rachel, Cora, Francis and Samuel Sixkiller, who were her children, and nominated and appointed A. W. Robb, N. B. Moore and James W. Stapler, executors of the same, and requested them to sell or rent the said real estate, as to them may seem most advantageous to the devisees. The will was never probated, and Robb, Moore and Stapler never qualified as executors. Nevertheless Robb and Moore, in the month of September or October, 1889, undertook to bargain and sell the real estate to William H. Rogers

at and for the sum of one thousand dollars. On the fifth day of October, 1889, Rogers drew a draft in favor of Turner & Byrne, of Muscogee, in the Indian Territory, on Carnall Bros. of Fort Smith, Ark., for the sum of $1,200. A short time after this Rogers died. The draft was not paid; neither was the $1,000, for which the real estate was sold, paid. Letters of administration on the estate of Rogers was granted by the probate court of Sebastian county, n this state, to J. H. Carnall. The draft, authenticated by the affidavit of C. W. Turner, who was a member of the firm of Turner & Byrne, was presented to and disallowed by the administrator, and after that was allowed in favor of Turner & Byrne by the probate court of Sebastian county. On the 24th of August, 1891, C. W. Turner, as the successor to Turner & Byrne, assigned the allowance of the draft against the estate of William H. Rogers, deceased, to John H. Rogers and James H. Clendening, as trustees for the heirs of William H. Rogers; and on the 12th of December, 1891, the trustees canceled and set aside the same. On the 31st of August, 1893, Eliza E. Evans, born Sixkiller, and Emma, Samuel, Fannie and Cora Sixkiller, by their guardian, the said Eliza E. Evans, instituted an action against John H. Rogers, J. H. Clendening, C. W. Turner and the heirs and administrator of William H. Rogers, deceased, to set aside the assignment and cancellation of the allowance, claiming that the draft was drawn for the purpose of paying the $1,000, and that Turner & Byrne undertook to collect it, and out of the proceeds pay the $1,000. The defendants answered. At the hearing the foregoing facts were proved, and it was also shown that all dealings and communications with Turner & Byrne in respect to the draft were with C. W. Turner and no one else. Evidence tending to prove other facts was adduced by both parties, and in some respects it was conflicting. The court, having heard all the evidence adduced, found the facts as follows: "That when Wm. H. Rogers, deceased, delivered the draft for $1,200 described in the complaint to C. W. Turner, it was delivered by him and taken by Turner, as agent, and for collection for the said W. H. Rogers; that the proceeds of the said draft, when collected, were intended by said W. H. Rogers,

at the time he delivered the same to Turner, to be used in buying and paying for the property of plaintiffs, and Turner knew this, but did not advance any money or have any interest in said draft himself, and did not agree with any one to pay the proceeds thereof to the plaintiffs, or to hold it for their benefit, his agreement being solely to the effect that he would collect the proceeds (draft) for W. H. Rogers." Upon these findings of facts, the court declared the law to be "that no trust relation, express, implied or constructive, existed between Turner and plaintiffs, as to said draft, and that its probate by Turner against the estate of W. H. Rogers, deceased, was improper, and conferred no interest therein, by trust or otherwise, to the plaintiffs, and therefore held that there was no equity in the bill, and dismissed the same."

We think that the findings of facts by the court were sustained by the preponderance of the evidence, and that the declarations as to the rights of the plaintiffs were correct. If Turner had collected the draft, the money would have belonged to W. H. Rogers. No part of it could become a payment of the amount due the plaintiffs, although it was so intended, until it was applied and appropriated by Rogers to that purpose. Until then plaintiffs could acquire no right to any part of it. *Hatch* v. *Hutchinson*, 64 Ark. 119. This being true, plaintiffs are entitled to no relief in this action.

Decree affirmed.

---

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

Opinion delivered January 20, 1900.

RAILROADS — STOCK-GUARDS — ENCLOSURE. — Under Sand. & H. Dig., §§ 6238-9, providing that it shall be the duty of all railroad companies, upon receiving ten days' notice in writing from the owner of enclosed lands, to construct suitable and safe stock-guards on either side of said enclosure where said railroads enter said enclosure, and to keep the same in good repair, and fixing a penalty for failure to do so, *held*,

that the owner of land through which a railroad runs has no right to give notice to the railroad company to erect stock-guards until he has an enclosure through which the road runs. (Page 359.)

Appeal from Pope Circuit Court.

JEREMIAH G. WALLACE, Judge.

Hood sued the St. Louis, Iron Mountain & Southern Railway Company to recover the statutory penalty for the latter's delay in building stock-guards on either side of an enclosure, after being duly notified to do so, thereby causing his meadow to be destroyed by cattle. Plaintiff's testimony showed that, at the time he served the notice on the defendant to put in the stock-guards, he had no enclosure at the points where he wanted the stock-guards placed. He had a field on one side of the track, but had not built his fence across the right of way, and had no enclosure on the other side. Within three or four days after the notice was given, he built his fence down to the right of way on both sides, but the company neglected, for ten days after he had done so, to put in the stock-guards.

A judgment was rendered for the plaintiff, from which defendant appealed.

*Dodge & Johnson*, for appellant.

Under section 6239, Sand. & H. Digest, requiring railway companys, upon receiving ten days' notice, to construct stock guards whenever they shall enter *enclosed* lands, there was no obligation upon the appellant to construct such cattle-guards where lands are not *enclosed* at the time of the notice. Compare 65 Ark. 499 and 59 Ark. 244.

WOOD, J. Sections 6238 and 6239 of Sandels & Hill's Digest are as follows: "It shall be the duty of all railroad companies organized under the laws of this state, which have constructed, or may hereafter construct, a railroad which may pass through or upon any enclosed lands of another, whether such lands were enclosed at the time of the construction of such railroad, or were enclosed thereafter, upon receiving ten days' notice in writing from the owner of said lands, to construct suitable and safe stock-guards on either side of said en-

closure where said railroads enter said enclosure and to keep the same in good repair."

"Any railroad company failing to comply with the requirements of the preceding section shall be liable to the person or persons aggrieved thereby for a penalty of not less than twenty five dollars nor more than two hundred dollars for each and every offense, to be collected by civil action in any court having jurisdiction thereof."

We need consider only one question presented by this record to-wit: Can the notice required by this statute be given before there is any enclosure on the land over which the railroad runs? The unequivocal language of the statute indicates that notice before there is an enclosure would be premature. The owner has no right to give notice to the railway company to erect cattle-guards until he has an enclosure through which the railroad runs. It matters not, we think, that he completes his enclosure after notice to the company before the expiration of ten days. This would not be in complianee with the statute, for how could one give notice "to construct suitable and safe stock-guards on either side of *said enclosure* where said railroad enters *said enclosure*" when there was no enclosure in fact in existence. The statute is in derogation of common right, is penal in its nature, and should be strictly construed. Reversed and remanded for new trial.

---

## GODDARD-PECK GROCERY COMPANY *v.* ADLER-GOLDMAN COMMISSION COMPANY.

Opinion delivered January 20, 1900.

JUDGMENT LIEN—PRIORITY.—A creditor who first obtained a judgment against his debtor acquired a superior lien on his lands as against another creditor who procured a general attachment to be issued, but failed to have it levied on such lands. (Page 361.

Appeal from Jackson Court in Chancery.

RICHARD H. POWELL, Judge.

*S. D. Fulkerson*, for appellant.

The court erred in holding the writ of attachment to be a lien upon the land without a levy thereon. Sand. & H. Dig., §§ 336, 341, 346, 363, 365; 29 Ark. 92; 39 Ark. 101; 34 Ark. 399; 45 Ark. 270; 54 Ark. 185; 56 Ark. 293; 59 Ark. 310; 60 Ark. 398.

*Gustave Jones*, for appellee.

Appellee's right to the surplus was superior to that of appellant, and, having appropriated it to the credit of its judgment, this superior right could not be supplanted by appellant's garnishment. 39 Ark. 97; 56 Ark. 292; 54 Ark. 170.

RIDDICK, J. In 1896 Morris Bloom owned a tract of land in Jackson county, of this state, which he had mortgaged to T. J. Watson. Bloom was indebted to other parties, and on January 6, 1896, the Goddard-Peck Grocery Company, appellant, recovered a judgment against him in the Jackson circuit court for the sum of $495.81. Prior to the recovery of this judgment, the appellee, Adler-Goldman Commission Company, had commenced suit against Bloom, and had sued out a general attachment against his property, which was levied upon certain property owned by him, but not upon the land mortgaged to Watson. This action progressed, and on May 7, 1897, the appellee, Adler-Goldman Commission Company, recovered judgment against Bloom for several thousand dollars, and its attachment was sustained. In 1898 Watson foreclosed his mortgage in the circuit court. The land was sold under order of the court, and the report of the commissioner showed that it was sold to the Adler-Goldman Commission Company for enough to satisfy the Watson debt and costs of the foreclosure suit, and leave a balance of several hundred dollars in his hands. The contention here is over the disposition of this excess realized by the sale of the land. The Goddard-Peck Grocery Company filed the intervention in the circuit court, claiming the money by virtue of its judgment lien. The Adler-Goldman Commission Company answered, claiming the right to hold the excess and apply the same upon its judgment, by virtue of its attachment suit and judgment, and the claim of the commission company was sustained by the cir-

cuit court. But we are of the opinion that the lien of the Goddard-Peck Grocery Company upon the land and the fund arising therefrom in excess of the Watson mortgage is superior to that of the Adler-Goldman Commission Company. The judgment of the Grocery Company was rendered against Bloom before that of the Commission Company, and was a lien upon the land, subject to the mortgage of Watson, from the time of its rendition. It is true that a general writ of attachment was issued in the case of the commission company against Bloom before the rendition of the judgment in favor of the grocery company, but this attachment was never levied upon the land in question. It was levied upon other property, and then returned. While, under our statute, an order of attachment binds the defendant's property in the county, which might be seized under an execution against him, from the time of the delivery of the order to the sheriff, yet after its return it ceases to be a lien upon any property except that upon which it has been levied. The security affected by the issuance of an attachment is but an inchoate and imperfect lien; its efficacy depending upon the condition that it shall without unnecessary delay be levied upon the property of the defendant, and that the plaintiff shall obtain a judgment and an order authorizing the property to be sold in satisfaction thereof. 3 Am. & Eng. Enc. Law, 219.

As no levy upon the land in question was made in this case, the Adler-Goldman Commission Company, appellee, obtained no lien thereon until the rendition of its judgment against Bloom, which, as before stated, was subsequent to the judgment of the appellant grocery company. For these reasons we are of the opinion that the court erred in holding that the lien of the appellee was superior to that of appellant. The judgment of the circuit court is therefore reversed, and cause remanded, with an order that judgment be entered in favor of the appellant.

## HUNTER v. MATTHEWS.

Opinion delivered January 27, 1899.

LANDLORD AND TENANT—LIEN—INNOCENT PURCHASER.—The statutory lien of a landlord for rent and supplies furnished is not enforceable against one who purchased the crop from the tenant in good faith and without notice of the landlord's claim. (Page 364.)

Appeal from Craighead Chancery Court, Western district.

EDWARD D. ROBERTSON, Chancellor.

*Block & Sullivan*, for appellant.

The lien prevails over the right of a *bona fide* purchaser. The statute gives it precedence over any "conveyance." Sand. & H. Dig., § 4795. For meaning of "conveyance," see: 1 Abb. Dict. 284; And. Law Dict. 254; *id.* 285; Webst. Dict.; 54 Ark. 346. The reference in the statute is to a purchaser of the product or an assignee of the receipt for the same when in storage. Suth. Stat. Const. § 260. No intention to waive the lien is to be presumed from the mere consent of the landlord to the removal of the property. 1 Jones, Liens, § 579; 74 Ala. 435.

*Allen Hughes*, for appellee.

The lien for rent does not prevail against an innocent purchaser. 31 Ark. 131; 52 Ark. 158; 60 Ark. 357; 1 Jones, Liens, § 578. Sandels & Hill's Digest, section 4804, makes the writ of attachment leviable upon "the crop in the possession of the tenant * * * * or in the possession of a *purchaser from him with notice of the lien of the landlord.*" This implies that the writ cannot be levied against others—*expressio unius est exclusio alterius.* Cf. 20 Ark. 410; 38 Ark. 205; 45 Ark. 524. The words "other conveyance," as used in the statute creating the lien, are limited in meaning by the special words preceding, so as to really mean "other *life* conveyance." End. Int. Stat. § 405 *et seq.*; 95 U. S. 704, 708; 17 Am. &

Eng. Enc. Law, 279; 7 N. W. 216; 7 N. E. 888; 2 Am. St. Rep. 373; 71 N. Y. 481; 44 Am. Rep. 124; 6 N. E. 469.

BUNN, C. J. This is a bill in chancery by appellant, Hunter, to recover of appellee, Matthews, the value of two bales of cotton, which appellant claimed had been produced by his tenant, Gamble, on his land in the year 1897, and upon which he claimed a landlord's lien for rent and necessary supplies furnished to make the same.

The case was tried upon the following agreed statement of facts, to-wit: The parties to this cause agree that the facts therein are as follows: "In the beginning of the crop season of 1897, J. H. Gamble contracted to work plaintiff's land on shares, plaintiff to furnish land, house and tools, and said Gamble to perform the labor, and they were to share the crop equally. Said Gamble raised eight bales of cotton on said land, of which plaintiff got four. To aid said Gamble to make said crop, plaintiff furnished him necessary supplies to the amount of $89.81. Two of Gamble's bales of said crop have been applied on said debt by attachment, judgment and sale, reducing said debt to $57.88, which is entirely unpaid, and was past due when this action was instituted. By an arrangement between plaintiff and Gamble, the latter took the other two bales home with him from the gin (his home being on the land above mentioned) to keep until such time as the parties should decide it was best to sell the same. Thereafter said Gamble, without plaintiff's knowledge or consent, hauled said cotton to Jonesboro, a distance of seventeen miles, and sold it to the defendant, a merchant and cotton buyer. Defendant bought said cotton in good faith, without notice of the plaintiff's claim, and paid Gamble therefor $54.80 in cash, which was the value of the cotton at that time. This sale occurred before the other two bales were attached by the plaintiff as above stated. When the suit was brought, defendant had mingled said cotton with his other cotton, and had shipped it to St. Louis, Mo."

The court found, in effect, that defendant was an innocent purchaser of the two bales of cotton, and rendered judgment in his favor, dismissing the bill for want of equity, and the plaintiff appealed to this court.

The lien for necessary supplies furnished by a landlord to his tenant to make the crop stands on substantially the same footing as the landlord's lien for rent, is enacted by statute, and expressed in the following language, to-wit: "If any landlord, to enable his tenant or employee to make and gather the crop shall advance such tenant or employee any necessary supplies, either of money, provisions, stock or other necessary articles, such landlord shall have a lien upon the crop raised upon the premises for the value of such advances, which lien shall have preference over any mortgage or other conveyance of such crop made by such tenant or employee. Such lien may be enforced by an action of attachment before any court or justice of the peace having jurisdiction, and the lien for advances and for rent may be joined and enforced in the same action."

The lien holds good against all persons having notice of the same, or who have knowledge of the relation of the parties sufficient to put them on the inquiry, but does not hold good against innocent purchasers. But "the purchaser or assignee of the receipt of any *ginner*, *warehouse holder*, or *cotton factor*, or other bailee for any *cotton*, corn or other farm products in store or custody of such ginner, warehouseman, cotton factor, or other bailee shall not be held to be an innocent purchaser of any such person against the lien of any landlord or laborer." Section 4798, Sand. & H. Digest. The landlord's lien is not lost by the tenant's sale of the crop to a purchaser with notice." *Volmer* v. *Wharton*, 34 Ark. 691.

This doctrine is impliedly held in *Anderson* v. *Bowles*, 44 Ark. 108; *Dickinson* v. *Harris*, 52 Ark. 58; *Bledsoe* v. *Mitchell*, *id.* 158. In the latter case it was held "that the evidence was not sufficient to show notice to the defendants of plaintiff's lien," thus indicating that the ordinary rules applicable to the case of an innocent purchaser are applicable.

In the case at bar the court, in effect, found that the defendant was an innocent purchaser; and not only so, but by the agreed statement of facts the defendant was without notice of plaintiff's claim. The decree is therefore affirmed.

# HENSHAW v. STATE.

67 365
74 258

Opinion delivered January 27, 1900.

1. TRIAL—MISCONDUCT OF PROSECUTING ATTORNEY.—The prosecuting attorney asked one of the defendant's witnesses whether he was not the same person that the state had up for cattle-stealing in an adjoining county. On defendant's objection, the question was withdrawn, but the prosecuting attorney, in the jury's hearing, said to defendant's attorney: "If you bring your jail birds here, I want the jury to know it." Thereupon defendant objected, and asked the court to reprimand the prosecuting attorney, and to instruct the jury to ignore the remark. The court sustained the objection, saying, "That is improper." *Held*, that the court's failure to reprimand the prosecuting attorney more severely was not prejudicial error. (Page 367.)

2. SAME.—The fact that the assistant prosecuting attorney denounced defendant's conduct in language much too severe, though not without support from the testimony, will not be ground for reversal if, upon objection, the language was withdrawn from the jury's consideration. (Page 369.)

3. JURY—SELECTION.—After one juror had been selected, a special venire issued for 22 jurors, but only 20 appeared, and the court proceeded to have the remainder of the jury selected from this number, over defendant's objection. The latter failed to exhaust his peremptory challenges, and a jury was filled out from the 20 who appeared. *Held*, no prejudicial error. (Page 370.)

Appeal from Poinsett Circuit Court.

FELIX G. TAYLOR, Judge.

*J. J. Mardis* and *N. F. Lamb*, for appellant.

It was error for the court to refuse to reprimand the prosecuting attorney for his misconduct, and instruct the jury to ignore the question to the witness and the statement made by the prosecuting attorney. 61 Ill. App. 55; 12 Mo. App. 431; 2 S. W. 585; 62 N. W. 572; 32 N. W. 849; 58 Ark. 473; *ib.* 353; 150 U. S. 76; 64 N. W. 261; 34 S. W. 228; 24 N. W. 390; 39 N. W. 585; 1 Bish. New Cr. Proc. § 975a; 27 S. W. 1109; 11 Ga. 615, 628; 65 N. C. 505; 75 N. C. 306; 79 N. C. 589; 41 N. E. 545; 32 S. W. 1149; 5 S. W. 842;

8 Tex. App. 416; 41 N. H. 317; 8 S. W. 749; 11 S. W. 462; 61 N. W. 246; 27 S. W. 128; 65 N. W. 61; 2 N. E. 296; 8 Tex. App. 416. It was error for the court to compel the defendant to proceed with the selection of a jury from a venire of only twenty persons, when eleven were required to complete the jury. Sand. & H. Dig., § 2194; 68 Ala. 515; 11 S. W. 723; 4 S. W. 816; 9 So. 429; 9 Pac. 925; 10 S. E. 979; 10 So. 433; 5 S. W. 251; 6 So. 368; 12 So. 906; 14 So. 111; 6 So. 395; *ib.* 396; 1 C. C. A. 53; *ib.* 286; 36 Pac. 7; 26 S. W. 388; 16 So. 264; 36 Pac. 7; 12 So. 906; 14 So. 111; 47 N. W. 306; 13 S. E. 73; 19 Atl. 376; 11 S. W. 1117; 2 S. W. 726; 23 N. W. 245; 5 S. W. 251, 254.

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

Since the adoption of the code, a prisoner has no right to a list of the jury. 35 Ark. 639; 38 Ark. 304. The court may excuse a talesman for any ground deemed sufficient. 29 Ark. 17; 35 Ark. 639; 44 Ark. 115. Appellant was not entitled to any particular juryman; and the use of a peremptory challenge could not have prejudiced him, when he did not use all his peremptory challenges before the panel was complete. 30 Ark. 328; 35 Ark. 639; 45 Ark. 169. No prejudice having resulted to appellant, the irregularity complained of is not reversible error. 11 Nev. 108; 8 Tex. App. 398; 29 Ga. 483. Appellant should have moved to set the panel aside. 29 Ark. 17; 5 Ark. 444; 21 Ark. 213.

BUNN, C. J. This is an indictment for murder in the first degree; trial and conviction for manslaughter, and sentence to three years' imprisonment in the penitentiary; and the defendant appealed to this court.

The defendant admits that the evidence is sufficient to sustain the verdict, and relies for reversal on errors of law.

A brief statement of the facts, however, will possibly throw light on the rulings of the trial court, which are the subject of exception and complaint before us.

The defendant is a young man, and at the time was looking after the business of his mother, who had rented land to

the deceased for the year, who, as her tenant, had made and was about gathering a crop thereon. The defendant and deceased had had a difficulty concerning the rents due from deceased to defendant's mother, and one or more wordy conflicts had arisen between them. Each party was more or less incensed at the conduct and language of the other. Quoting from the brief and abstract of defendant's counsel: "The evidence adduced by defendant tends to show that Barker (the deceased) was a tenant on a farm belonging to defendant's mother; that a difficulty had arisen over the rent; that Barker had abused appellant's mother, and had threatened to do violence to appellant; that on the day of the killing appellant had been to Harrisburg (the county town), and consulted an attorney with reference to the rent; had procured papers to file before a justice of the peace the next day, with a view to enforcing his mother's lien for the rent; that on returning from Harrisburg he went over to Barker's house to see if a settlement could be made; called Barker out to the gate; moved away with him twenty or thirty steps; asked him if he would pay the rent without suit; that Barker thereupon became angry and abusive; struck at appellant with a large club; cut at him with his knife, cutting his shirt and suspender; and that appellant thereupon drew his pistol and killed Barker." As to what occurred between the defendant and deceased after the latter had gone out to meet the former, at his invitation, in front of the gate, the testimony for the state makes quite a different case from that made by the evidence on the part of the defendant, he being his only witness as to that.

The first error of the trial court, assigned and insisted on by the defendant, is the refusal of the court to properly instruct the jury as to improper remarks of state's counsel made before them, and its refusal to reprimand said counsel for making said remarks. It appears that, on cross-examination of Henry Moss, a witness for defendant, the prosecuting attorney interrogated the witness thus: "If he was not the same Henry Moss we had up for cattle stealing in Craighead county;" which being objected to by defendant's counsel, the same was, in words, withdrawn by the prosecuting attorney, who, apparently in explanation of

his reason for asking the question, addressing himself to the defendant's counsel, but in the hearing of the jury, further said: "If you bring your jail birds here, I want the jury to know it." Objected to by the defendant's counsel, and objection sustained by the court, using the following language: "That is improper." The defendant, at the time of making the objection to the question and the remarks of the prosecuting attorney, also asked the court to reprimand the prosecuting attorney for asking the question and making the remark, and to instruct the jury to ignore the same, which the court refusing to do, the defendant excepted. The court might have been a little more emphatic in instructing the jury on the subject, but we do not think we can safely circumscribe trial judges to such minuteness of expression as asked in this controversy. They are present conducting the trial, and it is only in case of manifest abuse of discretion that they should be interfered with. The same may be said, but with still more emphasis, as to the court's refusal to reprimand the prosecuting attorney. The persistency in disobeying the rules of court, and contumaciousness in unbecoming conduct generally, which alone would call forth a reprimand of a public officer representing the state, are matters to be dealt with cautiously, for fear that the remedy may prove worse than the disease. Each judge ought to and does have a sound discretion when and where to employ this method of discipline, and this discretion ought not to be controlled by appellate courts, except in extreme cases, and where the control is clearly right and proper.

Not as a matter affecting the legal proposition, but rather to show that this whole controversy had a rather unnecessary origin, the witness Moss, having been permitted finally to proceed and give his testimony, said that he had heard deceased say on one occasion, when talking about the crop, that "he would take Henshaw by the heel and wear his head out against the ground;" and again, within a month before the killing, he had heard deceased say he had a crop on Henshaw's place, and that they had some trouble, and that he had made him (defendant) take some calves out of the field, and "if that outfit [meaning the Henshaws] fools with me, I will go up, and throw the

whole business out. They have fooled with me about all they are going to." This was evidence adduced on the part of the defendant to show that threats had been made by the deceased against the defendant, and as a defense against the charge against him. Such threats, if threats they were, were not such as would justify a homicide, or even such as would induce the threatened party to put himself on his guard. They were, in fact, incapable of being carried into execution, or amounted to mere idle talk or boasting, indicating only that no good feeling existed between the parties. There was, however, some degree of prejudicial error, some unfairness, in the question and the subsequent remark. It does not appear that the witness had ever been convicted of cattle stealing. He was therefore innocent of such a charge, and it was improper to cast this reflection upon him, and through him upon the defendant and his cause. But the remarks of the court may have been all sufficient to give the jury to understand how to treat this matter. It is not easy to suppose that any one is so ignorant as not to understand the meaning of words used by the court in this connection.

The assistant prosecuting attorney, in his opening argument to the jury, used the following language, viz.: "The defendant is a scoundrel, and an incarnate fiend; the defense from beginning to end is branded as a lie, and manufactured for the purpose. The defendant went to the home of Barker when all honest men should have been at home, and like a thief in the night." Objection being made, the assistant prosecuting attorney withdrew the remarks, and, on further objection, the court said: "The remarks are improper, but have been withdrawn, and cannot be considered;" and defendant excepted, and asked that his exceptions be noted of record, which was done. While the language used is objectionable for its extravagance of denunciation, and for that reason ought never to be heard in a court room, yet, if the testimony on the part of the state was to be believed,—and the prosecuting attorney had a right to insist on that,—the conduct of the defendant, in going to his enemy's house in the night time, arousing and calling him out to a distance in the dark, so as to be out of hearing of the

family, and then shooting him down, certainly subjected him to the severest denunciation, and the same could scarcely be said to be entirely unwarranted by the testimony. Again, the obviously futile effort to show by previous threats that the homicide was justified was the subject of just adverse criticism, and to what extent this should or should not have been carried, it is impossible to say accurately. The only reasonable defense in the case was in the testimony of the defendant himself, in making his case one of self-defense against the onslaught of deceased at the time. Under the circumstances, it is impossible to say just what the court could have done or ought to have done, more than it did do, to keep the scale of justice on even balance. In fact, the only thing else the court could have done would have been to set aside the verdict as a rebuke to the counsel for the state. But the public has some interest in such trials, and they are not had as mere occasions to enforce discipline in the courts. When attorneys abuse these privileges to the obstruction of the course of justice, we will not hesitate to reverse, but it will be because of possible injury to the opposite party, and not to punish the counsel of the other for stepping over the bounds of orderly procedure or of forensic discussion. But we lift the finger of warning to all, in order to impress upon them the truth that it is best and safest to refrain from all questionable language, for in the heat of discussion one is never a safe judge of how far he may go, and yet not prejudice the case of the opposite side, and thus take undue advantage to himself.

It is objected that the manner of selecting the jury was prejudicial to defendant. Some of the jurymen were selected—one, we believe—and twenty-two persons were ordered to be summoned, and they were summoned, but only twenty appeared. The court proceeded to have the selection made from these twenty, instead of requiring the presence of the twenty-two, and this over the objection of defendant. The defendant, it appears, did not exhaust his peremptory challenges. As he was not entitled to any particular jurymen, it is impossible to see in what way he was prejudiced by the fact that two did not appear, and thus furnish him the larger number from which to select;

for he accepted or rejected as each was turned over to him by the state, and there was in the twenty enough to whom he had no objection to make the jury. We can imagine that, if the two had presented themselves with the others, one or both of them might have been preferable to some or any of the twenty which the defendant chose to take, and to whom he had no objection; but if that were the case, or even might have been the case, the defendant should have rejected one or two of the twenty which were the least free from doubt, and thus caused the twenty-two to be presented. His contention seems to be that nothing could cure the defect unless all were presented at once. In fact, the law directs that all—the sufficient number—shall be summoned. That was done, but the error, if error there was, consisted in the two not appearing, and in the court's not stopping to have the two delinquents, or two other persons in their places, brought in. Technically, this was error, perhaps, but the prejudice of such an error is the barest possibility, if it exists at all.

Affirmed.

BATTLE, J., did not participate.

---

67 371
71 304
67 371
f80 295
67 371
86 96

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

Opinion delivered January 27, 1900.

1. RAILROAD TRAIN—PRESUMPTION OF NEGLIGENCE.—Proof that an engine was in the hands of a competent engineer at the time that a fire was started from its escaping cinders will not overcome the statutory presumption of negligence arising from proof that the fire originated from the engine. (Page 373.)

2. DAMAGES—DESTRUCTION OF GROWING TREES.—The measure of damages for the destruction of growing trees is the difference in the value of the land before and after the trees were destroyed. (Page 374.)

3. SAME—MITIGATION.—In an action to recover damages done by fire to land held for rental purposes, it is competent for the defendant to show that the plaintiff could have rented his land after the fire for agricultural purposes, and thus have lessened the damages. (Page 375.)

Appeal from Scott Circuit Court.

EDGAR E. BRYANT, Judge.

*Dodge & Johnson*, for appellant.

Where the question involved is the amount of damage occasioned by a particular act, witnesses, whether expert or not, can not give their opinion, but are confined to the relation of facts: Rogers, Exp. Tes. § 154; 66 Vt. 343; 73 Ga. 705; 47 Ark. 497; 25 Neb. 138-145; 23 Wend. 433; 66 Barb. 604; 43 N. Y. 279; 8 Hun, 358; 71 Ind. 271; 58 Ga. 107; 11 La. Ann. 178; 5 Ohio St. 568; 21 Kas. 248; 18 Ia. 244; 51 Ark. 328; 59 Ark. 110; 21 S. W. 81; 21 S. W. 607; 31 S. W. 412; 67 Tex. 241; 85 Tex. 593; 14 Neb. 463; S. C. 16 N. W. 747; 17 Wend. 161; 1 Sath. Dam. 94. The land being valuable solely for the timber upon it, the value of the timber was the correct measure of damages. 17 L. R. A. 426. Appellant discharged its duty as to furnishing good engines, etc. 49 Ark. 540.

*Winchester & Martin*, for appellee.

To rebut the presumption of negligence, appellant must show, not only the good condition, but the careful management of the engines. 59 Ark. 105; 49 Ark. 542; 13 Am. & Eng. R. Cas. 460; 30 Wis. 110; 31 Md. 251; 35 La. Ann. 251; 57 Ark. 418. Appellant's exception to the evidence of W. M. Ayres, being too general, is ineffectual. 58 Ark. 373, 374; 62 Ark. 208. Witness had a right to state his opinion as to the amount of the damage. 44 Ark. 103; 57 Ark. 512; 51 Ark. 324; 42 Am. Rep. 707. Since appellant did not urge the objection to this evidence in its motion for a new trial, it is considered waived. 33 Ark. 107; 40 Ark. 114; 27 Ark. 374; 55 Ark. 376; *ib.* 547; 46 Ark. 17; 62 Ark. 543. The loss of rental of the meadow is the measure of damage to it. 47 Kas. 630. The measure of damage to the forest land was the difference in the value of the lands with the trees and without them. 57 Ark. 387; 17 L. R. A. 426; 18 N. H. 456; 33 Me. 457; 6 Cal. 162; 18 Mo. App. 540.

HUGHES, J. The complaint charged that plaintiff owned certain lands in Sebastian county; that the railroad ran through

the same; that on July 27th, and on August 1st and 3d, by reason of the defective construction, handling, managing and operation of an engine, sparks, fire and cinders were thrown upon the said land, setting it afire and causing it to destroy 600 acres of meadow and growing grass, valued at $300; 715 fence posts, valued at $14; 109 cedar posts, valued at $21.80; 18 fence posts, valued at $2.70, and 65 oak trees, valued at $34. Judgment was prayed for $430, with interest. The answer denied explicitly each allegation of the complaint.

After the evidence was in, and instructions had been given them by the court, the jury rendered a verdict for the plaintiff in the sum of $322.50. A motion for a new trial was filed, which was overruled, to which exceptions were saved, and the case appealed to this court.

The third instruction given by the court over the objection of the defendant, and to the giving of which he excepted, is as follows: "Now, conceding that defendant has shown in this case that the engine was properly constructed, and with the best appliances to prevent the escape of fire, there is no showing of what care was used in the management and handling of the alleged trains; and so the court tells you that if a fire was started by fire escaping from an engine of defendant that set fire to grass on the right of way, and that such fire spread to and burned plaintiff's property, the court tells you that defendant is presumed to have been negligent, and is liable for the damage done. The burden of proving that the fire was set out by the defendant's engine is on the plaintiff to show by a fair preponderance of the evidence."

The appellant objected to the statement in this instruction "that there was no showing of what care was used in the management and handling of the alleged trains." The appellant contends that, when he had shown that the engineer who handled the train that set out the fire was competent and skilful, this ought to have been considered by the jury in determining whether proper care was used in handling the train on the occasion when the fire was set out, and that the court therefore erred in the above statement of the instruction. We cannot agree with the learned counsel for the appellant in this.

If this were the law, all a defendant would have to do to exonerate itself from the charge of negligence in a case of this kind would be to prove that its engineer was skilful and competent, and thus change the burden of proof to the plaintiff. From the setting out of the fire the law presumes negligence, and to overcome this presumption the defendant must show due care at the time in the management and handling of the engine. It is not sufficient merely to show that the engineer was competent and skilful, for competent and skilful men are sometimes negligent. This action is to recover damages caused by an injury by an alleged specific act of negligence, and if the engineer was negligent on this occasion, and his negligence caused the injury, it matters not how skilful and competent he was generally, the company is liable. The presumption is that he was negligent. It was his privilege to overcome this presumption by showing that on the occasion of setting out the fire such care was used as would overcome the presumption of negligence. *Railway Co.* v. *Mitchell*, 57 Ark. 418; *Railway Co.* v. *Jones*, 59 Ark. 105; *Tilley* v. *St. Louis & S. F. Ry. Co.*, 49 Ark. 540.

As to the measure of damages for the destruction of the trees on the land by reason of the fire, we think the fifth instruction by the court announced the proper measure; that is, that the measure was the difference between the value of the land with the trees unburned and with the trees burned. This means the market value of the land. The trees were a part of the freehold, and could not be replaced in a short time, and only at considerable expense. *Coykendall* v. *Denkee*, 13 Hun, 260. The destruction of the trees was a depreciation in the value of the land of which they were part, and it was competent to show by evidence what the land was worth before the destruction of the trees, and what it was worth after they were destroyed; and, this being shown, the *quantum* of damage was a matter of computation for the jury. 3 Sutherland on Damages, 612; *Coykendall* v. *Denkee*, 13 Hun, 260; *Railway Co.* v. *Combs*, 51 Ark. 324.

It has been held that in such a case a witness, having stated the value before and after the injury to the land, may

give his opinion as to the *quantum* of damages, as it is a mere matter of calculation. *Railway Co.* v. *Combs*, 51 Ark. 324. But the general rule is well settled that a witness cannot give his opinion merely as to the amount of damages sustained by a wrongful act. He must state facts, and it is the province of a jury, upon the facts in evidence, to find the amount of the damages. 3 Sedgwick on Damages, § 1293, and cases cited; *Dickerson* v. *Johnson*, 24 Ark. 251; *Joyce* v. *State*, 62 Ark. 510; *Little Rock, M. R. & T. R. R. Co.* v. *Hayes*, 45 Ark. 497. It is competent for a witness to give his opinion of value, after stating his means of knowledge. 3 Sedgwick on Damages, § 1294, and cases cited; *L. R. Junction Ry. Co.* v. *Woodruff*, 49 Ark. 381; *Railway Co.* v. *Lyman*, 57 Ark. 512; *St. Louis, Ark. & Tex. R. R. Co.* v. *Anderson*, 39 Ark. 167.

On cross-examination of witness Wm. Smith, he was asked by defendant's counsel: Q. What was the rental value of that land per acre after the fire? I don't mean for hay, but for any purpose. What was its rental value for any purpose? Q. What was it worth per acre after the fire? On cross-examination of B. Luce, he was asked by defendant's counsel: Q. What was the rental value of these prairie lands for other agricultural purposes? These questions were overruled, and Luce was asked as to the rental value of the land per acre, and stated that it was $25 per acre. He was asked what was the rental value of the lands after the fire? This question was ruled out. The appellant excepted to the ruling out of these questions. It is evident that these questions as to the rental value of the land after the fire were based upon the theory of avoidable consequences. The land was not occupied by the plaintiff. It does not appear that he had stock upon it, or used it for a pasture himself, but it does appear that he held it for the purpose of renting, and deriving an income from the rents only. Therefore the question arises, if he could derive an income from renting it for agricultural purposes after the fire, was it not his duty to use reasonable efforts to do so, and by receipt of the rents to lessen the damage which would otherwise accrue? We think it was clearly his duty to use reasonable effort to lessen the damage that might

accrue from the fire. He ought not by his negligence to have exaggerated the damages. We think this rule well established. The defendant was liable to pay all damages, if injury was caused by its negligence, which the plaintiff sustained by reason of such negligence, but the damages must have been the immediate result of such negligence, and not have been caused or aggravated by the plaintiff's own negligence. *Milton* v. *Hudson River Steamboat Co.*, 37 N. Y. Court of Appeals, 215; *Hogle* v. *N. Y. C. & H. R. R. Co.*, 28 Hun, 364.

In *Waters* v. *Brown*, 44 Mo. 303, the court, by Judge Wagner, said: "If a party can, by a trifling expense or by reasonable exertions, avert the damages caused by the wrongful act of another, it is his duty to do so; and if he fails in performing the full measure of his duty in this regard, he will be only entitled to recover such damages as were not the result of his negligence or omission. He can charge the delinquent party only for such damages as, by reasonable endeavors and expense, he could not prevent." This was a case of damage caused by the wilful burning of a prairie. "The action sounds purely in damages, and the plaintiff will be entitled to recover whatever amount of damages he may show has been sustained, and which he could not avert by reasonable exertions."

It was competent for the defendant to show, if it could, that the plaintiff could have rented his land after the fire for agricultural purposes, and thus have lessened the damages. But the court, by refusing to permit the question asked to be answered, cut off all effort in this direction. This was error for which the judgment is reversed, and the cause is remanded for a new trial.

WOOD, J., did not participate in the consideration of this case.

BUNN, C. J., dissented as to the reasoning, but concurred in the judgment.

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

Opinion delivered January 27, 1900.

1. MASTER AND SERVANT—NEGLIGENCE.—Proof that while deceased, an employee of appellant, under the orders of his foreman, was engaged in coupling cars at night on appellant's transfer track, eight or ten cars were placed on the other end of such track by other employees of appellant and shunted down to where deceased was at a high rate of speed, causing deceased to be knocked down and killed, is sufficient, in the absence of proof that any effort was made by appellant to ascertain if the track was clear, or that there was any means of controlling the cars thus shunted down the transfer track, to sustain a finding of negligence on the part of appellant. (Page 383.)
2. CONTRIBUTORY NEGLIGENCE.—A switchman who is ordered to couple cars on a transfer track at night is justified in presuming that other cars will not be shunted against the cars he is ordered to couple without warning and without regard to his safety; and if he is killed by cars so shunted down the track, while in the discharge of his duty, the jury is justified in finding that he was not guilty of contributory negligence. (Page 384.)
3. FELLOW SERVANTS—WHO ARE NOT.—The foreman of a switching crew and a switchman of another crew are not fellow servants, under Sand. & H. Dig., §§ 6248-9, not being of the same grade of employment. (Page 384.)
4. DAMAGES—EXCESSIVENESS.—A verdict of $500 as damages for deceased's pain and suffering, and for $2,500 for pecuniary loss suffered by the children of deceased, will not be set aside as excessive where deceased lived four hours after he was injured, and suffered some pain, though the doctors could not say how much, and where he was earning, at the time of his death, $60 per month and had been in the habit of sending money to support his children. (Page 386.)

Appeal from Pulaski Circuit Court, Second Division.

JOSEPH W. MARTIN, Judge.

STATEMENT BY THE COURT.

The complaint charged that on March 16, 1897, plaintiff's intestate was employed by the defendant in its yards in North Little Rock as switchman; that on the night of said date he

was run over and killed, while switching cars, by reason of the negligence and carelessness of defendant's employees in the handling of its trains and the incompetency of its servants, and in violation of its rules, and in consequence of the incompetent and unskilful engineer in charge of the engine being used at the time; that the said Epple left two children, 6 and 10 years of age, surviving him; that he was 30 years of age, earning about $60 per month at the time; that his estate and next of kin were damaged in the sum of $25,000, for which plaintiff prayed judgment.

The answer denied each and every allegation of the complaint, and, for its complete defense, set up that Chas. C. Epple was guilty of negligence and carelessness amounting to recklessness in going upon the track between two cars, and in so acting as to be the direct and sole cause of his death, and that, had he not, by his own negligence, contributed to the same, the accident would not have happened.

After the jury had been impaneled, and the trial had commenced, the plaintiff asked leave to file an amendment to his amended complaint in which he charged: "That the foreman of defendant's switch crew, who were placing cars on said transfer track to be taken or hauled out on said Fort Smith road, negligently, carelessly and recklessly ordered the section of cars moved, which set said stationary cars in motion, to be kicked in or kicked in on said transfer track, without any warning to plaintiff's intestate, Epple, and without taking any care or precaution to ascertain if anyone was on the track, or to keep from setting in motion the stationary cars which ran over and killed the plaintiff's intestate, Epple; and by reason of such negligence and want of care on the part of such foreman the plaintiff's intestate was run over and mortally wounded, without any negligence on his part."

To the filing of this amendment to the amended complaint defendant objected, as setting up a new cause of action, and as coming too late and after the trial of the case had commenced. The court overruled the objections, and exceptions were properly saved by defendant.

Defendant then answered said amendment to the amended

complaint, denying each of its allegations, and charging that the said Epple, at the time of the injury, was engaged in the yards at Little Rock as a switchman, switching cars in said yards; that one of the hazards, dangers and risks of said work was that of getting caught between cars while switching, and that said Epple assumed the risk at the time he entered into the employment of the company; that his death was an accident, without fault on the part of any of the employees of defendant, said accident growing out of the contributory negligence of the said Epple.

Dr. J. W. Jenkins testified that Chas. Epple, alias Culver, was brought to the Missouri Pacific Hospital on the night of March 16th; that he was cut open in the stride, and was very badly injured by the car wheels passing over him. He was in a dazed condition from the shock, and, although he lived about three hours, the shock was such that he did not suffer greatly on account of his injuries.

John Curry testified that he was a switchman, working with the switching crew of which the deceased was a member; that his crew was moving cars from the transfer track, while a switch engine and another crew were putting cars on the transfer track for his crew to move into another part of the yard; that his crew, with whom was deceased, backed down into the transfer track, then coupled up three cars; that he and deceased went across the track between the cars to the other track to look for links and pins. "I suppose Epple got what he wanted while I walked on down to look for more. I heard the lamp jingle, and I heard the deceased say, 'Oh, my God! I am killed!' I holloed to our engineer not to move, for fear they would shove in; ran for the foreman of the switching crew, Harry Nolan; and when I got back there were several men around Epple." Whenever switchmen want to get links, when they are not in the cars, as they generally are, they go and get them wherever they can find them. The track where the injury occurred was curved, and held about thirty-four cars. It was witness' and deceased's duty to couple the cars when they were backed down, and they were going to get the links for this purpose, and it was while Epple was returning across the track between the two

cars that the cars came together and caught him. It was somewhere about 9:30 o'clock at night—after dark. On cross-examination witness stated that the yardmaster that night was Con Curry, and had charge of both crews. These two crews were switching under the directions of the same night yardmaster, Con Curry; that his switch crew had pushed down on the van or transfer track for the purpose of moving cars. While the cars were standing there, he and deceased passed across the track between the two cars for the purpose of getting pins and links, and deceased had got his links and pins, he supposed, and while going back was caught between the two cars as they came together.

Harry Nolan testified that he was foreman of the switch crew in which John Curry and Epple were working; that Chas. Compton was switch foreman of the other crew. Compton's crew were pushing cars on the van or transfer track for witness' crew to take and distribute in the yards. In other words, they were transferring the cars from one part of the yard to the other, Compton's crew delivering the cars, and his (Nolan's) crew receiving them.

The record shows that about 9:30 on the night of March 16, 1897, Charles C. Epple was in the employ of the Iron Mountain Railway Company as a switchman, engaged at work in the Baring Cross yards. He had sought employment from defendant, and was working under the assumed name of Charles E. Culver. As such he had signed his application, and as such he was carried on the rolls. His divorced wife testified that the reason he had changed his name was because he had been in the American Railway Union strike of 1894; but, be this as it may, the deceased, on the night in question, formed one of the switching crew, working under the direction of Harry Nolan, foreman. Nolan's crew were at the time of the accident engaged in receiving cars from the van or transfer track, which were being placed there by another switching crew, working at the north end of the transfer track, under one Compton, foreman.

Just before deceased was injured, his particular crew had backed their engine up into the south end of the van or trans-

fer track, and there coupled onto three cars and stopped. This engine and three cars were standing on the south end of the van or transfer track, the engine facing south with three cars attached to it. While this engine and the three cars were thus standing still, deceased and switchman Curry, a fellow switchman, crossed the track with their lighted lanterns in their hands, hunting for links and pins, which, it seems, they expected to need in making the coupling with the cars coming in on the north end of the transfer track. Curry saw deceased turn with his lantern and start back over the track, supposing he had found what links and pins he was after. Just as the deceased stepped between the iron rails, an empty coal car moved back and caught deceased between it and the three cars standing still, and killed him.

At the same time this was occurring, on the north end of the van or transfer track was another switching crew at work under switch foreman Compton. This crew was placing cars in and upon the transfer track for the purpose of enabling the crew of the deceased to take hold of them and move them to those points in the yard where needed. The track both crews were working on was known as the van or transfer track, where cars were placed for distribution about the yard. Compton's crew was delivering the cars on the van or transfer track, while Nolan's crew, with which the deceased was working, was receiving them on the van or transfer track, and distributing the cars in the yard. Thus it was, while Compton's crew was pushing eight or ten cars down on the transfer track, deceased attempted to cross between the cars, and was caught and killed."

The court gave ten instructions at the instance of the plaintiff, thirteen for defendant, and refused one asked for by the defendant. The defendant, at the close of the testimony, moved the court to instruct the jury to return a verdict for the defendant, which the court refused to do. The defendant excepted to the giving of the instructions for the plaintiff, and to the court's refusal to give the one for it numbered thirteen. The jury returned a verdict for five hundred dollars for the pain and suffering by the deceased caused by the injury, and twenty-five hundred dollars for pecuniary

damages sustained by the children of the deceased, on account of his death. The defendant filed a motion for a new trial, which was overruled, to which it excepted and appealed.

*Dodge & Johnson*, for appellant.

The evidence does not show any negligence on the part of appellant. 41 Neb. 860; 46 Ark. 567. The deceased assumed the risk of such contingencies as the one which caused his death. 35 Ark. 602; 46 Ark. 388; 56 Ark. 209; 116 N. Y. 398; 15 Am. & Eng. Ry. Cas. 257; 82 Fed. 789. If there was any negligence which caused decedent's death, it was that of a fellow servant. Acts 1893, p. 68; Sand. & H. Dig., §§ 6248–9; 52 Ill. App. 641. Since the statute of 1893 the old rule as to who are fellow servants has been changed only in so far as the statute specifies who are *not* fellow servants. For the old rule, see: 42 Ark. 417; 58 Ark. 126; *ib.* 198; 61 Ark. 306; 54 Ark. 289; 58 Ark. 66; *ib.* 217. Under the first section of the statute, therefore, decedent and Compton were fellow servants. They were fellow servants also, within the meaning of the second section of the statute making all employees of the same grade, working together and having no superintendence or control over each other, fellow servants. 63 Ark. 485; 35 S. W. 364; 1 C. C. A. 633; 109 U. S. 478; 58 Fed. 525; 13 Sup. Ct. Rep. 914, 919, 921; 56 Fed. 810; 27 Minn. 162, 165, 166; S. C. 6 N. W. 484; 31 Minn. 553; S. C. 18 N. W. 834; 58 Fed. 529; 111 U. S. 313; S. C. 5 Sup. Ct. Rep. 433; 138 U. S. 483; S. C. 11 Sup. Ct. Rep. 464; 125 Mass. 485; 3 C. C. A. 429; S. C. 53 Fed. 61; 56 Fed. 973–980; 3 C. C. A. 280; 52 Fed. 777; 123 U. S. 727, 733; S. C. 8 Sup. Ct. Rep. 266; 139 U. S. 469; S. C. 11 Sup. Ct. Rep. 569; 145 U. S. 593–606; S. C. 12 Sup. Ct. Rep. 905; 145 U. S. 611–618; S. C. 12 Sup. Ct. Rep. 972; 35 S. W. 365; 41 S. W. 72; 36 S. W. 432; 35 S. W. 364; 31 S. W. 333; 38 S. W. 818; 72 N. W. 806; 108 Ill. 288; 24 N. E. 627, 628; 108 Ill. 288; 121 Ill. 259; 112 U. S. 377; 114 Ill. 57; 116 U. S. 647; 14 Fed. 564; 15 S. W. 442; 41 Neb. 860, 865–6; 71 Mo. 164; S. C. 5 Am. & Eng. R. Cas. 610; 52 Ill. App. 641; 31 N. E. 808; 5 N. E. 187; 63 Fed. 107; 11 C. C. A. 56; 63 Fed. 114; 11 C. C. A. 63; 50

Fed. 728; 12 Am. & Eng. R. Cas. 610; *ib.* 648; 68 Ill. App. 244.

*W. S. & F. L. McCain*, for appellee:

It was the duty of the appellant to adopt proper rules and regulations for the safety of its switching crews. 28 Am. & Eng. R. Cas. 497, note; 12 Am. & Eng. R. Cas. 235. Railway employees are fellow servants with each other only when they are working together to a common purpose, and are of the same grade, neither being entrusted with superintendence or control over their fellow employees. Sand. & H. Dig., § 6249; 63 Ark. 477; McKinney, Fellow Serv. §§ 98, 99, 103; 2 Bailey, Pers. Inj. 92–3; 65 Ark. 140.

HUGHES, J., (after stating the facts.) It is unnecessary to set out the instructions given and the one refused. We find no error in the court's action for which the case should be reversed.

The questions in the case are: 1st. Was the company guilty of negligence which caused the injury? 2d. Were Compton, the foreman, and the deceased switchman, Epple, fellow servants? 3d. Was Epple guilty of contributory negligence?

The evidence tends to show that Epple, the deceased, under Harry Nolan, foreman of the switch crew to which he belonged at the time of the injury resulting in his death, was engaged on the van or transfer track of the defendant's railway in coupling cars to be moved out by his crew, and which had been placed on said track by the crew at the other end of the track, working under the control and direction of Compton as foreman; that Compton ordered eight or ten cars put on his end of the track to be received by Nolan's crew at the other end of the track, and that these cars were sent or "kicked" down this track at a very considerable rate of speed, ran against cars standing on the track, and pushed them with great force against others in front of them; that Epple at the time was between the cars first struck and those in front, was knocked down and received injury, from which he died in about four hours. The proof tends to show that Epple at the time was

in the discharge of his duty, coupling the cars struck to those in front; that this occurred in the night time about 9:30 o'clock; that the night was dark; and that it was raining. There is no evidence that any effort was made to ascertain if the track was clear, or if anyone was on the track, nor is there any evidence that there was any means of controlling these eight or ten cars that were thus "kicked" or "shunted" down this track, upon which men were constantly engaged in receiving and moving out cars, when such work was necessary. We are of the opinion that the evidence is sufficient to support the finding that sending the cars down this track in the manner stated was negligence.

Was the deceased switchman, Epple, guilty of contributory negligence? It appears that he was in the discharge of his duty. The night was dark, and it was raining. There is no evidence that he did not look and listen for the cars "shunted" or "kicked" on the transfer track before going between the cars to couple them. He was justified in believing, which he must have believed, that cars would not be sent down the track in the manner they were sent, without warning, and without regard to whether any one might be on the other end of the track. Contributory negligence is a question of fact for the jury, and must be proved, and by their verdict the jury have said that Epple was not guilty of it, and we think the evidence supports the finding.

Were Compton and Epple fellow servants? Under the decisions before the passage of the act of 1893 (Sandels & Hill's Digest, sections 6248 and 6249) they would be held to be fellow servants, because they were working in one common employment at the same time and place, to a common purpose, that was, the switching of cars. The first section of the act of 1893 (p. 68) reads as follows: "All persons engaged in the service of any railway corporation * * * who are entrusted with * * * superintendence, control or command of other persons in the employ of such corporation, or with the authority to direct any other employee in the performance of any duty of such employee, are vice principals of such corporation, and are not fellow servants with such employee."

The second section of this act is as follows: "All persons * * * * engaged in the common service of such railway, and who * * * are working together to a common purpose, of the same grade, neither of such persons being entrusted by such corporation with any superintendence or control over their fellow employees, are fellow servants with each other." We have found no statutes of other states exactly like ours. The Texas statutes are very nearly like ours.

In the view we have taken of this statute, as applied to this case, unless Compton was of the same grade as Epple, they were not fellow servants, because the second section of the act provides that if they were of the same grade, they were fellow servants, "neither being entrusted with any superintendence and control over their fellow employees." Now it seems apparent that they were not of the same grade; for Compton was a foreman, having superintendence and control over his fellow employees, while Epple was a switchman, obeying the commands of a foreman having superintendence and control of his fellow employees. It seems clear they were not of the same grade. Again, was not Compton entrusted with superintendence and control over his fellow employees? He certainly had superintendence and control of fellow employees of the class of switchmen of which Chas. Epple, the deceased, was one. We think it would be a strained construction to say that, because Compton had no immediate control at the time over Epple, who was under the superintendence and control of Harry Nolan, his immediate foreman, that therefore he was a fellow servant of Compton. This construction would put the men of one crew without protection from the carelessness of the foreman of another crew, which crew was obeying his commands, and could not reasonably be held guilty of negligence in such a case as this. Many decisions are cited by the appellant in its brief to show that the proper construction of such an act would make the foreman and the switchman fellow-servants, and such seems to be the tendency of some of them, especially decisions cited from Texas. But we do not agree to any such a construction, and think the conclusion to which we have arrived is in consonance with reason, and a proper construction of this act. Compton.

as the representative of the company, had the superintendance and control of the crew which was ordered to and did send eight or ten cars down the transfer track, which came violently in collision with cars being coupled by the deceased in the night time while it was raining, causing the injury to the deceased, who was of a class over a crew of which class Compton had control.

We think Compton, the foreman, and Epple, the switchman, were not fellow servants, under the circumstances of the case, under the act of 1893. We think that we are in harmony with *Kansas City, F. S. & M. Ry. Co.* v. *Becker*, 63 Ark. 485, on this question.

Were the damages excessive? We find the deceased at the time of the accident was earning a salary of $60.00 per month, that he frequently sent money to aid in the support of his children, as much as ten dollars at the time, and generally at the time the board bill of one of the children was due; that at one time he sent two twenty dollar bills; that the deceased lived four hours after his injury; that he suffered pain, how much the doctor could not tell. We think the damages not excessive.

Affirmed.

---

## BROWN *v.* ALLEN.

Opinion delivered January 27, 1900.

TRESPASS—EXEMPLARY DAMAGES.—For the seizure and sale of the goods of a wife under attachment against her husband she can not recover exemplary damages if the goods were believed to belong to the husband, and there was nothing malicious in the conduct of the officer or of the attachment plaintiff, nor any excess of force used. (Page 388.)

Appeal from Lee Circuit Court.

HANCE N. HUTTON, Judge.

STATEMENT BY THE COURT.

This is an appeal prosecuted from the judgment in a suit by the appellee, Mrs. Mattie E. Allen, against the appellants.

Duncan Brown, as constable, and James P. Brown, C. H. Banks and L. Benham, his sureties, and Ben Elder and E. B. Walton. The two defendants last named were plaintiffs in an attachment suit against W. B. Allen, the husband of the plaintiff. Their attachment was sustained in said suit, and the constable, Duncan Brown, was ordered to advertise and sell the property he had seized under the same. This he did.

Soon thereafter appellant commenced this action against all the above-named defendants, claiming that the goods levied on and sold were hers, and not her husband's, and praying judgment for $118.50, as the value of the goods, and also for exemplary damages, claimed by reason of the shame, humiliation and disgrace said to have been wilfully caused to her by appellees by seizing her household goods, wantonly parading them through the streets, and then selling them.

The answer amounts to a general denial of all the allegations of the complaint. A jury trial was had.

The evidence tends to show that the property seized and sold did in fact belong to the appellant. But it also shows that the goods were seized under the belief that they were her husband's, and that there was nothing wanton or malicious in the conduct of the officers or of any of the defendants, and that no unnecessary humiliation was inflicted upon the appellant, and that there was no excess of force used. Evidence was also introduced to show the value of the goods seized. The jury returned a verdict for $118.50, as the value of the goods, and $100 as exemplary damages. Defendants appeal, assigning causes for reversal.

*Jas. P. Brown* and *John B. Vineyard*, for appellants.

For the gift from husband to wife to have been good as against existing creditors, it was necessary that the husband claim it as exempt by scheduling. 41 Ark. 249; 49 Ark. 114; 52 Ark. 547; 63 Ark. 540. It was error to exclude evidence of what the property brought at the constable's sale. 2 Suth. Dam. 376; 49 S. W. 569. The amount awarded as actual damages was excessive. 29 Ark. 453, 463; 172 U. S. 534. The sureties on the constable's bond could, at most, be held liable for only compensatory damages. 34 Ark. 707; 51

Ark. 380; Hale, Dam. 209, 213; 44 Am. Rep. 519; Shinn, Attach. §§ 190, 374, 400; 84 Ill. 511; 20 S. Car. 514; 29 S. W. 819; 31 S. W. 212; 58 Minn. 242; S. C. 59 N. W. 1012. On the general doctrine of exemplary damages, see, 11 L. R. A. 689. Malice must be shown before exemplary damages can be recovered. 30 Ark. 376; 53 Ark. 7; 41 Ark. 295; 29 Ark. 448; 39 Ark. 387; 1 Wade, Attach. § 302; 40 L. R. A. 661; 26 Conn. 355; 60 Md. 358; 35 N. Y. 297; 23 Hun, 50; 10 Pet. 80; 5 Ia. 308; 76 Me. 216; 42 Conn. 318; 18 Cal. 315; 75 Ill. 361; 33 Mich. 511; 70 Ill. 28; 11 Mich. 542; 35 Ia. 306; 54 Ia. 68; Sackett, Instructions, 329; Shinn, Attach. 377, 382; Sedg. Dam. 472. The state would have to be a party to an action on the constable's bond.

*McCulloch & McCulloch*, for appellee.

As to exempt property, there are no creditors' rights. 52 Ark. 547; *id.* 101. The objection that the suit should have been in the name of the state comes too late. 51 Ark. 205. The appellees, being the real parties in interest, could sue. Sand. & H. Dig., § 5623; 30 Ark. 69; 39 Ark. 172; 51 Ark. 205. Sureties on an official bond are liable for all acts of their principal done *colore officio*. Murfree, Off. Bonds, § 698. Exemplary damages are recoverable in such a case as this. 15 Ark. 452; 35 Ark. 492; 42 Ark. 321; 2 Thomp. Neg. 1264; 56 Ark. 603; *ib.* 51; 58 Ark. 136; 59 Ark. 215; 39 Ark. 387; 1 Suth. Dam. chap. 9; Wood's Mayne, Dam. 59; 13 How. 371; 35 S. Car. 475; 61 Mich. 445; 85 *id.* 578; 81 Ga. 468; 76 Va. 128; 23 S. W. 457; 30 S. W. 1040; 106 N. C. 494.

WOOD, J., (after stating the facts.) The evidence is somewhat voluminous, and no useful purpose will be served by setting it out. After a careful consideration of it, we are unable to agree with the attorney for appellee that "upon the facts a stronger case for exemplary damages cannot be imagined." On the contrary, we find no legally sufficient evidence to justify such damages, when the facts are measured by the rule announced by this court in *Kelly* v. *McDonald*, 39 Ark. 393: "Exemplary damages ought not to be given unless in case of intentional violation of another's right, or when a proper

act is done with an excess of force or violence, or with malicious intent to injure another in his person or property."

The charge of the court, assuming there was evidence to justify a verdict for exemplary damages, was correct; but, as we are of the opinion that there was no evidence to warrant a finding by the jury of exemplary damages, the court should have eliminated this branch of the case from their consideration. This is the only error we find in the record, and it can be cured by remittitur, if the appellee so elect. If, therefore, the appellee will remit in 30 days the amount recovered for exemplary damages, the judgment will be affirmed; otherwise, it will be reversed and remanded for new trial.

---

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

Opinion delivered January 27, 1900.

RAILROAD—LEASED TRAIN—EXCLUSION OF PASSENGER.—A railroad company which leased a train of cars to a picnic association for the purpose of carrying a party of excursionists to the picnic grounds, and gave to the association the right to designate who should ride on the train, will be liable in damages to the holder of a ticket purchased from the picnic association who was arbitrarily ejected from the train by the managers of the picnic association, although her ticket read: "This ticket will be refused, if presented by any objectionable person." (Page 394.)

Appeal from Saline Circuit Court.

ALEXANDER M. DUFFIE, Judge.

STATEMENT BY THE COURT.

The complaint charged that defendant was a common carrier, operating a railroad between Little Rock and Benton; that on the 23d day of May, 1894, she purchased a ticket from Little Rock to Benton, and entered one of defendant's passenger cars, upon one of its trains, and took a seat therein as a passenger, for the purpose of going to Benton; that, after she had taken her seat, one of the agents of defendant in charge of said

train maliciously, without cause, and against the will and protest of the plaintiff, and to her shame and mortification, compelled her to give up her ticket, and with insulting and contemptuous language, and by force, ejected her from said train at the said city of Little Rock; that upon said ticket was conspicuously printed these words: "This ticket will be refused if presented by any objectionable person;" that defendant's agents, at the time they ejected plaintiff as aforesaid, took said ticket from her, in the sight of all the other passengers, and thereby wilfully, maliciously and publicly stigmatized her as being an objectionable, unworthy and disreputable person, unfit to be in said coach. Whereby she was damaged in the sum of $50,000.

To this complaint the following answer was filed: "Comes the defendant, and files herein its answer, and for defense to said cause of action it says: "That on or about the 22d day of May, 1894, a committee from the Union Picnic Association of Little Rock applied to this defendant for the express purpose of hiring a number of cars in order to enable them to haul such persons as they might select or designate to a picnic to be given by them at the Saline river, Saline county, Ark. Such understanding was then had between said committee that the defendant agreed to hire to said committee seven cars for the sum of $200 cash, which was then and there duly paid. By said agreement, it was expressly understood that said picnic association were to have entire control of said cars, and were to designate who should go upon the same. It was further understood and agreed that the said cars should be pulled by defendant's engine in charge of defendant's engineer and fireman, and that said train should be under the care and control of defendant's conductor in the movement and operation of same, to the end that this defendant might be protected and held harmless by the careful management, running and operation of said cars. After said train had been specially hired, and the consideration therefore duly paid by the said Picnic Association of Little Rock, the said association advertised said picnic, and proceeded through its committees and agents, over whom this defendant had no authority or control, to sell their tickets to whomsoever

they chose. The said tickets were in words as follows: 'No. 765. Union Picnic. Little Rock to Benton and return. Wednesday, May 23, 1894. Under the auspices of Division 131, O. R. C.; Division 182, B. of L. E.; Lodge 45, B. of L. F.; Lodge 75, S. M. A. A.; Lodge 49, B. of R. T. Round trip tickets, 50 cents. Trains leave Argenta: 8:00 a. m. and 1 p. m. Trains leave Little Rock: 8:30 a. m. and 1:30 p. m. This ticket will be refused if presented by an objectionable person.' Upon the back of said tickets, when they were sold, was stamped the following: 'Picnic Association of R. R. Men, Little Rock and Argenta. Organized April 21, 1892. Grounds and Pavilion.' Defendant says it had no part or hand in selling said tickets; that it did not authorize the same, nor did it receive any benefit whatsoever from the selling of the same, or the proceeds thereof; but it says that the said ticket was a means adopted by the said Picnic Association whereby they chose to designate the persons who were to ride upon said cars so specifically hired and engaged by itself. Afterwards, to-wit, on the 23d day of May, 1894, this defendant, in accordance with said contract, drew up a train of cars at the Union Depot, in the city of Little Rock, for the use of said hirers, and then and there the said hirers proceeded to take charge of the same in designating the parties who were to go upon the same, and in seeing that no parties went upon the same that they did not desire to be there; and while said committee advertised the excursion, and offered the tickets for sale to whomsoever they chose, they exercised their own discretion in putting off the train any particular person whom they were unwilling to allow to remain on the train. Defendant says that neither defendant nor defendant's servants had anything to do with the loading of said cars, or the designation of who should go thereon. It did not put plaintiff onto said cars, nor did it refuse to let her ride thereon, but it says that the said Picnic Association committee, who had specially hired and paid for said train for their own especial and exclusive use, alone had the right to designate who should ride thereon. Defendant further says that it is informed that plaintiff was put off of said cars at the Union Depot by order of the said

committee, for the reason, it is informed, that said committee did not desire her to ride upon said train. Defendant further says that it knows nothing of this; that at the time it knew nothing of it; that it took no part in the same; and that defendant's conductor and officers in charge of the operation of said train knew nothing of the same, were not present, and did not know the same had taken place until the institution of this suit. Defendant further says that neither defendant, nor its servants, took up the tickets on said cars, nor assumed any control over the same, further than was necessary in operating and the safe management of said train, in seeing that it should be safely carried to and from the points of destination.

Defendant further says that there was no negligence, maliciousness or improper conduct on the part of its servants, agents or employees towards the plaintiff in this suit, and it says that if plaintiff was put off of said cars, it was done by said Picnic Association, who had specially hired said train for their own use, and who had the right to designate who should ride thereon, and that defendant is therefore in no manner responsible for the same. Defendant further says that it denies that, while hauling said train, it was a common public carrier, but that, by virtue of the agreement made between it and the Picnic Association, it was acting as a private carrier for the special purpose, under a special agreement. It denies that said train was a public passenger train, but says it was a special private excursion train, hired especially to the said Picnic Association of Little Rock. Said train did not run on schedule time, nor at the times when its regular passenger trains were run, but it says that the said train was hauled by this defendant at such times as the said association asked and designated. Defendant further says that, if the said plaintiff desired to go to Benton, she could have done so on that day, either on the early local freight train, a regular passenger train of this defendant, leaving Little Rock at 6 o'clock a. m., or she could have gone on the "Cannon Ball" train, a regular schedule passenger train leaving Little Rock at 8 a. m., or she could have gone upon the Hot Springs special passenger train, leaving Little Rock at 9:30 a. m., or on the regular noon day

passenger train leaving Little Rock at 1:45 p. m., but it said that she had no right to ride upon said excursion cars, if said parties hiring the same did not so desire. Therefore, defendant says that it is in no manner responsible for any pain or mortification suffered by plaintiff by reason of the hirers of said train electing to put her off the same, but says that said acts were the acts of those who had specially hired said train, over which this defendant had no authority or control, in the exercise of their rights to say who should ride upon their train. Wherefore defendant prays to be dismissed with all of its costs."

To this answer plaintiff demurred, upon the grounds that it did not state facts sufficient to constitute a defense. The demurrer was overruled, plaintiff saved her exceptions, and, electing to stand upon the demurrer, judgment was rendered in favor of defendant, and plaintiff appealed.

*Carmichael & Seawel*, and *W. S. & F. L. McCain*, for appellant.

A railroad company can not let or hire out its trains to third persons, so as to escape liability for the wrongful acts of such third persons to passengers. 20 S. E. 191; 30 S. W. 21; 39 S. W. 643; 17 Wall. 445; 5 Wall. 90; 19 Am. & Eng. Enc. Law, 899; 102 U. S. 451; Hutch. Carr. § 563; 21 Am. & Eng. R. R. Cas. 233, 7 *id.* 413; 26 *id.* 611; Patt. Ry. Acc. Law, 132 n.; Beach, Priv. Corp. § 336; 20 Ill. 623; 2 Am. & Eng. Enc. Law, 756; 3 S. W. 460; 9 S. W. 604; 4 S. W. 216.

*Dodge & Johnson*, for appellee.

Since the refusal of the "Picnic Association" to allow appellant to ride was without appellee's knowledge or consent, it is not liable. 27 L. J. Exch. 155; 51 Fed. 171; 34 N. Y. 9; 157 Pa. St. 103; 30 Fed. 208; 96 Ind. 360; 119 Ind. 583; 43 Ia. 276; 37 La. Ann. 705; 39 La. Ann. 649; 53 N. J. Law, 169; 58 Am. & Eng. R. Cas. 191; 32 N. Y. Stat. Rep. 381; 35 Hun, 390, Affd. in 104 N. Y. 683; 73 Hun, 562; 20 Phila. Rep. 258; 81 Tex. 273, S. C. 12 Am. & Eng. R. Cas. 175. Appellee's only obligation was for making up and running of the train, and the safety of the cars and

the protection of the passengers while operating said train of cars; and the hirer was responsible to appellant, if anyone was. 20 Ill. 623; 2 Ell. Railroads, § 473; 156 Mass. 526; 27 Ga. 539; 56 Mich. 113; 97 Mo. 521; 61 Fed. 607; 13 S. W. 693; 62 Fed. 268; 18 Am. & Eng. R. Cas. 317, 320; S. C. 88 N. C. 526; 39 N. W. 189; 3 So. 633. In this case appellee was acting as a private carrier for hire, and was not held to all of a common carrier's liabilities. 4 Ell. Railroads, § 1573; 17 Wall. 357; 13 Ore. 352; 76 Ala. 357; 26 Vt. 247; 45 Ark. 263; 47 Ark. 79.

WOOD, J., (after stating the facts.) Section 12, article 17, of the constitution provides: "All railroads which are now or may hereafter be built and operated, either in whole or in part, in this state shall be responsible for all damages to persons and property, under such regulations as may be prescribed by the general assembly." Section 6206 of Sand. & H. Digest provides: "All persons who own or operate railroads in this state are authorized and empowered to do and perform all acts and things which may be necessary to protect passengers on their cars from all acts of fraud, imposition or annoyance, which are attempted or perpetrated while said passengers are on said cars." Our laws therefore afford ample redress to passengers against railway companies for injuries such as are alleged in the complaint, whether done directly by the agents of the company, as therein alleged, or negligently suffered by them to be done by others. The complaint therefore states a cause of action. None of its allegations, setting up the specific acts constituting the tort, are denied. Appellee does not seek to jutsify them, but defends solely upon the ground that it hired the cars from which appellant was expelled to the Union Picnic Association of Little Rock, as a special private excursion train, and that all the acts of which appellant complains were the acts of the agents of such association, of which it knew nothing and for which it is not responsible. Such, in short, is the defense in this case, and it is not sufficient. Unless we indulge in some metaphysical refinements not justified by the difference in the facts of the two cases, the present case must be ruled by the principle

recently announced by this court in *Texarkana & Ft. Smith Ry. Co.* v. *Anderson*, *ante*, p. 123, where Chief Justice Bunn, speaking for the court, said: "The issue of law was thus made by the instructions given and refused as aforesaid, whether or not a railroad company can, by leasing its cars temporarily, as in this case, relieve itself from liability for carrying persons thereon beyond stations where they desire to get off, and from the duty of protecting passengers from the misconduct of one another, as in ordinary cases. A majority of the court are of the opinion that the company was liable for such injuries as might be shown to have been done, under these heads, in this case, growing out of its negligent running and control of the train." Citing *Harmon* v. *Railroad Co.*, 28 S. C. 401. The basic principle of all cases of this character, which is said by Mr. Justice Davis to be "the accepted doctrine of this country," is that "a railroad corporation cannot escape the performance of any duty or obligation imposed by its charter, or the general laws of the state, by a voluntary surrender of its road into the hands of lessees." *Railroad Co.* v. *Brown*, 17 Wall. 450; *Chesapeake & Ohio Ry. Co.* v. *Osborne*, 30 S. W. 21; *Collins* v. *Texas & P. Ry. Co.*, 39 S. W. 643. See also *White* v. *Norfolk & S. R. Co.*, 20 S. E. Rep. 191; *Skinner* v. *Railway Co.*, 5 Exch. 787, and the many authorities cited in appellant's brief.

The learned counsel for appellee say in their excellent brief: "We grant that if plaintiff had become a passenger upon this train, by the consent of the hirers, and the railway company, by its agents, servants, or employees, had assaulted her, or had ejected her from the train, or done anything else that was improper, after the train had begun its journey, there might be some grounds for saying that the answer was insufficient." That the train had not begun its journey could make no possible difference, if the relation of passenger and carrier had been established. When the railroad hired to the Picnic Association a train of cars for excursion purposes, and allowed the association the privilege of selecting its own crowd of excursionists, it (the railway) must be held to have consented to carry as passengers, and to protect as such, all to whom the association sold tickets and accepted to go on the excursion

train. "As a general rule, every one on the passenger trains of a railroad company for the purpose of carriage, with the consent, express or implied, of the company, is presumptively a passenger." 4 Elliott, Railroads, § 1578, and authorities cited; Hutch. Carriers, § 554.

The railroad had the right to hire its train for excursion purposes, and to authorize the association to say who should be passengers on the train set apart for the excursion. The association designated Cora Moore as a passenger by selling her a ticket, and permitting her to enter the excursion train, and to take her seat as a passenger. Her ticket was the evidence of a contract for carriage from Little Rock to "Benton and return" on the train hired to the Picnic Association. The relation of passenger and carrier was established as soon as the appellant entered the train, and put herself under the control of the carrier for the purpose of carriage, unless, notwithstanding this, the carrier was justified in refusing to accept her as a passenger because of the reservation in the contract: "This ticket will be refused if presented by an objectionable person." We need not pass on this phase of the case, because it is not raised by the answer. In the absence of an affirmative allegation that appellant was an objectionable person, it must be presumed that she was unobjectionable. Therefore, according to the showing made by the complaint and answer, we are of the opinion that appellant was a passenger on the occasion named, and hence entitled to all the immunities, rights and privileges of any other excursionist passenger on that train. Among these were the right to be carried "to Benton and return," according to the contract evidenced by the ticket, and, while being so carried, to be protected from fraud, imposition or annoyance, while on the cars.

The railway company, through its own agents and employees, could not arbitrarily eject any excursion passenger, after he or she had purchased a ticket from the Picnic Association, and had entered the cars for carriage. Nor could it negligently permit the committee of the Picnic Association, or any one else, to do so under such circumstances, without being liable in damages for the resultant injuries. The authorities making railroad

liable for the acts here complained of are numerous. *Railway Co.* v. *Davis*, 56 Ark: 51; Hutch. on Car. § 591, and authorities cited; 3 Wood, Railroads, p. 1675, 1863, § 363, authorities cited; 2 Fetter's Car. Pass. § 538, and authorities cited.

Reverse the judgment, with directions to sustain the demurrer to the appellee's answer.

BUNN, C. J., (dissenting.) I think the court fails to properly discriminate between things a railroad company can do and those things it cannot do, when granting special privileges to excursionists. A railroad company, in consideration of enjoying the special benefits of the state's right of eminent domain, and also under the rules governing public carriers, owes certain duties to the public, of which it cannot relieve itself by leasing its road or trains to another. Among these is the duty of affording facilities at all times, under reasonable circumstances, for carrying freight and passengers, as the demand may be made upon it. Its duty is to carry freight and passengers with all proper dispatch and safety. When these duties have been performed, the public demand has been met, and, as the road and its trains and appliances belong to the company, it may use it as it sees fit; for in such case the public has no further claims upon it.

It is not denied that a railroad company can hire its trains—the seats and passenger accommodation therein—to excursionists. Indeed, this is expressly sanctioned by statute, which allows reduction of fare in cases of excursions not allowed otherwise. This being true, it remains to ascertain what are those things pertaining to an excursion train which it can do and cannot do. It certainly can permit excursionists to fill up the cars with just such persons as they think proper to admit therein, for the principal objects of an excursion is to gather together congenial spirits for an outing. I refer now to an excursion like that under consideration, for there is another kind of excursion. Now, any rules the excursionists may choose to make by which they may select their company is within their right to make, and they alone are responsible for their effects upon others, and the railway company is not. Otherwise, special excursions are not to be

thought of; for the people will not seek recreation and the joys of social intercourse, except with those who are congenial, and the railroad companies cannot afford to contract with excursionists without being relieved of the work and responsibility of selecting the persons to be included in the company.

It is to be conceded, also, that the company cannot relieve itself of the duty of operating its trains—even excursion trains—by and through its own skilled and duly-authorized servants—persons who understand the business in their several spheres. Public policy demands that these skilled and competent persons shall operate the trains, even when loaded with excursionists traveling under special contracts, for the duty of life and property demands that this should be so. These skilled and trained employees are under the restraints incident to their employment, and are then the better suited to this class of work. Hence the rule laid down in *Texarkana & Ft. Smith Railroad Co.* v. *Anderson*, *ante*, p. 123, is the correct rule, as was the rule in *Harmon* v. *Railway Company*, 28 S. C. 401, and *Collins* v. *J. & P. Ry. Co.*, 39 S. W. 643; for in each of those cases the negligence alleged was in the operating and running the train, so as to produce the injury complained of; and in the case of *Collins* v. *Railway Company* the negligence complained of was the neglect of the conductor to protect the plaintiff from insult at the hands of her fellow passengers, a duty the conductor and his company clearly owed to the public, one which the company could not delegate to the managers of the excursionists, so as to relieve itself of the necessity of its performance. That duty is one of the police duties imposed by law upon the conductor and other trainmen, a failure to perform which renders the company liable.

Finally, the railroad company, having provided for meeting the reasonable demands of the public for the carriage of passengers, is at liberty to employ its trains in its own way, with the proviso that these trains must, as a matter of public policy, be operated and run by its own qualified servants for the protection and safety of life and property, and any negligence in this respect (that is, in running and operating the train) will render the company liable.

The appellant never became the passenger of the railroad company, because she was excluded from the coach by the lessees of the train before the company or its servants had entered upon the performance of their duties—the running and operation of the train. Until the company, through its servants, took charge of the train for the purpose of running it, the lessees had the right, under their lease, to exercise their right of selecting passengers, being also responsible to persons injured by the unlawful manner of exercising that right of selection. The railroad company undertook, and was required, only to carry such persons as the lessees might select for the excursion, and owed no duty to such as the lessees excluded before the train started.

I think the judgment of the circuit court was correct, and should be affirmed.

BATTLE, J., concurs in this dissenting opinion.

---

67 399
73 333
67 399
89 326

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

Opinion delivered January 27, 1900.

1. FINDING OF JURY—CONCLUSIVENESS.—A finding of the jury which is supported by evidence will be conclusive on appeal, though it seems to be against the preponderance of the evidence. (Page 401.)

2. RAILROAD—EJECTION OF PASSENGER.—In an action by a passenger for damages for being forcibly ejected from a depot platform by the railroad company's employees, an instruction that if defendant's employees had reasonable grounds for believing that, at the time plaintiff was ejected, he was violating the company's rule against soliciting for a hotel, the jury should find for the defendant, was properly refused if there was evidence (a) that plaintiff was ejected with unnecessary force, or (b) that plaintiff was not in fact violating the alleged rule. (Page 401.)

Appeal from Hot Springs Circuit Court.

ALEXANDER M. DUFFIE, Judge.

STATEMENT BY THE COURT.

This action was brought by Thomas H. Osborn against the St. Louis, Iron Mountain & Southern Railway Company to recover damages for injuries which he alleged were occasioned to him by being ejected from its platform and depot at Little Rock on the 6th day of August, 1894. The plaintiff testified that he had purchased a ticket and was traveling to Benton, Ark. When the train stopped at Little Rock, to permit passengers to get dinner, he stepped upon the platform on his way to the dining room of the restaurant. While on the platform he says that he spoke to another passenger, and was thereupon seized by an employee of defendant, and rudely pulled from the platform and depot. In doing so, plaintiff claims that one of his legs and ankle were injured to such an extent that he still suffers great pain therefrom. The defendant company on the trial admitted that its employees had ejected the plaintiff from the platform, but in justification thereof set up that he was violating a rule of the company forbidding persons to use its premises for the purpose of soliciting for hotels; that, although repeatedly warned of such rule, the plaintiff persisted in soliciting for his hotel at Hot Springs upon its cars and premises, and for that reason he was without unnecessary force ejected from its depot platform. On the trial the jury found in favor of plaintiff, and assessed his damages at $1,000. The circuit court rendered judgment for that sum, and the company appealed.

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

Appellant had the right to eject any one who was violating its rules by "drumming," etc. 31 Ark. 50; 18 Am. Ry. Rep. 14; Sand. & H. Dig,. § 6206. Probable cause for believing appellee guilty of such violation of the rules was sufficient to excuse appellant's conduct. This would be so if, instead of ejecting him, he had been arrested. 32 Ark. 166; 32 Ark. 763; 33 Ark. 316. Appellant's choosing to eject appellee rather than arrest him does not change this rule. The duty rested on appellant to protect its passengers from annoyance. 4 C. C. A. 221; 87 Mo. 74.

*Wood & Henderson*, for appellee.

Appellee was a passenger. 5 Am. & Eng. Enc. Law (2 Ed.), 486 *et seq.* The existence of reasonable grounds for belief, on the part of the railroad's employees, that appellee was violating the rules of the company was no justification of their wrong to appellee. 43 Ark. 529; 56 Ark. 51; 62 Ark. 254.

RIDDICK, J., (after stating the facts.) There is no doubt that the railway company had the right to prohibit soliciting for hotels upon its cars and depot platforms. (*Landigran* v. *State*, 31 Ark. 50.) But the question as to whether the plaintiff was "soliciting" at the time of his ejection was submitted to the jury, and their finding was in favor of the plaintiff. Although the finding seems to us to be against the preponderence of the evidence, still it has evidence to support it, and, being properly submitted to the jury, the decision of the jury is binding upon us. We must therefore take it as established that the plaintiff was wrongfully ejected by the employees of the company under the belief that he was violating its rules by soliciting for a hotel, when in fact he was not doing so. On this point counsel for defendant requested the circuit judge to instruct the jury as follows: "If you find from the testimony that defendant's agents and servants had reasonable or probable grounds for believing that plaintiff was soliciting for a hotel at the time of his ejection, you will find for defendant." We think the circuit judge properly refused this request. If reasonable or probable cause to believe that the plaintiff was violating its rules would justify the ejection, still under the evidence in this case the defendant might be liable on the ground that its employees used more force than was necessary. The instruction as requested would have excluded that question from the jury, and its refusal was therefore proper.

But we are of the opinion that the instruction as requested was subject to other objections; for when a passenger, without fault on his part, is ejected by a railway company from its premises for a supposed violation of its rules, it seems, from the decisions, that the company is liable for the injury occasioned, without regard to whether it exercised care or not. Thus,

where a rule of a street car company forbade its conductors from allowing intoxicated persons to ride on its cars, the company was held liable for ejecting a person afflicted with St. Vitus's dance, which produced involuntary motions resembling those of an intoxicated person, and led the conductor to believe that the passenger was intoxicated. In that case the court said: "The defendant judged at its peril as to the application of such a rule in a given case, and if it erred it would be answerable for its mistakes, or that of its servants acting under its authority. It was within the power of the conductor to have ascertained the real cause of the plaintiff's appearance, and thus to have avoided the mistake." *Regner* v. *Glens Falls, etc., R. Co.*, 74 Hun (N. Y.), 202; 1 Fetter, Car. Pass. page 821.

It is the duty of the railway company to protect its passengers from insult and injury by its servants, and, when the passenger is not himself at fault, it is no justification of an assault upon him to show that the employees of the company believed, or had reasonable grounds to believe, that he was violating its rules when in fact he was innocent. 4 Elliott on Railroads, § 1638.

We have carefully read the briefs of counsel and the transcript, but are unable to see that any ground for reversal is presented.

The judgment is therefore affirmed.

---

## HILL *v.* ST. LOUIS SOUTHWESTERN RAILROAD COMPANY.

Opinion delivered February 3, 1900.

CARRIER—SHIPMENT TO BLIND STATION—DELIVERY.—Where a car load of grain was shipped to a side-track having no agent, under a bill of lading issued by a connecting carrier which stipulated that the switching of said car "at such side track shall be and constitute a complete delivery," the delivery was complete when the car was switched at the side-track, and the ultimate carrier is not liable for any damage or loss which occurred thereafter. (Page 460.)

Appeal from Ouachita Circuit Court.

CHARLES W. SMITH, Judge.

*Smead & Powell*, for appellants.

The initial carrier could not be forced to deliver the goods beyond its own line. 64 Ark. 115; 63 Ark. 326; 39 Ark. 148; *ib.* 529; 40 Ark. 375. Hence the initial carrier's stipulation against liability beyond its own line is valid. 63 Ark. 330; 47 Ark. 103; 44 Ark. 209; 52 Ark. 30; 35 Ark. 402. If appellee had been merely an agent of the initial carrier, the exemptions in the latter's contract might apply. 50 Ark. 397; 39 Ark. 148, 154; 18 Am. & Eng. R. Cas. 590. But, as consideration to support any exemption from liability, the initial carrier would have had to do something for appellant which the law did not require of him. 57 Ark. 112, 127. The mere undertaking to convey to the end of its line and then deliver to the connecting carrier was not such consideration, and the appellee can claim no benefit from the stipulations of the initial contract. 49 N. Y. 495; 61 Pa. St. 86. The mere receipt of freight directed to a point beyond the carrier's lines does not create a special contract to carry to destination. 54 N. Y. 502; 3 Fed. 768; 9 Mo. App. 166; 6 Am. & Eng. Enc. Law (2 Ed.), 635; 23 Conn. 457, S. C. 63 Am. Dec. 143; 33 Conn. 166; 36 Minn. 396; 51 Miss. 222, S. C. 24 Am. Rep. 626; 19 S. Car. 353; 76 Tex. 195; 15 S. W. 503; 31 Fed. 247; 87 Tex. 311. The "traffic arrangement," for the division of freight collections, between appellee and the initial carrier does not make appellee a party to the contract, so as to be entitled to the exemptions of the initial carrier. 16 Am. & Eng. R. Cas. 194; 24 S. W. 362; 12 Mo. App. 479; 127 N. Y. 438; 81 Ga. 602. Receipt of freight for the whole distance, under such an arrangement, did not make the initial carrier a common carrier beyond its own line. 113 Mass. 490. The bill of lading is the only evidence of the contract with the initial carrier, and it can not be altered or varied by parol. 65 Ark. 333. The law *prima facie* fixes upon appellee the liability of a common carrier, and throws upon it the burden of showing any exceptions therefrom. 5 Am. & Eng. Enc. Law (2 Ed.), 359; 46 Ark. 244; Hutch. Carr. §§ 4, 344, 373. The liability

of a railway company continues after goods have arrived at their destination, until the consignee has had a reasonable time, after notice, to remove them. 2 Redf. Rys. 81; Story, Bailm. § 543. Before appellants could be held bound by appellee's usages as to delivery at "prepay" stations, they must be shown to have had knowledge of them. 54 Mich. 609; 63 Me. 105; 18 Am. Rep. 200; 51 *id.* 489; 50 N. Y. 666; 34 N. Y. 425; 44 N. Y. 500; 50 Barb. 289; 99 Am. Dec. 749; 54 Ga. 554; 20 Ark. 251; 52 Mo. 434; 100 U. S. 686; 33 How. 420. If personal knowledge of appellants was not shown, it was necessary to show that the usage was so universal and notorious that all are presumed to know it. 15 Gray, 82; 23 Me. 90, S. C. 39 Am. Dec. 311; 25 Am. Dec. 363; 26 Mo. 386; 31 Eng. C. L. 342; 4 Metc. (Ky.) 121; 66 N. W. 598; Hutch. Carr. §§ 342, 345.

*Jno. T. Sifford* and *Sam. H. West*, for appellee.

The stipulation in the bill of lading inured to appellee. Hutch. Carr. §§ 271, 272; 39 Ark. 158. Since the bill of lading was not made out to shipper's order, appellee was justified in delivering the goods at Ogemaw. Appellant, being told that Ogemaw was a "prepay" station, is held to have agreed to the conditions of delivery existing there, and is bound thereby. 66 Ala. 167; Elliott, Railroads, §§ 1527, 1522; Porter, Bills of Lading, § 396; Ray's Neg. Imp. Duties, Freight Carr. § 137; p. 409; 46 Ark. 222; 13 Fed. 181.

BUNN, C. J. This is a suit by the appellants here against the defendant railway company, the appellee here, for the loss of a car load of grain alleged to have been worth $250. The case was tried on an agreed statement of facts and some additional testimony, and by the court sitting as a jury. The court found for defendant, and rendered judgment accordingly, to which plaintiffs excepted, and appealed to this court.

There is a variance between the declaration and the bill of lading upon which the grain was shipped, but the plaintiff contends that the bill of lading is effectual only as between the initial carrier, which issued it, and the shippers, and that the connecting carrier carried the car under shipper's order contract, or a

common law contract, without limitation of liability. This, in fact, is the sole matter in controversy. The bill of lading upon which this car was issued by the initial carrier, the M. K. & T. Ry. Co. at Temple, Texas, and shipped by it to Texarkana, and exhibited in evidence by the plaintiff, is a through bill of lading from Temple, Texas, to Ogemaw, Arkansas, the latter being a prepay or blind station on the connecting carrier's road; that is to say, a station having no freight agent and no depot building. The bill of lading shows that the freight was paid in advance to the agent of the M. K. & T. Ry. Co. at Temple, Texas, and that the consignment was not to shipper's order, but to D. W. Hill at Ogemaw, Arkansas. The bill of lading contains limitations upon the carrier's liability, among others, the following: "It is further stipulated and agreed that the freight destined to switches or side tracks having no agent is receipted for under this contract upon conditions that freight is prepaid as an accommodation to the consignee, who hereby agrees that either the unloading of said freight, or the switching of said car containing the same at such side track, shall be and constitute a complete delivery, and that the Missouri, Kansas & Texas Railway Company shall not be liable for any loss or damage whatsoever that may occur, from any cause thereafter." It is shown in evidence that at the time there was existing between the two carriers what is known as a freight traffic arrangement. It is also shown in evidence that when the car was delivered at Texarkana by the initial carrier to the defendant, the connecting carrier, the said bill of lading was not delivered to the latter, but, in lieu thereof, a way bill was furnished, which "showed the shipper, the consignee, the destination, the route, and the conditions, and also the freight, whether prepaid or not, and the nature of the consignment." Much other evidence showing the nature of the shipment, and the customs of the roads and shippers, and circulars in relation thereto, etc., was adduced. The following is the agreed statement of facts referred to:

"We agree that the following stipulations of facts may be taken on the trial of the above cause: On July 25, 1895, the M. K. & T. Ry. Co. received for shipment one car of corn and oats from Temple, Texas, to Ogemaw, Arkansas, (the same

as Wamego, Arkansas,) and on that day issued its bill of lading therefor to Hill & Webb, consigning said car to D. W. Hill, Ogemaw, Arkansas; that the defendant, as a connecting carrier, received said car at Texarkana, Arkansas, and issued no new bill of lading.

"The defendant took said car, and in due and proper time carried it to the station of Ogemaw, a saw mill station, unincorporated, and four miles from the incorporated town of Stephens, where a station house and agent were and are maintained; and left said car on a side track in front of the business office of the saw mill company doing business at said station, adjacent (to) and near the place where freight was usually put on and off the trains, in full and public view. The said station was a small place of about one hundred and fifty inhabitants. That said car remained a short time—about a day—when J. E. Potts, the proprietor of the said saw mill, doing business at said place, without permission or authority from the defendant or plaintiffs, broke open said car, which was sealed and locked, took, unloaded, and carried away said corn and oats, and has not paid the defendant or the plaintiffs therefor, and that defendant has not paid plaintiffs therefor."

It was further shown in evidence that the car load of corn and oats was really intended for the Ogemaw Lumber Company, at Ogemaw, of which one J. E. Potts, referred to in the agreed statement of facts, was controller and manager; and that a draft on it, with said bill of lading attached, was sent to the First National Bank of Camden, for collection, but that said lumber company had not paid the same.

The trial court, in effect, found that it was the intention of all the parties, and that they so understood it, that said car was shipped under the terms of the through bill of landing, and that the delivery of the car at Ogemaw, a prepay station, on the side track, was a complete delivery; and gave judgment for defendant. There was evidence to sustain the court in its findings, and the judgment is therefore affirmed.

HUGHES and RIDDICK, JJ., not participating

67 407
f82 357

67 407
e89 410
89 411
90 314

## ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY v. HURST.

Opinion delivered February 3, 1900.

1. BILL OF LADING—STIPULATION AS TO NOTICE OF LOSS OR DAMAGE.—A stipulation in a bill of lading that the carrier shall not be responsible for loss or damage to property unless notice of such loss or damage is given to the delivering carrier within 30 hours after delivery is not unreasonable, as regards packages which may have been entirely lost; and, as to damaged packages, its reasonableness will depend upon whether sufficient time was given to discover the damage and report the loss. (Page 409.)

2. SAME—RESTRICTION OF LIABILITY—CONSIDERATION.—Where a bill of lading is based upon a valuable consideration, there is no presumption that a restriction of the common-law liability of a common carrier, contained therein, is not based upon a good and sufficient consideration. (Page 410.)

Appeal from Crawford Circuit Court.

JEPHTHA H. EVANS, Judge.

*L. F. Parker* and *B. R. Davidson*, for appellant.

The bill of lading was conclusive evidence of the contract between the parties, and the shipper was bound by its terms. 50 Ark. 397; 32 Ark. 669; Hutch. Carr. § 126; 74 Mo. 125; 136 Mo. 189; 46 Ark. 236. The contract entered into was a reasonable one, and the notice of loss a condition precedent to the right to sue. 16 U. C. C. P. 76; 76 Mo. 514; 20 Mo. App. 445; 18 Mo. App. 577; 16 Ind. Sup. Ct. Rep. 543; 23 Am. & Eng. R. Cas. 684; 16 *ib.* 259; 35 *ib.* 678; 111 Ill. 351; 127 N. Y. 430. The burden was on the plaintiff to show that the contract was not binding, or that he had complied therewith. 39 Ark. 523; 40 Ark. 375; 44 Ark. 208; 52 Ark. 26. Consideration for the stipulations of the bill of lading is presumed. 36 Ill. App. 140.

*Chew & Fitzhugh*, for appellee.

The facts as to the stipulation for notice being undisputed, their reasonableness was for the court to decide. 54 Ark. 221; 17 Mo. App. 257; 1 Ell. Railroads, § 202. As a matter of

law, the stipulation was unreasonable and void. 11 Cush. 155; 49 Am. & Eng. R. Cas. 98; 9 Baxt. 188; 19 J. & S. 196; 62 Ark. 106. There must be consideration for concessions or stipulations in a bill of lading as to a carrier's liability. 4 Ell. Rys. §§ 1504, 1510; 57 Ark. 112; L. R. A. 508. The carrier to avoid liability must prove the contract limiting liability, and that the loss was an excepted one. 46 Ark. 236.

BATTLE, J. In the complaint in this action it is alleged that the defendant, St. Louis & San Francisco Railroad Company, received from the plaintiff, Jesse Hurst, and agreed to carry ten boxes of household goods and other property from the town of Talahini, in the Indian Territory, and deliver them to the plaintiff at the town of Mountainburg, in this state; "that the defendant carelessly and negligently lost one box, of the value of $125, and permitted other goods to be damaged in the sum of $125, by allowing the same to become wet, and by breaking, scarring and otherwise injuring the goods;" and for such damages the plaintiff asked for a judgment for $250.

The defendant answered the complaint, and denied the loss of the box, and that the other goods were damaged; and alleged that, by the terms of the contract of shipment of said boxes and other property, it was agreed, by and between the plaintiff and defendant, that the railroad company should not be "responsible for loss or damage to property unless notice of said loss or damage" was "given to the delivering carrier within thirty hours after delivery;" and that no such notice had been given.

The evidence adduced at the trial proved that the defendant received the ten boxes and other property from the plaintiff for shipment from Talahini, in the Indian Territory, to Mountainburg, in this state, and agreed to deliver the same to the defendant at the latter place; and that a bill of lading, in which the contract of shipment was contained, was executed by the defendant to the plaintiff. In the bill of lading is the following stipulation: "No carrier shall be responsible for loss or damage to property unless notice of such loss or damage is given to the delivering carrier within thirty hours after delivery." Evidence was adduced tending to prove that all the property shipped, except one box of goods, was delivered to the

defendant at Mountainburg; that one of the boxes was lost, and the other property was damaged; and that no notice of such loss or damage was given to the defendant within thirty hours after the property received was delivered. Evidence was also adduced tending to prove that none of the property was lost or damaged, and that all of it was delivered to the plaintiff according to the contract.

Upon this evidence the court instructed the jury, over the objections of the defendant, as follows: "If the goods of plaintiff, or any of them, were lost or damaged by want of ordinary care on the part of the defendant, while in its possession, then defendant is liable for such loss or damage. If you find for plaintiff, you will assess his damage at the value of the goods lost, and the actual damage to those damaged but not lost, if you find that any goods of his were lost or damaged as aforesaid."

And the court refused to give, at the request of the defendant, the following instructions:

"If you find that under the terms of the bill of lading it was agreed that no carrier should be responsible for loss or damage to property, unless notice of such loss or damage was given to the delivering carrier within thirty hours after the delivery of the goods, and that no such notice was given, you will find for the defendant.

"If you find that by the terms of the bill of lading notice should have been given to the defendant railway company of any loss or damage to the property within thirty hours after the delivery of the property; that plaintiff could reasonably have given such notice within thirty hours after the delivery, but did not do so,—then you will find for the defendant."

The jury returned a verdict in favor of the plaintiff for $40. Judgment was rendered accordingly, and the defendant appealed.

In *Kansas & Arkansas Valley Railroad Company* v. *Ayers*, 63 Ark. 331, a contract for the shipment of live stock, which made it "a condition precedent to the recovery of damages to such stock that, before such stock is mingled with other stock, and within one day after delivery of the stock at destination,

the shipper shall give to the carrier notice in writing of his intention to claim damages," was held to be reasonable. In this case so much of the contract as required notice of loss to be given within thirty hours after delivery was certainly reasonable. The remainder of the contract was reasonable if it allowed the shipper sufficient time, with the use of reasonable diligence, to discover the damage and give the notice; otherwise, it was unreasonable. But the trial court ignored the contract as to notice, and virtually instructed the jury to return a verdict in favor of the plaintiff for the value of the goods which were lost, if they found any were lost, notwithstanding it appeared that no notice was given within thirty hours after the delivery of the goods which were received by the shipper. The right to recover the value of the box of goods which was alleged to have been lost, the loss being shown, depended entirely upon the giving of the notice within the time stipulated. Under the contract of the parties and the issues in the case, it was not sufficient to find that the box was lost, to render the railroad company liable to the shipper for its value, but it was also necessary to find that the notice was given according to the contract. The instructing the jury to return a verdict in favor of the plaintiff for the value of the box of goods, if they found it was lost, was virtually telling them to return such verdict notwithstanding they should find that the notice which the shipper agreed to give was not given. This was a fatal defect in the instruction, which was not cured by any other instruction.

The entire contract of shipment was based upon a valuable consideration. The evidence does not show that it was not sufficient to sustain every part of the contract, and we will not presume that it was not. *York Company* v. *Central Railroad*, 3 Wall. 107; *McMillan* v. *Michigan, etc. R. Co.*, 16 Mich. 79.

Reversed and remanded for a new trial.

RIDDICK, J., did not sit in this case.

67 411
d71 393
67 411
76 450
67 411
d79 199
81 261

# WOOLFOLK v. BUCKNER.

Opinion delivered February 3, 1900.

STATUTE OF LIMITATIONS—TAX LANDS.—A purchaser of land under a void tax title will acquire title, under the two years' statute of limitation (Sand. & H. Dig., § 4819), only to so much of the land as he has held in his actual and adverse possession for the requisite period; the constructive possession of so much of the land as is unoccupied being in the holder of the legal title. (Page 412.)

Appeal from Chicot Circuit Court.

MARCUS L. HAWKINS, Judge.

*D. H. Reynolds* and *Jno. B. Jones*, for appellant.

Appellant has the rightful tittle to the land in controversy, and appellee's tax-title is void. 60 Ark. 163. Appellee had no constructive possession of the land. Tied. Real Prop. § 696; 57 Ark. 527; 60 Ark. 163. Disseizin, by election of the owner to so treat it for the purpose of an ejectment suit, does not create such an adverse possession as will ripen to good title. Tied. Real Prop. §§ 698, 695, 693.

*Jno. C. Connerly* and *R. A. Buckner*, for appellee.

A void tax deed, coupled with actual possession for two years, becomes a good title by limitation.

HUGHES, J. This suit was brought by appellant to recover certain lands described in his complaint. There was judgment for the appellee, and the judgment was reversed, and, upon a retrial of the cause in the court below, there was judgment for appellee again, and the case is here now on a second appeal. The title to the lands was originally in the appellant, and he had possession. The appellee claims under a void tax title and two years' adverse possession, relying upon section 4475 of Mansfield's Digest (Sand. & H. Dig., § 4819), and former decisions of this court holding that two years' adverse

possession under a void tax sale will bar recovery by the former owner.

On the trial the court announced, in effect, in its instructions to the jury, that the occupation by the appellee of a part of the lands, under his tax deed, gave him possession of the whole of the lands described in his tax deed, except such as were actually occupied by the owner of the original title. This was error for which the cause must be reversed.

The appellant was the owner of the original title. As to this there is no dispute. The appellee claimed under a tax title, which on the former appeal in this cause was held to be void. *Woolfork* v. *Buckner*, 60 Ark. 163. In this case in 60 Ark. 163, this court said: "The rightful owner is deemed to be in possession until he is ousted or disseized. Possession follows the title, in the absence of any actual possession adverse to it. * * * There is only one way in which he [the owner] can be dispossessed or disseized by an illegal tax sale, and that is by actual adverse possession." Seizin and possession are treated as synonymous, meaning that possession which is held under claim of title. There cannot, however, be more than one seizin, and when therefore two persons, one holding the legal title, and the other claiming under a void deed, are in actual possession, he has the seizin who can show good title. Tiedeman on Real Property, §§ 693, 695 and 698.

If the original owner of the legal title was in constructive possession because he had the legal title, how could the claimant under the void tax title have the constructive possession at the same time? To so hold would be to give to possession under a void tax title more legal effect than to possession under a valid legal title—to give to the mere shadow more force than to the legal title. This cannot be. It would amount to an absurdity.

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

67 413
f75 288
f77 529
67 413
78 412
f81 117
e81 246

# MYERS v. HAWKINS.

Opinion delivered February 3, 1900.

1. INJUNCTION—TRESPASS—CUTTING TIMBER.—Injunction will not lie to prevent a trespasser from cutting timber where there was no proof of irreparable injury to the freehold nor of defendant's insolvency. (Page 414.)

2. ST. FRANCIS LEVEE DISTRICT—SALE OF TIMBER ON DONATED LAND.—Under acts 1893, p. 173, § 1, power was conferred on the St. Francis Levee District to sell the land donated to the district by the state, but a sale by it of the timber, separate and apart from the land, was unauthorized and void, and could not be ratified by the district. Hence one who has purchased from the Levee District land so donated by the state may maintain ejectment for possession of the land, and replevin or trover for timber cut therefrom, against one who had purchased the standing timber from the district or its agent. (Page 415.)

Appeal from St. Francis Chancery Court.

EDWARD D. ROBERTSON, Chancellor.

STATEMENT BY THE COURT.

This is an action by appellants to perpetually enjoin the appellee from cutting, removing and destroying timber on certain lands. Appellants claim that they as a firm are the owners of the lands, having purchased same from Jno. B. Driver, as President of the Board of Directors of the St. Francis Levee District, by deed dated 9th day of September, 1899. They set up that the defendant claims title to the oak timber standing on said land by a pretended conveyance from Peterson Jackson as agent for the St. Francis Levee District; that said Jackson was not authorized to sell or convey said timber, or any part thereof, by the Board of Directors of the St. Francis Levee District, nor was he empowered by the president of said board or by resolution of said board or by any officer or person authorized by said board to so empower him. And the appellants allege that the conveyance from Peterson Jackson to appellee is a nullity. They further state that the defendant

has a large number of hands employed to cut the timber on the lands described in the complaint, and teams on ground to haul the same, and that they are daily and at present so cutting, and threaten to continue to so cut and destroy, said timber. They further state that, unless the defendant (appellee) is restrained from further cutting, removing and destroying said timber at once, they will suffer irreparable loss; that the timber constitutes a material part of the value of said land, and, if the plaintiff is deprived thereof, his land will be greatly reduced in value. The prayer was for a temporary restraining order, and for perpetual injunction on final hearing.

The answer set up the ownership of the timber by virtue of sale from the Board of Levee Directors, through its agent, Peterson Jackson, prior to the deed of plaintiffs; denied that Peterson Jackson had no authority to make the sale, and alleged that, if true that there was no formal order or resolution of the Board of Directors authorizing Jackson to make sale of the timber, still the Board had held him out to the public as its agent to make such sales, and had for a number of years ratified sales of timber made by him by accepting the proceeds thereof, and had never repudiated such sales, and that the defendant bought, knowing these facts and relying upon the authority of the said agent thus held out to the public. A temporary restraining order was granted, and on the final hearing same was dissolved, and the plaintiff's complaint dismissed for want of equity. Much proof was taken pro and con, concerning the authority of Peterson Jackson to make sale of the timber in question, and the ratification or non-ratification of sales of timber by the said Jackson, and of the particular sales in question, all of which, in the view we take of the case, it is unnecessary to set out.

*S. H. Mann* and *R. J. Williams*, for appellant.

*Norton & Prewett*, for appellee.

WOOD, J., (after stating the facts.) The complaint alleges that plaintiffs will suffer irreparable loss from the acts complained of, but there is nothing in the proof to show that the alleged trespass or trespasses of the defendant tended to

the irreparable injury of the property—nothing to show that these acts rendered the freehold less susceptible of enjoyment, or that the trespasses were of a nature to constitute a nuisance. There was no allegation or proof of the insolvency of the defendant—nothing in fact in the complaint or proof to show that the plaintiff did not and do not have a complete and adequate remedy at law. In *Ellsworth* v. *Hale*, 33 Ark. 637, this court said: "The distinction is obvious between such continued acts as render the *corpus* of the freehold less fitting for enjoyment,—such as turning water upon it, obstructing the light, or infecting the air,—and mere acts of aggression and injury,—such as pulling down fences and the like. In the former class of cases there arises a nuisance which may be enjoined. In the latter there are mere trespasses, which, however often repeated, may be each time remedied by action." The injury here complained of, as alleged and proved, belongs to the latter class. See *Coulson* v. *White*, 3 Atk. 21; *Hatcher* v. *Hampton*, 7 Geo. 48,—cited by Justice Eakin in case *supra*.

Moreover, it is clear that the appellee has no title whatever to the timber in question. The Board of Directors of the St. Francis Levee District had no power to authorize the sale of timber on lands belonging to said district. The statute provides: "The said Levee District may sell said lands for the minimum prices of $2.50, $1.50 and fifty cents per acre as to grade, * * * * and the treasurer of the levee board of said district, upon the receipt of payment of any part or parcel of said lands, shall certify same to the president of said board, who shall execute a deed in the name of said corporation to the purchaser of said lands." Acts 1893, p. 173, § 1. The express power here conferred upon the district is to sell the land, but there is no power granted to sell the timber, separate and apart from the land. It is not pretended that the board, acting as such, conferred upon Peterson Jackson the authority to sell timber. It is only claimed that the district, having received the proceeds of sales of timber made by Peterson Jackson, is estopped to deny his authority to make such sales, upon the doctrine of ratification. But even if the board had expressly authorized such sales, such act would have been *ultra*

*vires* and utterly void. There can be no ratification of an act which was beyond the power of the board to perform. *Newport* v. *Railway Co.*, 58 Ark. 270; *Carson* v. *St. Francis Levee District*, 59 Ark. 513.

The board is authorized to sell the lands belonging to the district. The St. Francis Levee District, by a regular conveyance in due form, sold the lands in controversy to a firm of which appellants were the members, thereby conferring upon them the legal title to the lands. As the firm of appellants has the legal title, their remedy at law is adequate and complete. They can sue in ejectment for possession of the land, recover the timber already cut, and that may be cut, in replevin, if it can be found, and, in case the timber already cut has been removed and cannot be found, they can recover its value; for it does not appear that appellee is insolvent.

We see no warrant for the interposition of a court of chancery, and the decree of the chancery court of St. Francis county is therefore affirmed.

BUNN. C. J., dissenting.

---

## LACKEY *v.* STATE.

67 416
70 343

67 416
77 476

67 416
83 195

67 416
80 350
f81 591

Opinion delivered February 3, 1900.

1. JURY IN CRIMINAL CASE—SELECTION.—In selecting a jury in a criminal case, the statutes (Sand. & H. Dig., §§ 2193, 2213), contemplate that each juror shall be examined touching his qualifications, first by the state and then by the defendant, and, after such examination is completed, if the juror is found by the court to be competent, the state may challenge him peremptorily or accept him; if accepted by the state, the defendant may challenge him peremptorily or accept him. (Page 418.)

2. EVIDENCE—EXCLUSION OF, NOT PREJUDICIAL WHEN.—The exclusion of evidence offered by the defendant in a murder trial tending to rebut the state's theory that defendant shot deceased from ambush, and consequently that he was guilty of murder in the first degree, is without prejudice if the jury found him guilty of murder in the second degree. (Page 419.)

3. INSTRUCTION—REASONABLE DOUBT.—If the state relies upon circumstantial evidence to convict, it is not necessary that each circumstance relied upon be proved beyond a reasonable doubt; the test being whether, upon the testimony in the whole case, there is a reasonable doubt of the defendant's guilt. (Page 420.)

4. SAME—INCOMPLETENESS.—If the defendant wishes the trial judge to instruct on any particular point not covered by his charge, he should ask an instruction covering the same, as it is not the duty of the court to give the whole law of the case, unless asked to do so. (Page 421.)

Appeal from Baxter Circuit Court.

JNO. B MCCALEB, Judge.

*J. C. South*, for appellant.

It was error to refuse to allow appellant to show to what extent the gun used would "scatter" at the ranges contended for by the state and defendants respectively. The evidence was relevant. 1 Whart. Cr. Ev. §§ 20, 21; 42 Ark. 554; 29 Ark. 386. Where the state relies upon circumstantial evidence, each material circumstance must be proved beyond a reasonable doubt. 59 Ark. 426, 427. The instructions were not full enough. 9 S. W. 737; 10 S. W. 210; Wilson's Cr. Forms, No. 714. It was error to require defendants to examine jurors on the *voir dire*, before the state had exhausted her challenges to each particular juror. Sand. & H. Dig., § 2213.

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

The court instructed the jury correctly upon the law of circumstantial evidence. 34 Ark. 754; 30 Ark. 328. There was no error in the impaneling of the jury.

RIDDICK, J. This is an appeal from a judgment of conviction for murder. On the 19th day of August, 1899, Thomas Hamilton was shot and killed near his home in Baxter county. He had gone from his house to a spring, riding one horse and leading two others, for the purpose of watering them. Shortly afterwards his wife heard the report of three gun shots fired in the direction of the spring. Hamilton had previously had a difficulty with Milton Lackey, one of the defendants, and Milton had made threats against him. These threats had been

communicated to Hamilton and his wife, and when she heard the sudden firing in the direction of the spring she at once surmised that her husband had been shot. She immediately ran towards the spring, screaming as she went. On the way she met a neighbor, to whom she told her fears, and he returned with her. They found Hamilton dead. He had been shot twice, once in front and a second time in the back, the last shot being fired at such close range that his clothing caught fire, and was burning when they found him. The defendants, who were brothers, were suspected, and were afterwards arrested and indicted for murder in the first degree. On the trial they admitted the killing, and admitted that they had fired all three of the shots the reports of which were heard, but claimed that they had acted in self defense. They were found guilty of murder in the second degree, and sentenced to five years in the penitentiary, and the following questions are presented by their appeal.

1. In selecting the jury, the trial judge ruled that, when an examination of the persons summoned to serve as jurors concerning their qualifications was desired, it should be made in the following order: first by the state, and then by the defendant. After the examination was completed, if the juror was found by the court to be competent, the state was then required to accept or peremptorily challenge him; and, if accepted by the state, the defendant was then required to accept or challenge. The defendant excepted to this method of selecting the jury, and his counsel now insist that the state should have been required to examine the juror, and then to exhaust her challenges, both peremptory and for cause, before passing him to defendant for examination. But a consideration of section 2193, Sand. & H. Digest, clearly shows that the contention of counsel for defendant is not sound, for this section requires that the court shall pass on the competency of the juror to serve before either party is called upon to accept him or to reject him by peremptory challenge. It would be unreasonable to require the state to exercise its right of peremptory challenge before the court had finally determined that the juror was competent, and the court could not determine that he was competent without

allowing the defendant to examine him touching his qualifications to serve. The ruling of the trial judge on this point was strictly in accord with the section above referred to, and undoubtedly correct. There may be some apparent conflict between this section and section 2213, Sand. & H. Dig., but, when read together, we think it is clear they mean that the state must exhaust her challenges for cause before passing the juror to the defendant for that purpose, and that, when the court has decided the juror to be competent, the state must first be called upon to accept or challenge the juror, and must accept before the defendant can be called on for that purpose.

2. The evidence showed that the shooting was done with a shot gun loaded with BB shot, and that the gun was owned by one Dilbeck. The wounds on the body of Hamilton showed that the first shot was fired at some distance away, and from the front of deceased, the shot wounds being scattered from the neck to the ankle. The last shot was fired in the back at close range, and resulted in almost instant death. During the trial the defendants offered to show by Dilbeck that since the killing he had tested the gun with BB shot, and that at the distance of fifty-nine feet it scattered about fifteen inches, and at forty yards it scattered shot over a space of about four feet in diameter. We agree with counsel for defendant that this evidence was competent, and under some circumstances might have been material, as tending to throw light on the position of the parties at the time of the shooting. Counsel say that they offered it to corroborate a statement of defendant Thomas Lackey that at the time he fired the first shot he was thirty-five or forty yards from Hamilton, and also to rebut the contention of the state that the first shot was fired from ambush, while defendants lay concealed, and only 59 feet from Hamilton. But we have carefully examined the record, and it does not show that Lackey made any statement as to how far he was from Hamilton at the time he fired the first shot. Nor is there anything in the record to support the contention of counsel that the state relied on the theory that the first shot was fired by defendant when only 59 feet from Hamilton. This being so, we do not see that the evidence of . ilbeck was material, or could have in anyway affected the

finding of the jury. But, even if the record contained the facts set forth by counsel, still the only object of this testimony of Dilbeck was to rebut evidence on the part of the state tending to show that defendants lay in wait for Hamilton, and fired from ambush, and were therefore guilty of murder in the first degree. But the verdict of murder in the second degree shows that the jury disregarded such evidence, and based their verdict on the theory that defendants were not lying in wait; and so in either case no prejudice resulted to defendants by the exclusion of this evidence, and no cause for reversal is shown.

3. The presiding judge, in his charge to the jury, told them that, before they "would be authorized to find the defendants guilty on circumstantial evidence alone, it should be of such a character as to exclude every reasonable hypothesis other than that the defendants are guilty." Counsel for defendants thereupon requested that he make the following addition to such instruction: "If the state relies on circumstantial evidence to prove any material allegation in the indictment, each circumstance relied on must be proved beyond a reasonable doubt." The circuit judge we think properly refused this request. The doctrine of reasonable doubt applies to the general issue of guilty or not guilty; but it does not apply to each item of testimony or to each circumstance tending to show the guilt of the defendant. It would in many cases be difficult to convict the guilty if the law forbade the jury to consider any circumstance or statement of fact not established beyond a reasonable doubt. Such a rule would be difficult of application, would embarrass the prosecution of criminals, and tend to confuse and mislead the jury. We did not intend to establish such a rule in *Gill* v. *State*, 59 Ark. 422, for the question was not in that case before us for decision. The test question under our statute is whether on the whole case, after all the evidence has been considered by the jury, they still entertain a reasonable doubt of the defendant's guilt. If they do, he should be acquitted. Sand. & H. Dig., § 2233. And this seems to be the rule generally approved by the court of other states. *Keating* v. *People*, 160 Ill. 480; *Bressler* v. *People*, 117 Ill. 422; *Davis* v. *People*,

114 Ill. 86; *Murphy* v. *State*, 108 Ala. 10; *State* v. *Schoenwald*, 31 Mo. 147; *Barr* v. *State*, 10 Tex. Appeals, 507; *Morgan* v. *State*, 71 N. W. (Neb.) 788; Underhill on Crim. Evidence, 21; Gillett's Indirect and Col. Evidence, § 120.

The instruction given by the circuit judge on this point was in fact more favorable than the defendant had the right to demand, for this prosecution was not based on circumstantial evidence alone. The defendants admitted the killing, and, that being established, the burden of proving circumstances in justification of the act devolved on them. Sand. & H. Dig., § 1643. We are therefore of the opinion that if the court committed any error in its instruction on this point, it was in favor of, and not against, the defendants.

4. In conclusion, counsel for defendants say that the charge of the circuit judge was defective and incomplete in other respects, and contend that it was the duty of the court to give the whole law of the case to the jury, whether asked to do so or not. In support of this contention, they cite decisions of the courts of Texas, but those cases rest upon the peculiar statute of that state (2 Thompson on Trials, § 2340.) So far as we know, no other state enforces such a rule. In this state it has been often held that if a party wishes the trial judge to instruct on any particular point not covered by his charge, he should ask an instruction covering such point. If he sits silent, and makes no effort to remedy the defect, he has no legal ground of complaint.

The facts in this case, as they appear in the record, make out, we think, a strong case against the defendants, and the charge of the trial judge was correct, and we find no legal ground for disturbing the judgment rendered against them. It is therefore affirmed.

67 422
f81 337
67 422
90 349

## STATE v. MULLINS.

Opinion delivered February 3, 1900.

WINE—UNLAWFUL SALE—NEGATIVING EXCEPTIONS.—An indictment which alleges that accused on a day named unlawfully sold wine in a certain township and county "when and where the majority of the votes cast at the last general election voted against the sale of wine," without alleging the quantity sold, alleges the commission of a public offense, under Sand. & H. Dig., § 4851, as, if accused, being a manufacturer of wine, sold wine in original packages of not less than five gallons (under Sand. & H. Dig., § 4851), or if he sold wine made from grapes or berries grown by him in quantities not less than one-fifth of a gallon (under act March 29, 1899), either would be matter of defense. (Page .425)

Appeal from Garland Circuit Court.

ALEXANDER M. DUFFIE, Judge.

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

Section 1 of the act of 1897 is not repealed by section 1 of the act of 1899.

WOOD, J. Appellee was indicted at the September term of the Garland circuit court for violating the wine law. The indictment, omitting the caption, is as follows: "The grand jury of Garland county, in the name of and by the authority of the State of Arkansas, accuse Randolph Mullins of the crime of violating the wine law, committed as follows, to-wit: The said Randolph Mullins, in the county and state aforesaid, on the 12th day of August, 1899, did unlawfully sell wine in the township of Lincoln and in said county, when and where the majority of the votes cast at the last general election voted against the sale of wine, against the peace and dignity of the State of Arkansas."

Appellee demurred to the indictment upon the following grounds: "First. Because it does not state facts sufficient to constitute a public offense. Second. Because it does not state

that the people of Lincoln township in Garland county had petitioned the county court of said county for an order prohibiting the sale of native wine therein, and that an order prohibiting such sale had been made by said court. Third. Because the indictment does not allege the quantity of wine sold."

The court sustains the demurrer, and the state appeals from the judgment discharging the defendant.

Section 4867, Sand. & H. Dig., is as follows: "At each general election for state officers there shall be submitted to the qualified electors of each county the question as to whether license shall or shall not be granted by the county court of such county for the sale of alcohol, or of spirituous, vinous, ardent, malt or fermented liquors, or any compound or preparation thereof, commonly called tonics, bitters or medicated liquors, in any quantity or for any purpose, within such county, for the two years commencing on the first of January next ensuing. In voting upon said question, the electors shall have printed or written upon their ballots 'For license' or 'Against license.' Provided, this section shall not apply to persons engaged in the manufacture of brandies or liquors who sell them in the original packages only."

An act entitled, "An act to regulate the sale of wine," approved June 26, 1897, (so far as is necessary to set it out) is as follows: Section 1. At the general election when the vote is taken 'For license' or 'Against license,' the sale of wine shall not be affected by that vote, but a separate vote 'For the sale of wine' or 'Against the sale of wine' shall be taken in the same manner as the vote on license.

"Section 2. When the county court is petitioned to prohibit the sale of liquors under the three mile law, the petition may specify all kinds of liquors as now provided by law, or may specify wine as the only liquor to be prohibited, or may except wine from the petition.

"Section 3. If it shall appear that the people of any county, township or ward of a city, or if any 'three mile district' under the operation of present laws, as modified by the two preceding sections, are not opposed to the sale of wine, and if there be no provisions in special acts or orders of courts for-

bidding the sale of wine, then it shall be lawful for any person who grows or raises grapes or berries to make wine thereof and without license sell the same in any quantities not less than one-fifth of a gallon anywhere in the state, except in counties, townships or wards of cities, or three mile districts, or under districts under special acts where the people have voted or petitioned or secured special laws against the sale of wine.

"Section 4. All wine sold in the state shall, before sale, be labeled so as to designate their qualities. Nothing but pure fermented juice of the grape or berry shall be labeled 'Natural Wine.' Wine to which sugar has been added, to insure its keeping qualities, shall be labeled 'Sugared Wine.' "

An act entitled "An act to regulate the sale of native wine, and other purposes," approved March 29, 1899, provides:

"Section 1. Any person who grows or raises grapes or berries may make wine thereof and sell the same in quantities not less than one-fifth of a gallon, or in sealed bottles, anywhere in the state without license when the same has been properly labeled, as provided for in section two (2) of this act; provided, that the people shall have the right to petition the county court to prohibit the sale of native wine as now provided by law, but native wine shall not be included under section 4877 of Sandels & Hill's Digest, unless by special petition against wine; *provided further*, that the growers of wine, as above mentioned, shall have the right to sell the same in original packages of not less than five gallons, as is now granted to manufacturers and distillers of whisky and brandy, under section 4851, Sandels & Hill's Digest.

"Section 2. All wine sold in this state shall, before sale, be labeled so as truly to designate its kind and quality. Nothing but the pure fermented juice of the grape or berry shall be labeled 'Natural Wine.' Wine to which sugar has been added before fermentation shall be labeled 'Sugared Wine.' The label shall also state if the wine be sweetened or unsweetened.

"Section 3. It shall be unlawful for any one to sell wine containing poisonous or injurious ingredients, or to sell any wine to which alcohol has been added. If any wine shall con-

tain more than 17 per cent. of alcohol, it shall be final and conclusive proof that alcohol has been added to the same."

Then follow the penalty and other provisions.

Construing the above statutes with reference to the sale of wine, we reach the following conclusions:

First. That, since the passage of the act of 1897, at each general election for state officers there shall be submitted to the qualified electors of each county the question as to whether license shall or shall not be granted "for the sale of wine" or "against the sale of wine." The vote on such question is to be taken in the same manner as the law prescribes for taking the vote on license for the sale of other liquors. There must be a separate vote "for the sale of wine" or "against the sale of wine." If a majority of the votes upon the question in the county be "for the sale of wine," and likewise a majority of those voting upon the question in any township or ward of a city be cast "for the sale of wine," then, but not until then, shall it be lawful for the county court to grant licenses for the sale of wine in such townships or wards.

Second. Those who grow or raise grapes or berries may make wine thereof, and sell the same in original packages of not less than five gallons, notwithstanding the majority of the votes in the county, township or ward of a city where such original packages are sold may be "against the sale of wine."

Third. Section 1 of the act of 1899 refers solely to native wine, or wine made by those who raise or grow the grapes or berries from which the wine is made.

It follows that the demurrer should have been overruled. The indictment charged the commission of a public offense, under section 4851 of Sandels & Hill's Digest. It was not essential that the indictment specify the quantity of the wine sold nor the price. If the appellee sold native wine in quantities not less than one-fifth of a gallon, or sold wine in original packages of not less than five gallons, these were exceptions that he could set up by way of defense. They were enactments subsequent to the statutes prohibiting the sale of wine. Crawford's Digest, and cases cited under title, CRIMINAL LAW, VI, g, "Negations of Defenses and Exceptions." Reversed and remanded with directions to overrule the demurrer.

67 426
78 351

## BANK OF MALVERN v. BURTON.

Opinion delivered February 10, 1900.

1. USURY—RENEWAL NOTE.—Where the note sued on was the last of a series of usurious notes given in renewal of a note untainted with usury, plaintiff was entitled to amend the complaint so as to recover on the original note. (Page 429.)

2. PLEADING—AMENDMENT TO CONFORM TO PROOF.—Where no objection was taken to the admission of evidence that the note sued on was given in renewal of a valid note, the complaint was properly treated by the trial court as amended to conform to the proof. (Page 429.)

Appeal from Hot Springs Circuit Court.

ALEXANDER M. DUFFIE, Judge.

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

It was error to strike appellant's reply from the files. 44 S. W. 393; 99 N. Car. 107. The usury, if any, in the renewal notes did not affect the consideration, which was free from usury. Hence the pleadings should have been considered amended by the proof, and judgment given for the original debt. 29 Ark. 323; 42 Ark. 57; 55 Ark. 143; 56 Ark. 334; 35 Ark. 217; 98 N. Car, 107; 27 Am. & Eng. Enc. Law, 946–7.

*Jesse B. Moore*, for appellee.

The court was correct in sustaining the motion to strike. 33 Ark. 56, 593; 44 Ark. 293; 48 Ark. 238. Since the first note was usurious and void, the debt is destroyed. 53 Ark. 271; 56 Ark. 143, 146. The court below had the right to disregard incompetent and irrelevant evidence, and it was its duty to do so. 42 Ark. 310; 4 Ark. 251. It was discretionary with the court to treat the complaint as amended or not. 22 Ark. 164; 23 Ark. 735; 54 Ark. 444. The evidence as to the debt was irrelevant, under the pleading. 46 Ark. 96.

BATTLE, J. The Bank of Malvern sued J. W. Burton and William Kilpatrick, in the Hot Springs circuit court, upon a

note executed by them to it for the sum of $349.50, bearing date the 12th day of May, 1896, and due ninety days after date. The defendants answered, and pleaded usury. The plaintiff filed a reply, which, on motion of defendants, was stricken from the files of the court. As it was not restored to record by bill of exceptions, it is no longer in the case.

The cause, both parties consenting, was submitted to the court sitting as a jury.

J. W. Burton testified as follows on his own behalf: "I am one of the defendants in the above-entitled cause, and I executed the note sued on herein. The note was due ninety days from its date. I paid $16.00 interest in advance for the extension of the note, which note was for $349.50, dated May 12, 1896, which interest was in excess of ten per cent. per annum, and was an intentional usurious charge of interest for the ninety day's forbearance, and was agreed to by the parties. The note on its face drew ten per cent. per annum from maturity until paid." *Cross-Examination.* "I did not get any money from the Bank of Malvern. The note sued on was given for another that I had in the bank. I never did get a dollar from the bank. This note, the one sued on herein, was given for a former note, and is for the same amount that the original note was given for, exactly. I think my first dealings with the Bank of Malvern were in 1894. I do not know how many times I have renewed the note. The first year I gave it it ran for one year; the next year W. W. Dutton and T. R. McHenry were on the note as sureties. I do not know where the old notes are. I could only find one of them, and Mr. Kilpatrick, the co-defendant, was my surety thereon. The note sued on herein is a renewal of the note I found, and is for the same amount. The first note I gave the Bank of Malvern was for $349.50. I do not know how much I have paid on it since. I think I have paid $27.10 at two different times and $26.00 is my recollection. The note was first to run one year, but the interest was to be paid every four months, and the interest for the first year amounted to $65.00 to $75.00. I do not remember the time I paid the first payment. I gave a note to R. H. Hurley for an interest in a horse, and he trans-

ferred said note to the Bank of Malvern. Robert W. Baker had also given his note in favor of said R. H. Hurley for $217.00 for an interest in the same horse, and I assumed the payment of the Robert W. Baker note to the Bank of Malvern, the same having been previously transferred to the bank by said R. H. Hurley. My note given to the said R. H. Hurley was for the same amount as the Robert W. Baker note; but I had paid over $100,00, and there was a balance due on my note and Robert W. Baker note of $349.50, for which amount I executed my note to the Bank of Malvern, with T. R. McHenry and W W. Dutton as sureties on December 24, 1894, which note has been renewed from time to time, each time for the same amount, but I would have to pay interest, each time for the renewal of the same, and, as well as I can remember, I have made the following payments: Between $25 and $27 the first payment; about the same the second time; and about the same the third time. I cannot remember how many times I renewed said note, but each time I paid usurious interest, more than 10 per cent. per annum, under agreement with the bank. *Re-Direct.* The note has been renewed from time to time, with the distinct agreement and understanding that I should pay more than ten per cent. interest per annum for the renewal of same, and was duly paid the bank."

Other witnesses testified, but none of them testified that the note executed by Burton to the bank on the 24th of December, 1894, with T. R. McHenry and W. W. Dutton as sureties, was usurious.

The plaintiff asked the court to declare the law as follows: "The notes of Robert W. Baker and J. W. Burton, owned by the Bank of Malvern being valuable negotiable paper, untainted with usury, aggregating $349.50 on the 24th of December, 1894, and J. W. Burton assumed the payment of the note of Robert W. Baker, and executed a note for said sum of $349.50 in satisfaction of said notes, and has since, from time to time, renewed said note for the said sum of $349.50, and paying a greater rate of interest than ten per cent. per annum for the extension of time payment, this would not vitiate the original note, and plaintiff is entitled to recover said

original amount, less the amount so paid by the defendant." And the court refused to so declare, but found for the defendants, and rendered judgment in their favor.

There were no objections to the evidence adduced in the trial in this cause. The origin of the indebtedness evidenced by the note sued on was freely and fully investigated. No witness, as we understand the evidence, testified that the first note executed to the Bank of Malvern for the sum of $349.50 was tainted with usury. Burton testified that the renewals of that note were usurious. The court, in its findings of facts, found "that the note sued on was the last of a series of notes given from time to time to secure a debt, originally free from and untainted with usury." This being true, and, the renewals being void for usury, the plaintiff was entitled to sue and recover upon the first note. *Tillman* v. *Thatcher*, 56 Ark. 334. It could have alleged in its complaint that the defendants claimed that the note sued on was void for usury, and would not pay it on that account, and that the first note was untainted, and asked for judgment on the same, as was done in *Winstead Bank* v. *Webb*, 39 N. Y. 325. Under the statutes of this state, the complaint could have been amended by conforming it to the facts proved, as the amendment would not have substantially changed the claim of the plaintiff. Sand. & H. Dig. § 5769. The testimony adduced by both parties showing that the first note in a series of notes given for the same indebtedness, of which the note sued on was the last, was a valid note having been admitted without objection, the complaint should have been regarded as amended in conformity to the same; and the declaration which the plaintiff asked should have been made. As the complaint could have been amended in the manner suggested, and evidence was admitted as if it had been, it would be unjust to deny the plaintiff the benefit of it. Had its competency been objected to, the objection might have been obviated by an amendment, on terms or otherwise. The plaintiff was therefore entitled to the benefit of it.

Reversed and remanded for a new trial.

RIDDICK, J., absent.

## PETTIT v. STUTTGART NORMAL INSTITUTE.

Opinion delivered February 10, 1900.

1. DEED—REVERSION.—Where a corporation conveyed land on condition that it should be used for educational purposes, and that when not so used it should revert to the stockholders of the corporation, the provision in effect creates a reversion in the corporation, and is valid. (Page 432.)

2. REVERSION—EFFECT OF SALE OF GRANTEE'S INTEREST.—Where a corporation conveyed land for educational purposes, on condition that it should revert to the grantor when not so used, a sale thereof under an execution against the grantees, after the land had reverted, did not convey title as against the corporation. (Page 433.)

Appeal from Arkansas Chancery Court.

JAMES F. ROBINSON, Chancellor.

*W. H. Halliburton* and *Rose, Hemingway & Rose*, for appellants.

A misnomer of parties to a judgment can be taken advantage of only by plea, and is waived if not so called to the court's attention. 1 Freeman, Judg. § 154; 55 Ark. 200; 5 *id.* 234; 6 Ark. 68; 18 How. 409. Appellee, having acquired title through appellant's lessee, is not in a position to contest appellant's title. 49 S. W. 494; 43 Ark. 28; 31 Ark. 472. Appellant had a right to perform the conditions of the deed, and keep the lands. 2 Paine, 545. The burden of proof is on him who seeks a forfeiture for condition broken. 4 Gray, 145; 38 N. H. 127; S. C. 75 Am. Dec. 163; 3 McCrary, 472.

*Jas. A. Gibson*, for appellees.

Upon breach of the condition, the property reverted to appellees. 24 Am. Dec. 296; 3 Col. 82; 67 Me. 198; 66 Ind. 380; 62 Ark. 229. A limitation or personal restraint on the power to sell in a deed is valid. 22 Am. Dec. 458. This court will not reverse upon a technicality as to the form of action, where no useful purpose will be served thereby. 54 Ark. 468.

BATTLE, J. The Stuttgart Normal Institute, a corporation organized under the laws of Arkansas for the purpose of establishing and maintaining an institution of learning at Stuttgart, in this state, purchased block 96 in the Improvement Company's Addition to that town, and built a house on it, to be used as a college, and furnished it for that purpose. On the 23d day of November, 1889, "W. M. Price, president, and L. R. Moss, secretary of the Stuttgart Normal Institute," in consideration of the sum of one dollar, and the undertakings of the grantees hereinafter set out, conveyed the said block 96 to W. M. Price, T. H. Leslie, J. H. Hutchinson, J. A. Thompson, J. W. Porter, J. I. Porter, J. H. Whaley, Thomas H. Ware and J. G. Christmas, as trustees of the Stuttgart Institute. The conveyance contains the following clauses:

"To have and to hold the same unto the said W. M. Price and others, and their successors, trustees of the Stuttgart Institute, in trust that said premises shall be used, kept, and maintained as an institution of learning for the use of its patrons, and under the care and charge of the Methodist Episcopal Church, South, subject to the discipline and usage of said church as from time to time authorized and declared by the General Conference within whose bounds the said premises are situate, except so far as modified and limited by the conditions hereinafter contained and set forth, which are as follows, to-wit: The said property is conveyed with the condition, first, this conveyance is for strictly educational purposes, and shall be good and valid so long as the grantee shall use the premises for school purposes, and when not so used they shall revert to the stockholders, their heirs and assigns.

"(2). The Methodist Episcopal Church, South, hereby assumes the financial responsibility of maintaining the school, and relieves the Stuttgart Normal Institute Company from all liability for maintaining the Institute, or for any other expenses or debts assumed or created by the said board of trustees of the Stuttgart Institute, and further undertakes to foster and maintain the said Stuttgart Institute as a first-class school of high order."

The Methodist Episcopal Church, South, took possession

of the block in 1889, and continued to hold possession until December 7, 1892, when it abandoned it, and the grantee in the deed ceased to use it for school purposes. In October, 1891, George C. Jones recovered a judgment in the Arkansas county court of common pleas against William M. Price, Thomas H. Leslie, John H. Hutchinson, John A. Thompson, James W. Porter, Joseph I. Porter, J. F. Whaley, T. H. Ware and T. Y. Christmas, as trustees of the Stuttgart Normal Institute, for $300. An execution was issued on this judgment on the 8th day of May, 1893, and was, on the 12th of that month, levied on block 96, which was sold under the writ on the 17th of June, 1893, and was conveyed to Jones by the sheriff on the 10th of September, 1894. On the 28th of February, 1895, Jones conveyed the block to Mrs. Annie Bell Pettit.

On the 30th of April, 1896, the Stuttgart Normal Institute, claiming to be the owner of the block and in possession of the same, instituted an action against Mrs. Pettit and her husband to set aside the deed from the sheriff to Jones and from Jones to Mrs. Pettit, and to quiet its title. Mrs. Pettit answered, denying that plaintiff was the owner and in possession of the block, and alleging that she was the owner and in the possession of the same.

After hearing the evidence adduced by both parties, the court found that plaintiff was the owner of the block, and was in possession of the same at the commencement of this action, and found that the deed of the sheriff to Jones and the deed of Jones to Mrs. Pettit conveyed no title, and were a cloud upon plaintiff's title, and canceled the same; and defendants appealed.

We think the evidence sustained the findings of the court. Plaintiff conveyed to the trustees of the Stuttgart Institute a qualified or determinable fee in the block in controversy. The deed provides: "The said property is conveyed with the condition, first, this conveyance is for strictly educational purposes, and shall be good and valid so long as the grantee shall use the premises for school purposes; and, when not so used, they shall revert to the stockholders, their heirs and assigns." The grantor attempted to create no remainder, but provided

that, upon the happening of the contingency mentioned, the block should revert. It could not revert to any one except the grantor, the original owner. The deed says, the block "should revert to the stockholders, their heirs and assigns." The component parts were used for the corporation. The legal effect of the provision was to create a reversion in the grantor.

The grantees ceased to use the block for educational purposes—in fact abandoned it; and the Stuttgart Normal Institute resumed possession, and remained in possession at all time afterwards, so far as the evidence discloses. It was the owner of the block, and in possession of it, at the commencement of this action.

The judgment recovered by Jones for $300 did not affect the Stuttgart Normal Institute. It was not indebted to Jones, and was not sued in the action in which the judgment was recovered. It had no trustees. It could not be served with notice by reading or delivering copies of a summons to trustees. The chancery court properly treated the judgment as not affecting the appellee. The deeds executed by the sheriff and Jones consequently conveyed no title.

Decree affirmed.

---

## PHŒNIX INSURANCE COMPANY *v.* HALE.

Opinion delivered February 10, 1900.

INSURANCE CONTRACT—VALIDITY.—The holder of a policy of fire insurance about to expire applied for renewal thereof, and paid the premium to the insurer's local agent, who delivered to him a "binding receipt," admitting payment and stating that the receipt was binding for 30 days from date, to be invalid on the issue of the renewal policy. The insurer declined to renew the policy, but failed to notify insured, or to return the premium. *Held*, that the insurer was bound under the contract as though the policy had been issued. (Page 437.)

Appeal from Mississippi Circuit Court.

FELIX G. TAYLOR, Judge.

STATEMENT BY THE COURT.

The appellee, William P. Hale, plaintiff below, brought suit at the fall term, 1897, of the Mississippi circuit court, against the Phoenix Insurance Company, of Hartford, Conn., alleging, in substance, that on the 12th of November, 1891, the insurance company issued and delivered to him a policy of insurance No. 6906, for the sum of $600, in which it covenanted and agreed, in consideration of the payment of the premium of $19.50, to insure his barn, located upon the Witherspoon Place, against all loss or damage by fire for the period of three years from the date of said policy. (Neither the original policy nor copy thereof was exhibited with complaint, but plaintiff alleged that it had been lost or mislaid). Plaintiff further alleged that shortly before the expiration of said policy the local surveyor and agent of the Insurance Company, Charles H. Gaylord, made to plaintiff a proposition for renewal of said policy for the further term of three years; that plaintiff accepted the proposition, and then and there paid said agent the sum of $19.50 as premium for renewal of policy No. 6906, insuring the same property for the same amount for the further period of three years from the expiration of the original policy; that at the time the said agent of the insurance company issued and delivered to plaintiff the following binding receipt, viz:

"BRANCH OF THE PHŒNIX INSURANCE COMPANY, HARTFORD, CONN.

"BINDING RECEIPT.

"Premium $19.50. Number 6906.

"This certifies that W. P. Hale of Osceola, Arkansas, has paid to the duly authorized surveyor of this company the sum of nineteen and 50-100 dollars, which entitles him to a renewal of policy No. 6906 (which expires November 12, 1894,) in the Phœnix Insurance Company, of Hartford, Conn., for the period of three years from the countersigning of this receipt, which is binding for a period not exceeding thirty days from the date of the countersigning by the duly authorized surveyor of this company at Osceola, Ark., and subject, in case of loss or damage by fire, to all the printed conditions of said policy, and to be invalid upon the issue of such renewal. This receipt

is not assignable, and any erasure or change made hereon will render it unconditionally null and void, but the same shall not be binding until countersigned by the duly appointed surveyor of the company, at Osceola, Ark.

"D. W. C. SKILTON, Secretary.

"Countersigned at Osceola, Ark., this 27th day of October, 1894. C. H. GAYLORD, Surveyor."

Plaintiff then alleges that he does not remember whether an additional policy was issued to him or not, as he can find none, but says that, having accepted defendant's proposition to renew, and having paid the premium for renewal, he considered this to be a contract and agreement of renewal of his original policy No. 6906. He also alleges that said transactions above set out had the force and effect of a contract of insurance, and of renewing and keeping alive his said original policy, No. 6906, for the period of three years from the 12th day of November, 1894, and is as binding upon the insurance company as if a new policy had been issued and delivered to him. Plaintiff then alleges that on the 6th day of April, 1897, his said barn was totally consumed by fire, under circumstances not within the excepted causes mentioned in said policy, and became a total loss to plaintiff; that by reason of said loss the insurance company became indebted to him in the sum of $600; that he immediately notified the insurance company of the loss, and demanded payment, which they refused on the ground that he had no insurance with them at the time of his loss.

To which complaint the insurance company interposed a general demurrer, alleging that it did not state facts sufficient to constitute a cause of action, which demurrer was by the court overruled, and to which ruling of the court defendant at the time excepted.

Defendant then answered, denying its indebtedness to plaintiff in the sum of $600, or any other sum, but admitting that on the 12th day of November, 1891, plaintiff took out the policy of insurance No. 6906, which said policy ran for a a period of three years, expiring on the 12th day of November, 1894; that since the 12th of November, 1894, plaintiff has carried no insurance with defendant company for any

amount, nor has defendant, since said time, issued plaintiff a policy of insurance. Defendant admitted that plaintiff did make application to its local surveyor and agent, C. H. Gaylord, for renewal of his said policy upon his barn on the 27th of October, 1894, but denies that he paid to their local surveyor and local agent the sum of $19.50 as premium for renewal of said policy, or that he paid any sum to their said local agent as premium for renewal of said policy. Defendant admitted the execution and delivery of binding receipt described in the complaint to the plaintiff by their local surveyor, who at once forwarded the application of plaintiff to the office of the defendant company, which application was at once rejected, and the plaintiff notified that his said application was rejected, unless he would include in his application his dwelling on his farm, and then with a condition annexed that he must reside in the dwelling. Defendant further alleged that, at the time said application was made by plaintiff for a renewal, he then had a policy of insurance with some other fire insurance company upon his dwelling on said farm, and declined to include his dwelling in his application. Defendant further alleged that its local surveyor and agent, C. H. Gaylord, had no authority to pass upon applications for insurance to bind the insurance company, nor had he any authority to issue policies of insurance, but the right to accept applications for policies of insurance, and to issue the same, was reserved to the home office.

Verdict and judgment for plaintiff, and defendant appealed to this court.

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

The "binding receipt" was not a contract of insurance, except for the time therein limited as a period for negotiations for a renewal. 61 Ia. 216; 61 Ind. 488. Evidence of the usages and customs of insurance companies with respect to such receipts was competent to explain it. 53 Pa. St. 485; 16 Gray, 359; 7 Wend. 270; 12 Cush. 429; Greenl. Ev. § 292. The renewal of the policy would have been a new and distinct contract. 54 Ill. 164. Appellee would have had to contract therefor with some one empowered to bind the company. He

is chargeable with notice of the agent's power. 39 Pac. 587; 62 N. W. 798. That the surveyor had no authority to renew insurance, see 54 Ark. 78.

*S. S. Semmes*, for appellee.

A parol contract of insurance is good when the parties have come to a definite understanding upon all the elements of the contract. 13 Am. &. Eng. Enc. Law (2 Ed.), 218; 63 Ark. 204; 19 N. Y. 305; 90 N. Y. 281; 19 How. 318; 21 Am. St. Rep. 883 n.; May, Ins. §19; Ostrander, Ins. 10 n., 17, 18; 5 Laws. Rights, Rem & Pr. §§ 2040, 2044.

HUGHES, J., (after stating the facts.) There was evidence in the case tending to show, and from which the jury might have found, that the appellee, W. P. Hale, made application to Gaylord, the local surveyor and agent of the appellant, the Phoenix Insurance Company, for renewal of his policy of insurance No. 6906; that he paid $19.50 to Gaylord, as a premium therefor; that he received the binding receipt of the company therefor, which was countersigned by Gaylord, the surveyor of the company; that Gaylord forwarded the said application to his company, and that the appellee, Hale, was not notified by said company that it declined to renew said policy, and that said premium of $19.50 paid by Hale to Gaylord was never returned to the appellee, Hale; that Hale believed his policy was renewed by the company, and that he never knew that the company claimed that it had not renewed his policy until after his barn, on which the original policy had been issued, was burned, and the company refused to pay the insurance on the ground that he had not renewed the policy of insurance. There is a square conflict of testimony as to the payment made by Hale, the appellee, of the $19.50, and as to whether Hale was notified that his application was refused by the company. These were questions of fact, upon which the jury found in favor of the appellee, and their verdict as to the facts must be taken as correct by this court.

Did the facts, as found by the jury, constitute a contract of insurance upon which the appellee was entitled to recover? It seems to a majority of the court that they did. If the ap-

pellant received the $19.50 premium paid by the appellee when he made application for the renewal of his policy and received the application, and neither returned the money nor notified the appellee that they declined to renew his policy, we think they are as much bound as though the policy had been issued. It has been decided by this court that a contract of insurance may be effected by parol,—that it need not be in writing. *King* v. *Cox*, 63 Ark. 204, and cases cited.

The cases of *Armstrong* v. *Insurance Co.*, 61 Iowa, 216, and *Barr* v. *Ins. Co. of North America*, 61 Ind. 488, cited by appellant to support the contention that there was no contract of insurance in this case, are not like the case at bar in some material matters of fact.

Affirmed.

BUNN, C. J., (concurring.) Whether or not the $19.50 were actually paid was a question of fact, and this question the trial court determined in favor of the plaintiff. This being the case, the only inquiry remaining was as to the real meaning of, and construction to be placed upon, the contract included in what is termed the "binding receipt," which reads as follows, to-wit:

"Premium $19.50. Number 6906.

"This certifies that W. P. Hale, of Osceola, Ark., has paid to the duly authorized surveyor of this company the sum of nineteen and 50–100 dollars, which entitles him to a renewal of policy No. 6906 (which expires November 12, 1894,) in the Phœnix Insurance Company of Hartford, Conn., for the period of three years from the countersigning of this reciept, which is binding for a period not exceeding thirty days from the date of the countersigning by the duly authorized surveyor of the company at Osceola, Ark., and subject, in case of loss or damage by fire, to the printed conditions of said policy, and to be invalid upon the issue of such renewal. This receipt is not assignable, and any erasure or change made hereon will render it unconditionally null and void, but the same shall not be binding until countersigned by the duly appointed surveyor of the company, at Osceola, Ark.

"D. W. C. SKILTON, Secretary.

Countersigned at Osceola, Ark., this 27th day of October, 1894. "C. H. GAYLORD. Surveyor."

Skilton was the general secretary of the Cincinnati branch of the Phœnix Insurance Company of Hartford, Conn., and Gaylord was the local surveyor of the company at Osceola, Ark., and the one in issuing said receipt, and the other in countersigning the same, were each acting within the scope of their respective authorities for that purpose. The latter was, however, not authorized to issue policies of insurance nor renewals thereof.

The receipt held good for thirty days from the date it was countersigned by Gaylord, or *until the renewal policy was issued and delivered*, when the receipt itself became null and void. The meaning of this is that, the receipt being issued on the application of Hale that he wished a renewal of the outstanding policy No. 6906, now about to expire, it bound the company to renew the old or outstanding policy, *conditions* remaining the same substantially as when it was first issued. The very word "renewal" means that the old policy should be repeated in substance. It is the same in this connection as "extended." The thirty days given was mostly for the convenience of the company, to enable it, through its agents, to ascertain if the *conditions* had in fact remained the same; for instance, that the property first named in the policy continued to exist, and in its original shape and condition substantially. That these and similar facts should exist was the reason that the receipt itself should be countersigned by the surveyer before it could take effect. The office and function of a surveyor, as used in the connection, is that of ascertaining the character and condition of property by examination and admeasurement. Hence it was a safeguard to the company that this officer should countersign the receipt before it should have any effect whatever. The company would then be informed that the conditions remained substantially the same as when the original policy was issued. And, to make doubly sure, the company gave itself thirty days in which to perfect its inquiry in this regard, and to make out, issue and deliver a renewal policy in due form. The benefit of such a receipt to the insured is of

course to indemnify him against loss in the meantime, if any should occur. It is plain that the obligation contained in the receipt remained in force until the company should issue the renewal, or at least refuse to do so, and so inform Hale. These obligations were direct from the company, and not created by Gaylord, except as a countersigner. It is in evidence that Gaylord reported his acts to the company in respect to countersigning and delivering the receipt, and that the company refused to renew the policy unless Hale would include additional property in the insurance—his residence. There is no satisfactory evidence that Hale was informed of this refusal and this condition of renewal. At least, upon the evidence, the court, in effect, found that he had not been notified.

The company had obligated itself to issue a renewal policy, on the payment of the fees, and on condition that things remained the same. It had no right to impose different conditions, and, on Hale's refusal to comply with these, to refuse to issue the renewal. Had the receipt not been given by which the company had obligated itself to issue the renewal policy, it could have renewed the policy or not just as it saw fit to do or not to do; but by the terms of the receipt it had said that, on the receipt of the $19.50, Hale was entitled to a renewal, and of course this meant, if Gaylord would say by his countersigning the receipt that the condition remained the same as at first, Hale was entitled to the renewal after paying the premium aforesaid. A strict renewal was all that Hale could claim or demand from the company, and this much the company, by its written obligation, contained in said receipt, was bound to give him, and it could not avoid this obligation by imposing upon Hale additional conditions and burdens than those contained in the policy or charged in the express language of the receipt. Hale, it seems, had complied with all the conditions upon which a renewal proper might be issued. The company was bound to comply with its part of the contract, and issue a renewal policy, not a new policy or a different policy. Failing to do this, it was bound as if it had done so, and the loss occurred.

BATTLE, J., dissented.

67 441
75 115

# POLK v. GARDNER.

Opinion delivered February 17, 1900

EQUITY—JURISDICTION—REMEDY AT LAW—Equity has no jurisdiction of a bill by a creditor, whose claim was secured by mortgage on the debtor's cotton, to enjoin an attachment suit by a subsequent creditor, and to have the court take control of the cotton, or its proceeds, and apply the same to plaintiff's debt, since there is an adequate remedy at law. (Page 442.)

Appeal from Crittenden Chancery Court.

*Edward D. Robertson*, Chancellor.

*F. H. Heiskell*, for appellants.

The right of appellants to foreclose their mortgage was a matter for equitable cognizance.

*Appellees, pro se.*

There being an adequate remedy at law, chancery has no jurisdiction. 27 Ark. 157.

BUNN, C. J. The defendant Overton Gardner rented for the year 1897 what was known as the Mary Knox farm, in Crittenden county, and gave a deed of trust to A. K. Burrow, as trustee, on the 18th of May, 1897, on certain live stock and the crops of corn, cotton and cotton seed then to be planted, cultivated and gathered on said farm for that year, to secure his note to the plaintiffs of that date for supplies to assist him in making said crops. It appears from the bill that Gardner made 20 bales of cotton, but shipped only three to plaintiffs, who were also to enjoy the benefit of handling and selling said crops, and 17 bales remained in his possession. The bill charges that the defendant, William Bernard, had in the meantime asserted some claim to or interest in said cotton, as had also defendant R. B. Barton, either for himself or in the name of his wife and co-defendant, Mrs. F. K. Barton, who was a merchant in said county doing business on her own account.

The bill also charges that the Bartons attached these 17 bales of cotton, as against Gardner, for the debt they claimed to be owing them by him, and that this suit was pending when the bill herein was filed. The plaintiffs also say in the bill that R. B. Barton, the husband, had previously represented to them that they (the Bartons) had also furnished supplies to Gardner, and that he desired to get control of the cotton; assuring them, however, that their claim, and others in this direction, would not interfere with plaintiffs' claim or rights in any particular, nor those of Gardner, and promising to ship the cotton to plaintiffs, that they might dispose of the same as aforesaid. The bill concludes with the prayer: "That said defendants, and all of them, be enjoined from further prosecuting this suit [the said suit in attachment] in the court at law, and that a receiver be appointed to take charge of this cotton, if it is still held by the Bartons, or either of them, or, if it has been sold, that they be required and compelled to put the proceeds in the hands of a receiver, who will hold the same until the rights of the parties have been disposed of, to the end that this court may be enabled to do justice to each party, and to see that the plaintiffs are paid in full the amount that has been due, out of the cotton which has been illegally and improperly withheld from them."

A demurrer to the bill was interposed by the Bartons and Bernard on two grounds: First, because the chancery court had no jurisdiction to hear and determine the cause; and, secondly, because the bill does not state facts sufficient to constitute a cause of action. This demurrer was sustained, and, the "plaintiffs expressly refusing to amend or plead further, and electing to stand upon their said complaint, it is considered, ordered and adjudged and decreed by the court that the complaint of plaintiffs be and the same is dismissed as to these defendants, and that plaintiffs pay all costs of this action, to all of which ruling, decision, and judgment of the court the plaintiffs excepted at the time, and prayed an appeal to the supreme court, which is by the court here granted."

The bill did not seek to foreclose the mortgage or deed of trust on the cotton, but merely to enjoin a proceeding at law

between the defendants herein, and to have the chancery court take control of the cotton which was the subject of this proceeding at law, or its proceeds, and apply the same to plaintiff's debt, as far as might be necessary to settle the same. This purpose might have been accomplished by one method at law, if not more. At all events, there was a plain, adequate remedy at law, and equity therefore had no jurisdiction. This logically affirms the judgment, at least on the first ground of the demurrer, and as to the second ground, as regards the sufficiency of the facts stated to constitute a cause of action in equity. But the bill may state facts sufficient to constitute a cause of action at law. If so, the order of dismissal should not have been made, but an order to transfer would have been proper.

It does not, however, appear certainly that a cause of action at law is properly stated in the bill, and it must be said in behalf of the chancellor that, upon the refusal of the plaintiffs to amend so as to show a cause of action at law, it is at least questionable whether or not his order was not all that could have been made. But, out of abundant caution, we will remand the cause, with directions to permit plaintiffs to amend, and ask a transfer, if they so desire, to the appropriate law court, under section 9 of the act organizing the chancery court. Acts of 1897, p. 92.

With this modification of the decretal order of the chancellor, the cause is remanded with the direction aforesaid.

BATTLE, J., did not participate in the decision of this case.

# HESS v. ADLER.

Opinion delivered February 17, 1900.

1. JUDGMENT AGAINST SURVIVING PARTNER—EFFECT.—A complaint on a partnership note alleged that the note was given by defendant H. and his deceased partner, A., late partners doing business under the firm name of H. & A. The proceeding was based on constructive service merely, the attachment writ and summons being against defendant H. "of the late firm of H. & A." The judgment was rendered against "the defendant," without further description. *Held*, that the proceedings taken were against defendant individually, and not as surviving partner, and that the judgment did not bind the estate, nor authorize a sale of the interest, of the deceased partner in the firm lands. (Page 454.)

2. PLEADING—AMENDMENT OF COMPLAINT BY ANSWER.—An insufficient description of the land in a bill to quiet title may be cured by a correct description in the answer. (Page 454.)

3. JUDGMENT—MODIFICATION TO CONFORM TO COMPLAINT.—Where, in a suit to quiet title to lands, a decree for plaintiff includes a tract not claimed in the bill, the decree will be modified by omitting it therefrom. (Page 455.)

Appeal from Stone Circuit Court in Chancery.

F. M. HANLEY, Special Judge.

STATEMENT BY THE COURT.

This is an appeal from a decree in chancery in favor of the appellees, claiming an undivided half interest in certain lands described in the complaint of appellees, and canceling the deeds under which the appellants claimed title to the same, and quieting the title of the appellees thereto.

The bill was filed October 28, 1874, by Alexander Adler and others against the appellants. It alleges that in the year 1860 James Ivey, Jr., Aaron Hirsch, and Israel H. Adler, were tenants in common of lands therein described. That a decree in partition was made in September, 1860, at the instance of said Ivey, giving him one-third, and the said Hirsch and Adler two-thirds of the lands, and this decree was performed by

commissioners, who set apart certain of said lands to Hirsch and Adler; that said Hirsch and Adler took possession of said lands. That afterwards, on or about the 3d of June, 1867, one Andrew Allen instituted a suit in the circuit court of Independence county (wherein said lands were then situated) against the said Aaron Hirsch, by filing a declaration in debt, and causing to be issued thereon by the clerk of said court a writ of attachment against the said Aaron Hirsch, commanding the sheriff of said county to attach all and singular his goods and chattels, lands, and tenements, credits and effects, or so much thereof as should be sufficient to secure the sum of $555.16, with interest and costs of suit. That in obedience to said writ the said sheriff, on June 11, 1867, attached the lands owned by said Hirsch and Adler as the property of said Hirsch. That on January 25, 1868, said Allen obtained judgment for $921.01 and costs, and a judgment of condemnation against the said land so attached; that on June 26, 1867, one Thomas Cox brought a similar suit in said court against said Hirsch for $2,500, interest and costs, under which the lands aforesaid were attached, and against which a judgment was rendered on January 25, 1868, for $3,525 and costs, and said lands were condemned to be sold to satisfy said judgment. That pluries executions issued in said causes on September 20, 1869, under which, after advertisement of said sale, on November 15, 1869, said lands were sold by said sheriff at public auction to the highest bidder in different tracts,—one of the complainants, to-wit: Simon Adler, buying in, under the Allen executions, e. ½ ne. ¼ 17, ne. ¼ se. ¼ 17, 13 north, 8 west; one Theophilus Edmonson buying in that part of sw. fractional ¼ of section 5, 13 north, 18 west, west of White river, and se. ¼ se. ¼ 16, 13 north, 8 west; said Cox buying nw. ¼ ne. ¼ 17, nw. ¼ ne. ¼ 21, ne. fractional ¼ ne. fractional ¼ 21, sw. fractional ¼ nw. fractional ¼ 16, ne. ¼ sw. ¼ 16, all in 13 north, 8 west. That under the Cox execution said Cox bought in se. ¼ ne. ¼, 21, ne. ¼ se. ¼ 21, part e. ½ se. ¼ 6, ne. ¼ ne. ¼ 7, township 13 north, range 8 west; Asberry York bought in ne. ¼ ne. ¼ 28, se. ¼ se. ¼ 21, 13 north, 8 west; Thomas M. Hess bought in nw. fractional ¼ nw. fractional ¼ 16, sw. fractional ¼ se.

fractional ¼ 16, nw. fractional ¼ of se. fractional ¼ 16, se. fractional ¼ of nw. fractional ¼ 16, 13 north, 8 west, and James W. Butler bought in sw. ¼ se. ¼ 21, 13 north, 8 west; that the said Butler assigned his certificate to said Simon Adler. That said lands were never redeemed, and twelve months after the sale the sheriff aforesaid executed deeds to said lands so purchased as follows: To Thomas Cox, November 9, 1870, acknowledged December 9, 1870; to Thomas M. Hess December 10, 1870; to Simon Adler March 13, 1871 (the deed to Adler including the lands purchased by Butler); to Asberry York December 10, 1870; to Theophilus Edmonson and James M. Case, his assignee, February 5, 1871. That said Cox conveyed the ne. ¼ of the ne. ¼ of 21, the nw. ¼ of ne. ¼ 21, se. ¼ ne. ¼ 21, and ne. ¼ se. ¼ 21, 13 north, 8 west, to James M. Gray. That he conveyed to Thomas M. Hess the ne. ¼ sw. fractional ¼ 16, and sw. fractional ¼ of nw. fractional ¼ 16, 13 north, 8 west. That said Israel H. Adler died March 15, 1867, leaving no children, he never having married, but the plaintiffs below as his collateral heirs. That he died seized of his half of the lands in controversy. That said Simon Adler became the administrator of his estate on January 24, 1871, by appointment of the probate court of Independence county. That no claims were filed against his estate. That thereafter the said Simon was discharged as such administrator. That no judgment had ever been obtained against said Israel H. Adler which constituted a lien upon any of his real estate. That the said purchasers, or their assigns, obtained possession of said lands at the expiration of the time for the execution of said deeds by the sheriff, and have held possession thereof ever since; and certain mesne profits are referred to as having been received by them. That said James Ivey, Jr., died June 15, 1863, leaving his widow, Paralee Ivey, afterwards Paralee Stokes, and his son James M. Ivey, his only heirs; and that William J. Bell was administrator of his estate. That of the lands so partitioned to James Ivey, Jr., the tracts described were conveyed by the administrator, under proper order of the probate court of Independence county, to James Ivey, Sr., George W. Williams, A. W. Hall, C. C. Monday, and Jno. F. Bell. That said Cox died February 3, 1871, leaving his widow, Laura

A. Cox, now Ewing, also his mother, Elizabeth Bybee, John Cox, James Cox, and Pleasant Cox, his brothers, all of whom were his heirs at law, and were non-residents of this state. That said James Ivey, Sr., died May 18, 1870, leaving Mary Ivey, his widow, William Ivey, his son, and James M. Ivey, his grandson, and Mary Ivey, his granddaughter, as his heirs; and William J. Bell became the administrator of his estate. That both of the grandchildren were minors, and that David M. Stokes had been appointed guardian of said grandson, and William A. Stafford had been appointed guardian of the granddaughter. That the widow and heirs were in possession of the land bought by said James Ivey, Sr., who denied the rights of plaintiff to any portion thereof. That the levy of the attachments in favor of Thomas Cox and Andrew Allen on the interest of Israel H. Adler as the property of said Aaron Hirsch was illegal and void. That the judgment of the Independence circuit court aforesaid, condemning said lands as the property of said Aaron Hirsch, and ordering their sale, was and is illegal and void, inasmuch as said judgment was rendered by said court whereby these plaintiffs were to be deprived of their interest in said land without notice to them, actual or constructive.

And the prayer was that the proceedings of the commissioner in the suit of Ivey *v.* Hirsch & Adler be confirmed as valid; that, if this could not be done, other commissioners be appointed in this proceeding to make partition; that an account of rents and profits be taken; that the deeds from the sheriff of Independence county to Cox, Hess, Edmonson, and Case, and from the administrator of Cox to Hess, Gray, and others, so far as they pretended to convey the interest which Israel H. Adler had in and to said lands, be canceled, and be held for naught, as a cloud upon the title of plaintiff.

To the bill of complaint, answers and cross bills were filed by W. H. Halliburton, Thomas M. Hess, William C. Case, James Case, Sis Dougherty (nee Case) and Nettie Pegg (the four last named being the heirs, and William C. Case being also administrator, of the estate of James M. Case). These agreed, in substance, in admitting the proceedings in the partition suit between Ivey and Hirsch & Adler, as shown by the exhibits to the bill;

also the suits of Allen and Cox for debt against said Hirsch & Adler, and the issuance and levy of attachments in said suits upon the real estate of said Hirsch & Adler, the rendition of judgment in said suits, the sale of the real estate levied upon, and the derivation of title to such lands as they respectively claimed under said sales,—the answers in the different cases alleging that in the year 1862 Aaron Hirsch and Israel H. Adler were engaged in the mercantile business in the town of Batesville, Ark., under the firm name of Hirsch & Adler; that during the continuance of said business by said firm they acquired the lands mentioned in the answers as partnership property; that during the continuance of said business said firm became indebted for the debts mentioned in the complaint to the said Allen and Cox as the partnership business of said firm; that Israel H. Adler died, leaving Aaron Hirsch the sole surviving partner of said firm; that the lands aforesaid were partnership assets of said firm; that the lands were sold for the satisfaction of the debts of the said firm as aforesaid; that by the death of Adler the said Hirsch became invested with the title of the partnership assets, including said lands, for the purpose of paying the indebtedness of said firm; that by said sale the parties obtained title to said lands; and that the proceeds of said sale went to satisfy the said debts of said firm. The allegations of the complaint were denied, charging that the judgments condemning said lands to be sold were void, and charging that the plaintiffs had been illegally deprived of their rights; and it was denied they had any rights to said lands. Allen was made a party, and his appearance was entered. And the answers and cross bills also set up estoppel by reason of the action of Simon Adler, one of the plaintiffs, who was present and made no objection to the sale; and they asked subrogation to the claims of Cox and Allen for the amount received out of the lands. The bar of the statute of limitations is pleaded in the answers of Hess and the Case heirs. And in all of the answers and cross bills affirmative relief is asked in the way of quieting title, and requiring conveyances by the plaintiffs.

In the Halliburton answer and cross bill the lands involved

seem to be sw. ¼ fractional quarter of section 16, west of River creek, township 13 north, range 8 west, 3 acres; ne. ¼ of ne. ¼ section 21; nw. ¼ ne. ¼ of section 22; se. ¼ of ne. ¼ of section 21, and that part of the ne. ¼ of se. ¼ of section 21, west of Wolf bayou, containing 15 acres; the sw. ¼ of ne. ¼ of section 21, and the nw. ¼ of the se. ¼ of section 21,—all in township 13 north, range 8 west. The two last-mentioned tracts are not mentioned in the bill. In the Hess answer and cross bill he claims an undivided fourth interest in that part of the sw. ¼ fractional quarter of section 5, west of White river, township 13 north, range 8 west, which he acquired from W. E. Davis, administrator of Theophilus Edmondson, deceased, who purchased the same as alleged in the complaint; also an undivided half interest in the se. ¼ of se. ¼ of section 6, and ne. ¼ of ne. ¼ of section 7, which he purchased from Urban E. Fort, administrator *de bonis non* of estate of Thomas Cox by deed of November 6, 1875. And he entered a disclaimer as to any other interest. The description in the bill is "part sw. fractional ¼, section 5;" also "part e. ½ of se. ¼, section 6, 55 acres." In the Case answer and cross bill the lands claimed are an undivided three-fourths of that part of the sw. fractional ¼ of section 5, west of White river, township 13 north, range 8 west, containing 54 acres, having acquired same by descent from their father, James Case, Sr., now deceased, who previously owned a half interest and afterwards purchased an undivided fourth of same from W. E. Davis, administrator of the estate of Theophilus Edmondson, deceased, on the 24th day of March, 1879, who purchased same as alleged in the complaint; also they claimed all of se. ¼ of se. fractional ¼, section 16, township 13 north, range 8 west, containing 16.85 acres, and they entered a disclaimer as to any other lands.

The testimony of Simon Adler and the exhibits thereto were introduced by complainants, in addition to the exhibits already mentioned, and the depositions of Thomas M. Hess and W. C. Case on the part of defendants, in addition to the exhibits thereto. Simon Adler testified that Israel H. Adler died March 15, 1867, leaving the plaintiffs as his heirs; that all of these were still living; that Hirsch & Adler were partners in

the mercantile business at Batesville, Ark.; that he (deponent) was administrator of his estate; that the estate was finally wound up, and he was discharged; that Andrew Allen and Thomas Cox brought proceedings against Hirsch, and they obtained judgments; and that he regarded the sales thereon as being only of Hirsch's interest. Hirsch and Adler each had a half interest in the lands. On cross examination he said that Aaron Hirsch had failed after the war; that neither Allen nor Cox had ever probated their claims against the estate of Adler; that their debts were paid by the sale of the lands under their judgments against Hirsch. There are some exhibits showing letters of administration, settlement and discharge. The discharge was at November term, 1877.

Thomas M. Hess testified that the land he had been sued for in the bill in section 16 belonged to Binks Hess, to whom he had conveyed it prior to the commencement of this suit. It was in March, 1870. Has a one-fourth interest in the land. Has an interest in 54 acres of land. It is southwest fractional quarter of section 5, township 13 north; range 8 west. He and James Case bought jointly a half interest. Case and Edmondson had owned the whole section 5 jointly, and when Edmondson died, his estate was insolvent, and witness bought of his administrator. Deed is exhibited, dated March, 24, 1879. Has held possession of this land ever since, and claimed it as as his own. Is in possession now. Has been renting it out ever since the purchase. He supposes other land involved in the suit which he owns is land in section 6, 13 north, range 8 west. It was bought at the Cox sale. A certificate of purchase was first made, and twelve months afterwards a deed. The lands mentioned were se. ¼ se. ¼ section 6; and ne. ¼ ne. ¼ section 7, township 13 north, range 8 west. The deed is dated February 7, 1877. The lands are in Stone county. Has rented this land out since the date of deed. Owns one-half interest in it now. This possession has been open and notorious and adverse to everybody else. He knew Aaron Hirsch and Israel H. Adler. They were partners, and carried on business at Batesville under the firm name of Hirsch & Adler. He attended the sale of their lands by the sheriff of Indpendence

county. Theophilus Edmondson bought in 54 acres mentioned in section 5, township 13 north, range 8 west, and the 40 acres in section 6, and the 40 acres in section 7, township 13 north, range 8 west, were bought in by Thomas Cox. Saw Simon Adler there. Did not hear him make any objection to sale. Would have heard it had he made any. Edmondson conveyed half the land bought to James Cox, because he was not able to pay for all of it, and the deed was made by the sheriff to them. Conveyed to each a half interest. The heirs of Case own three-fourths interest in the 54 acres in said section 5,—one-half interest so obtained, and afterwards another quarter interest was obtained from Edmondson, administrator. They have had possession of their land ever since it was purchased, cultivating or renting it.

W. C. Case testified: James Case was his father, and his co-defendants in the answer were his brothers and sisters. His father, and his brothers, sisters, and himself, and Mr. Hess, had been in possession of the lands mentioned ever since they were purchased, either cultivating or renting them out. Everybody knew this. His father had six children, James Case, William C. Case, Sis Dougherty, Nettie Pegg, Mrs. S. E. Martin, and Armity Gray. Witness had bought Armity Gray's interest, and George Dougherty had bought Mrs. Martin's.

Thomas M. Hess recalled: Testified that Halliburton had purchased that land that James Gray had bought in; that Gray had sold to James Case; and Case had sold to John Bell; and John Bell had sold to Halliburton.

A decree was rendered against all of the said defendants for an undivided half interest in the land set forth in the said answers and cross bills. Appeal here is prayed from this decree by W. A. Halliburton, T. M. Hess, W. C. Case, James Case, Jr., Sis Dougherty, and Nettie Pegg.

*J. C. Yancey* and *Morris M. Cohn*, for appellants.

A surviving partner may be sued individually for a firm debt. 1 Abb. Forms of Pledg. 60[1]. Though not necessary, it is the better practice to state the surviving partner's character. 1 Abb. Forms of Pledg. *supra;* 70 N. Y. 180, 189, 190; 51 N. Y. Sup. Ct. 96; 17 N. W. 447, 448; 35 Ia. 306. Even

if this were not true, the objection could not be raised collaterally. 24 Ark. 122; 34 Ark. 399; 37 Ark. 155; 52 Ark. 1. Until the partnership creditors were paid, and the individual interest of the surviving partner ascertained, his heirs had no rights in the property. 16 Ark. 616; 19 Ark. 443; 26 Ark. 134; *ib.* 154; 54 Ark. 395; 27 Mich. 537. The judgment against the surviving partner is binding on the partnership assets. 18 Ia. 19; 4 Nev. 437; 41 Tex. 193; 7 W. & S. 143; 10 Wend. 630; 17 S. & R. 456; 156 U. S. 218, 232; 118 U. S. 3, 8. The surviving partner had the right to sell the realty to pay plaintiff debts, and a court of equity will protect his vendees. 2 Sandf. Ch. 366; 1 Russ. & M. 45; 1 Myl. & K. 649; 3 *id.* 443; 8 Sim. 429; 11 *id.* 498 n.; 21 Ala. 437; 17 Cal. 262; 104 U. S. 19, 22, 24; 49 Fed. 183, 185; 135 U. S. 621, 625; 54 Ark. 395, 398; 5 Metc. 562; 65 Ark. 290; 118 U. S. 3; 51 Ark. 56, 59. On the doctrines of subrogation, see: Sheldon, Sub. chap. 1; 29 Ark. 47; 50 Ark. 361; 38 Ark. 385; 41 Ark. 149: 42 Ark. 77; 42 Ark. 100; 42 Ark. 140; 55 Ark. 30; 43 Ark. 469; 45 Ark. 149; 47 Ark. 421; 52 Ark. 1; 52 Ark. 499; 53 Ark. 545; 54 Ark. 273; 56 Ark. 563; 56 Ark. 574. Description of land as "part of the southwest fractional quarter section 5" is not sufficient. Newm. Pl. & Pr. 446. Appellees are barred by laches. 19 Ark. 16; 17 Fed. 36; 120 U. S. 377, 387; 124 U. S. 183, 188, 189; 145 U. S. 368; 150 U. S. 193; 137 U. S. 556, 566; 148 U. S. 360; 145 U. S. 214; 149 U S. 287, 294; 148 U. S. 360, 370; 124 U. S. 183, 188. Estoppel also bars them. 10 Ark. 211; 24 Ark. 371; 33 Ark. 465; 36 Ark. 663; 51 Ark. 235; *ib.* 491; 35 Ark. 293; 52 Ark. 389; 47 Ark. 226; *ib.* 301; 48 Ark. 258; 30 Ark. 453.

*Robert Neill*, for appellees.

On the death of Israel Adler the descent of his interest in the partnership really was cast upon his heirs. Sand. & H. Dig., § 2470; 5 Ark. 608; 8 Ark. 8. There being no evidence to show that the lands were partnership lands, the presumption is that they were held in common. Sand. & H. Dig., § 704. The judgment against the surviving partner and the sale thereunder passed only his interest in the partnership realty. If the

creditors wished to reach the interest of the deceased partner, they should have forced the surviving partner to exercise his right of sale in their favor. 42 Ark. 422; 78 Ky. 33; 104 U. S. 18; Story, Part. § 347. In the attachment suits the court acquired no jurisdiction over any other property than that attached. Act March 7, 1867, chap. 17; 38 Ark. 194. The only claim that the surviving partner could make to the land of the deceased partner was as trustee for himself and the creditors. 17 Am. & Eng. Enc. Law, 1154; 38 Cal. 389; 21 Ala. 442; 76 Ala. 505; 82 Ala. 198. The rule of *caveat emptor* applies to the sale in this case. 10 Ark. 211; 31 Ark. 258; 5 Metc. 580. There was no estoppel. 10 Ark. 211. Attachment sales are not judicial sales. 52 Ark. 290.

*J. C. Yancey* and *Morris M. Cohn*, for appellees in reply.

Partnership property is regarded as a trust fund for the benefit of partnership creditors. 119 N. Y. 465; 65 Ark. 292, 293. A creditor is subrogated to the partner's rights in his deceased partners' property. 42 Ark. 423. A purchase at execution sale is the equivalent of a voluntary conveyance in such a case as this. 42 Ark. 452. Courts of equity aid the process of law courts, where property fraudulently conveyed or property of an equitable nature is sought to be reached under legal process. 33 Ark. 328; 43 Ark. 84; 46 Ark. 537; 56 Ark. 476; 104 U. S. 19. The doctrine of *caveat emptor* has no application. The purchasers at the sale are entitled to subrogation to the rights of the firm creditors. 56 Ark. 563; 56 Ark. 574; 47 Ark. 421; 52 Ark. 1; 54 Ark. 273; 50 Ark. 361.

HUGHES, J., (after stating the facts.) It appears that the lands in controversy are claimed by the appellees, as heirs of Israel H. Adler, deceased, who in his lifetime was a partner of Aaron Hirsch. The appellants claim under a sale of these lands by virtue of pluries executions at law, issued on a judgment at law, rendered, as they claim, against Aaron Hirsch as surviving partner of Hirsch & Adler, for the recovery of a partnership debt. The suits in which these judgments were rendered were commenced by actions of debt, in which attachments were issued and levied upon the lands of Aaron Hirsch. Only constructive

service was had upon Aaron Hirsch, and no personal judgment was rendered against him. The judgments were rendered against "the defendant," without further designation or description. The lands were attached "as the property of the said Aaron Hirsch." The writ of attachment directed the attachment of Aaron Hirsch (of the late firm of Hirsch & Adler) by all and singular his goods, chattels, lands and tenements, and contained a summons, which commanded the sheriff to summon Aaron Hirsch (of the late firm of Hirsch & Adler) to be and appear etc. The declaration was upon a joint and several obligation of Hirsch and Adler, and stated: "Your petitioner, Andrew Allen, the plaintiff in this cause, states that he is the legal owner of a note against the defendant Aaron Hirsch and Israel H. Adler, late merchants and partners doing business by the firm name and style of Hirsch & Adler (the said Israel Adler, deceased, not sued herein) etc. The execution commanded the sheriff to cause to be made the debt recovered against "the said Aaron Hirsch."

Without discussing the various questions raised in this case, suffice it to say that the court is of the opinion that all the proceedings in the causes against Aaron Hirsch by Allen & Cox, in which the sales of the lands in controversy are claimed by appellants to have been made, were had against Aaron Hirsch in his individual capacity, and not against him as surviving partner of Hirsch & Adler, and there were no judgments in said causes that bound the estate or authorized a sale of Adler's interest in said lands, or any interest other than that of Aaron Hirsch, which was the only interest seized under the writ of attachment, and commanded by the court to be sold. Aaron Hirsch was proceeded against individually in the complaints upon which the attachments were issued, was constructively summoned only, and no personal judgment was or could have been rendered against him. The ground in the affidavits for the attachments was that Hirsch was a non-resident of the state. The court finds that the appellees were not estopped nor barred by limitations or laches; also that the appellants were not entitled to be subrogated.

We find that the sw. ¼ of the nw. ¼ of section 21, which

was included in the decree in favor of appellees, is not claimed by them in their complaint; but the nw. ¼ of the sw. ¼ of section 21, (both in township 13 north, range 8 west) is in the bill. The bill of complaint described one piece of land claimed as a part of the sw. fractional ¼ of section 5, containing 54 acres, being a part of the land for which Hess was sued. This description is defective, but the answer of Hess described it as "that part of sw. fractional ¼ of section 5, west of White River, containing 54 acres," and having been acquired 24th of March, 1879, from W. E. Davis, administrator of Theophilus Edmondson, who purchased the same, as is alleged in the complaint; thus curing the defect in the description, and identifying this tract as part of the lands claimed by both plaintiffs and defendants to be part of the lands of Hirsch & Adler. We think the statement of the answer in regard to se. ¼ of the se. ¼ of section 6 cures the misdescription of this piece in the complaint.

The object of the suit of appellees is to obtain a clear title to an undivided half on the lands held by Hess and the Case heirs that belonged to Hirsch and Adler, and to have a partition and division of said lands.

We think the claims of Hess are covered by their title to an undivided half. The decree is affirmed except as to the sw. ¼ of the nw. ¼ of 21, not claimed in the bill of complaint, as to which the decree is modified by leaving this piece out.

---

## COCKE v. CLAUSEN.

Opinion delivered February 17, 1900. [67 455 / 68 130]

1. TENANCY IN COMMON—IMPROVEMENTS—RENTS.—Where a tenant in common has received the rents accruing from the land held in common, her subsequent grantee will not be entitled, in a suit for partition, to recover the improvements placed thereon by her, in addition to her *pro rata* share of the land, but will be allowed to offset the rents received by her against the value of such improvements. (Page 460.)

2. SAME.—Where a tenant in common assumes to act as landlord in the collection of the rents of the land held in common, his co-tenants, in a bill for partition, will be entitled to offset against the value of improvements made by him the amount of the rents so received. (Page 461.)

3. PLEADING—IRREGULARITY—WAIVER.—Where, on a bill by tenants in common against their co-tenants, defendants set up by way of answer a claim for their proportionate share in the rents collected by plaintiffs, instead of alleging such matter by way of cross-bill, and no objection to its allowance was made at the trial, the irregularity will be considered waived. (Page 462.)

4. LANDLORD'S LIEN—ENFORCEMENT.—A landlord's lien on the tenant's crop cannot be enforced against one who purchased such crop without notice of such lien, nor against any one after expiration of the period of six months from the time the rent became due and payable. (Page 463.)

Appeal from Crittenden Circuit Court in Chancery.

FELIX G. TAYLOR, Judge.

STATEMENT BY THE COURT.

Appellants, J. L. Cocke & Co., filed a complaint in equity against Mrs. Edna R. Clausen and her minor brother, Wm. C. Urie, seeking partition of certain lands, in manner as will presently appear.

The lands in controversy were originally held in common by the defendants and their sister, Mrs. Botts, as heirs of S. D. Rives. Appellants acquired title to Mrs. Botts' undivided interest at a sale under a trust deed executed to them by Mrs. Botts to secure them for advances of supplies and for certain gin machinery and improvements placed by them upon the land at her instance. Cocke & Co. allege that Mrs. Botts represented herself as being the sole owner of the land in controversy, and that they placed the said improvements upon the land, and took the deed of trust thereon as security, upon the faith of such representation. They further state that they have never been paid for said machinery. Hence, in asking partition, they pray the court to give to them one-third of the real estate involved, exclusive of the value of the improvements aforesaid, and so selected as to embrace said gin and improvements.

Appellees answered, agreeing that a partition be made,

but denying appellant's superior right to the gin and improvements; claiming the same to be a part of the realty, and demanding that their value be considered in making the partition. Appellees also alleged in their answer a claim for their respective portions of the rents for certain years, alleged to have been collected on the lands by Cocke & Co. and never accounted for to appellees.

A reference was had, and commissioners appointed to state the account as to the rents, and to ascertain what would be an equitable partition of the property. The commissioners filed reports, but these need not be here set out in full. To these reports Cocke & Co. urged several exceptions, in substance as follows: (1.) That the commissioners should have reported that no rentals had been proved to be due from the plaintiffs which would be a charge upon the real estate. (2.) That the commissioners erred in reporting that the rents of 1890, 1891 and 1892 went into hands of Cocke & Co. (3.) That the commissioners erred in not reporting that Mrs. Botts was empowered by Mrs. Clausen to rent out the land for the year 1890 and 1891. (4.) That the commissioners erred in not reporting that Cocke & Co. received the crops of 1890 and 1891 without notice of Urie's interest. (5.) That the commissioners erred in taking into consideration, in making the partition, the value of the machinery and improvements.

The court, upon a hearing of these exceptions, overruled the first, fourth, and fifth grounds above specified, sustained the second, so far as concerns the rent of 1892, and sustained the third *in toto*.

Hence the decree of the court gives to appellee Urie $886.45, as his portion of the rents for the years 1890 and 1891, and partitions the real estate by giving to each claimant so much of the whole as was equal in value to one third of it, reckoning the gin and improvements in question as part of the realty. From this decision Cocke & Co. appeal, contending here that they are entitled absolutely to the gin and improvements placed upon the land by them, and are not liable to Wm. C. Urie for the rent decreed to him; and appellees also prosecute a cross-appeal from the portions of the decree adverse to them.

From a lease contract executed March 4, 1889, it appears that one Samuel Floyd leased from Mrs. Cashion (afterwards Botts) the land upon which the improvements in controversy are situate for a period of four years, commencing January 1, 1889, at a rental of one thousand dollars per annum. Floyd purchased the machinery, constituting the improvements, from J. L. Cocke & Co., and placed same upon the lands. In the contract of lease Floyd also inserted a clause transferring all his interest in the machinery to Mrs. Cashion, except that during the continuance of the lease Floyd was to have the free use of the machinery, which at the expiration of said lease was to become the property of Mrs. Cashion (Botts).

On the 27th day of December, 1889, J. L. Cocke & Co. entered into a written agreement, which, after reciting the terms of the lease from Mrs. Cashion (or Botts) to Floyd, is as follows: "And whereas the said Floyd hath, by instrument in writing duly signed by him, assigned the said unexpired term to the said J. L. Cocke & Co.: Now, this indenture witnesseth that the said first parties [J. L. Cocke & Co.], in consideration of an annual rent of two thousand dollars, paid and to be paid as hereinafter stated, doth hereby devise, lease and rent to the said second parties [J. E. and Nannie E. Botts], for a term commencing on the delivery hereof, and ending on the 29th day of December, 1892, the aforesaid Cashion plantation. As rent for the demised premises, the said Nannie E. Botts hath delivered up to the said J. L. Cocke & Co. the unpaid rent notes for $1,000 executed by the said Samuel Floyd, and above described, after having first marked all of said notes 'Paid,' before delivering them. As further rent for the demised premises, the second parties covenant that they will pay to the first parties, or their assignee, the following sums, to-wit: On November 1, 1890, the sum of $1,000.00; on November 1, 1891, $1,000.00, and on November 1, 1892, $1,000.00,—evidenced by three certain promissory notes of 'even date herewith." On the 2d day of February 1891, J. E. and Nannie E. Botts executed to J. L. Cocke & Co. this instrument: "We, John E. Botts and wife, N. E. Botts, agree that J. L. Cocke & Co. shall advance to J. M. Wheeler in supplies and money, etc., as may be agreeable to them and him,

the sum of fifteen hundred dollars, and while we do not assume or become responsible for the same or its payment, yet we agree that the crop raised on the place shall at first be responsible for the payment of said amount, in preference to landlord's lien for rent, and, as said crop is to be handled by Cocke & Co., we agree that the first proceeds therefrom, to the amount of fifteen hundred dollars, before the payment of our rent, shall be paid by Cocke & Co. to themselves, if they have advanced that amount to Mr. Wheeler."

On the 10th day of February, 1891, J. E. and Nannie E. Botts, by deed of trust, conveyed the lands and machinery in controversy to J. L. Cocke & Co., to secure a debt of $3,000, under which deed J. L. Cocke & Co., by foreclosure and sale acquired the interest of Mrs. Nannie E. Botts to the land and the improvements thereon.

*W. G. Weatherford*, for appellants.

In partition proceedings in equity, a co-tenant who has placed improvements upon the land is entitled to their value. 21 Ark. 557; 23 Ark. 213; 31 Ark. 562; Story, Eq. Jur. § 655. The rents did not constitute a valid counter-claim as against these improvements. Sand. & H. Dig., § 5723; 40 Ark. 78. Nor were they the proper subject for a plea of set-off. Sand. & H. Dig., § 5725. The claim for rent was purely a claim for relief at law, unconnected with the partition proceeding, and should not have been brought into it. 31 Ark. 359, 360; 48 Ark. 169; 32 Ark. 289; *ib.* 303; 43 Ark. 297. The lien for rent had expired when suit was begun. Sand. & H. Dig., § 4794. Appellants having no notice of the claim of any of the co-tenants, they are not constructive trustees for the rent received. 129 U. S. 355; 31 Ark. 131.

*J. P. Hall, of Tennessee*, for appellees:

The improvements were not originally placed upon the land by a tenant in common. If appellants had control under a valid transfer from Lloyd, there being no privity between them and the original lessor, Mrs. Botts, the power of attorney given to the latter by Mrs. Clausen would avail appellants nothing. 12 Am. & Eng. Enc. Law, 744; 58 Tex. 430. Rents are re-

coverable in a partition proceeding, where one tenant in common has been receiving them to the exclusion of the rest. 1 Story, Eq. Jur. § 655; 4 Lea, 474; 56 Miss. 174. If improper matters are pleaded in an answer, they must be objected to in proper time. Gantt's Dig., § 4567; 23 Ark. 212; 1 Enc. Pl. & Pr. 872.

WOOD, J., (after stating the facts.) From the above and other proof in the record, we conclude:

1. That in the year 1889 Mrs. Botts received from Samuel Floyd rent for the land in controversy amounting to $1,000. The improvements—engine, gin, boiler, etc.—which Floyd evidently put up on the land in the early part of 1889 were at that time worth, according to the testimony of Cocke, $1,135. There was then a difference of only $135 between the value of the machinery, when Mrs. Botts purchased and came into possession of it from Floyd, and the value of the rents received by Mrs. Botts for the year 1889.

Mrs. Botts, had she brought suit in equity for partition at that time, would have been entitled to recompense for the value of the improvements. *McDearman* v . *McClure*, 31 Ark. 562; *Jones* v. *Jones*, 23 Ark. 213; *Drennen* v. *Walker*, 21 Ark. 557. Appellees in such a proceeding would also have had the right to have their *pro rata* share of the value of the improvements paid or set-off by their *pro rata* share of the rents which their co-tenant in common had received. Section 5917, Sandels & Hill's Digest. "Where one tenant in common has been in the exclusive perception of the rents and profits, on a bill for partition and account, the latter will also be decreed." 1 Story, Eq. Jur. § 655, and authorities cited; *Drennen* v. *Walker*, *supra*.

When Cocke & Co. foreclosed their deed of trust, and purchased the lands and improvements thereon, they acquired only the interest that Mrs. Botts had when she executed the deed of trust. As we have seen, at that time the improvements which Mrs. Botts had put upon the land (treating her as the one making such improvements) had all been paid for, except, perhaps, the sum of $135. So that appellants, as tenants in common with appellees, in a suit for partition, would have no

right to have the lands partitioned so as to give them a one-third interest therein, exclusive of the improvements, and then have compensation for improvements also; for the appellees, as we have seen, with a possible exception of the amount of $135, had paid for the improvements, and owned same, before Cocke & Co. became tenants in common.

But, even if appellees had not already paid for their share of the improvements to Mrs. Botts in the manner indicated, still Cocke & Co. would have no right to compensation for same from the appellees in a suit for partition, for another reason, to-wit: It appears, by the written agreement between appellants, Cocke & Co., and J. E. and Nannie Botts of December 27, 1889, that appellants had acquired from Floyd the unexpired term of Floyd's lease, and that appellants on that day leased or rented same back to Mrs. Botts for the sum of $1,000 for the years 1890, 1891, and 1892, annually, to be paid November 1, 1890, November 1, 1891, and November 1, 1892. Appellants, having thus assumed to act as landlords of the premises, and having collected from Mrs. Botts the rents for the year 1890, would be responsible to the appellees, as tenants in common of an undivided two-thirds, for their share of said rents. And, in this suit by appellants to have compensation for the improvements, appellees certainly have the right to show that the improvements had been paid for to appellants by their perception of the entire rents of the place for the year 1890. These rents just about offset the value of the improvements. Therefore, from any point of view we may take, the decree was substantially correct in overruling the exception to the report of the commissioners as to the partition of the property, and in confirming said report as made.

2. As to the claim of appellees for rents for the years 1890, 1891 and 1892: The improvements having been paid for (except about $135) out of rents collected by Mrs. Botts for the year 1889, appellees, as tenants in common, would be entitled to two-thirds of the rents of the lands for the year 1890, less two-thirds of one hundred and thirty-five dollars, because for that year the proof warrants the conclusion that Cocke & Co., as the landlords, collected rent amounting to the sum of

$1,000 from Mrs. Botts. It is objected here, for the first time, that the claim for rent, as pleaded in the answer of appellees, is not sufficient to entitle them to any relief whatever.

This court said in *Drennen* v. *Walker*, *supra*, that ordinarily correlative to the question of improvements is that of rents and profits. The answer of appellees, after setting up a claim for rents for various years, and specifically alleging the amounts due them, and alleging "that said rent collected by Mrs. Botts and Cocke & Co., and appropriated by them, and wrongfully detained from these defendants, should be reimbursed to them out of said improvements, besides any share which may rightfully belong to them," prays that "same may be done," and "that they be allowed judgment for same." In *Harrison* v. *Harrison*, 56 Miss. 174, it is said: "On a bill by one tenant in common for partition, where one defendant by his answer sets up a claim for contribution from the other co-tenants for certain expenditures on the estate, the relief may be granted him, although he did not make his answer a cross bill." This would apply to a claim for rents. And especially might such relief be granted where, as here, there was no objection below to the form of asserting the claim for rents, and the proof was had and the case was heard by the court below just as though the defendants had set up their claim for rent by cross bill, or in an independent proceeding. Where "matters only proper for a cross bill are included in the answer, and no objection has been made after evidence introduced by both parties, and the issues have been determined thereon, the irregularity is waived, and affirmative relief may be granted as if a cross bill had been filed." 1 Enc. Pl. & Prac. 872, and authorities cited in note. Appellees were entitled to a decree against appellants for two-thirds of the rent for the year 1890, or $666.66, less two-thirds of $135, which appellees still owed for the improvements.

As to the rents for the year 1891, there is no proof whatever that appellants ever received any rents as landlord for that year. Cocke swears that their firm did not receive any rents for that year from the lands which it had previously sublet to Mrs. Botts, and the written agreement of the 2d day of February,

1891, between J. E. and Nannie E. Botts and J. L. Cocke & Co. had the effect to abrogate the prior agreement between Mrs. Botts and Cocke & Co. whereby Mrs. Botts had agreed to lease and rent the lands from Cocke & Co. for that year. For this agreement of February 2, 1891, shows that Mrs. Botts had assumed to stand as landlord of the place for that year to one Wheeler, who, it seems, had the place rented, and she expressly waived any claim for rents on the place for that year until the sum of fifteen hundred dollars was paid to J. L. Cocke & Co. for supplies advanced to Wheeler, if they equaled that sum. If J. L. Cocke & Co. could be made responsible at all to the appellees for the rents of 1891, it would be upon the theory that they had received cotton from the place, upon which there was a landlord's lien for rents with notice of such lien. But this would not be tenable, for two reasons: First, because the proof is hardly sufficient to charge them with notice of appellee's lien; and, second, if it were sufficient, the lien of a landlord for rent expires in six months after the rent becomes due and payable. Sand. & H. Dig., § 4794. The rent for the year 1891 would be due at the end of the year, and this claim for rents was not set up until appellee's answer was filed in this case, November 13, 1894. Appellants could not be held for the use and occupation for this year (1891), because they did not use and occupy. They could not be held for rents collected, because they did not collect any, nor for the purchase of cotton that should have gone to pay the landlord's lien for rent, for the reasons stated. The decree, therefore, in favor of appellee Urie for the rent of 1891 is erroneous.

As to the rent of the year 1892, the court was clearly correct in holding that appellants were not liable to appellees for the rents of 1892. The proof shows that one B. L. Armstrong was appointed a receiver in a suit between *J. L. Cocke & Co. et al.* v. *Nannie E. Botts et al.* in a controversy over the property involved in the present suit, and that as such receiver he collected the rents for the year 1892, and, under the orders of the court in that case, paid same over to the parties; one-third being paid to Cocke & Co., and two-thirds to the representative of the appellees here.

The decree of the Crittenden chancery court in overruling the first and fifth (or last) exceptions to the commissioner's report is affirmed. As to the second, third and fourth exceptions, what its rulings should have been on these is sufficiently indicated by what we have already said. The decree, in so far as it denies Mrs. Clausen her share of the rents of 1890, and gives Urie rents for 1891, is reversed. Appellants did not set up limitations or laches against the claim for rents. The court should have given a decree for Mrs. Clausen and Urie for two-thirds of the rent of 1890, less two-thirds of $135. Reversed and remanded, with directions to enter a decree in accordance with this opinion.

BUNN, C. J., dissents.

BATTLE, J., dissents from so much of decree as allows rents to appellees.

---

67 464
84 343
84 344

## OVERTON v. LOHMANN.

Opinion delivered February 17, 1900.

1. BILL OF EXCEPTIONS—EVIDENCE.—The statement in a bill of exceptions that it was agreed that either party could use as evidence such portions of the records of the circuit court as he desired does not show that any portions of such records were in fact read as evidence. (Page 467.)
2. SAME—PRESUMPTION.—Where a bill of exceptions is confused and contradictory, doubts as to its meaning must be resolved against the appellant, and in support of the judgment. (Page 468.)
3. APPEAL—WHEN JUDGMENT AFFIRMED.—Where a reversal is sought on the ground that the judgment was not supported by the evidence, the judgment will be affirmed if it cannot be determined from the bill of exceptions with certainty what the evidence was. (Page 468.)

Appeal from Phillips Circuit Court.

HANCE N. HUTTON, Judge.

*Tappan & Porter*, for appellant.

An answer alleging inconsistent defenses is bad on demur-

rer. Bliss' Code Pldg. §§ 342, 343. Denials must be direct. 33 Ark. 227. Appellant could, after surrendering his tenancy, set up the title he had acquired to the land. 15 Ark. 104; 33 Ark. 536; 31 Ark. 471; 33 Ark. 195; 42 Ark. 289; 64 Ark. 453. The decree in the overdue tax case is conclusive in any collateral proceeding. 49 Ark. 336; 50 Ark. 188; 11 Ark. 521; 49 Ark. 419. Where land is forfeited to the state for non-payment of taxes, it is not thereafter subject to sale by the county collector for the taxes for which it has been forfeited, or any others. 56 Ark. 279. The tax sale is a nullity, and appellee is not entitled to recover either what he paid or the value of his improvements. 31 Ark. 279; 37 Ark. 101; 51 Ark. 397; 57 Ark. 474. Neither laches nor limitation can be pleaded against the state. 63 Ark. 56; 23 Ark. 642; 9 Wheat. 720; 13 Wall. 92; 105 U. S. 271; 51 Ark. 33; 6 Pick. 408; 4 Am. Dec. 488, S. C. 4. H. & M. 57; 7 Am. Dec. 737, S. C. 4 Bibb, 62; 27 Am. Dec. 613, S. C. 5 Lea, 512; 32 Am. Dec. 718, S. C. 5 Ohio, 298; 95 Am. Dec. 729; 24 Ia. 283; 67 Am. Dec. 471; 27 Pa. St. 339. Nor does the statute run against the grantee of the state until after the state parts with title. 16 Al. 239; 3 Metc. (Ky.) 50; 4 Wall. 202; 22 Wall. 444; 117 U. S. 151.

*Jacob Trieber*, for appellee:

The bill of exceptions is defective, and presents nothing to the court. Where an extension of time beyond the term is given to prepare a bill of exceptions, it does not become a part of the record, when settled by a judge in vacation, unless filed by the clerk within the time allowed by law. 53 Ark. 415; 45 Ark. 102; 42 Ark. 488; 58 Ark. 110; 35 Ark. 386; *ib.* 395. Copying the pleadings in a bill of exceptions does not bring them before this court. 34 Ark. 696; 47 Ark. 504. A general finding in favor of a party is sufficient to support a judgment, and is conclusive on appeal. 65 Ark. 14; 53 Ark. 537. In the absence of a showing as to what declarations of law were made by a court, the presumption is in favor of their fullness and correctness. 46 Ark. 207; 36 Ark. 491. The instructions having been presented and excepted to in gross, if any one of them was bad, they were properly refused. 28 Ark. 8; 38 Ark.

528. Inconsistent defenses, pleaded in separate paragraphs, are permissible. 35 Ark. 560. Where a demurrer is made to an answer setting up several defenses, it is properly overruled if any of them are good. 31 Ark. 301; 37 *ib.* 32. Where a court finds generally for a party, the presumption is that all facts necessary to such finding are also found true. 53 Ark. 537; 65 Ark. 14. There was no legal confirmation of the sale to the state, and no title passed thereby. 53 Ark. 445; 59 Ark. 5. The sale being void, the land was liable to taxation and sale. 34 Fed. 70; 140 U. S. 646.

RIDDICK, J. We are of the opinion that the judgment appealed from in this case should be affirmed for want of a proper bill of exceptions. The action was one in ejectment to recover 80 acres of land, and was tried before the circuit judge without a jury, who gave judgment in favor of the defendant. The bill of exceptions improperly includes all the pleadings and orders of the court to the final judgment, but leaves us in doubt as to what evidence was before the court. It commences by saying that the cause was heard by consent before the court sitting as a jury, and continues as follows: "Thereupon the plaintiff offered the complaint in evidence and a deed from the commissioner of state lands of this state to said plaintiff conveying the lands in controversy to him, which said deed was made an exhibit to the complaint. And the said defendant thereupon read his answer to said complaint and also a deed executed by the county clerk of Phillips county to said defendant for the land in controversy, which was an exhibit to said answer; and thereupon an agreed statement of facts, which was made a matter of record, and is included in judgment on page 17, was also read,—which was all the evidence in this case." It then states that plaintiff offered instructions, which were refused. That the court gave judgment for defendant, and afterwards overruled a motion of plaintiff for a new trial, to which plaintiff excepted. All this is contained on the first page of the bill of exceptions. On other pages following is set out the complaint, a deed to plaintiff from the commissioner of state lands, a decree of the circuit court of Phillips county in an overdue tax suit ordering the

sale of certain lands (among them the land in controversy), and a subsequent order confirming the sale. After this follow the answer of defendant, a clerk's tax deed conveying the land to defendant, certain motions, orders of the circuit court, the final judgment, instructions asked by plaintiff and refused by the court, motion for new trial, order overruling same, order granting the appeal, and then, in conclusion, the following: "And thereupon the plaintiff comes on this, the 20th day of May, and tenders this, his bill of exceptions, which he asks may be signed, sealed and enrolled as such in this cause, and be made a part of the record thereof.

"Given under my hand, this day May 21, 1898.

"H. N. HUTTON, Judge First Judicial Circuit."

It will be noticed that the bill of exceptions specifically states that the only evidence introduced was the complaint and deed from state land commissioner, the answer and deed from clerk of Phillips county, and, in addition thereto, an agreed statement of facts, which the bill of exceptions states was read in evidence, and incorporated in the judgment. But the judgment does not contain any agreed statement of facts. The only reference therein to an agreement is the statement that the court finds by agreement of counsel that the rent for 1897 was nothing, and for 1898 was seventy-five dollars, and the following statement: "It is further agreed in open court that each party may use such part of the record of this court as he may choose as testimony in this case." Though this statement is placed at the close of the final judgment, we suppose that the agreement it contains was made before the judgment, as it is not apparent how evidence could have been introduced after the rendition of the judgment deciding the case. This statement in the judgment entry shows that the parties had agreed as to the admissibility of certain records, but it does not show that any such records were in fact read, nor does it contain any agreement as to the facts of the case. There appears in the bill of exceptions, as before stated, a copy of decree and order in an overdue tax case, and we think it probable that this decree and order were used in evidence, and that the agreed statement of facts, which the bill of exceptions states was

read in evidence, refers to the agreement above mentioned allowing either party to use such portions of the record of the circuit court as he might choose as evidence. But this is only a supposition on our part. The bill of exceptions states that, besides the pleadings, nothing except two deeds and the agreed statement of facts was read in evidence. As to what this agreed statement of facts was we are left in doubt. Nor can we say whether the decrees in the overdue tax suit copied in the record were read in evidence or not. The statement in the bill of exceptions that only two deeds and an agreed statement of facts were read in evidence seems to exclude these overdue tax decrees. And the mere agreement that either party could use as evidence such portions of the records of the circuit court as he desired does not show that any such record was in fact read as evidence. The bill of exceptions does not affirmatively state that it contains all the evidence, while the presence of these overdue tax decrees in the record, the reference to an agreed statement of facts, and the findings of the circuit judge as to the adverse possession by the defendants and on other points indicate that there was evidence before him not found in the bill of exceptions.

We know that it is often necessary to prepare bills of exceptions in haste, and we therefore overlook matters of form; but when we are asked to reverse the judgment of the circuit court in a cause when it is necessary for us to know the evidence before the court, that evidence should be set out with a reasonable degree of certainty.

The bill of exceptions is generally prepared by the counsel for appellant, and, when it is confused and contradictory, doubts as to its meaning must be resolved against the appellant, and in support of the judgment. 3 Enc. Plead. & Prac. 509, and cases cited.

The only ground set up in the motion for new trial that would be tenable in any view of the evidence is that the finding and judgment is not supported by the evidence. As we are not able to say from the bill of exceptions with any reasonable degree of certainty what that evidence was, the judgment must be affirmed.

## STATE v. ADLER.

Opinion delivered February 24, 1900.

1. BAIL BOND—EFFECT OF DISCHARGE OF PRINCIPAL.—If one held to bail be discharged on habeas corpus by a tribunal of competent jurisdiction, this will also discharge the surety in the bail bond. (Page 477.)

2. SAME—DISCHARGE—COLLATERAL ATTACK.—Where a person who is an officer of the United States is charged in a state court with an offense alleged to have been committed by him in the discharge of his official duties, the judgment of a federal court or judge, having jurisdiction, discharging such officer on habeas corpus cannot be attacked for informality of procedure in a suit by the state to forfeit the bail of such officer. (Page 477.)

Appeal from Independence Circuit Court.

FREDERICK D. FULKERSON, Judge.

*Jeff Davis, Attorney General, Chas. Jacobson, S. D. Campbell* and *J. C. Yancey*, for appellant.

It was in the surety's power to surrender his principal, and, having failed to do so, he is liable on the bond. 49 S. W. 349; 62 Ark. 505; 51 Am. Rep. 277; 35 Ark. 532; 25 Am. Rep. 524; 35 Am. Rep. 437; 4 Am. Rep. 58; 16 Wall. 366. The habeas corpus act (Rev. St. U. S. §§ 751–766) gives the federal courts power to release a person only when the body of the petitioner can be brought before the judge and by the person actually having him under *involuntary* custody. Church, Habeas Corpus, § 87, p. 106; 169 U. S. 293, 294; 1 Am. & Eng. Enc. Law, 1067; 172 U. S. 148, S. C. 19 Sup. Ct. Rep. 110; also, 4 Am. & Eng. Dec. in Eq. 495; 29 Ark. 47; 43 Ark. 107; 48 Ark. 151; 54 Ark. 627; 62 Ark. 439. The return must be made by the officer or person having the petitioner in custody under the alleged illegal process. 114 U. S. 564; 6 Martin, 569; Rev. Stat. U. S. §§ 755, 756, 757 and 758; 3 Utah, 50. The release in a habeas corpus case relates only to the particular writ under which the prisoner is held. 9 Peters, 704; 13 Fed. Cas. 450;

140 U. S. 278, 289; 29 Ark. 575; 55 Ark. 633. The federal court had no jurisdiction to issue habeas corpus where the petitioner is not held in violation of the constitution or a law of congress or a treaty of the United States. 18 Fed. 62, 68; 13 West. Jur. 505. Appellant had no right to make an arrest under a "John Doe" warrant, and in so doing was violating the law. 153 U. S. 78; 92 Fed. 881; 4 Dill. 323; 34 Ark. 174.

*Jacob Trieber*, for appellee.

The appearance and filing of pleas by the respondents gave the court all necessary jurisdiction of the parties. 46 Ark. 38; 64 Mo. 205. The judge and court had jurisdiction of this class of cases and of this particular one. Rev. Stat. U. S. §§ 752, 753; 82 Fed. 302; 87 Fed. 453; 173 U. S. 277; 100 U. S. 257; 135 U. S. 1; 117 U. S. 241; 173 U. S. 277. The question of jurisdiction cannot be raised collaterally. 10 Wheat. 192; 152 U. S. 327, 340; 50 Ark. 338; 49 Ark. 397; 88 Tenn. 734; 60 Wis. 349; 64 Mo. 205. The discharge of the prisoner by habeas corpus placed him out of the reach of his bail and discharged it. 38 N. J. Law, 247; 1 Bush, 616; 25 Ark. 315; 91 Ky. 588; 80 Ky. 208; Doug. 45; 1 Overton, 224; 35 Kas. 659; 107 U. S. 601.

*Morris M. Cohn*, for appellants, in reply.

The judge of the district court had no jurisdiction to act outside of the territorial limits of his court. 5 Mason, 35, 40; 3 Wash. C. C. 456; 12 Pet. 300, 328–9. Cf. Rev. Stat. U. S. § 533; 1 G. & T,'s. notes, 223, 224; 2 Ark. 494; 31 N. E. 88; 17 Ohio St. 146. The habeas corpus act of congress limits the jurisdiction of the judge to cases within the jurisdiction of his court. Rev. Stat. U. S. § 752. "Within the jurisdiction," as used therein, means within the territorial jurisdiction. If the judge was without jurisdiction, his rulings were void. 124 U. S. 200, 220. No appeal lies from the decision of a district judge in a habeas corpus proceeding. 160 U. S. 231, 244; 157 U. S. 697; 121 U. S. 87.

*Jacob Trieber*, for appellees, in reply:

In the absence of evidence showing where the writ was issued, the presumption is that it was issued at the proper place. 50 Ark. 338. The objection to the place of issuance of the writ, not having been raised in the court below, was not open to review on direct appeal; much less in a collateral proceeding. 116 U. S. 80, 93; 4 U. S. App. 603. The decision of a court that it has jurisdiction can not be questioned collaterally. 1 Black, Judg. § 274. That the federal judges have the power to issue the writ, and that an appeal lies therefrom, see: 45 Ark. 158; 64 Mo. 205.

BUNN, C. J. This is a suit by the state against the defendant, Nathan Adler, surety on a forfeited bail bond. Adler made defense that while his principal in said bond, one A. M. Schlierholz, was in his custody as such bail, and before the day set for the appearance of Schlierholz, and his trial, by the justice of the peace before whom the charge against him was pending, he, the said Schlierholz, was taken in custody by the United States marshal of the Eastern district of Arkansas, and taken from his (Adler's) custody, under and by virtue of a writ of habeas corpus issued by the Hon. John A. Williams, Judge of the United States district court for the Eastern district of Arkansas, and by virtue of said writ taken to the city of Little Rock before the forfeiture of said bond had been declared, and that for this reason he was unable to produce the body of said Schlierholz before said justice of the peace court, as he had undertaken in said bond to do; that afterwards, on the 3d day of February, 1899, when said habeas corpus proceedings came on for hearing before said United States district judge, appellant therein, the State of Arkansas, appeared before said judge, and filed her response, as did also other parties named in the writ of habeas corpus, and after a hearing by said judge it was by him decided and determined that said Schlierholz was illegally deprived of his liberty by virtue and by reason of said cause pending before said Ashley (J. P.), and he was ordered by said judge to be discharged; that by reason of said proceedings he (Adler) was powerless to produce the body of said Schlierholz at the time said forfeiture was taken.

With the answer was exhibited the petition of Schlierholz for the writ of habeas corpus, and, as exhibits to the same, the affidavit of E. M. Phillips, charging him with the crime of false imprisonment; also a warrant of arrest, issued by N. E. Duffy, J. P. (the first justice of the peace, from whom a change of venue was subsequently taken to Ashley, another justice of the peace in Independence county); also, the writ of habeas corpus. The record also contains all proper returns and the proceedings before the Hon. John A. Williams on the hearing of the petition for the writ, and the appearance and responses of the parties summoned therein on his order, among whom is the State of Arkansas, and his findings and judgment on the issues therein made before him.

Such being the evidence before the circuit court, thereupon the appellant requested the court, in writing, to find the facts as follows:

"1. That Charles A. M. Schlierholz and defendant Nathan Adler executed the bond herein sued on, and there has been a breach of said bond on the part of the defendant; that said bond had been forfeited, and defendant Adler is liable to the State of Arkansas for the penalty thereof.

"2. That on the 10th day of July, 1898, the defendant Schlierholz procured himself to be taken into the custody of the United States marshal for the Eastern district of Arkansas, and the only authority for such custody at that time was a telegram from Judge John A. Williams, sent from Manitou, Colorado, where said judge then was, which telegram is marked 'Exhibit D' to stenographer's transcript.

"3. That defendant Nathan Adler never was at any time a party to the habeas corpus proceedings, and there was no notice of such proceedings to any one until July 21, 1898, and after the forefeiture was taken on the bond sued on.

"4. That at the time said bond was forfeited said defendant Adler was not deprived of the privilege of surrendering him by law, and the obligee in said bond had done nothing to discharge defendant Adler from his obligations, and defendant is liable on said bond.

"5. The district judge, John A. Williams, had no jurisdiction to discharge defendant, Nathan Adler, from his obliga-

tion on said bond, and, so far as said order seeks to impair such obligation of said Adler, said order is null and void.

"6. That defendant Adler has never surrendered nor attempted to surrender said Schlierholz into custody of any constable, sheriff or jailer in Independence county, nor has he attempted to arrest or retake said Schlierholz for the purpose of making such surrender."

And the court refused to find the facts as contained in any one of said foregoing paragraphs, as requested by appellant, and to each refusal appellant excepted, and duly saved her exceptions of record.

At the request of the appellee, the court found the facts as follows:

"The court finds the facts to be: That defendant executed a bail bond to the State of Arkansas, on the 6th day of July, 1898, in the sum of five hundred dollars, for the appearance of the defendant Schlierholz on July 9, 1898, before N. E. Duffy, a justice of the peace for Independence county, to answer a criminal charge on which said justice had issued a warrant. On July 9th the accused appeared, and on his motion the venue was changed to Justice W. C. Ashley, and the cause set for July 11th. That on July 10, 1898, the said Schlierholz was taken in custody by the United States marshal of the Eastern district of Arkansas, in pursuance of a writ of habeas corpus issued for him and commanding the marshal to take his body, which writ was issued by the Hon. John A. Williams, district judge of the United States for the Eastern district of Arkansas, and while in said custody, on July 11th, a forfeiture was entered by the justice before whom the cause was set for a hearing. That in the habeas corpus proceedings before said United States judge the state entered its appearance and filed its reponse, as did also the justice and the sheriff; that the question of jurisdiction of the said United States judge to issue said writ of habeas corpus was raised, and by the judge decided that he had jurisdiction, and upon the hearing made an order discharging said Schlierholz from the custody of his bail, the defendant Adler, and declared said arrest and proceedings in which

the bond sued on was given void. Thereafter this suit was instituted. The court further finds that said United States judge had jurisdiction of the person of Schlierholz, and that the State of Arkansas and its officers had duly entered their appearance before him and contested said habeas corpus proceedings; that the judgment of said United States judge in said case has never been appealed, set aside nor in any manner vacated, but is in full force; that the writ of habeas corpus was issued by the United States judge while said judge was in the State of Colorado, and by him forwarded to the United States marshal at Little Rock."

And to that part of the court's findings of facts, to-wit: "That on July 10, 1898, the said Schlierholz was taken in custody by the United States marshal of the Eastern district of Arkansas, in pursuance of a writ of habeas corpus issued for him, and commanding the marshal to take his body, which writ was issued by the Hon. John A. Williams, district judge of the United States, for the Eastern district of Arkansas, and while in such custody, on July 11th, a forfeiture was entered by the justice before whom the cause was set for hearing;" and also to the finding of the court, to-wit: "Upon the hearing he made an order discharging said Schlierholz from the custody of his bail, the defendant Adler, and declared said arrest and proceedings in which said bond sued on was given void;" and also to the finding, to-wit: "That said United States judge had jurisdiction of the person of said Schlierholz, and that the State of Arkansas and its officers had duly entered their appearance before him, and contested said habeas corpus proceedings; that the judgment of said United States judge in said cause has never been appealed, set aside or in any manner vacated, but is in full force"—to each and every of said findings, separately, the appellant duly excepted.

Thereupon appellant requested the court to make the following declarations of law:

"1. When the defendant Nathan Adler executed the bond sued on, he assumed all risks of Schlierholz's voluntary noncompliance with the terms and conditions thereof, and although Schlierholz may have been in lawful custody of another at the

time the forfeiture was declared, such custody being voluntary on the part of Schlierholz, and the obligee, State of Arkansas, not having taken him from the custody of said Adler, and having done nothing herself to impair the obligation, defendant is liable.

"2. The defendant Adler not having been a party to the habeas corpus proceedings, and not having shown to the said district judge, the Hon. John A. Williams, by return or response, the authority by which he was in his constructive custody, and having made no effort to retain said Schlierholz in his custody, or to have him remanded to his custody, that he might comply with the conditions and terms of his said bond, he is liable.

"3. The said district judge, the Hon. John A. Williams, having heard said habeas corpus proceedings and having made said order at his chambers, the transcript of said order and proceedings is not the record of any court, and said proceedings cannot affect the liability of defendent on the bond in this action.

"4. The said district judge of the United States, at his chambers, did not have jurisdiction to discharge said Schlierholz from the custody of his bail, nor to declare the said arrest and proceedings under which said bond was given void.

"5. The defendant Adler, having signed and executed the bond in this case, is estopped from claiming as a defense thereto that the arrest and proceedings under which said bond was given are void, and estopped from pleading any order of the United States district judge to such effect.

"6. The said defendant Adler having executed the bond sued on, and failing to appear in the justice of the peace court of W. C. Ashley, to whom said Schlierholz had, on his motion, taken a change of venue on the day set for trial of said cause, and judgment of forfeiture having been taken on said bond by a court of competent jurisdiction on the failure of the said Schlierholz to appear, and defendant Adler at that time failing to show any cause why he could not produce the body of said Schlierholz, said defendant is now thereby estopped from set-

ting up any inability on his part to comply with said obligation.

"7. On the whole case the law is in favor of the plaintiff, who should recover the penalty of the bond in this action."

The court refused to make each of the respective declarations of law above asked, and appellant duly excepted severally to each refusal.

At the request of appellee Adler, the court made the following declarations of law, to-wit:

"1. A bail may be released from his liability by act of the law, and when the accused is taken from his bail by a writ of habeas corpus issued by a court or judge, which has jurisdiction to issue such writ, and upon a hearing before such court or judge, to which the obligee makes itself a party by entering appearance and filing response, and judgment of discharge is rendered, it will release the bail from producing the principal.

"2. When a person who is an officer of the United States is charged in the state court with an offense which he claims was done by him in discharge of his duty as such an officer, and in pursuance of the rules and regulations prescribed by the chief of his department in pursuance of the laws of the United States, a court or judge of the United States has jurisdiction to inquire into the legality of his imprisonment or detention by state process, and the findings of such court or judge cannot be attacked in a collateral proceeding.

"3. Upon such a discharge the bail has not the right to re-arrest and surrender the principal, and whenever the judgment of the court of competent jurisdiction deprives the bail of the right to surrender him, he is discharged from liability by act of the law."

To the giving of each of the foregoing declarations of law appellant objected, and severally saved her exceptions thereto. Thereupon the court gave judgment in favor of appellee, to which appellant at the time duly excepted. In due time appellant filed her motion for a new trial, assigning as grounds therein matters hereinbefore mentioned, to which objections were made and exceptions saved by her, which said motion for a new trial was by the court overruled,

and exceptions duly saved by appellant. An appeal was prayed by appellant to this court, which was duly granted, and at the same term of said court appellant duly filed her bill of exceptions, containing all the evidence offered or introduced, and making of record all the proceedings hereinbefore referred to.

The findings of fact by the court below will not be disturbed; and our inquiry is as to the declarations of law. The proposition that if one held to bail is discharged on petition and writ of habeas corpus by a tribunal of competent jurisdiction, this will also discharge the bail, as set forth in the court's first declaration of law, is well settled. *Belding* v. *State*, 25 Ark. 315; *Smith* v. *Commonwealth*, 91 Ky. 588; *Davis* v. *South Carolina*, 107 S. C. 597; Revised Statutes U. S. § 766.

The second declaration of law by the trial court involves the real substance of the jurisdiction of the federal courts in cases like this one. The Supreme Court of the United States in *Re Neagle*, 135 U. S. 1, in construing section 753, Revised Statutes, although regarded as having gone to the very verge of legal construction, as to one feature of the case, yet, in the main, expressed the generally accepted doctrine that a federal officer is protected while in the discharge of the duties imposed upon him by law. The general principle is doubtless the correct one, as reasoned in the case of *Davis* v. *Tennessee*, 100 U. S. 257, where it is also held that where a civil suit or criminal prosecution has been commenced in the state courts against an officer of the United States for acts done in the discharge of his official duties, the cause may be removed to the proper federal court at once, and it is held in *Ex parte Royall*, 117 U. S. 241, and many other cases, that the writ of *habeas corpus* furnishes a proper remedy in cases of criminal prosecution, the federal courts having a sound discretion to exercise the jurisdiction before or after trial of the petitioner in the state courts. This is approved in *Ohio* v. *Thomas*, 173 U. S. 276. Section 752, Revised Statutes of the United States, confers jurisdiction upon the justices and judges of the United States courts, as well as upon the courts themselves, to hear and determine petitions for writs of habeas corpus, and section 763 of the same chapter

provides that appeals may be taken from their decisions to the circuit court of the district. The cases touching this point have greatly multiplied in recent years, but it is unnecessary to make further citations. In the case at bar, the federal judge who heard and determined the issues made by the petition and responses thereto in the habeas corpus proceedings found that Schlierholz was acting in the discharge of his duty as an officer of the general land office of the United States when he committed the offense charged against him in the state courts, if at all. He had therefore substantive jurisdiction of the cause.

The principal stress is put upon the manner of procedure. For instance, it is objected, first, that Schlierholz arrested Phillips, his prosecutor in the state court, afterwards, for false imprisonment, on what is known as a "John Doe warrant" (that is to say, a warrant issued against a fictitious person), and that therefore his arrest of Phillips by virtue of said warrant was unwarranted in law. It is not claimed that Phillips was the wrong man, but only that he was not named in the warrant of the United States Commissioner. It is claimed, however, that the federal grand jury ignored the presentment against Phillips, and thus inferentially, it may be argued, that he was not guilty of the charge named in the warrant. But this action of the grand jury is explained. This, after all, is not a matter for our inquiry. Whether Schlierholz was guilty of a crime or not in arresting Phillips, makes no difference. The only question in that connection is as to the irregularity of the warrant.

Another similar question is presented as to the place where the writ of habeas corpus was issued by the federal judge—a place without the limits of his territorial jurisdiction. These writs had served their purpose. In the case of the warrant Phillips had been, at least constructively or informally, arrested, and his case presented to the grand jury, and the matter against him compromised and settled by permission of the court, as we understand from the record. In the matter of the writ of habeas corpus, it served its purpose; all parties named therein appearing as therein directed, and the trial had and

judgment rendered. If there were errors, they might have been corrected on appeal, but no appeal was taken.

Another question presented in the record is, whether or not the "constructive" custody of Adler of the person of Schlierholz at the time of the issuance of the writ of habeas corpus by the federal judge. This question was also directly addressed to the district judge, and, if he committed any error in relation thereto, it was proper to have the same corrected on appeal, and this course was open to all the parties before him in that proceeding. We see no error in the court's second declaration of law.

The appellee, as the bail of Schlierholz, after the latter's arrest and discharge, was certainly prohibited from re-arresting him under or by virtue of his relation as his bail; for the discharge of the principal, as we have seen, if lawful, would also work a discharge of the obligations of the bond; and, of course, its rights and privileges passed with the corresponding obligations of the bond. Besides, this seems to be settled by the provisions of section 766 of the Revised Statutes of the United States. This disposes of the question arising upon the making the third declaration of law.

It appears to us that all the questions presented for our consideration were before the federal judge,—at least all the questions affecting his own jurisdiction and powers. His determination of the same were judicial determinations, from which appeals might have been taken. His judgments could not therefore have been treated as nullities—could not be attacked collaterally. This was the view the learned circuit judge took of the case, and in this he was right. The judgment is therefore affirmed.

67 480
80 332

KIRKLAND v. BENJAMIN.

Opinion delivered February 24, 1900.

NOTES—LEGALITY—COMPOUNDING A FELONY.—Notes executed for the purpose of procuring the dismissal of a criminal prosecution are contrary to public policy and void.

Appeal from LaFayette Circuit Court.

CHAS. W. SMITH, Judge.

*J. W. Warren*, for appellants.

Contracts like this one are prohibited by statute. Sand. & H. Dig., § 1488. A note given in consideration of the dismissal of a prosecution is void. Tied. Com. Pap. § 183; 1 Dan. Neg. Inst. § 196; 54 Mo. 340. It is sufficient if the offense be charged. 1 Dan. Neg. Inst. § 196; 51 Ark. 519. If the promise to dismiss the prosecution constituted any part of the consideration of the note, it was void. Teid. Com. Pap. §§ 179, 183. A contract to *use every legal and proper endeavor* to have a prosecution dismissed is against public policy and void. Tied. Com. Pap. § 183; 14 Bush, 505; 78 Ind 152; 6 Bradw. 612.

BATTLE, J. "A promissory note made to procure the dismissal of a criminal prosecution, although given for the amount of a debt due to the payee, is contrary to public policy, and void." *Rogers* v. *Blythe*, 51 Ark. 519.

"The general rule is that where an illegal contract has been made, neither courts of law nor equity will interpose to grant any relief to the parties, but will leave them where it finds them, if they have been equally cognizant of the illegality." *Shattuck* v. *Watson*, 53 Ark. 147.

We think that the evidence adduced at the hearing of this cause clearly shows that the notes sued on were executed for the purpose of procuring the dismissal of a criminal prosecution.

The decree of the circuit court is therefore reversed, and the cause is remanded; with instructions to the court to dismiss the complaint.

WOOD, J., absent.

---

67 484
82 585

## STOUT v. BROWN.

Opinion delivered February 24, 1900.

ATTACHMENT—SALE—REVERSAL—RESALE.—Certain property was seized under attachment, and, the attachment being sustained, was sold, and the sale affirmed. Upon appeal the judgment was affirmed, except that the sale was set aside, and the trial court ordered to resell the property, if within its jurisdiction. Upon a return of the cause, the trial court found that no part of the property was within its jurisdiction, part of it having been bought and disposed of by plaintiff, that it had been sold for its market value, and that the proceeds had been applied to the payment of the judgment against defendant. Upon such findings the trial court re-confirmed the sale, instead of ordering plaintiff to account for the property purchased by him. *Held*, no prejudicial error. (Page 483.)

Appeal from Benton Circuit Court.

EDWARD I. MCDANIEL, Judge.

*E. P. Watson*, for appellant.

It was error for the court to re-confirm the same sale which the judgment of the supreme court, in 64 Ark. 312, ordered it to set aside. The attachment lien became merged in the judgment lien, which was a specific lien. Waples, Att. 582, 583. This specific lien exists no longer than the court's actual custody of the property. Waples, Att. 279, 280, 298; Waples, Proc. in Rem. §§ 611, 612. The court loses control of the property upon its being taken beyond its jurisdiction. Waples, Att. 312, 313. The officer had no power to turn over the property to the plaintiffs until the sale was confirmed. 64 Ark. 312. The delivery of the custody of the goods to plaintiff operates as a dissolution of the attachment, to that extent.

3 Am. & Eng. Enc. Law (2 Ed.), 240, n. When the attachment lien is superseded by the execution lien, and the latter is lost, there is no authority to re-take or sell the property under the attachment. Freeman, Ex. 271 b. Upon failure to sell within the statutory time after judgment in favor of the plaintiff in attachment, the lien will be dissolved. 3 Am. & Eng. Enc. Law (2 Ed.), 243.

*James A. Rice*, for appellee.

After judgment and condemnation, the contingent lien brought into existence by the mere seizure is converted into a *jus ad rem*, and is no longer subject to be lost by the acts of an executive officer. Waples, Proc. in Rem. §§ 580, 584; 3 Am. & Eng. Enc. Law (2 Ed.), 217, 239. As between the parties to the attachment, the judgment is the only limit of the amount of liability of the attached property. 3 Am. & Eng. Enc. Law (2 Ed.), 222. As to what constitutes an abandonment of attached property, see 3 Am. & Eng. Enc. Law (2 Ed.), 217, 239.

BATTLE, J. This is the second time this cause has been before this court on appeal. The opinion delivered when it was here the first time is reported in 64 Ark. 312 (*Stout* v. *Brown*). The facts, as stated in that opinion, are as follows: "W. W. Brown brought suit against J. P. Sewell and C. R. Stout, and attached certain lots, also 48,000 feet of lumber. Upon a trial against Stout, judgment was rendered for the sum of $1,401.71, the attachment was sustained, and the property attached ordered to be sold. Afterwards the sheriff sold the property attached, and reported the sale to the circuit court. The appellant, Stout, filed his exceptions to the sale, and asked that it be set aside and a new sale ordered. * * * Upon a hearing, the exceptions were overruled, and the sale confirmed, and the case brought here by appeal." This court sustained the judgment of the court as to the sale of the lots, but reversed it as to the lumber, and to that extent set the sale aside, and ordered that the lumber be resold, if it be within the jurisdiction of the court. Upon the return of the cause the circuit court heard

evidence which proved that the lumber was sold for its market value, and confirmed the sale; and the defendant appealed.

The sale of the lumber having been set aside by this court, the circuit court had no power to revive it. *Hill* v. *Draper*, 63 Ark. 141. But the record shows that the greater part of the lumber was sold to the appellee, W. W. Brown, for $150.75, and that the remainder was sold to J. M. Collins for the sum of $100, and that the latter sum was paid to the sheriff, and was used by him in the payment of costs, and that the lumber was delivered to the purchasers, who have since disposed of it, and that no part of it was within the jurisdiction of the trial court when this cause was remanded. The result was there could not be a resale. But appellee was not without remedy. The attachment of the property had not been abandoned. The lien acquired by the delivery of the order of attachment to the sheriff was perfected when the attachment was sustained. *Cross* v. *Fombey*, 54 Ark. 179; *Cunningham* v. *Burk*, 45 Ark. 267. The court attempted to enforce it by ordering the property sold; the sheriff made the sale; the court confirmed; and this court set it aside and ordered a resale, if the lumber was still within the jurisdiction of the circuit court. If it had been within its jurisdiction, the circuit court could have ordered the sheriff to repossess himself, for the purpose of selling it. Sandels & Hill's Digest, § 369. As it was not, did appellee lose his right in respect to it? He acquired the right to have the lumber appropriated to the payment of his debt, and this right was involved in this action. Did the court lose the power to enforce it? A similar question arose in *Atkins* v. *Swope*, 38 Ark. 528. In that case the plaintiff took possession of the cotton attached, and shipped it beyond the limits of the state, and sold it without the authority of law and the defendant's consent. The defendant recovered a judgment for $200, including the value of the cotton. This court, in speaking of the power of the court to compel the plaintiff to account for the cotton, said: "There had been no issue made, as provided by statute, upon the grounds of attachment; no discharge of the attachment itself. Nevertheless, as the court might, by its inherent power, have compelled the plaintiff to account for the

property by him converted, before giving a judgment in his favor or allowing execution, or, in case of a judgment against him, might have compelled him to refund, no material injustice of which he could complain would be done by including the matter in a verdict." So in this case, as in *Atkins* v. *Swope*, the plaintiff acquired possession of a part of the property attached, and converted it to his own use; and the court had the right to compel him to account for it, and to protect both parties by crediting the defendant on the judgment against him with its market value. As to the remainder of the lumber, Collins purchased it under a judgment in full force and effect at the time of the sale, and his purchase was confirmed by the court. He paid for it all it was worth, and the money received has been used in paying costs for which the judgment was liable. He could not be compelled to pay any more than the market value of it. He has done this, and the defendant has received the benefit of it. The defendant has not been prejudiced by the action of the court, and Collins does not complain. By confirming the sale the court reached the same result it would have obtained by compelling the parties to pay the market value of the lumber, and appropriating the proceeds to the payment of the judgment against the defendant. The illegality of the manner in which the end was accomplished has not prejudiced the appellant, and he has no right to complain.

Judgment affirmed.

WOOD, J., absent.

---

67 484
75 342

## STEPHENS *v.* CAMPBELL.

Opinion delivered February 24, 1900.

DE FACTO OFFICER—RIGHT TO FEES.—One who has acted as night watchman *de facto* of a city, but without legal title to the office, is not entitled to recover fees for services performed as such watchman. (Page 491.)

Appeal from Jackson Circuit Court.

RICHARD H. POWELL, Judge.

*J. W. Phillips* and *S. D. Campbell*, for appellant.

The appointment of appellee as night watchman could not be made by the vote of less than a majority of the whole council. Sand. & H. Dig., § 5158. The resolution having failed to pass, there was no such office as night watchman, and appellee could not be even a *de facto* officer. 68 Am. St. Rep. 95; 118 U. S. 425. Even a *de facto* officer cannot recover fees or salary, unless he be also an officer *de jure*. 28 Am. St. Rep. 163; 32 Am. St. Rep. 228. Appellee entered upon the discharge of his duties before passage of the ordinance providing that he should have the fees sued for in this case. Hence he is not entitled to have them. The emoluments of the office could not be increased during his term, so as to inure to his benefit. Sand. & H. Dig., § 5167; 50 Ark. 81; 53 Ark. 205. The city had no power to compensate a watchman by fees. 45 Ark. 454; 31 Ark. 462.

*Gustave Jones*, for appellee.

An attack on appellee's title to the office could not be made except by the state. Sand. & H. Dig., §§ 7367, 7368. Title to an office cannot be attacked collaterally. 29 Pa. St. 129; 49 Ark. 439.

BATTLE, J. On the 28th of October, 1897, W. W. Campbell sued T. S. Stephens, before a justice of the peace of Jackson county, on the following account:

"T. S. Stephens, Dr.

"To W. W. Campbell.

"To money had and received.....$30.75."

A jury was impaneled to try the issues in the case, and the plaintiff then stated that he was the night watchman or policeman of the city of Newport, and had performed services for which the fees sued for were due; that the defendant was marshal of the city, and had collected the fees; and that he was entitled to the same. The defendant thereupon made his statement to the jury, and admitted that he was marshal, but denied all the other statements made by the plaintiff.

S. R. Phillips, a witness in behalf of the plaintiff, testified

as follows: "Am recorder of city of Newport, and have here record of council meetings. Minutes of council meeting of January 4, 1897, read as follows, viz.:

"Council Room, January 4, 1897.

"Council met in regular session, with the following members present: Mayor Foster, Ald. Thompson, Goldman and Bach. Absent: Ald. Johnson. Quorum present. Minutes of preceding meeting were read and approved.

"Resolved by the city council that the mayor appoint a night watchman, to be confirmed by the council, at a salary of fifty dollars per month, and that said night watchman be required to give bond in the sum of one thousand dollars for the faithful performance of his duties, and to account for all moneys and valuables that may come to his hands as such officer. [Signed] Ike Goldman, Alderman."

"Motion by Ald. Thompson, second by Ald. Goldman, that the above resolution be adopted as read. The roll was called: Ald. Thompson, 'Yes.' Ald. Goldman, 'Yes,' and Bach did not vote."

"His Honor, Mayor Foster, appointed W. W. Campbell as night watchman.

"Motion by Ald. Thompson, second by Ald. Goldman, that the appointment by the mayor of W. W. Campbell to the office of night watchman be confirmed. On roll call, Ald. Thompson, 'Yes;' Goldman, 'Yes;' Ald. Bach did not vote.

"R. C. HARDER, Recorder.

"J. P. FOSTER, Mayor."

"Minutes of council meeting of February 15, 1897, read as follows, viz:

"Council Room February 15, 1897.

"Council met in regular session, with the following members present: Mayor Foster, Ald. Johnson, Ald. Bach and Ald. Thompson; Recorder Harder absent.

"Ordinance to establish the office of night policeman or night watchman introduced, placed on first reading; rules were suspended; placed on second reading by caption; on motion it was placed on third and final reading. Motion by Ald. Johnson, seconded by Ald. Bach, that the ordinance be

adopted. Ald. Johnson voted 'Yes;' Ald. Bach, 'Yes;' Ald. Thompson, 'Yes.' (Signed)

"J. P. FOSTER, Mayor.

"W. R. THOMPSON, Recorder Pro. Tem."

"The record does not show any appointment of Ald. Thompson as recorder pro tem, in absence of Harder."

"I have ordinance record, containing ordinance No. 89, creating office of night watchman or policeman, and fixing compensation, and it reads as follows:

"'ORDINANCE No. 89.

"'An ordinance to establish the office of city watch or police, and to prescribe the duties and compensation of the incumbent.

"'Be it ordained by the city council of the city of Newport.

"'Section 1. That the office of city watch or police is hereby created and established for the city of Newport, the incumbent of which shall hold office during the term of the city council electing him, and until his successor is elected and qualified; provided that such office may be vacated, or the incumbent removed therefrom, at any time by a majority vote of the city council, upon three days' notice in writing, served upon him previous to the time of taking such vote.

"'Sec. 2. That the night watchman or policeman shall be elected every two years, and at the first regular meeting of a new city council, or as soon thereafter as practicable. Any member of the council is authorized to nominate a candidate for such office, and the candidate receiving a majority vote of the council shall be declared elected.

"'Sec. 3. The watchman or policeman so elected shall receive as compensation for his services fifty dollars per month, and in addition thereto shall receive the same fees allowed by law to constables for similar services; provided the same are taxed in the costs and collected from the defendant.

"'Sec. 4. The watchman or policeman shall within ten days from his election enter into bond to said city of Newport with good and sufficient securities to be approved by the city council in the sum of one thousand dollars, conditioned that he will obey all orders of the mayor, or, in his absence, the

mayor *pro tem.*; that he will execute all process to him directed or delivered, and pay over monthly all moneys or city scrip or other valuables received by him by virtue of his office to the city council or the parties entitled thereto, and in [every] respect discharge the duties of watchman or policeman according to law and the ordinances of said city.

"'Sec. 5. If said city watchman or policeman shall fail to enter into said bond within the time herein prescribed, then such office shall be declared vacant, unless further time be given him by the city council to make the bond.

"'Sec. 6. The city watchman or policeman shall be a conservator of the peace throughout the city of Newport. He shall execute all process, orders or notices to him directed by the mayor, council, or city attorney, delivered to him for that purpose. It shall be his further duty to suppress all riots, affrays, fighting, and unlawful assemblies, and shall keep the peace and cause all offenders to be arrested and taken before the mayor or some magistrate to be dealt with according to the ordinances of the city of Newport, or the laws of the state, and shall well and truly present to the proper officers all offenders against the ordinances of said city and the laws of the state, which shall come within his knowledge. He shall, when necessary for his protection or assistance in getting around through the streets, alleys and drives of the city, and in all places where he may think any person or persons are violating any ordinance of the city, or the laws of the state, carry a lantern, and shall also carry a billy or club, and shall, when on duty, and in search of offenders of any ordinance of the city or laws of the state, or guarding prisoners, together with the persons summoned by him to aid him in the discharge of such duty, be permitted to carry a pistol, as provided by section 1498 of Sandels & Hill's Digest, and at all times when on duty he shall wear some sufficient sign or badge. He shall have [authority] at all times, when necessary to preserve the peace of the city, or to secure the citizens thereof from personal violence, and their property from fire and unlawful depredations, to summons any bystander or citizen of the city, or as many thereof as may be deemed necessary, to assist him in making arrests, suppressing riots,

affrays, and unlawful assemblies, and taking the offenders before the mayor, or some magistrate, to be dealt with according to law, or to jail to await his or their trial; and any person failing to obey such summons or order shall, upon conviction before the mayor, be fined in any sum not exceeding ten dollars.

"'Sec. 7. That the city watchman or policeman shall at all times be under the general superintendence of the mayor. He shall go on duty at 6 p. m., and remain until 6 a. m., unless otherwise ordered by the mayor.

"'Sec. 8. That this ordinance be in force and take effect from and after its publication.'"

Evidence was adduced tending to prove that the plaintiff rendered services in various cases as night watchman or policeman, and that the defendant collected the fees allowed for such services.

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

"No. 1. This is an action by plaintiff, Walter Campbell, against T. S. Stephens, for certain fees, which he alleges the said Stephens collected, which were due him as night watchman for services rendered by him as such night watchman and police officer.

"No. 2. The city ordinance creates the office of night watchman, and fixes his fees for his services at such amount as are allowed constables for similar service.

"No. 3. [Section 3328, Sand. & H. Digest of statutes of Arkansas.]

"No. 4. Now, if you find, from a preponderance of evidence in the case, that the defendant collected fees due plaintiff for services as night watchman and police officer, your verdict may be for the plaintiff in such sum as you may find the defendant has collected since his appointment under his appointment, after the publication of the ordinance creating the office of night watchman or police officer."

At the request of the defendant the court gave the following instruction: "The jury are instructed that if you find

for the plaintiff, you will say in what cases you find he is entitled to recover, and specify the items in each."

The jury returned the following verdict: "We, the jury, find for the plaintiff.

| | |
|---|---|
| City of Newport v. Jno. Holloway, 1 arrest, .75 | $ 75 |
| City of Newport v. Mattie Kennedy, 1 arrest, .75; summoning 3 witnesses, .75; attending court, .50 | 2 00 |
| City of Newport v. James O'Brian, 1 arrest, .75; attending court, .25; serving commitment | 1 75 |
| City of Newport v. J. N. S. White, 1 arrest, .75; attending court, .25; com. to jail, .75 | 1 75 |
| City of Newport v. Chas. Curtin, 1 arrest, .75; attending court, .25; com. to jail, .75 | 1 75 |
| City of Newport v. Foster Bates, 1 arrest, .75; attending court, .50; com. to jail, .75 | 2 00 |
| City of Newport v. Lizzie Wilkins, 1 arrest, .75 | 75 |
| City of Newport v. William Johnson, 1 arrest, .75; attending court, .25; com. to jail, .75 | 2 00 |
| City of Newport v. Maggie Taylor, 1 arrest, .75 | 75 |
| City of Newport v. Walter Jones, 1 arrest, .75 | 75 |
| Total | $14 00 |

"M. S. LITTLETON, Foreman."

The fees specified in the verdict of the jury were for services rendered by the plaintiff as night watchman or policeman. Judgment was rendered in accordance with the verdict, and the defendant appealed.

The statutes of this state provide that cities of the first and second class "shall have power to establish a city watch or

police; to organize the same under the general superintendence of the mayor; prescribe its duties and define its powers in such manner as will most effectually preserve the peace of the city, secure the citizens thereof from personal violence, and their property from fire and unlawful depredations." Sand. & H. Dig, § 5204. They also provide: "All appointments of officers by any council shall be made *viva voce*, and the concurrence of a like majority [that is, a majority of the whole number of members elected to the council] shall be required; the names of those voting, and for whom they voted, on the votes resulting in the appointment, shall be recorded, and all such voting shall be public." *Id.* § 5158.

In this case the appellee, Campbell, introduced the minutes of the proceedings of the city council of Newport, which were had on the 4th day of January, 1897, to show that he was appointed or elected night watchman of the city of Newport. At that time no such office was in existence. On the 15th day of February, 1897, the city council of the city of Newport passed an ordinance, and thereby ordained that the office of the city watch or police be created for the city of Newport, and that the incumbent thereof shall hold the same during the term of the city council electing him, and until his successor is elected and qualified. Appellee does not claim or pretend that he was appointed or elected night watchman by the city council since the passage of the ordinance creating that office, but contends that he was at least a *de facto* officer, and that his title to the office cannot be inquired into in a collateral proceeding. He was, obviously, not elected,—first, because the city council of Newport had not created the office of night watchman at the time he was nominated for that position by the mayor, and was voted for by members of the city council, and, in the second place, if there had been such an office, he was not legally elected, a majority of the members of the council not having concurred in his election.

Assuming that he was a night watchman *de facto*, is he entitled to recover the fees allowed for the services rendered by him in that capacity? It is true that the acts of a *de facto* officer are valid as respects the rights of third persons.

But the rule is different when he seeks to recover a salary or fees which rest upon the title to the office. As said in *Andrews* v. *Portland*, 79 Me. 490: "A *de facto* officer has no legal right to the emoluments of the office, the duties of which he performs under color of an appointment, but without legal title. He cannot maintain an action for the salary. His action puts in issue his legal title to the office, and he cannot recover by showing merely that he was an officer *de facto*." In *Nichols* v. *McLean*, 101 N. Y. 526, the court says: "It is abundantly settled by authority that an officer *de facto* can, as a general rule, assert no right of property, and that his acts are void as to himself, unless he is also an officer *de jure*." In Cro. Eliz. 699, the doctrine is tersely stated as follows: "The act of an officer *de facto*, when it is for his own benefit, is void, because he shall not take advantage of his own want of title, which he must be cognizant of; but where it is for the benefit of strangers, or the public, who are presumed to be ignorant of such defect of title, it is good.' *Pooler* v. *Reed*, 73 Maine, 129; *State* v. *Carroll*, 38 Conn. 449; *McVeany* v. *Mayor*, 80 N. Y. 192; *Dolan* v. *Mayor*, 68 N. Y. 274; *Nichols* v. *McLean*, 101 N. Y. 526; *McCue* v. *County of Wapello*, 56 Iowa, 698; *People* v. *Potter*, 63 Col. 127; *State* v. *Carr*, 28 Am. St. 163; *Waterman* v. *Ry. Co.*, 32 Am. St. 228; *Riddle* v. *County of Bedford*, 7 Serg. & Rawle, 386; *Mayfield* v. *Moore*, 53 Ill. 428; S. C. 5 Am. Rep. 52; Mechem's Public Offices and Officers, § 342.

In *Miller* v. *Callaway*, 32 Ark. 666, the rule stated was followed, the court holding that "the acts of an officer *de facto* only are, when they concern the public or third persons having an interest in the act done, valid, and cannot be collaterally called in question; yet it is also well settled that a mere color of title to the office does not avail as a protection to him in an action against him for trespass to persons or property, and that his acts, so far as he is himself concerned, are invalid."

Under the statutes of this state, an officer *de facto*, without legal title to the office, is a usurper (*Lambert* v. *Gallagher*, 28 Ark. 451; *Wheat* v. *Smith*, 50 Ark. 267, 273), and can be removed from office by "an action by proceedings at law * * instituted against him, either by the state or the party entitled

to the office." Where he "has received fees and emoluments arising from the office," he is liable therefor to the person entitled thereto, who may claim the same in the action brought to deprive him of the office, * * or in a separate action. If no one be entitled to the office, * * the same may be recovered by the state, and paid into the state treasury." Sandels & Hill's Digest, § 7371. The fees are not his, and he is not entitled to hold them. If he collects any fees for services rendered, he holds them at sufferance.

It follows from what we have said that appellee is not entitled to recover the fees allowed for services rendered by him as a night watchman or policeman, he having no legal title to that office.

The judgment of the circuit court is therefore reversed, and final judgment upon the merits will be entered here in favor of the defendant.

WOOD, J., absent.

---

## ATKINS v. JOHNSON, CARUTHERS & RAND COMPANY.

Opinion delivered February 24, 1900.

APPEAL FROM JUSTICE'S COURT—AFFIDAVIT—AMENDMENT.—An informal affidavit for appeal from a justice's court may be amended in the circuit court, and if the record on appeal from the circuit court shows that evidence was heard in regard to the affidavit which does not appear in the bill of exceptions, and that the circuit court overruled a motion to dismiss, it will be presumed that the circuit court treated the affidavit as amended. (Page 495.)

Appeal from Union Circuit Court.

CHAS. W. SMITH, Judge.

STATEMENT BY THE COURT.

Johnson, Caruthers & Rand Company brought replevin in justice court against A. S. Atkins and one Terrell, from whom Atkins purchased the goods in controversy. Upon a

trial before a jury in the justice court, the jury returned a verdict for the defendant, Atkins, the case having been dismissed as to Terrell. Johnson, Caruthers & Rand Company attempted to appeal the case to the circuit court.

In the circuit court Atkins moved to dismiss the appeal, for want of the statutory affidavit. The court overruled the motion to dismiss, and Atkins' exceptions were noted. The following is a copy of the affidavit for an appeal, omitting the caption:

"We, Johnson, Caruthers & Rand Company, do solemnly swear that the appeal taken by us in the above entitled cause is not taken for the purpose of delay, but that justice may be done us. [Signed] JOHNSON, CARUTHERS & RAND CO.

"I am one of the attorneys in this cause of action, and state that the plaintiffs are absent from the county. [Signed] "E. O. MAHONEY.

"Subscribed and sworn to before me this the 3d day of December, 1896. "G. M. WRIGHT, J. P."

After overruling the motion to dismiss, the court ordered the case to proceed to trial before a jury, who returned a verdict for plaintiff, after which judgment was rendered accordingly. The defendant prayed an appeal to this court, which was granted.

*Murry & Callaway*, for appellants.

The statutory affidavit for appeal is a prerequisite to the granting of an appeal from a justice's court. 19 Ark. 647. Every affidavit must be signed by the *affiant*. The affidavit in this case is insufficient. 35 Ark. 214; 36 Mo. App. 419; 11 Paige, 173; 72 Mo. 370; 54 Miss. 640; 41 Ind. 301; 70 Ia. 386; 16 S. W. 337; Sand. & H. Dig., § 2976.

*H. P. Smead* and *H. S. Powell*, for appellant.

An appeal from justice's court can not be dismissed for mere informality of the affidavit. 60 Ark. 524; Sand. & H. Dig., §§ 4437, 4438. An informal affidavit can be amended in the circuit court, and if no objection is taken to it there, none can be urged on appeal. 33 Ark. 745; 59 Ark. 177; 46 Ark. 302; 47 Ark. 49.

HUGHES, J., (after stating the facts.) The appellant contends that this affidavit is not sufficient, or, rather, that it is really no affidavit. This affidavit was amendable. The record shows that evidence was heard in regard to the affidavit, which evidence does not appear in the bill of exceptions. If the court considered the affidavit insufficient, it may have treated it as amended, upon hearing the evidence.

The judgment is affirmed.

---

67 495
77 442

## DIXON v. STATE.

Opinion delivered February 24, 1900.

1. LIQUORS—SALE WITHOUT LICENSE—EVIDENCE.—A conviction of selling whisky without license will not be set aside for failure of the proof to connect defendant with the crime if it was shown that an unlawful sale of whisky was made in a restaurant kept by defendant under circumstances which seem to connect him with the crime. (Page 496.)

2. SAME—PROOF AS TO TIME OF SALE.—A conviction of selling whisky without license will be set aside if the only evidence to prove that the whisky was sold prior to the finding of the indictment was the testimony of a witness that he bought the whisky during the term of the court at which the indictment was returned. (Page 497.)

Appeal from Greene Circuit Court.

FELIX G. TAYLOR, Judge.

*N. F. Lamb*, for appellant.

The motion in arrest of judgment should have been sustained. The evidence is insufficient, and fails to show that any offense was committed before the indictment was returned.

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

The indictment charged the offense with sufficient clearness. 16 Ark. 506; 1 Ark. 178; 1 Bish. Cr. Proc. §§ 356, 357. The proof was sufficient.

RIDDICK, J. This is an appeal from a judgment convicting the defendant, Joe Dixon, of the crime of selling whisky without license.

The case was tried before the circuit judge without a jury, and the most serious question raised is whether the evidence was sufficient to support the finding and judgment. The evidence was brief, consisting of testimony of only two witnesses, and was taken down by a stenographer, and copied in full in the bill of exceptions. The substance of it is as follows: Dixon kept a hotel or restaurant in Jonesboro. The witness for the state testified that during a term of the circuit court at Jonesboro he stopped one night at Dixon's house. On the next morning Dixon was behind the counter in the lunch room when another man, whose name is not given, came in and pulling a bottle out of his pocket gave witness and Dixon a drink. Witness, after he had taken the drink, remarked to the man that he (witness) would like to get some whisky, to which the man responded: "I will see if I can make arrangements for you to get some." The examination of witness then proceeds as follows: Ques. "Was Mr. Dixon standing on the other side of the counter?" Ans. "Yes, sir." Ques. "Was he listening to the conversation?" Ans. "Yes, sir." Ques. "What did the man say?" Ans. "He says, 'I will see if I can make arrangements for you to get some,' and he nodded to Mr. Dixon, and they both walked off together; and in a short time he came back and nodded his head at me, and I went back there with him. There was some whisky laying on the table, and I laid some money on the table and took the whisky." The witness further stated that when Dixon and the men walked off together they went into the back end of the house. He did not know whether Dixon went "behind the curtain, or into the little room." Dixon was not with the man when he returned. This is about all the evidence against Dixon, and on this evidence the trial judge found that he was guilty.

The evidence may not be entirely satisfactory, but it raises in our minds the belief that Dixon either sold the whisky, or was interested in the sale of it, which, under the indictment, amounts to the same thing. The sale of the whisky took place

in his house, and under circumstances which seem to connect him with it. The weight to be given circumstances of that kind is a matter peculiarly within the province of the judge or jury trying the case to determine. We therefore conclude that on this point the evidence was sufficient to support the finding.

But on another point presented here—whether this sale took place before or after the finding of the indictment—there is no evidence whatever. The only reference to the date of the sale is in the first question put to the witness, which, with the answer, is as follows: Ques. "Mr. Dixon is charged with selling whisky in Jonesboro during the last term of court there. Did you stop at his house then?" Ans. "Yes, sir; I stayed there all night." The indictment was returned by the grand jury on the 3d day of March, 1899, and it alleges that the sale was made on the 2d day of March, 1899. No one can read the evidence, apart from the indictment, and tell whether the circumstances detailed by the witness took place on or before the 3d day of March. It may be inferred from the question and answer that witness stopped with Dixon on some night during the term of court there, though even this is not very clear. But, assuming that to be so, it is not sufficient, for it should appear that this was before the indictment was found. It is not shown that the witness went before the grand jury, and there is nothing whatever to show that the sale of the whisky was made before the finding of the indictment.

Our statute requires that the indictment shall show "that the offense was committed within the jurisdiction of the court, and at some time prior to the finding of the indictment." Sand. & H. Dig., § 2075. It is equally necessary that there shall be some proof to sustain this allegation of the indictment, and unless there is such proof the case is not made out. 1 Bishop, New Crim. Proc. § 400; *State* v. *Reick*, 43 Kas. 279; *Armistead* v. *State*, 43 Ala. 340.

Doubtless, the attention of the trial judge was not called to this matter, but the question is directly raised here by the motion for new trial and appeal. For the reasons stated, the judgment is reversed, and a new trial ordered.

67 498
81 568

# ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY v. MILLER COUNTY.

Opinion delivered February 24, 1900.

1. RAILWAY TAXATION—ASSESSMENT OF STOCKYARDS.—Stockyards used in the operation of a railroad, and necessary to the proper shipment and handling of livestock, should be assessed by the board of railroad commissioners as part of the right of way, under Sand. & H. Dig., § 2781, providing that the words "right of way," as applied to railroads, "include all grounds necessary for sidetracks, turnouts, depots, shops, water stations, and other necessary buildings." (Page 500.)

2. RAILROADS—CONSOLIDATION —WIDTH OF RIGHT OF WAY.—The St. Louis, Iron Mountain & Southern Railway Company, formed in 1874 by the consolidation of the Cairo & Fulton Railroad Company with the St. Louis, Iron Mountain & Southern Railroad Company, a Missouri corporation, was authorized by the statute in force at the date of such consolidation to take a right of way not exceeding 100 feet in width, and did not succeed to the charter right of the Cairo & Fulton Railroad Company to take a right of way 200 feet wide. (Page 504.)

3. TAXATION—ASSESSMENT OF RAILWAY LANDS.—Land belonging to a railroad company, which is not part of its right of way, but is being held to meet the requirements of its probable future needs in the way of additional terminal facilities, is assessable by the local assessor. (Page 504.)

4. SAME—LANDS OMITTED FROM TAX BOOKS.—Where lands have never been placed upon the assessment books until the current year, the county clerk is not authorized to extend against them taxes for the years in which the lands were omitted from the tax books, based upon the assessment for the current year. (Page 505.)

Appeal from Miller Circuit Court.

JOEL D. CONWAY, Judge.

STATEMENT BY THE COURT.

This action was commenced by a petition of the railway company, filed in the county court of Miller county, asking that court to set aside and declare void an asssessment of certain land owned by the company in the city of Texarkana. The different lots of land assessed, with the exception of that por-

tion used by the company for stock yards, lie on each side of the railway tracks of the company, no portion thereof being within fifty feet of any such track. With the exception of the stock yards, no building or structure used in the operation of the railroad is located on the land, nor is any portion of it used as approaches or grounds for any such building. The assessment in question was made in 1897 by the tax assessor of Miller county, and the petition alleged that it was illegal and void for the following reasons:

(1) Because said land is a part of the railroad right of way, and necessary for the use and operation of the railway, and is not subject to assessment by the county assessor.

(2) That the assessor had no authority to assess lands for back or overdue taxes, but undertook to assess the land for the years 1883 to 1897 inclusive, and that for this reason alone the assessment was void, except for the current year 1897.

The county appeared by its attorneys, and filed a response to the petition, denying that the land in question was a part of the right of way, or necessary for the use and operation of the railway, and denying that the assessment was in any respect illegal.

The circuit court, to which the case was carried by appeal, held that so much of the land assessed as was used by the company for stock yards was not subject to local assessment, and ordered such assessment to be set aside, cancelled and held for naught. As to the remainder, it declared that the assessment was valid, and overruled the petition as to the same. Both parties appealed.

*Dodge & Johnson*, for appellant:

The assessor had no authority to assess appellant's lands for back taxes, except in the way provided in the act of 1887, p. 33 (Sand. & H. Dig., § 6438). The county clerk had no power to extend the back taxes against the lands at the same valuation as that of the then current year. The constitution (sec. 5, art. 16) requires uniformity in both the rate of taxation and the mode of assessment. 25 Ark. 298; 49 Ark. 337. The county court had no power or authority to direct the sur-

veyor to make the plat in this case. Railroad property of the class in controversy is assessable only by the state board of railroad commissioners. Sand. & H. Dig., §§ 6464–6480. As to what is included in "right of way," see Sand. & H. Dig., § 2781. The board is made the sole judge of what property is necessary and appurtenant or "adds to the value of such railroad as an entire thing." 52 Ark. 529; 120 U. S. 97. The property in controversy was so situated as to be necessary to and a part of the right of way; and was hence not subject to local assessment. 9 N. E. 93, 97; 72 Ill. 144; 99 Ill. 404; 92 U. S. 575. 113 U. S. 516, S. C. 5 Sup. Ct. Rep. 601; 75 Pa. St. 461; 22 Ind. 262; 18 N. W. 72; 9 Atl. 782; 35 N. J. Law, 537; 129 Ill. 517; 96 Ill. 448; 118 Ill. 136; 55 N. J. Law, 132; 37 Atl. 629; 114 Mo. 1; 89 Mo. 98; 98 Ill. 354; 11 Am. & Eng. R. Cas. 813, 821 n.

*E. B. Kinsworthy, Attorney General,* and *Scott & Jones,* for appellee.

Where lands have inadvertently been omitted by the clerk, and not assessed by the assessor, taxes may be extended for the years during which they escaped taxation. Sand. & H. Dig., §§ 6544, 6441. Tracts of land not within fifty feet of any track or side-track of a railroad do not belong to its right of way, and are subject to local assessment. Sand. & H. Dig., §§ 2763, 6475; 72 N. Y. 200; 22 Atl. 56; 32 Ark. 131. The Cairo & Fulton Ry. Co., from which appellant purchased, claimed only 100 feet as right of way. 31 Ark. 494.

RIDDICK, J., (after stating the facts.) The first question in this case is whether the land of the appellant railway company, which it alleges has been unlawfully assessed, was subject to be assessed by the local assessor, or whether it is property which the statute requires the board of railroad commissioners to value and assess for taxation. The method of taxing property of railway companies imposed by our statute is to treat all such property, forming a part of the railway line, and used in the operation of the railway, as an entirety. It requires that such property shall be assessed by the board of railroad commissioners, and taxed as a whole. This is the best method

of taxing railroads, since any other "would dissect the property into fragmentary parts, and lead to confusion and injustice." 2 Elliott on Railroads, § 737.

But our statute does not authorize the board of railroad commissioners to assess all real estate which may be owned by railroad companies. The authority of such board to assess land is limited to the railway line and its right of way, with the improvements thereon which add to its value as a railroad. All other real estate must be asseesed by the local assessor. The statute requires the railroad company to "make out and file with the secretary of state a statement or schedule showing the length of the main track and all side tracks, switches, and turnouts in each county in which the railroad may be located, and in each city and town in said county through or into which the railroad may run." It provides that the company shall state the value of the whole railroad, "taking into consideration in estimating and fixing such value the entire right of way, * * * and everything upon such right of way and appurtenant to such railroad which adds to the value thereof as an entire thing." Sand. & H. Dig., §§ 6467, 6468. It will be noticed that the statute expressly requires that the entire right of way shall be considered in estimating the value of the road. This, in effect, covers about all the land actually used in the operation of the railroad, for, under our statute, the words "right of way," as applied to railroads, "include all grounds necessary for side tracks, turnouts, depots, shops, water stations, and other necessary buildings." Sand. & H. Dig., § 2781.

It is clear then that, if the land assessed includes any portion of the right of way of the company as defined by the statute, the assessment was illegal and void, for the assessor has no authority to assess the right of way of a railway company; that power being vested only in the board of railroad commissioners. On the other hand, if it is not a part of the right of way, it is subject to assessment by county assessor. After considering the evidence, we are of the opinion that the finding of the circuit judge on this question was correct. That portion of the land in respect to which he held the assessment invalid

had upon it the stock yards of the company. These yards were used in the operation of the railroad, and were necessary to the proper shipment and handling of live stock. A stock yard is in fact a depot for the reception of a peculiar class of freight, and is a part of the right of way, under the statute above quoted, which provides that the words "right of way" shall include all grounds necessary for depots and other necessary buildings. In a country where cattle and other live stock are shipped to and from nearly every station, a stock yard, or pen for live stock, is almost as necessary to a railway company as a depot for other freight. Speaking of this question, the supreme court of New York said: "It hardly needs an argument to establish that in the city of New York depots for freight and the vast number of cattle and other live stock that are constantly being transported to the city are as much within the purposes for which railroads are constructed, and as necessary to their operation, as depots for the accommodation of passenger traffic. The argument, indeed, is more strongly in favor of the former; for, while a railroad company might, with safety to itself, leave its passengers upon a public street to take care of themselves upon their individual responsibility, it could not do so with respect to the animals it transported, but must securely keep them from injuring and annoying the public until proper delivery to owners or consignees." *N. Y. Cent. R. Co.* v. *Gas Light Co.*, 5 Hun, 201.

But the same argument will apply to every station to and from which cattle and other live stock are shipped. It will certainly apply to a railroad center like Texarkana, where cattle are not only brought for shipment, but where they are transferred from one road to another, and where, in cases of through shipment, it is often necessary that they be taken from the cars for water, feed and rest, before being carried forward to their destination. These yards were surrounded on all sides by the tracks of the company, were a portion of its terminal facilities, and under our statute the county assessor had no authority to assess them or the land covered by them. The court properly declared such assessment to be illegal and void.

As to the other portions of the land which the court held to be properly assessed, none of it lies within fifty feet of

the railway track or side track. It lies outside of such tracks, and none of it was occupied by any structure used in the actual operation of the road, nor was there any portion of it used as approaches or grounds for such a building. A portion of the land had been used by the company as a pumping station, but as to this portion the circuit judge held that it was exempt from assessment by county assessor during the years in which it was so used. After its use for such purpose was abandoned by the company, and when the pumping station was converted into a residence, it became subject to assessment by local assessor.

The statute regulating the assessment of railways directs that the board of railroad commissioners, in fixing the value of the road, shall take into consideration the entire right of way, "as given by the charter of the company or statutes of the state." Sand. & H. Dig., § 6468. We take this to mean that, in the absence of any showing to the contrary, it will, for the purpose of assessment, be presumed that the right of way was of the full width permitted by its charter or the statute, whichever it may be that authorized the company to take a right of way. Now, the appellant company was formed by the consolidation of the Cairo & Fulton Railroad Company with the St. Louis, Iron Mountain & Southern Railroad Company, the former being a corporation of this state and the latter a Missouri corporation. The charter of the Cairo & Fulton Company gave it the power to take a right of way two hundred feet in width. Appellant contends that it has such power by virtue of the consolidation above mentioned; that a portion of the property assessed was within a hundred feet of its side track, and part of its right of way, which the local assessor had no power to assess. But the franchises of a corporation formed by the consolidation of two or more companies are derived wholly from the statute authorizing the consolidation. The new corporation comes into existence precisely as if it had been organized under a charter granted at the date of the consolidation and subject to the constitutional provisions then existing. *Keokuk & W. R. R. Co. v. Missouri*, 152 U. S. 301; *St. L., I. M. & S. Ry. Co.* v. *Berry*, 113 *ib.* 465; *St. L., I. M. & S. Ry. Co.* v. *Berry*, 41 Ark. 509; 2 Morawetz, Corp. § 944.

This consolidation took place in April 1874, under the act of 1868. The constitution of 1868, which was then in force, contained the following provisions: "The general assembly shall pass no special act conferring corporate powers. Corporations may be formed under general laws, but all such laws may, from time to time, be altered or repealed. Art. 5, § 48. The general assembly shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens." Art. 1, § 18. The appellant company had, under these provisions of the constitution, no greater right in respect to taking land for its right of way than other railroads, and these rights are subject to be altered from time to time by legislation. It is true that the right of way, with other property rights owned by the Cairo & Fulton Company at the time of the consolidation, passed to appellant company. But there is nothing in the record to show that any portion of the land assessed was ever a part of the Cairo & Fulton right of way. The statute now in force which fixes the right of this and other railway companies to take land for right of way limits that right for ordinary purposes to a width not exceeding one hundred feet. The circuit court, we think, correctly held that for the purpose of taxation the ordinary right of way of appellant on the land sought to be taxed extended only fifty feet from the center of the track or side track.

The evidence shows that the most, if not all, of this land which the circuit judge decided to be subject to local assessment is being held by the company to meet the requirements of its probable future needs in the way of additional terminal facilities at Texarkana. The company has the right, and it may be an act of prudence for it, to acquire and hold land for such a purpose; but this does not make such land a part of the present railroad right of way, as defined by our statute. When the company actually appropriates this property to use in the operation of its railway by constructing thereon side tracks, workshops or other necessary buildings, it may become subject to assessment by the board of railroad commissioners. But, until it does so, such property is subject to assessment by the local

assessor under the provisions of the statute which directs that "all other real estate, including the buildings and structures thereon, other than that denominated railroad track, belonging to any railroad company in this state, shall be listed by the assessor of the county in which they are situated." Sand. & H. Dig., § 6475.

On the question as to whether the assessor had the right to assess the lands for overdue taxes, we have to say that we find no statute giving him such power. In fact, it appears that he made but one assessment, and that was for the current year 1897. On the basis of this assessment for the year 1897, the county clerk extended on the tax books the taxes against such lands for each of the years from 1883 to 1897, inclusive. An assessment made within the time and in the manner prescribed by the statute is indispensable in proceedings to enforce the collection of taxes. Blackwell on Tax Titles, 106. The clerk had no authority to assess land for taxation, and, as there was no legal assessment of these lands for the years preceding 1897, the tax for those years was invalid. The statute, we know, directs that, when lands are omitted from the tax books by mistake, it shall be the duty of the clerk to enter the same on the tax books of the next succeeding year, and to add to the taxes of the current year the taxes of each and every preceding year in which such lands or lots shall have escaped taxation. Sand. & H. Dig., § 6544. But this direction to the clerk presupposes that such lands have already been lawfully assessed. If no assessment of the lands has been made for the years during which they have been untaxed, this must be done in the manner authorized by law, before such land can be lawfully sold for the non-payment of taxes. So far as the lands involved in this proceeding are concerned, the act of March 1, 1887, for the collection of overdue taxes from corporations, provides a method by which they may be assessed, and all unpaid taxes for the past years collected.

While we concur in the judgment of the circuit court that these lots of land should be assessed by the county assessor, yet, for the reasons stated, we are of the opinion that the assessment was illegal and void, except as to the year 1897.

The judgment of the circuit court is to that extent reversed and remanded, with an order to enter judgment in favor of petitioner declaring the assessment illegal and void for the years named. In other respects the judgment is affirmed.

---

## UNITED BROTHERS OF FRIENDSHIP v. HAYMON.

Opinion delivered March 3, 1900.

BENEFIT INSURANCE—LIABILITY.—Where a mutual aid association issued a certificate of insurance to a member of one of its local lodges, which provided for the payment of a sum of money to the beneficiary named therein on the death of the member, on the condition that such member should comply with all the laws of the association, it is liable on the certificate at the member's death, if the member kept her dues paid and otherwise complied with the laws of the association, although the local lodge of which she was a member had been suspended from the association for non-payment of its dues. (Page 511.)

Appeal from Pulaski Circuit Court, Second District.

JOSEPH W. MARTIN, Judge.

*Cockrill & Cockrill*, for appellants:

The officers of the subordinate lodge had no authority to waive the positive requirement of the by-laws that all back dues be paid before re-instatement. Nib. Ben. Soc. 197; 81 Ia. 401; 10 N. Y. Supp. 503; 86 Ill. 479. It was error to instruct the jury that the member must have had notice of assessments due. Since the by-laws did not provide for such notice, the custom of the society to give it did not render it necessary. 58 Md. 463; 104 U. S. 252. No statement of the secretary or local custom of branch lodge could excuse the non-performance of the positive requirements of the by-laws. 22 Mo. App. 127; 153 Mass. 83; 50 Ill. App. 101; Bacon, Ben. Soc. § 80; Niblack, Ben. Soc. 33. Under the laws and constitution of the order, the state grand master had power to suspend lodges for arrearages. Niblack, Ben. Soc. §§ 67, 287; 121 Ill. 412; 18 La. 425. The construction placed upon the law relating to

suspension by the governing body of the Mutual Aid Association should govern. 57 Fed. 348, 353. The laws of the order being silent as to the method of re-instatement of a lodge, the custom in reference thereto may be proved. 2 Am. & Eng. Enc. Law, 709 n. 1. A by-law requiring that an applicant for re-instatement furnish a certificate of health is valid. 57 Fed. 348; 53 N. W. 243; 41 Ill. App. 462. One who is a member of a suspended lodge is suspended from the order. 83 Mich. 92; 168 Mass. 397. Evidence of a custom will not be heard to override a by-law. Niblack, Ben. Soc. 33. The secretary had no power to waive the rules of the society as to re-instatement. 81 Ia. 401; 10 N. Y. Supp. 503; 86 Ill. 479; 56 Mo. App. 463.

*Marshall & Coffman*, for appellee; *J. H. Hamiter*, of counsel.

The customary construction of the rules became a part of the contract of insurance. 3 Am. & Eng. Enc. Law (2 Ed.), 1082. The society is estopped to claim a forfeiture. 72 N. W. 48; Nib. Ben. Soc. 556, 559; 516, 517, 542, 555. Notice of suspension was necessary to a forfeiture. 6 Cent. Dig. 2067; 31 Mich. 458; 32 S. E. 951; 3 Am. & Eng. Enc. Law (2 Ed.), 1073, 1086–7; Niblack, Ben. Soc. §§ 532–536. The burden was on appellants to prove notice. 82 Ill. App. 214, 351–4; 54 *ib.* 71; 23 Mo. App. 268. Even where a policy provides on its face that it is subject to future amendments, these must be reasonable. Niblack, Ben. Soc. § 58. Where there is no such provision, no prejudicial changes can be made. *Ib.* 62; 58 N. Y. Sup. 119; 76 N. W. 683; 31 Mich. 458; Niblack, Ben. Soc. 9, 273, 545; 3 Am. & Eng. Enc. Law (2 Ed.), 1080. Rules which conflict with the charter are void. 36 Atl. 666; 31 S. W. 493; 74 Ill. App. 545; 171 Ill. 417; Niblack, Ben. Soc. 32, 44. The suspension of the lodge was void for want of authority to suspend. 47 Mich. 429; 2 L. R. A. 841 n.; 3 Atl. 104. Also, for want of notice. 3 Am. & Eng. Enc. Law (2 Ed.), 1072 n. 2; 38 Pac. 947; 33 Atl. 1038; 47 Ill. App. 251; 35 Atl. 1055; 10 Ark. 9; *ib.* 236, 613. The suspension of the lodge did not forfeit the insurance. Acceptance of the past due assessments by the managing officers was a waiver of the

forfeiture. 22 Cent. Law J. 560; 44 Wis. 376; Niblack, Ben. Soc. 552, 571, 572, 573.

BATTLE, J. The National Grand Lodge of the United Brothers of Friendship and Sisters of the Mysterious Ten of the United States of America, Dominion of Canada, Districts, Territories, and Foreign Countries, organized in this state a grand lodge, known as the "Grand Lodge of the United Brothers of Friendship and Sisters of the Mysterious Ten of the State of Arkansas." The grand lodge of the state established, as a branch of it, a mutual aid association, which carried on a benefit and life insurance business among its members, and also established over the state local lodges, called "lodges" and "temples," the former being composed chiefly of men, and the latter of women. The constitution of the grand lodge of the state provides that "all members of each lodge and temple are members of the Mutual Aid Association," and that, "upon the death of a member, the said Mutual Aid Association shall pay to his or her legal heirs or representatives the sum of $100 within sixty days after the notice of death." Among the temples created was "Lincoln Temple No. 23," of which Julia White was princess, and N. P. Bradford was the "Joshua" whose duty it was to instruct, and Martha Dockings was a member. On the 6th of October, 1896, the Mutual Aid Association issued to her the following certificate or policy: "Mutual Aid Association U. B. F. & S. M. T. of Arkansas issues this certificate to Martha Dockings, a member of Lincoln Temple No. 23, located in Little Rock, Arkansas, upon evidence received from said temple that she is a member in good standing of the same; and upon the condition that the said Martha Dockings will comply with all the laws governing said United Brothers of Friendship and Sisters of the Mysterious Ten Mutual Aid Association, the said U. B. F. & S. M. T. Mutual Aid Association of Arkansas promises to pay out of the sum raised by assessment upon all members to her, her physician, Dr. George W. Haymon, a sum not to exceed one hundred dollars, in accordance with the laws of the same. In witness whereof, the U. B. F. & S. M. T. Mutual Aid Association

of Arkansas has hereunto affixed its seal, and caused this certificate to be issued by

"X. R. Perry, Chairman;
"F. H. Hurd, Secretary."

Martha Dockings died, and George W. Haymon, the beneficiary named in the certificate, brought this action to recover the one hundred dollars.

In the trial of the action, which was before a jury, the foregoing facts were proved, and evidence was adduced which tended to establish the following facts: Martha Dockings was a member of Lincoln Temple at the time it was organized. She failed to pay the first quarterly assessment of sixty cents, which each member of the temple was required to pay on the first of October, 1895, for the Mutual Aid Association, and was suspended from the temple on account of that failure. Afterwards she was present at the temple on the first Tuesday night in July, 1896, and offered to pay all sums due from her, including insurance premiums, and she paid them to the princess. Afterwards, Hurd, the secretary of the Mutual Aid Association, was present, and agreed with the princess as to the amount due from Martha Dockings to the Mutual Aid Association, and received the same from the princess in full for the year 1896; but Dockings did not pay the second assessment, because it accrued in the time she was suspended. Upon these sums being paid, she was re-instated and restored to full fellowship in the temple. After this, on the 6th of October, 1896, the certificate sued on was issued to her. On the 19th of December, 1896, the temple was suspended on account of the non-payment of its dues to the Mutual Aid Association. While it was suspended it had no connection with the United Brothers of Friendship and Sisters of the Mysterious Ten, paid no dues, and was not recognized as a part of the order. In January, 1897, the dues which accrued on her insurance during her suspension of the temple were paid to the secretary of the Mutual Aid Association. On the 20th of January, 1897, she died, and on the 20th of February, 1897, her temple was re-instated. She belonged to no other temple.

Upon this evidence the court instructed the jury, over the

objections of the defendant, as follows: "You are instructed that if you find from the evidence that it was the custom of the temple to re-instate members upon payment of amounts for which they were suspended, and if you find that Martha Dockings was so re-instated, and that the money paid by her therefor was received by the secretary of the Mutual Aid Association in full payment of her dues, and if you further find that she was not thereafter in arrears of which she had notice for non-payment of dues or premiums on insurance, then your verdict will be for the plaintiff, although you may find that the temple stood suspended at the time of her death."

And the defendant asked the court to instruct the jury as follows: "If you find from the evidence that, at the time of deceased's death, she had not complied with the rules and regulations of defendant society, and that she was in arrears in her dues to the Mutual Aid Association, and the time for the collection of said dues had fully expired before her death, and she never paid said dues or tendered them, then you are told that plaintiff cannot recover, without reference to the suspension of the subordinate lodge of the deceased; that is, if you find that she had notice that such assessments were due and unpaid,"—and the court gave it with a modification. The defendant also asked the court to give the following instruction: "If you find that deceased member paid her first assessment due her subordinate lodge, and was then suspended by said lodge, and afterwards by it reinstated, you are instructed that, according to the rules and regulations of said society, said member, upon being reinstated, must pay all back dues and assessments, and that the amounts paid by said deceased member upon reinstatement must be first applied to the back dues by her. If, therefore, you find that, when said member was reinstated, she had not paid her second assessment, you are told that the payment by her of any sum will first be applied to this second assessment, unless she was excused from such payment by the statement of the secretary or an established custom to that effect." And the court gave this instruction with a modification. The record fails to show what the two modifications were. But the defendant says that the first modifica-

tion was, "that is, if you find that she had notice that such assessments were due and unpaid," and that the second was, "unless she was excused from such payment by the statement of the secretary or an established custom to that effect." This may be true, but the record shows that the instructions were asked in the form we have stated.

The court refused to instruct the jury, at the request of the defendant, to return a verdict in favor of the defendant, in the event they found that Martha Dockings died during the suspension of Lincoln Temple, and was not at that time a member of any other temple of the same order.

The jury returned a verdict in favor of the plaintiff for the one hundred dollars; and the defendant appealed.

The instructions which we state that the defendant asked for, and set out in full, are substantially the same as the instructions given over the objections of the defendant, with one exception, and that is that the court, in the instruction objected to, told the jury that the suspension of Lincoln Temple at the time of Martha Dockings' death did not affect the right of appellee to recover. This leaves only one question for us to decide, and that is, did the suspension of the Lincoln Temple at the time when Martha Dockings died defeat the appellee's right to recover, she belonging to no other temple at that time?

The contract sued on is contained in these words: "Upon the condition that said Martha Dockings will comply with all the laws governing said United Brothers of Friendship and Sisters of the Mysterious Ten Mutual Aid Association, the said U. B. F. & S. M. T. Mutual Aid Association of Arkansas promises to pay out of the sum raised by assessment to her physician, Dr. George W. Haymon, a sum not to exceed one hundred dollars." It does not make the right of the beneficiary to the sum not exceeding one hundred dollars depend upon the act or omission of Lincoln Temple, but upon the compliance of Martha Dockings with the laws of the order. This is as it should be. It would be unjust to hold her responsible for conditions which she could not control. No construction which would give to the contract this effect should be placed upon it, if it can be reasonably avoided. The law does not

favor forfeitures, and reasonable constructions consistent with the language used, which would avoid such results, should be placed upon contracts. The language used in the contract in this case fortunately is not reasonably susceptible of any construction other than that we have placed upon it. We do not think that the suspension of Lincoln Temple defeated the right of appellee to recover in this action.

Judgment affirmed.

---

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

Opinion delivered March 3, 1900.

VENUE—JUDICIAL NOTICE.—Where the only proof of the venue of the killing of a mule by a railroad train was the testimony of a witness that it was killed "near Glenwood," the court cannot take judicial notice that the killing occurred in the county of Phillips in which suit was brought. (Page 513.)

Appeal from Phillips Circuit Court.

HANCE N. HUTTON, Judge.

STATEMENT BY THE COURT.

This suit is to recover damages for the alleged killing of a mule. The complaint is as follows: "The plaintiff, Henry Cady, for cause of action against the defendant, St. Louis, Iron Mountain & Southern Railway Company, states that on the 18th day of July, 1898, said defendant wilfully, negligently, carelessly ran its train over a mule, the property of said plaintiff, of the value of one hundred and ten dollars, thereby killing said mule. Wherefore plaintiff prays judgment for said sum of one hundred and ten dollars, and for all other relief."

The answer reads as follows: "For answer to plaintiff's complaint defendant denies that on the 18th day of July, 1898, or at any other time, it wilfully, negligently or carelessly ran its train of cars over a mule; and denies that the mule was

the property of the said plaintiff, or that it was of the value in said complaint stated. Wherefore it asks to be dismissed, with its costs.

A witness for plaintiff testified: "I saw some mules on the railroad, eating grass, as near as I could state about it. The train was on the other side of the culvert at Glenwood. The mules were on this side, between the two banks. The mules were on this side, and the train never started to blowing until it got pretty near to the mules. The black mule jumped off, and the iron gray didn't have time to get off. It killed him on this side of my house, and took him on the other. I don't know how many steps it was."

Another testified: "I was going from town, and met the Iron Mountain train up by the Allen Polk place, and when I got there this woman that testified here a little while ago says: "There is your mule down there that the train killed." I jumped out, and went down, and looked at the mule, and saw it was my mule. He was still warm. The train had dragged him as far as from here to Major Hornor's house (about 150 yards) on the track, and had come to a steep place, and he had fallen off, and had laid up by the side of the railroad." There was a judgment for $110.

*Dodge & Johnson*, for appellant.

Actions for the killing of stock must be brought in the county where the killing occurred, and the complaint must so state. Sand. & H. Dig., § 6322; 38 Ark. 205; 55 Ark. 282.

*Quarles & Moore*, for appellee.

If the jury and court could know from the evidence when the killing took place, that was sufficient, and the evidence supplies the defect of allegation. 29 Ark. 293; 53 Ark. 46; 57 Ark. 359. There is evidence to support the verdict, and it will not be disturbed here. 49 Ark. 122.

WOOD, J., (after stating the facts.) Appellant urges reversal of the judgment for the reason that no jurisdiction is shown in the circuit court to render judgment herein. Sec. 6352 of Sand. & H. Dig., (sec. 4 Act of February 3, 1875) as construed in *Little Rock & F. S. Rd. Co.* v. *Chilton*, 38 Ark. 205, requires the plantiff to allege

and prove that the injury occurred in the county in which suit was brought. There was no such proof in this record. It is shown that the killing occurred near Glenwood. But we cannot find that Glenwood is a town, village or postoffice in this state. We do not know what it is, nor where. Appellee's counsel suggest that it is a railway station. That does not appear in the record however. There is not enough in the record to indicate that the court below must have known by common knowledge where Glenwood was. We do not know, and do not think that judicial cognizance should be taken of the fact that "Glenwood is in Phillips county." The case does not come within the rule in *Wilder* v. *State*, 29 Ark. 293, *Forehand* v. *State*, 53 Ark. 46, or *Railway Company* v. *Petty*, 57 Ark. 359, cited by appellee. Nor, indeed, within the purview of the things of which courts take notice. 1 Greenl. Ev. (16 Ed.) § 5.

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

---

67 514
f 84 373
67 514
f78 237
80 383
f80 399
81 372

## ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILROAD COMPANY *v.* LANDERS.

Opinion delivered March 3, 1900.

STOCK-KILLING—WHEN PRESUMPTION OF NEGLIGENCE OVERCOME.—Where the *prima facie* case of negligence, made by proof of the killing of a steer by a railroad train, is clearly overcome by the testimony of the engineer and fireman, which is consistent and reasonable, and there is no other evidence of negligence, a verdict for the plaintiff will be set aside. (Page 516.)

Appeal from Poinsett Circuit Court.

FELIX G. TAYLOR, Judge.

STATEMENT BY THE COURT.

This suit was commenced in a justice-of-the-peace court, by the filing of the following account:

"St. L., I. M. & So. Ry. Co. to W. C. Landers.

"To damages for killing one two-year old steer on the 6th

day of July, 1896, at a public crossing in the town of Harrisburg, valued at $10. W. C. LANDERS."

Defendant made default, and judgment was rendered in the justice's court for the amount sued for, and the defendant appealed. In the circuit court the case was tried anew.

Jim Goodloe testified that he was in his house near the right of way when he heard the ringing of the engine bell and the blowing of the whistle several times. He immediately went out of his house to the railway crossing, and saw the yearling turn down from the crossing. The train was running tolerably slow, and the engine struck it. When he first saw the steer, it was about thirty feet in front of the engine. He knew nothing about the value of the animal.

Jack Grant lived near the railroad track, south of Goodloe's. His attention was attracted by the signals and ringing of the bell. He looked, and saw the steer from twenty to forty feet in front of the engine, south of the middle crossing. He was one hundred and fifty feet from the animal. Saw the engine strike it, and knock it off the track. The train was running pretty fast.

Ed Liliker did not see the animal struck, but hauled it off after it was killed. The steer was about eighteen months old.

This was all the testimony in favor of the plaintiff.

The engineer testified: "That he saw the steer just as it came on the track. He was about fifty or sixty feet from it when he first saw it. The steer was just coming on the crossing. I whistled for the crossing, the fireman was ringing the bell, and I whistled the stock alarm as soon as I saw it, and set the brakes. Was going between fifteen and eighteen miles an hour. Was looking ahead. I saw the animal as soon as it came in range of my vision. It seemed to be walking leisurely, and, as soon as I whistled, it turned, and ran down the track. The fireman was sitting on the fireman's seat, if I recollect right, ringing the bell. Nothing else could have been done to avoid striking the animal. I had the train under control. The steam was shut off. The train was drifting,—running by its own momentum. The engine had all the modern appliances. I applied all my air when I saw the stock. Going at the rate of speed I was run-

ning with the steam shut off, it would require two hundred and fifty feet to bring the train to a standstill. My train was about three hundred and fifty feet long. With the air applied, steam shut off, and drifting, the train will run between two hundred and twenty five and three hundred feet before I can stop it. A train like mine, drifting as I have described, would run about thirteen hundred and twenty feet in a minute,—about fifteen miles an hour. We run from twenty to forty five or fifty miles an hour with steam on and air brake off."

G. B. Reed, the fireman, testified: "That he was ringing the bell; that he saw the animal standing on the edge of the road crossing, at a little ditch for the side track, about fifteen feet from the track the train was on. He saw the animal turn, look and start towards the track, and then start down the track. The train was running fifteen miles an hour. When he first saw the yearling, it was about seventy-five feet from him, on the outside of the side track, about fifteen feet from the main track. The animal got about twenty feet south of the crossing when it was struck."

This was all the evidence. There was a verdict and judgment for ten dollars.

*Dodge & Johnson*, for appellant.

The rebuttal of the *prima facie* case of negligence exonerated the company. 51 S. W. 319; 53 Ark. 96; 62 Ark. 182; 43 Ark. 225; 14 Am. & Eng. R. Cas. (N. S.) 34; 14 Am. & Eng. R. Cas. (N. S.) 30; 83 Ga. 393.

WOOD, J., (after stating the facts.) The *prima facie* case of negligence made by proof of the killing was clearly overcome by the testimony of the engineer and fireman, which was consistent and reasonable. The jury could not arbitrarily disregard it. *K. C. F. S. & M. Ry.* v. *King*, 66 Ark. 439; *Ry. Co.* v. *Shoecraft*, 53 Ark. 96; *St. Louis S. W. Ry. Co.* v. *Russell*, 62 Ark. 182; *Memphis & L. R. Rd. Co.* v. *Sanders*, 43 Ark. 225; *St Louis, I. M. & S. Ry. Co.* v. *Bragg*, 66 Ark. 248; *Cantrell* v. *K. C. M. & B. Ry.* 14 Am. & Eng. Ry. Cases (N. S.), 30; *Ga. M. & G. Ry.* v. *Harris*, 83 Ga. 393.

Witnesses for plaintiff fail to establish any negligence whatever.

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

---

67 517
72 338
67 517
75 21

## WILMANS v. ROBINSON.

Opinion delivered March 3, 1900.

FEE-TAIL—CONSTRUCTION OF DEED.—A deed of conveyance to the grantee and her bodily heirs creates a fee-tail at common law, whereby, under the statute (Sand. &. H. Dig., § 700), the grantee takes an estate for her natural life, with remainder in fee in her children. (Page 520.)

Appeal from Jackson Circuit Court.

RICHARD H. POWELL, Judge.

STATEMENT BY THE COURT.

This suit was brought by appellees to recover possession of certain lands in Jackson county. They deraign title from the government to one Nathaniel Williams, and claim directly from him under a deed which is as follows:

"This deed of conveyance, made this, the 25th day of July, 1862, witnesseth that Nathaniel C. Williams, of Jackson county, State of Arkansas, for and in consideration of the sum of one dollar to him in hand paid, and for the esteem and regard he has for Martha Ann Arundell, has this day granted, bargained and sold, and by these presents do grant, bargain, sell and convey unto the said Martha Ann Arundell, and her bodily heirs, the following described tracts or parcels of land, to-wit: The northwest quarter of the southeast quarter, the northeast quarter of the southwest quarter, the southwest quarter of the northeast quarter, and the southeast quarter of the northwest quarter of section 23, in township 12 north, in range 2 west, containing one hundred and sixty acres, being and situated in the county of Jackson, State of Arkansas. To have and to hold the above-described tracts or parcels of land,

with all the appurtenances to the same belonging, to the said Martha Ann Arundell, for her separate use and benefit and her bodily heirs, and exclusive and free from liability to be disposed of by her husband, except for the benefit of the said Martha Ann and her heirs. And the said Nathaniel C. Williams will warrant and defend the title to said lands unto the said Martha Ann Arundell and her heirs, forever, against the lawful claims of all persons whatsoever. Witness my hand and seal, this the 25th day of July, A. D. 1862.

"N. C. Williams (Seal)."

The complaint alleged the death of Martha Ann Arundell (then Martha Ann Robinson), leaving surviving the plaintiffs, her only children, and the sole heirs of her body, who thereupon became seized in fee simple of the lands in suit. Then the complaint, after setting out that the defendants claim title and are in possession under a chain of conveyances commencing with one made by the said Martha Ann to one Stephen B. Allen, alleges the rental value of the premises during such possession, and concludes with a prayer for possession, and for $250 as rents.

The defendants filed a general demurrer to the complaint, which was overruled. Louis M. Hellman was made a party defendant. Subsequently the defendants filed their answer, denying that plaintiffs were the owners of the land in controversy; admitting the execution of the conveyances alleged in, and exhibited with, the complaint; alleging that the conveyance of said lands by Martha Ann Robinson to Stephen B. Allen was made for her sole and separate benefit, and that of her bodily heirs; that the consideration of said conveyance was the sum of $500 cash in hand paid to her by said Stephen B. Allen, for her separate use and benefit, and that of her bodily heirs, and that the said sum of money was used by her for her benefit and that of her heirs, and free from all disposition of the same by her husband; admitted and alleged that defendant, Louis M. Hellman, claimed title by virtue of the conveyances alleged in the complaint, and set out as exhibits to answer,—deed of conveyance of Martha Ann to Stephen B. Allen (Exhibit A), deed of conveyance from Stephen B. Allen to G. A. Jowers (Ex-

hibit B), deed of trust from G. A. Jowers to Lancelot Minor (Exhibit C), and deed of Special Commissioner John M. Rose, at foreclosure sale, to Louis M. Hellman. Defendants admitted that plaintiffs are the bodily heirs of said Martha Ann, but denied that upon her death they became seized of any estate in said lands; denied that plaintiffs were entitled to the possession of the same, etc.

Thereupon plaintiffs demurred to the answer, alleging that it did not state facts sufficient to constitute a defense, etc. The demurrer was sustained, and defendants declined to plead further. Judgment was rendered in favor of plaintiffs for the lands in controversy, $125 damages and costs, and the defendants appealed.

*Jos. W. Phillips* and *S. D. Campbell*, for appellants.

The complaint does not show on its face that appellees are entitled to the lands in controversy. This case is not within sec. 700, Sand. & H. Dig., governing fees-tail, and 44 Ark. 458, construing same. The rule in Shelley's case applies, and gives the grantee in the deed a fee simple. 58 Ark. 303; 2 Bl. Comm. 242. The demurrer to the answer should have been overruled and judgment given for appellants. 8 Ark. 224; 18 Ark. 269; 24 Ark. 554.

*Gustave Jones*, *J. M. Bell* and *J. A. Watkins*.

The estate created by the deed "*to Martha Ann Arundell and her bodily heirs*" was a fee-tail. 1 Kerr, Real Prop. § 433; 1 Root, 79; Tied. Real Prop. §§ 46–48; 1 Mo. 344; 103 Mo. 329; 26 S. W. 957; 17 Oh. St. 439; 44 N. E. 63; 13 N. E. 505. For the general doctrine of estates tail, see: 1 Kerr, Real Prop. § 452, 459; 2 Bl. Conn. 112; 11 Wend. 259, 278; 1 Washb. 82; Tied. Real Prop. §§ 45, 46; 60 Ia. 60; 14 N. W. 90; 1 Cruise, 73. Under section 700, Sand. & H. Dig., the grantee in the deed took a life estate, and the remainder in fee simple went to her heirs. 44 N. E. 63; 13 N. E. 505. Where an estate tail is granted, the fact that the *habendum* of the deed creating it is to the grantee and her heirs will not enlarge the estate to a fee simple; nor will the

entail be destroyed by a warranty to the grantee and her heirs. 20 Pick. 214; 4 Hawks, 310; 1 H. & McH. 275; 3 *id.* 220.

WOOD, J., (after stating the facts.) The only question is, does the granting clause, "do grant, bargain, sell and convey unto Martha Ann Arundell, and her bodily heirs," convey to the grantee an estate in fee or in tail?

Section 700, Sand. & H. Dig., is as follows: "In cases when by common law any person may hereafter become seized in fee tail of any lands or tenements, by virtue of any devise, gift, grant, or other conveyance, such person, instead of being or becoming seized thereof in fee tail, shall be adjudged to be and become seized thereof for his natural life only, and the remainder shall pass in fee simple absolute to the person to whom the estate tail would first pass according to the course of the common law by virtue of such devise, gift, grant or conveyance."

Now, in the language of Mr. Kerr: "A fee tail is simply a conditional fee at the common law, so modified by the statute *de donis conditionalibus*, known as the Statute of Westminister II, [passed about 1285], that the estate can descend only to certain classes of heirs, which are held not to take a conditional fee simple, but a particular estate, which has been denominated a fee-tail, the donor holding the ultimate fee-simple expectant on the failure of issue; in other words, the reversion. This estate corresponds to the *feudum talliatum* of the feudal law,—that is, a fee from which the general heirs are *taille* or cut off." 1 Kerr, Real Prop. 452; 1 Cruise, 73; 1 Wash. Real Prop. 99. In the creation of an estate tail, the usual form of limitation was to one and "the heirs of his body." This created an estate tail general. Tiedeman, Real Prop. § 47; 1 Kerr, Real Prop. § 460.

By the common law, then, which is a rule of decision in this state, (section 600, Sand. & H. Digest,) Martha Ann Arundell became seized of an estate tail under her deed from Nathaniel C. Williams. Therefore, under the express terms of the statute (section 700, *supra*), she took an estate for her natural life only. *Clarkson* v. *Clarkson* (Mo.), 28 S. W. 446; *Chiles* v. *Bartleson*, 21 Mo. 334; *Wood* v. *Kice*, 103 Mo. 329;

*Reed* v. *Lane*, 26 S. W. (Mo.) 957; *Pollock* v. *Speidel*, 17 O. St. 439. In *Horsley* v. *Hilburn*, 44 Ark. 458, the deed conveyed "to Marietta Hilburn and the heirs of her body" a tract of land. This court held in that case, under the act of 1837 (sec. 700, Sand. & H. Dig., *supra*), that "Mrs. Hilburn took nothing but a life estate," and that upon her death the remainder in fee was vested in her children. See also *Myar* v. *Snow*, 49 Ark. 125. It follows that, as Martha Ann Arundell only took an estate for life, with the remainder in fee to her bodily heirs, who were the appellees, the demurrer to the answer was properly sustained, and the judgment of the court in favor of plaintiffs was correct.

This decision in no manner conflicts with *Hardage* v. *Stroope*, 58 Ark. 303 The clause upon which the rights of the parties in that case hinged was as follows: "To have and to hold the said land unto the said Tennessee M. Carroll for and during her natural life, and then to the heirs of her body, in fee simple; and if at her death there are no heirs of her body to take the said land, then and in that case to be divided and distributed according to the laws for descent and distribution in this state." Judge Battle in that case said: It "is obvious that the deed to Mrs. Carroll created in her no estate in tail." This certainly is not the case with the deed under consideration. Again, he said: "The intention that the heirs were to take only in the capacity of heirs is manifest." That was the conclusion from a consideration of the entire clause, and particularly the concluding portion, showing the bodily heirs took *qua* heirs, by descent, and not by purchase.

Mr. Kerr, in speaking of the rule in Shelly's case, says it is a "rule of construction, and not of law; simply providing that where an estate of freehold is limited to a person, and the same instrument contains a limitation, either mediate or immediate to his heirs, or the heirs of his body, the word "heirs" is a word of limitation; that is, the ancestor takes the whole estate comprised in the term. If the limitation be to the heirs "of his body," he takes a fee tail. If to his heirs generally, he takes a fee simple.

In this case the limitation is "to her bodily heirs," cre-

ating an estate tail in the grantee. In *Hardage* v. *Stroope*, the effect of the clause was to create a limitation to his heirs in general. At all events, the present case falls clearly within the statute (sec. 700 of Sand. & H. Digest), and must be controlled by it.

Let the judgment be affirmed.

---

## PAGET v. BROGAN.

Opinion delivered March 3, 1900.

PROBATE COURT—JURISDICTION.—The probate court has no jurisdiction, in a proceeding by the heirs of an estate to prevent the administrator from subjecting certain lands to the payment of debts, to audit a claim of attorney's fees for services rendered the heirs in such proceeding, and to order it paid out of the funds of the estate. (Page 524.)

Appeal from Sebastian Circuit Court.

EDGAR E. BRYANT, Judge.

STATEMENT BY THE COURT.

At the October term, 1894, of the Sebastian county probate court for the Fort Smith district, the appellee, as administrator of the estate of his deceased brother, Joseph Brogan, filed a petition, in which he represented that the estate was involved in litigation, and that it was necessary to secure the assistance of an attorney, or attorneys, and asked leave of the court to employ the same in the interests of said estate.

At the January term, 1895, the said court took up said petition to consider it, but, instead of granting it, as prayed, it made an order that the administrator should pay said Grace and Forrester for representing the creditors $100, and also that he should pay H. M. Paget and Thomas Boles a like amount for representing the heirs in said litigation.

The administrator refused to pay Paget and Boles, and they presented their petition to the probate court for an order compelling the administrator to pay them $100. The court (a

new judge having been elected) denied the petition, finding that said Paget and Boles represented the heirs in a suit to recover the assets of the estate from the administrator, and holding that it was not within the power of the probate court to make the order to pay counsel for the heirs out of the proceeds of the estate while it is still in course of administration, and to the prejudice of creditors. From this decision an appeal was taken to the circuit court, which found the facts as follows: "That Boles and H. M. Paget, as attorneys for the heirs of the estate of Jos. Brogan, deceased, applied to the probate court of the Fort Smith district of Sebastian county to prevent the administrator, E. C. Brogan, from proceeding, as he was doing, to subject certain lands of the deceased to sale and payment of the estate's debts; that the court held said lands to be subject to be applied to the debts, and ordered them to be sold by the administrator for that purpose; that the heirs, by said Boles and Paget, appealed from said decision to this (circuit) court, where, the decision being again adverse to the heirs, an appeal was prayed by them to the supreme court; that, while said cause was pending on this appeal to the supreme court, the administrator filed in the probate court the petition to employ counsel introduced in evidence, upon which the probate court (trial on January 25, 1895) had the proceedings (introduced as evidence) directing $100 to be paid to attorneys Grace and Forrester, and $100 to Boles and Paget; that said Grace and Forrester had represented the administrator in all the proceedings in the cause aforesaid, and that afterwards in the supreme court they continued to and did represent the administrator, and Boles and Paget represented the heirs; that, on a special hearing in the supreme court of said cause, part of said lands were held subject to the administration, to be sold to pay debts, and a part were held not; that the administrator paid $100 to Grace and Forrester, and has refused to pay the $100 to Boles and Paget. The probate court having refused on their application in this cause to make an order requiring the administrator to pay the claim of said Boles and Paget for $100 against the estate, Boles and Paget have appealed to this court."

The court then declared the law to be that the probate

court had no jurisdiction to make the order of January 25, 1895, in so far as it directs the administrator to pay $100 to said H. M. Paget and Thos. Boles as attorneys of the heirs in said litigation," to which declaration of law the plaintiff objected and excepted. The court then rendered judgment disallowing the claim of Paget and Boles, and in all things affirming the judgment of the probate court, from which this appeal is prosecuted.

Appellants, *pro se*.

The probate court had jurisdicion in all matters relating to the estate. Sand. & H. Dig., § 1141; 34 Ark. 163. The probate court having ordered the employment of appellants, the contract is valid. 38 Ark. 139. This order, not having been appealed from, cannot be attacked on certiorari or in a collateral proceeding. 40 Ark. 175; 33 Ark. 581; 46 Ark. 260; 55 Ark. 562; 36 Ark. 256; 35 Ark. 211; 31 Ark. 471; 62 Am. St. Rep. 693, n.; 1 Woern. Adm. 328; 37 Ark. 155; 35 Ark. 205; 26 Ark. 421; 60 Ill. 110; 84 Ill. 333; 3 Coldw. 512. Appellants have made proper application (38 Ark. 471), and the payment should be made. 34 Ark. 204.

*Geo. A. Grace*, for appellee.

The probate court had no power to order the payment of counsel who represented the heirs in a suit against the estate. 15 Ark. 97. The judgment of the probate court was without jurisdiction, and hence void. 13 Ark. 381; 16 Ark. 478; 55 Ark. 562; 55 Ark. 222; 62 Ark. 323; 61 Ark. 410; 64 Ark. 438, 443; 11 Am. & Eng. Enc. Law (2 Ed.), 1247; 65 Cal. 287; 55 Conn. 239; 14 La. Ann. 876; 131 Pa. St. 359; 2 Woern. Adm. §§ 516, 356; 1 *id.* § 153; 17 Pac. 223; 35 Ark. 180; 36 Ark. 383, 396.

WOOD, J., (after stating the facts.) The law as declared by the circuit court is correct, and its judgment must be affirmed. This court in *McPaxton* v. *Dickson*, 15 Ark. 97, said: "Where a portion of the heirs and distributees employ an attorney to contest the settlement of the executors, the probate court has no power to direct the payment of the attorney's fee by the executor of the re duary

fund of the estate; if it be a proper case for contribution by all interested in the estate, the remedy is in chancery only." We held in *Pike* v. *Thomas*, 62 Ark. 223, that the probate court had no jurisdiction over a claim against an estate for services rendered by an attorney employed by an administrator to prosecute a suit on behalf of the estate. *Tucker* v. *Grace*, 61 Ark. 410; *Bryan* v. *Craig*, 64 Ark. 438–43. *A fortiori* would it be utterly beyond the power of the probate court, in a proceeding by the heirs before said court to prevent the administrator from subjecting certain lands to pay debts, to order and audit a claim of attorney's fees for services rendered the heirs in such proceeding. The administrator as a trustee represents all parties interested in the estate, heirs as well as creditors. Probate courts can authorize the employment of counsel by the administrator, in the necessary protection of the estate in his hand, and may allow fees for such services rendered the administrator to protect and preserve the estate, as necessary expenses of administration. But such a thing as allowing or directing fees to be paid out of the estate to attorneys, whether employed by the heirs or "by the court," in a suit against the administrator, is without authority to support it. Creditors are beneficiaries, as well as heirs. "No allowance will be made for the fees of counsel in litigation between beneficiaries of the estate, or for services rendered to any individual beneficiary." 11 Am. & Eng. Enc. Law (2 Ed.), 1247; *Matter of Marrey*, 65 Cal. 287; *In re Simons*, 65 Conn. 239; *Hughes' Succession*, 14 La. Ann. 876; *McGregor's Estate*, 131 Penn. St. 359; 2 Woerner's Adm. § 516. Not only will such fees not be allowed, but the court has no jurisdiction to allow same.

Affirm the judgment.

67 526
86 254

## SALYERS v. SMITH.

Opinion delivered March 3, 1900.

1. AGREEMENT TO SUPPORT—BREACH.—A cause of action on an agreement by defendant to support plaintiff during his life will not arise until defendant either refused to render plaintiff the support promised, or did some act tantamount to such a refusal. (Page 530.)
2. SAME—DAMAGES.—In a suit by the grantor in a deed to recover from the grantee an amount sufficient for his support, which the grantee had agreed to furnish in consideration of the conveyance, the measure of damages would be the amount required for such support during the time only that the grantor had been forced to support himself up to the bringing of the suit. (Page 530.)
3. STATUTE OF FRAUDS—TRUST.—An express trust in land cannot rest in parol, under Sand. & H. Dig., § 3480. (Page 530.)
4. DEED—FAILURE OF CONSIDERATION—REMEDY.—Where the consideration of a deed was the grantee's undertaking to support the grantor, and the grantee failed to comply with such undertaking, the grantor's remedy was either to sue at law for the amount of the consideration as it should become due, or else to treat the contract as void, and sue in equity to cancel it. (Page 530.)
5. VENDOR'S LIEN—WHEN DOES NOT ARISE.—An equitable vendor's lien will not arise to secure the performance of an act the non-performance of which would make a claim for unliquidated damages. (Page 531.)

Appeal from Hempstead Circuit Court in Chancery.

C. A. BRIDEWELL, Special Judge.

STATEMENT BY THE COURT.

The appellee brought this suit in equity against his daughter and her husband, alleging that before her marriage appellee had made her a deed to certain land in consideration that she would support him as long as he lived, and that she afterwards married, and turned him out. He alleged that it would take $150 per annum for his support, and prayed that he have a lien against said land for his support during life, and that the defendants be restrained from selling or incumbering the land; that he have judgment against the land for

the amount necessary, payable each year during his natural life, and, if same be not paid at the time due, that said land be sold to satisfy said lien, and for all proper relief.

The answer denied the consideration alleged, set up a valuable consideration of $600, and denied that appellants had refused to support appellee, and averred that he had left the house without cause, and refused to accept their support, which they offered in their answer to continue.

The deed is a simple, unconditional warranty deed, reciting a consideration of $600, and a receipt for same.

The plaintiff, Smith, himself testified as follows: "When my wife died, I told my daughter Amanda that I would give her all I had when I died if she would remain with me until I died. I made a will giving her all my property. She became dissatisfied with the will, and I gave her my note for $600, and afterwards I made her a deed to the land in controversy; she agreeing to support me the balance of my life. A year or so afterwards she married, and then she and her husband began to abuse and mistreat me; and finally, their conduct becoming intolerable, I was forced to leave them. He [Salyers] would walk through the house, and say that he intended to rule and boss me. I was blind, and they would not assist me or lead me about. I would not have made Amanda a deed to the land except that she would promise that she would never leave or forsake me. My daughter never married until last January. She always stayed at home, and did all the work after my wife died. She did everything she could for me up to the time I left them in last March. The first note I gave her ran out of date, and I gave her another note. I gave the note to Amanda because the other children had married, and were living to themselves, and Amanda was living with and taking care of me, and I intended that she should have all my property at my death, and so I intend now."

J. C. Ross, a son-in-law of plaintiff, testified: That defendant Amanda Salyers had lived with plaintiff for some years before this falling out. That when the plaintiff left defendants' home in March, he went over to try and settle up the dispute, but Salyers told him he would not speak to the old

man, and that it would be better for him to be in the poor house. Plaintiff then went to my house, and remained about two months. It is worth $20 per month to care for the old man."

Mrs. Margaret Ross, a daughter, testified that she had a conversation with defendant Amanda Salyers, in which Amanda told her that she and her husband were going off and leave the old man, and that she did not care whether he was killed or not when she left him, as it would make no difference. Ellen Cottingham, a daughter of the plaintiff, and Willie Ross and a daughter of Mrs. Ross, both the last named grand-children of the plaintiff, testified to the same facts as did Mrs. Ross.

Salyers testified, denying, specifically, the testimony of Ross as to the conversation alleged to have been had with him by Ross; and he further testified that he had never mistreated or abused the plaintiff, but that the plaintiff was cross and irritable. He testified further: "I have never refused him a home. I have always considered my home his, and would take him and care for him now, if he saw proper to come back, and we have never intended to do anything else."

Amanda Saylers, the defendant, testified: "I am 53 years of age. I have never been married except to my present husband. I have always lived with my father until he left my house last March. He has been palsied since my mother's death. After my mother's death May 13, 1889, my father gave me his note for $600. After this note ran out of date, he gave me another note for it. On December 5, 1895, he took up said note, and made me a deed to the property in controversy. I have waited on and cared for my father for thirteen years. For a long time the old man has been in his dotage, and is irritable, and cross and fretful. He frequently would get into a tantrum, and lose his temper without any provocation. At the time he went away he did so without any cause, and I begged him to stay. My husband did all he could to assist him in every way." The witness denies the conversations testified to by Mrs. Ross, Ellen Cottingham and the Ross children. "I feel the same for him now that I have always felt, and would be glad to have him come and live with me."

J. M. Hendricks testified as follows: "I am well acquainted with the parties to this suit. I live on an adjoining farm, and have lived there for the last twenty-seven years, and I know Mrs. Salyers has lived there and taken care of her father ever since the death of her mother. Two hundred dollars is every cent the home farm is worth. The eighty acres in the bottom is worth about $1 per acre. The day Mr. Smith left, I heard some one hallooing, and went over there. It was about sun-down when I walked up. Mr. Smith was sitting out in the yard, and Mrs. Salyers walked away crying. I asked them what was the matter, and they said that they did not know; that they had seen him in a tantrum, but they had never seen him in such a fix before. She went and took him by the hand, and led him about ten feet of the door, and he said he was not going in there. He said he was going to halloo, and she told him not to do that; that Mr. Hendricks was there, and he said, "Who? Jim Hendricks?" and she said, "Yes," and he replied, "I God! Jim, come here." I went to him, and he held out his hand. We had not been on friendly terms for fifteen years. Salyers and his wife said, "Get him in the house, and on the bed, if you can; you may get him quiet." He said, "No," he would not go in there; that, if he did, they would cut his throat, for he had $35. He said he wanted to hire me to take him to Mr. Daniel, and I did so. He gave me as his reason for going away that Mr. Salyers was a perfect devil, and would kill him. He never complained of any mistreatment of either of them. He bragged on Salyers' children, saying that they were the best children he had ever seen. It appeared to me that they were doing everything they could to quiet and pacify him. Neither one of the parties ordered or directed Mr. Smith to leave the place in my hearing."

The chancellor adjudged that appellants should pay appellee $10 per month for his support, declared this a lien, and ordered the land sold in default of its payment.

*W. S. & F. L. McCain*, for appellants.

There can be no resulting trust in this case, as that comes about only when the deed is made without consideration. 1

Perry, Trusts, 124. Nor can there be an express trust, as it could not rest in parol. Sand. & H. Dig., § 3480. While no contract will be implied between a father and his child to pay for services, yet it is competent for them to make an express contract with regard thereto. 17 Am. & Eng. Enc. Law, 336. A vendor's lien for an unliquidated amount is not enforceable. 37 Ark. 353.

WOOD, J., (after stating the facts.) The proof is hardly sufficient to justify a finding by the chancellor that appellants had refused to support the appellee, if such support were a part of the consideration, or the only consideration, for the deed. Until appellants had positively refused to render him the support promised, or had done some act tantamount to that, conceding that such was the consideration for the deed, there could be no cause of action to appellee. If the conduct of appellants was such to make the life of appellee intolerable, and to force him to quit their home, still, in a suit brought to recover an amount sufficient for such support, the measure of the damages would be the amount required for such support during the time only that the appellee had been forced to support himself up to the bringing of the suit. Judgment could not be rendered for future support, for that had not accrued, and was not due under the contract, if same should be construed as a continuing contract. Especially would there be no cause of action as to that when the defendants (as here) alleged and proved that they were willing to and would continue such support, if the appellee would only permit. This would have been a complete fulfillment of their contract, and the consideration had not, then, failed.

But, whatever view may be taken of the nature of the consideration, the deed was an executed contract. There were no provisions in it creating a trust, and an express trust of lands can not rest in parol. Sand. & H. Dig., § 3480.

The chancellor clearly erred in rendering a money judgment for a fixed and continuing amount, and declaring same a lien on the lands. No vendor's lien was reserved in the deed. No fraud was charged in the execution of the deed. It expressed a valuable consideration, and was, at least, based upon

a good consideration. But if the consideration failed, then the remedy was either to sue at law for the amount of the consideration as it should become due, or else to treat the contract as void, and sue in equity to cancel and set it aside. We cannot find, upon the pleadings and proof, any authority upon which the decree of the chancellor can be upheld. The court seems to have proceeded upon the theory that the appellee had a vendor's lien for the amount required for his support; we assume, upon the idea that the promised support was in the nature of purchase money. This was not the correct view. No liquidated amount was stated, if we go beyond the consideration named in the deed. There was no contract by appellees "to pay any sum of money whatever, nor the equivalent of any definite sum in property or services." Necessarily, the value of the services was variable, depending upon the varying wants and necessities of the poor old blind man, who had already passed his four score and ten. A vendor's lien would not arise to secure the performance of an act the non-performance of which would make a claim for unliquidated damages. *Harris* v. *Hanie*, 37 Ark. 348.

The decree of the Hempstead chancery court is therefore reversed, and the complaint is dismissed for want of equity.

---

67 531
72 578

67 531
f78 59
f82 507

67 531
88 175

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

Opinion delivered March 3, 1900.

1. APPEAL—CONCLUSIVENESS OF VERDICT.—A verdict based upon conflicting evidence will not be set aside on appeal as unsupported by evidence. (Page 537.)

2. CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.—Whether or not a feeble passenger waited a reasonable time for the promised assistance of the trainmen before attempting, unaided, to alight from a train is for the jury, where the facts are in dispute. (Page 538.)

3. INSTRUCTION—IGNORING PARTICULAR THEORY.—An instruction is not objectionable as ignoring proof tending to establish defendant's theory of the case if that theory is sufficiently presented in another instruction. (Page 538.)

4. PASSENGER ALIGHTING FROM TRAIN—WHEN NOT NEGLIGENT.—In an action against a carrier by a passenger who was injured in attempting to alight unaided from a train, although she had been promised the assistance of the trainmen, the court properly instructed the jury that she might rely on the directions of the conductor, though addressed to passengers generally, to get off the train, "provided she took no more risks in getting off the train than a prudent person would have taken under the same circumstances." (Page 538.)

5. INSTRUCTIONS—INVITED ERROR.—Appellant company cannot complain of an instruction given at appellee's instance as abstract if it asked, and the court gave, an instruction bearing upon the same subject. (Page 539.)

6. SAME—WHEN NOT PREJUDICIAL.—An abstract instruction is not prejudicial if the special finding of the jury shows that it was eliminated from their consideration. (Page 539.)

7. SAME—BURDEN OF PROOF.—An objection to an instruction casting the burden of proof on defendant to show contributory negligence on the part of plaintiff that it deprives defendant of the benefit of any proof of such negligence in plaintiff's testimony is cured by another instruction that the jury will find for defendant if the testimony shows that the injury was due to plaintiff's lack of care. (Page 539.)

8. CONTRIBUTORY NEGLIGENCE—WHEN QUESTION FOR JURY.—A passenger in feeble condition requested the assistance of the trainmen in alighting from the cars, and was told by the porter to keep her seat, and he would come back and help her off. On arriving at the station she waited until the conductor came to the door and said for everybody to get off the train. She then started out with the other passengers, and pressed forward with valise in hand until she reached the bottom step. She called for assistance, but, receiving none, attempted to alight unaided, and was injured. *Held*, that whether she was negligent in attempting to alight without assistance was a question for the jury. (Page 540.)

9. APPEAL—MOTION FOR NEW TRIAL.—An exception to evidence not reserved in the motion for new trial will not be considered on appeal. (Page 541.)

10. PHYSICAL SUFFERING—MEASURE OF DAMAGES.—Where the proof shows that plaintiff received injuries to her skull which have caused her much suffering, and which may be of a permanent character, a verdict of $2,625 cannot be said to be excessive. (Page 541.)

Appeal from Woodruff Circuit Court.

HANCE N. HUTTON, Judge.

STATEMENT BY THE COURT.

This is a suit for damages for personal injury. The injury complained of was caused by a fall while plaintiff was alighting from appellant's train at Bald Knob. The complaint, after setting out the relationship of passenger and carrier, and the occasion and circumstances of the injury in detail, charged "that said fall and injuries were caused by the defendant carelessly and negligently failing to render her necessary assistance in getting off the car."

The answer admitted that the relation of carrier and passenger existed, but in other respects denied the material allegations of the complaint, and set up affirmatively "that whatever injuries plaintiff may have received in attempting to alight from the train * * * were occasioned by her own fault and carelessness in attempting to alight at the time and in the manner in which she did, and without waiting to be assisted off by any of the train crew."

Mrs. Baker, the plaintiff, in her own behalf testified that she did not know she had to change at Bald Knob until the conductor passed through and took up the tickets, just before reaching Bald Knob. She then told him of her feebleness, and wished his help in getting off at Kensett, as she had been used to going that way, and not getting off at Bald Knob. The only answer which the conductor made,—"he just waived his hand at me, and passed on down the aisle." When the porter came along, she asked him to assist her in making the change. He agreed to do so, and told her to keep her seat, and he would come back and help her off. This, she said, he never did. She got off the car in front of the ticket office. Says she waited for the porter until the conductor came to the door, and said for everybody to get off the train. Describing her getting off, she says that she went in front of another lady passenger, and that "some passengers were already off of the train, and some were still behind us." There were persons between her and the conductor, who was in sight, but she "never got right at him." He was out on the ground. "I could see him. I knew him by his uniform." She did not know how far it was to the ground. There was a great deal of noise from a train which was switching. There

were a great many refugees on the train on their way home, a very rude and noisy crowd," and making a great deal of noise. She pressed forward until she got to the bottom step. "I was on the bottom step, and couldn't get back. There were people behind me, and I had to get down." Says she couldn't make anybody hear her when she called for some one to assist her in getting off, "and I had to try to get down alone, of course." She then describes how she got down with her valise in one hand, and holding to the hand rail with the other. Stepped off with her right foot, "and lost my balance, and whirled around and hit my head on some projection of the car." Did not know whether she fell or lit on her feet. Was stunned, and couldn't remember for a little while. The conductor did not think it was anything serious, but said he would come and put her on the train for Kensett, which he did. After reaching Kensett on her way to her home, she stopped at her family physician's, and had him attend to her wound. It was about three months before it healed entirely. Claims that it is not entirely well yet. Cannot bear anything to touch it. Her health had not been good before that, but nothing the matter with her head until after this injury. Suffered in her head all the time for three weeks, and still has spells of suffering. "For several weeks I never slept any without using chloral." Q. "Have you ceased using chloral?" A. "No, sir." Q. "Under whose direction?" A. "Under Dr. Tabscott's." Her worst spells of headache occur once or twice a week. Does not sleep well, nor eat much. Her eyes are also affected. Has feelings of fainting, etc. Becomes nervous, and can't sleep. She was 58 years old last February. Usual weight is 104 to 110. Suffered with dyspepsia, and sometimes would be better, and have more flesh. In repeating what occurred between her and the brakeman, she again says, "He told me to wait when they stopped until he came back. He told me to keep my seat until he came back and helped me off."

Dr. Dale testified in part: "I am confident—I am sure—that the bone has suffered an injury. As to the extent, it would be difficult to say at this late day. From an examination of the wound, I am confident that the bone suffered at the

time, and it would necessarily leave pain, and it would take time for it to be entirely relieved. It may be that the lady would be a sufferer as long as she lives, because of the external bone being driven into the cavity."

E. R. Brownell testified: Was conductor of the train. Had 14 years of such experience. Took up plaintiff's ticket shortly after leaving Fair Oaks. Witness told her she would have to change at Bald Knob. She said she would need help in making the change. Witness replied: "All right. We will assist you in changing cars." Plaintiff afterwards called witness' attention to the same subject, and witness again assured her that she should have all necessary assistance. "I told her to keep her seat when we arrived at Bald Knob, and we would assist her." The reason the train had to stop at Bald Knob, and transfer its passengers to the train on main line, was on account of Little Rock having quarantined against Corinth and Memphis. Witness then gives in detail the manner of backing down and pulling into Bald Knob. They had to couple the sleeper which they had brought from Memphis on to the sleeper of the main-line train. Witness had to give signals. His brakeman and the one belonging to the other train made the couplings. When this was done, witness went to the coaches of his train to transfer his passengers. He got on the coach where he expected to find plaintiff. "I went in there to find Mrs. Baker, and help her out of the train, but I guess she had already gotten out. I didn't find her. I walked right out again, and stood helping the other passengers out." He did not give any order about getting out, for they were getting out when he reached the coach. He had 25 or 30 passengers in that coach. Witness was assisting some one off the car, when some one remarked that a lady had been injured.

C. R. Whittemore testified: "The first time his attention was called to plaintiff was shortly after they left Fair Oaks. She asked him if the train went through to Kensett. Witness told her that it did not, but that she would have to change at Bald Knob. She said she would need assistance in making the change. "I told her if she would keep her seat until I got through with the work I had to do for a few minutes, after I got through I

would come back and assist her in changing cars." Witness then explains that the work he had to do was to couple on to the main-line sleeper. As soon as he did this, he came forward to assist passengers off. Witness says that the same promise of assistance was made by him twice. The other time was somewhere between Fair Oaks and Augusta. "She said that she needed assistance, and I told her, if she would keep her seat until I got back, that I would help her off." Again he says: "I got off after we coupled up and came on up to see after the lady. I had promised to help her off, and I went through the rear end of the car, and saw that she had got out, and I came around the other way, and the crowd was coming out, and I didn't see her any more." The train stopped at Bald Knob about thirty minutes, so that there was nothing to cause the passengers to be in any hurry. Witness says there was plenty of light from the two principal ones, as well as those from the ticket and telegraph offices. They all threw light on the platform. Had fourteen years' experience on the road. Witness, on cross-examination, again explains what duty he had to attend to with reference to coupling on to the main sleeper. When he did this he was only one car length from the coach in which plaintiff was. Entered the car from the north end, and saw that plaintiff was not there. The crowd was coming out of the south end of that coach, so witness went out the way he came in, and intercepted the outcoming passengers at the south end of the car, and helped some of them off. The conductor was doing the same thing.

The court, at the request of defendant, directed the jury to bring in the following special findings, and the jury, after argument of counsel and instruction of the court, returned special verdicts thereon, as set out in the answers: "(1.) Was the defendant guilty of any negligence which contributed to plaintiff's injury. Yes. (2.) If so, in what did said negligence consist? A. In the conductor not using due diligence in assisting plaintiff from car; she having previously notified him that assistance would be necessary. (3.) Did the plaintiff wait a reasonable time in the car for the assistance which had been promised her? A. Yes. (4.) Was the plaintiff guilty of negligence in undertaking to get off of the train at

the time and under the circumstances surrounding her? A. No." And the jury returned a general verdict for the plaintiff for $2,625. Motion for judgment *non obstante veredicto* on the part of the defendant was overruled by the court. To which ruling the defendant saved its exceptions. Motion for new trial was overruled, and defendant excepted.

*Dodge & Johnson*, for appellants.

The evidence does not sustain either the general verdict or the special findings. It was for the court to determine the question of whether the plaintiff waited a *reasonable* time or the defendant made *unreasonable* delay. 52 Ark. 406; 58 Ark. 334; 20 N. Y. 126; 43 Ill. 420; 49 Ark. 357; 29 Fed. 278; 11 How. 373 ;9 Wall. 197; 22 Wall. 116; 102 Pa. St. 425; 134 Mass. 682; 105 Mass. 77; 26 Mich. 189; 20 Mo. App. 100; 14 Minn. 385; Elliott, Railroads, § 1528; 55 Ark. 134; 3 Elliott, Railroads, § 1169, n. 3 and 4; 86 Ga. 192; 123 Mo. 445. Appellee is barred by contributory negligence. 12 Am. & Eng. R. Cas. 163, 164; 46 Mich. 504; S. C. 9 N. W. 830; 49 Mich. 153; S. C. 13 N. W. 494; 49 Mich. 495; S. C. 13 N. W. 832. On the general rule as to negligence, see: 34 Mich. 323; 34 Mich, 506; 38 Mich. 714; 46 Mich. 498; S. C. 9 N. W. 828; 28 Mich. 440; 47 Mich. 401; S. C. 11 N. W. 216; 46 Mich. 504; S. C. 9 N. W. 830; 49 Mich. 153; S. C. 13 N. W. 494; 49 Mich. 495; S. C. 13 N. W. 832.

*P. R. Andrews*, for appellee.

The question as to what was a reasonable time becomes one for the court only when the facts are undisputed. 30 Cal. 548, 558; 15 Minn. 49; 13 Ill. 289; 1 Stark. Ev. 584, 516, 517 i. The first instruction given for appellee was correct. 37 Ark. 521–2. The eighth, also, was correct. 46 Ark. 182; 48 Ark. 106; *ib.* 334; *ib.* 461.

WOOD, J., (after stating the facts.) Appellant contends, first, that neither the general verdict nor the special findings are sustained by any evidence. The evidence was conflicting, and susceptible of different conclusions being drawn from it, depending upon the point of view from which it was consid-

ered. The jury were the judges of it, and we are of the opinion that their verdict is not without evidence sufficient here to sustain it. The question as to whether or not the plaintiff waited a reasonable time for the promised assistance before attempting, unaided, to alight from the train, under all the circumstances in proof, we think was for the jury. It is not a case where the facts are undisputed, and from which only one conclusion can be drawn.

2. Appellant objects to the following instruction. "If the jury find from the evidence that the plaintiff was a passenger on the defendant's train for Kensett, and, on arriving at Bald Knob, the conductor or agent called out the name of the station, and directed the plaintiff to get off of said train for the purpose of changing cars and getting on another train, which would carry her to her destination, she had a right to rely on such advice or directions, provided she took no more risks in getting off the train than a prudent person would have taken under the same circumstances." The objection urged is that it ignores proof on the part of the appellant tending to show the special arrangements made by plaintiff with both the conductor and brakeman for assisting her off the train, and further that under the instruction the jury are left to say "she took no more risks in getting off the train than a prudent person would have taken." The objection is not tenable for two reasons. (1.) The court presented the defendant's theory as to the special arrangement between plaintiff and the conductor and brakeman for assisting her off the train in its ninth instruction asked by the defendant, and modified and given as follows. "9. If the jury believe from the evidence that defendant's employees in charge of the train on which plaintiff was, before the train reached Bald Knob, told plaintiff that she would be assisted off by them, or any one of them, when the train should arrive at Bald Knob, and further told her to wait in the car until he or they should come to assist her, and further find that she did not wait for such assistance, but got off the car by herself, and was injured in so getting off, without having waited a reasonable time for such assistance, you will find for the defendant." (2.) It was not improper to tell the jury that plaintiff had a right to rely

upon the advice or direction of the conductor (although addressed to the passengers generally) to "get off the train," provided she took no more risk than a prudent person would have taken under the circumstances. Even if the conductor had told her to wait until he came to assist her off, she could not know but that he was then ready to give her the proffered assistance, and was there at the front end of the car for for that purpose. From his own testimony the jury could have found that he was at the steps assisting passengers off, when his attention was called to plaintiff's injury. There was proof from which the jury might have found that the conductor was near at hand when plaintiff attempted to alight, and failed to hear when "she called for some one to assist her in getting off," and therefore failed to assist her off.

There was no prejudicial error in giving instruction numbered 2, and the first clause of No. 4, asked by the plaintiff, with reference to the duty of defendant to provide ordinarily safe and sufficient platforms, and safe and convenient means of entrance to and departure from their trains; for, although the instructions might not have been properly worded, and, in view of the proof, might have been considered abstract, not having evidence upon which to base them, yet, if error, appellant cannot complain of it as being abstract, when it asked, and the court gave at its request, instructions bearing upon the same subject, numbered 2 and 4. Furthermore, the defendant requested the jury to find specially, "In what did said negligence consist," and the answer was, "In the conductor not using due diligence in assisting plaintiff from car, she having previously notified him that assistance would be necessary." This shows that the other matters were eliminated from their consideration.

Appellant complains of this instruction given at the request of plaintiff: "8. The jury are instructed that contributory negligence is a defense which must be affirmatively proved by the defendant, and the burden is upon them to show such negligence, and it must be established by a preponderance of the testimony." This is the law, as it applies to the appellant (defendant), in undertaking to sustain its plea of contributory

negligence. If, however, the proof on the part of the plaintiff in the progress of the trial and the development of her case showed contributory negligence, the defendant (appellant) had the right to take advantage of that fact, and to rely upon such proof, just as though it had been introduced by it originally. Where such is the case, the defendant is relieved of the necessity of introducing additional evidence on that point. The court, however, did give an instruction on behalf of the defendant which fully meets the objection as follows: "8. The court instructs the jury that contributory negligence is a complete bar to suits of this character, and if they find from the testimony that whatever injuries may have been received by the plaintiff were due to her lack of care, and the lack of the exercise of ordinary diligence on her part in alighting from said train, your verdict should be for defendant." The instructions, taken together, declare the law pertaining to this phase of the case. See *Texas & St. L. Ry.* v. *Orr*, 46 Ark. 182; *Little Rock & F. S. Ry. Co.* v. *Cavenesse*, 48 Ark. 106; *Little Rock, M. R. & T. Ry. Co.* v. *Leverett*, 48 Ark. 334; *Little Rock & F. S. Ry. Co.* v. *Eubanks*, 48 Ark. 461; *Park Hotel Co.* v. *Lockhart*, 59 Ark. 465.

The ninth* instruction was not prejudicial, and we find no error in the ruling of the court in giving the eleventh† at the request

*The ninth instruction given at plaintiff's instance is as follows: "9. They [carriers] are required to provide all things necessary to the security of the passenger reasonably consistent with their business and appropriate to the means of conveyance employed by them."

†"11. If the jury find from the evidence that the plaintiff, by reason of her physical disability, on account of her age or health, or both (which was apparent to the conductor or porter whose duty it was to look after the safety of the passengers), needed special assistance to enable her to leave the train in safety; being in that condition, she made the same known to the conductor or porter, or either of them, by requesting either of them to render her assistance in leaving the train, which they failed to render to her, or offered to do so within reasonable time; and if you further find that, if assistance had been rendered her by the conductor or porter, the injury would not have occurred, then your verdict should be for the plaintiff; provided, you further find that plaintiff took no more risk in getting off the car than a prudent person would under the same circumstances."

of plaintiff, nor in modifying, and giving as modified, the second‡ and ninth‖ asked by the defendant.

3. Contributory negligence, under the evidence, was a question for the jury.

4. Although objection was made to the manner of proving the character of the injury by expert witnesses, and although some reference was made thereto in arguing the question of the excessiveness of the verdict, we do not find that the point is reserved in the motion for new trial.

5. While the verdict is large, yet we cannot say from the proof that it was excessive.

Affirm the judgment.

BUNN, C. J., dissenting.

---

‡"2. In her complaint the plaintiff charges that the injuries of which she complains were caused by the defendant carelessly and negligently failing to provide sufficient lights and other means of egress, *or assistance within reasonable time*, from the car in which she was riding. Unless you find from the evidence that the defendant was negligent in some one or more of the particulars referred to, and that such negligence caused the injuries to plaintiff, your verdict will be for the defendant."

‖"9. If the jury believe from the evidence that defendant's employees in charge of the train on which plaintiff was, before the train reached Bald Knob, told plaintiff that she would be assisted off by them, or any one of them, when the train should arrive at Bald Knob, and further told her to wait in the car until he or they should come to assist her, and further find that she did not wait for such assistance, but got off the car by herself, and was injured in so getting off, *without having waited a reasonable time for such assistance*, you will find for the defendant."

The court's modifications of the second and ninth instructions, as asked by defendant, are indicated by italics.

67 542
79 51

67 542
85 187

# TEXARKANA & FORT SMITH RAILWAY COMPANY v. BEMIS LUMBER COMPANY.

Opinion delivered March 3, 1900.

1. RAILROAD—ACCOMMODATION NOTE—LIABILITY.—Where the president of a Texas railroad company borrowed money in that state, giving a note to which he signed the company's name, by himself as president, and stated to the payee that he was borrowing the money to pay off the company's employees, and the transaction was so understood by the payee, though the money was used by such president for his individual purposes, an instruction that the note was void under the laws of Texas if it was given for accommodation of such president was properly refused as not sustained by any proof that the note was given for accommodation. (Page 548.)

2. CORPORATION—PRESIDENT—APPARENT AUTHORITY.—Where the president of a corporation has been in the habit of signing its name to notes, without the express authority of the board of directors, of which custom said board was cognizant, the company will be bound by a note so signed as though express power to sign it had been conferred. (Page 550.)

Appeal from Little River Circuit Court.

WILL P. FEAZEL, Judge.

STATEMENT BY THE COURT.

Appellee sued appellant on the following note:

"$300. TEXARKANA, TEX., November 16, 1891.

"Sixty days after date we promise to pay to the order of A. Weinstein three hundred dollars at————. If collected by law or placed for collection, we agree to pay 10 per cent. for attorney fees. [Signed]

"TEXARKANA & FT. SMITH RAILWAY CO.
"By W. L. WHITAKER, President."

Indorsed on face:

"Protested for non-payment January 21, 1892.
[Signed] "W. ESTES, Notary Public."

Indorsed on back:

"W. L. Whitaker, Benj. Whitaker.

"Assigned to Bemis Lumber Co., without any recourse or liability of any kind whatsoever on me. This 21st day of December, 1894. [Signed.] A. WEINSTEIN."

Appellant and appellee were both corporations organized under the laws of the state of Texas. The complaint alleged that the note was executed in Texas, and there delivered for a valuable consideration to Weinstein, who for a valuable consideration transferred same to the appellee. The prayer of the complaint was for judgment against appellant and the indorsers, for the debt, interest, protest and attorney's fees, and for costs.

Appellant, for answer to the complaint, denied that the note was executed by appellant or by its authority; averred that it was executed by W. L. Whitaker solely for himself and Benjamin Whitaker; denied that the board of directors had knowledge of the execution of the note until after this suit was brought; alleged that the appellee recovered judgment on said note in the Nevada circuit court against W. L. Whitaker and Benjamin Whitaker, and that said judgment had been satisfied by them or other voluntary payers for them; denied that appellee was the owner of the note; alleged that appellee had acquired possession of the note with full knowledge of all the facts, and after its maturity; that appellant had received no consideration for the note; pleaded the laws of the state of Texas, and alleged that said note was void under the laws of Texas, as well as under the laws of Arkansas. By an amendment to its answer, appellant alleged that the payment of said note to Weinstein was secured by collaterals furnished by W. L. and Benjamin Whitaker; that said collaterals consisted of stock in certain corporations, and was of a greater value than the amount of said note; that appellee purchased said shares from Weinstein and the Whitakers, and that part of the consideration was the payment by appellee to Weinstein of the note and judgment thereon; that appellee had paid to Benjamin Whitaker large sums of money in consideration for said collaterals, knowing at the time that the same were pledged to Weinstein for

the payment of this note; that appellee was estopped from complaining against appellant.

The proof tended to show that appellant, at the time of the execution of the note sued on, owned and operated a railroad from Texarkana, Texas, north into Little River county, Arkansas, and was then engaged in the construction of its road in the state of Arkansas; that W. L. Whitaker was the president of appellant railway company at the time the note in suit was executed, and was the principal party interested in said railroad, and owned nearly all of the capital stock of the company; that he was in the habit of signing the name of appellant, by himself as its president, to notes, drafts and bonds, without express authority from the board of directors, and that this was the "course of business under which the business of the company" was then being conducted; that, there were but few meetings of the board of directors, and that W. L. Whitaker was the general manager of the company; that, in 1889, F. M. Henry, one of the directors, at a meeting of the board, brought up the question as to Whitaker's right to execute notes in the name of the company, and the matter was discussed at the meeting, but no action was taken by the board. "It was not a very formal matter." The matter was afterwards mentioned on the streets to Whitaker by some members of the board. Whitaker continued to execute notes on behalf of appellant as president from 1889 to 1892. His authority to do so was never challenged, except at the times and in the manner mentioned above. On November 19, 1891, W. L. Whitaker, as president of the Texarkana & Fort Smith Railway Coompany, in the office of the company in Texarkana, Texas, applied to A. Weinstein for a loan of money to the company. He then and there stated to Weinstein that he was bound to have some money to pay off the hands who were at work in constructing said railroad. Weinstein made the loan requested to the amount of the note, less the discount, and Whitaker gave Weinstein the note in suit, indorsed by W. L. Whitaker and Benjamin Whitaker, for the money. Weinstein understood from Whitaker at the time that the money was being loaned on the railway company for the purpose of paying off its employees

for labor done in the construction of the road, and if he had not so understood he would not have loaned the money. Prior to the execution of this note, Weinstein had discounted $2,000 of this railway company's notes signed by W. L. Whitaker, president, payable to Grigsby Bros., who were contractors engaged in the construction of the railroad. Appellee paid to Weinstein the amount due on the note, and Weinstein indorsed the note to appellee without recourse on him.

W. L. Whitaker testified that he borrowed the money from Weinstein to take up his individual note at Texarkana National Bank, and used the money for that purpose; that he signed the name of appellant as maker of the note without any authority; that the note was accommodation paper, so far as the railroad was concerned; that he was putting up his own money in the construction of the road, etc. But Whitaker nowhere denies affirmatively the testimony of Weinstein. "He told me he was bound to have some money to pay off the hands on the said railroad. I loaned him the amount of the note, less the legal discount, for the purpose of paying off these hands." Whitaker only testified that he did not remember any such statement.

Art. 12, § 6 of the constitution of Texas is as follows: "No corporation shall issue stock or bonds except for money paid, labor done, or property actually received, and all fictitious increase of stock or indebtedness shall be void."

A statute of Texas provides that no corporation created under its laws "shall employ its stock, means, assets or other property, directly or indirectly, for any other purpose whatever than to accomplish the legitimate objects of its creation." Rev. Stat. 1895, art. 665.

The only statute of Texas relative to the power of railroad corporations to borrow money is the following: A railroad corporation "shall have the right from time to time to borrow such sums of money as may be necessary for constructing, completing, improving or operating its railway, and to issue and dispose of its bonds for any amount so borrowed, and to mortgage its corporate property and franchise to secure the

payment of any debt contracted by such corporation for the purposes aforesaid." *Id.* art. 4486.

Under the laws of Texas the provision in a note for the payment of attorney's fees is valid, and can be enforced. The note in suit was executed in Texas, and all the parties thereto were at the time of its execution residents and citizens of Texas.

The following, in substance, was testified by W. N. Bemis: The Bemis Lumber Company owned the note sued on at the time of the institution of this suit, and no part of said note has ever been paid. The Bemis Lumber Company paid Weinstein the amount due on this note in order to relieve the stock of the Ozan Lumber Company, and the stock of the Prescott & Northwestern Railroad Company, which stock had been pledged by Benjamin Whitaker to A. Weinstein to secure the indebtedness due by Benjamin Whitaker to A. Weinstein, including this note on which Benjamin Whitaker was liable as indorser. On payment of the amount due thereon to A. Weinstein, the Bemis Lumber Company took up the note. Before paying the note the Bemis Lumber Company tried to get A. Weinstein to sue the railroad company on it, but Weinstein, knowing that his security was ample, refused to sue, and in order to bring suit, the Bemis Lumber Company took up the note. The Bemis Lumber Company did not take up the note voluntarily. The money was due Weinstein from the Texarkana & Ft. Smith Railway Company, and the Bemis Lumber Company took up the note to relieve the stock, and then sued the railway company. It paid the money due on this note to Scott & Jones, attorneys for A. Weinstein. The note was taken up before the Bemis Lumber Company had a settlement with Benjamin Whitaker. Weinstein had nothing to do with the Whitaker trade, and Whitaker had nothing to do with the Weinstein trade, so far as this note was concerned.

When the Bemis Lumber Company paid the amount due on the note sued on, and the note was transferred to the company, it instructed Scott & Jones, as its attorneys, to bring suit on the note at once.

Such other facts as may be necessary will be stated in the opinion.

*William T. Hudgins*, for appellant.

The note sued on was void and unenforceable, as against the railroad company, because the corporation had no power to make it without receiving value for it. Accommodation paper of a corporation is void. Texas const. art. 12, § 6; Ark. const. art. 12, § 8. That such an obligation is void, see: 116 U. S. 491; 41 Ark. 331; 167 U. S. 362; 40 S. W. 328; 88 Tex. 570; S. C. 30 S. W. 1055; 167 U. S. 362; 120 U. S. 287–303; 139 U. S. 24–61; 50 Conn. 167; 3 McLean, 102; *ib.* 276; 27 Cal. 255; 4 McLean, 8; *ib.* 387; 18 Ohio, 151; 8 Ala. 827; 101 Mass. 57; 57 Mo. 503; Green's Brice's Ultra Vires, 88; 1 Dan. Neg. Inst. 197, 807; 1 Rand. Com. Pap. § 334; 2 Beach, Priv. Corp. §§ 391, 422. Even *bona fide* holders of paper executed in violation of express statute are not protected. 1 Dan. Neg. Inst. § 807; 9 Exch. 244; 2 Beach, Priv. Corp. 699, n.; 11 Otto, 71; 139 U. S. 59–60; 163 U. S, 581; 40 S. W. 330; 165 U. S. 538; 30 S. W. 1057; Rand. Com. Pap. § 386. The note had been legally paid by the real obligors. 1 Rand. Com. Pap. § 795; 3 *id.* §§ 1396, 1426; 76 Ind. 13. Appellee had no power under its charter to acquire the note as it did, and it is not a *bona fide* holder. Rand. Com Pap. § 986; 13 Pet. 519. Appellant was discharged by the release of the principal obligors. Rand. Com. Pap. § 946 *et seq.* The makers were discharged by appellee's appropriation of the collaterals. 2 Rand. Com. Pap. § 951. Appellee is estopped by having deprived appellant of its right of subrogation to said collaterals. 2 Rand. Com. Pap. 984.

*Scott & Jones*, for appellee.

The note is governed by the Texas law. 44 Ark. 215; 46 Ark. 66; 22 Ark. 130. The note was good in the hands of a *bona fide* holder, at all events. 34 S. W. 344, citing: 7 Atl. 488; 1 Dan. Neg. Inst. (4 Ed.) § 386; 1 Am. St. Rep. 136 n.; 8 Atl. 472; Cook, Stocks and Stockholders § 25; 11 Paige, 635; 73 Ga. 641. Private corporations have the implied power to borrow money and issue negotiable securities therefor. 4 Thompson, Corp. § 5697; 78 Pa. St. 370; 41 Pa. St. 278; 44 N. H. 127, 135; 67 Ala. 253; 27 N. Y. 546; S. C. 84 Am. Dec. 298;

7 Am. & Eng. Enc. Law (2 Ed.), 771, 779, 780; 4 Th. Corp. §§ 5731, 5734; 18 How. Pr. 374; 9 Ind. 359; 27 N. Y. 546. *Ultra vires* commercial paper is valid in the hands of a *bona fide* holder for value. 28 Minn. 291; S. C. 41 Am. Rep. 285; 11 Paige, 635; 35 N. Y. 505; 10 Ill. 48; 101 Mass. 57; 22 N. Y. 258, 289; 14 Wall. 282; 2 Black, 722; Ang. & Ames, Corp. § 268; Green's Brice's Ultra Vires, 273–4, 729; 4 Thompson, Corp. §§ 5739–40, 4800; 13 N. Y. 515; 27 N. Y. 546. A private corporation is responsible for the fraud of its agent, and is bound by his acts within the apparent scope of his authority. 5 Thompson, Corp. §§ 6321, 6322; 4 *ib.* §§ 4816, 4824, 4826, 5738, 4958, 4933, 5707; 16 N. H. 26; 2 Morawetz, Corp. § 679, 588; 87 N. Y. 628; 36 N. J. 548; 26 N. Y. 505; 40 S. W. 328; 167 U. S. 362. The established course of dealing was sufficient to authorize the president of the appellant company to bind it by note. 62 Ark. 7; 54 Ark. 58; 30 Vt. 158, 170; 3 Thompson, Corp. § 3938; 62 Ark. 33; Morawetz, Corp. 577–8; 34 N. Y. 50; 1 Beach, Priv. Corp. 189; 86 Mo. 125; 46 Ill. App. 456; 104 U. S. 492; 43 N. E. 203; 61 N. W. 904.

WOOD, J., (after stating the facts.) Appellant contends, first, that it is not liable, because "the note in suit was executed by its president, W. L. Whitaker, solely for his own private accommodation." On this point the court instructed the jury as follows: "If you believe from the evidence that the note sued on was executed by W. L. Whitaker for his own private use or accommodation, and that the defendant received no consideration therefor, and that such facts were known to the plaintiff or to said Weinstein before Weinstein lent the money to Whitaker, then you should find for the defendant." And, among others, refused the following: "If you believe from the evidence that the defendant, the Texarkana & Ft. Smith Railway Company, did not receive any consideration for the note sued upon, but that said note was executed in its name by its president, W. L. Whitaker, for his own private use or accommodation, or for the use and accommodation of himself and Benjamin Whitaker, and was indorsed by him and said Benjamin Whitaker before the same was delivered to the said A. Wein-

stein, then the plaintiff is not entitled to recover against the Texarkana & Ft. Smith Railway Company, and you will find a verdict for defendant."

If the note sued on was really understood by the parties, payer and payee, at the time of its execution to be for the accommodation of W. L. Whitaker, then, under the laws of Texas, by which it must be construed, it was an *ultra vires* contract, and absolutely void. Const. Texas, art. 12, § 6; Rev. Stat. Texas, 1895, arts. 665, 4486 *supra*.

A contract prohibited by the constitution or statute of a state, although negotiable in form, is not so in fact, and no innocence or ignorance on the part of the holder will make it enforceable. It is an absolute nullity. 1 Dan. Neg. Inst. § 807; *Union Pac. Ry. Co.* v. *Chicago, etc. R. Co.*, 163 U.S . 581; *Central Trans. Co.* v. *Pullman's Palace Car Co.*, 139 U. S. 59, 60; *McCormick* v. *Market National Bank*, 165 U. S. 538; *Northside Ry. Co.* v. *Worthington*, 30 S. W. Rep. (Texas) 1057; S. C. 88 Texas, 569; *South Texas National Bank* v. *Lagrange Oil Mill Co.*, 40 S. W. Rep. (Texas) 328. There is a marked distinction between such contracts and those which are merely in excess of power expressly conferred or necessarily implied, a failure to observe which has led to some confusion in the authorities.

If it be conceded, therefore, that the note in suit was executed solely for the accommodation of W. L. Whitaker, or that there was evidence to justify such a finding, the instruction given by the court was erroneous. We do not find, however, that there was any evidence to warrant a finding that the note was given for accommodation. True, Whitaker testified: "I executed this note for my own benefit, and signed the railway company as maker without any authority, because it was the only way I could raise money." Such might have been the mental reservation of Whitaker at the time he executed the note, or it might have been the conclusion to which he came when giving his testimony. But there is nothing in the proof to show that it was the understanding between the railway company, the maker, and Whitaker, or between the railway company and the payee, Weinstein, that the note was exe-

cuted for Whitaker's benefit individually. On the contrary, the positive proof of what actually occurred when the note was executed, uncontradicted, is that the money was loaned to the railway company for the purpose of paying off its employees for labor done in the construction of the road. There is nothing upon the face of the paper to indicate that it was given for accommodation. The presumption is in view of the constitutional provision, that it was not. The positive proof of the payee is that at the time of the execution of the note the declarations of the agent of the railroad, acting for it, were as stated above. Such then must be taken as the uncontroverted fact. A mental reservation in the mind of one of the parties, not communicated to the other at the time of the making of the contract, or a conclusion formed afterwards as to the effect of the contract, does not even tend to show what the contract really was. The question was not what one or both of the parties thought or said about the note afterwards, but what did they think and say at the time of its execution. This only could throw any light upon the real character of the intrument. The contract must be determined by what they said contemporaneous with the making thereof. We are of the opinion, from the proof, that the appellant's request for instructions on the accommodation phase of the note, and the court's charge as given orally, raised a supposititious issue, suggested in the answer, but not sustained by the proof.

Aside from the question of payment, which we will discuss later, the true theory of the liability or non-liability of appellant under the evidence was presented in the following instruction: "If the jury find from the evidence that W. L. Whitaker, as president of the Texarkana & Fort Smith Railway Company, executed the note sued on, and that in the execution of said note he was acting within the scope of his actual authority, or within the scope of his apparent authority, and that he received from A. Weinstein $300, less the legal discount or the discount agreed on, and delivered said note to said Weinstein for said money, and that he represented to said Weinstein that the money was being borrowed by defendant railway company, and for the purpose of paying laborers the money due them for the

construction of said railroad, and that Weinstein loaned said money to defendant for that purpose, then did said railway company become liable to pay said note." The note, having been given for money used in the construction of the railroad, was within the express power of the corporation to make. Did the president have authority to make it? He "was in the habit of signing the railway company's name to notes, etc., without authority from the board of directors." The directory was cognizant of the fact. The matter had been brought to their attention, and was discussed in their meeting, but no formal action was taken, and the president continued to exercise such authority for years. The board of directors must be held, under the circumstances, to have acquiesced, and the corporation was bound for the same, as though the board of directors had, by formal action, conferred upon the president express authority to make the note. *Estes* v. *German National Bank*, 62 Ark. 7; *City Electric Ry. Co.* v. *First National Bank*, 62 Ark. 33; *Mining Co.* v. *Anglo-Californian Bank*, 104 U. S. 192.

As to the plea of payment, the facts, in the main, are correctly stated in appellee's brief as follows: "Weinstein held the joint notes of W. L. Whitaker, Benjamin Whitaker and T. L. L. Temple, aggregating $3,666. He also held the note here sued on. Weinstein filed two suits in the Nevada circuit court,—one against the Whitakers and Temple on the joint notes for $3,666; the other on the note herein sued on against the Whitakers alone. Attachments were issued in both suits, and levied on 1,480 shares of the capital stock of the Ozan Lumber Company and 150 shares of the capital stock of the Prescott & Northwestern Railway Company, as the property of Benjamin Whitaker. To secure this entire indebtedness to Weinstein, Benjamin Whitaker executed a deed of trust to W. R. Grim, conveying to Grim, as trustee, all of the lumber company stock and all of the railway company stock which had been levied on under the orders of attachment. The suits were filed and attachments levied on April 8, 1892. This was not done, as appellants states, in settlement of the indebtedness due to Weinstein, but to secure the payment of that indebtedness. Afterwards appellee purchased the lumber company stock and the rail-

way company stock from Benjamin Whitaker, and, in order to relieve it from the lien of the Grim deed of trust, paid to Weinstein the entire indebtedness due him. Appellee paid Weinstein the amount due on the note in this controversy long before he concluded the deal with Whitaker for the stock, and had the note transferred to him. Judgments by default were rendered against W. L. and Benjamin Whitaker in the Weinstein suits on July 25, 1894. These judgments were paid off at different times, but W. N. Bemis could not say whether full payment was made before or after he closed his deal with Benjamin Whitaker for the stock. The Bemis Lumber Company had tried to get Weinstein to sue appellee on this note, but Weinstein declined to do so, because he was amply secured. The lumber company then paid to Scott & Jones, Weinstein's attorneys, the amount due on the note, and had the note transferred to it by Weinstein, and instructed Scott & Jones to sue appellant on the note, which was done. There had been previous dealings between Benjamin Whitaker and the Bemis Lumber Company, and Mrs. J. H. Bemis, the mother of the Bemis boys, who organized the Bemis Lumber Company. When the deal for the stock was finally consummated, and settlement made with Benjamin Whitaker, the Bemis Lumber Company neglected to include in the settlement the note in suit, and a balance was found to be due Whitaker on settlement of $21,000, which was paid him by the Bemis Lumber Company, and the stock was transferred to H. D. K. Bemis. This note formed no part of the consideration paid by Bemis Lumber Company for the stock. The claim made by appellant in its brief is that Benjamin Whitaker paid this note. This is contradicted by Benjamin Whitaker himself. His testimony on this point is as follows: "Judgment on this note has been paid off and satisfied by the Bemis Lumber Company to A. Weinstein. Nothing is due A. Weinstein on note or judgment, because the same has been paid to him by the Bemis Lumber Company. I don't know how, from whom, nor under what circumstances the Bemis Lumber Company obtained possession of said note. I think they must have gotten it from Weinstein or his attorney. Q. Did not the Bemis Lumber Company pay to A. Weinstein the amount

due on this note? If yes, state the circumstances under which they paid it." Ans. "Yes; under the following circumstances: Weinstein had attached some of the stock of the Ozan Lumber Company, and some of the stock of the Prescott & Northwestern Railway Company in which some of the Bemises were interested, but which stood in my name, and the Bemis Lumber Company paid off the note to relieve the stock."

The finding that the note had not been paid was justified by the evidence. We find no reversible error in any of the other assignments presented by counsel.

Affirmed.

BATTLE, J., did not sit in this case.

---

## ARKANSAS FIRE INSURANCE COMPANY *v.* WILSON.

67 553
75 58
67 553
78 205

Opinion delivered March 3, 1900.

INSURANCE POLICY—OWNERSHIP CLAUSE—FORFEITURE.—A policy of fire insurance which provides that, if the interest of the insured becomes other than the entire, unincumbered and sole ownership, the policy shall be be void, unless agreement therefor is indorsed on the policy, is not forfeited because the insured entered into an executory agreement in writing to sell, if no deed passed, and no possession was given. (Page 558.)

Appeal from Faulkner Circuit Court.

JAMES S. THOMAS, Judge.

STATEMENT BY THE COURT.

This suit was brought by appellees to recover on a fire insurance policy. The defense was that the policy was void because of a violation of a provision of the policy "that if the property be unoccupied for more than fifteen days, consecutively, the policy would be void, unless agreement therefor was indorsed on the policy;" also, because of a violation of the provision "that if the interest of the assured became other than the entire, unconditional, unincumbered and sole owner-

ship, the policy should be void, unless agreement therefor was indorsed on the policy." The answer enumerates four particulars in which this provision was violated, namely: "First, that the property had been placed in the hands of a receiver, and was burned while in his hands; second, that at the July term, 1896, of the Faulkner circuit court, judgments had been rendered against Wilson, which were liens on the property; third, that Wilson had sold the property before the fire; fourth, that at the April term, 1897, of the Faulkner probate court a judgment had been rendered against Wilson, as administrator, which was a lien on the property."

The cause was submitted to a jury, who, after hearing the evidence and instructions of the court, rendered a verdict in favor of the plaintiffs (appellees). Judgment was entered, and this appeal duly prosecuted.

*J. H. Harrod*, for appellant.

The provision as to change of ownership is reasonable and valid. 62 Ark. 348; 63 Ark. 187: The mailing of appellee's acceptance of the proposition of Dunaway completed the sale. 47 Ark. 519. If the contract was made, the mere fact that it was subsequently abandoned by the parties would not prevent a forfeiture of the policy. 32 N. W. 514. The change of ownership was within the meaning of the clause in the policy, and worked a forfeiture of same. 59 Minn. 269; 2 Hun, 540. It was the duty of the court to declare that the letters completed a contract for sale. 2 Pars. Cont. 638 n. A judgment is an incumbrance. 40 Md. 620. The court erred in excluding the assignment and transfer of the policy by appellee. 25 Ark. 380. The questions upon which special findings are directed must be stated in writing. Sand. & H. Dig., § 5831.

*Jno. G. B. Simms*, *E. A. Bolton*, *J. T. Young* and *Sam Frauenthal*, for appellee.

There was no such change of ownership or interest as would avoid the policy in this case. 71 N. Y. 396; 14 Hun, 299; 1 May, Ins. § 276; 26 E. D. Smith, 206; 92 N. Y. 51; 101 Ind. 392. The decisions of the probate court on the motions to retax costs were not judgments, and are not encumbrances

on the property. Freeman, Judg. § 13; 2 Black, Judg. § 407. Probate judgments are not liens upon real estate. Sand. & H. Dig., § 4200; 36 Ark. 257. The question as to whether or not there was a sale of the property was fairly submitted to the jury upon proper instructions, and their decision is final. An agreement to sell is not a change of ownership. 32 Neb. 645; 62 Ia. 83; 59 Pa. St. 479; Biddle, Ins. § 206; Richards, Ins. § 147; 17 Ia. 176. There was not even such a contract as would be specifically enforced. 1 Ark. 421; 4 Wall. 513; 71 U. S. 435; 13 N. W. 506; 1 White & Tud. Lead. Cas. Eq., pt. 2, 120 (Am. notes).

WOOD, J., (after stating the facts.) The propositions upon which appellant relies for a reversal are:

First. That the conditions of the policy were broken, and the policy thereby forfeited, and upon the undisputed facts the court should have directed a verdict for defendant.

Second. That the court erred in not declaring that the evidence showed a sale of the property by Wilson to Dunaway.

Third. That the court erred in not giving the sixth instruction asked by defendant.

Fourth. That the court erred in refusing to permit the defendant to introduce in evidence the judgments against Wilson.

Fifth. That the court erred in refusing to allow defendant to read in evidence the transfer of the policy to Kincheloe.

Sixth. That the court erred in directing the jury to find a special verdict as to whether there had been a sale of the property.

We will consider these in the order named.

It is contended that the policy was forfeited by a sale of the property to one Dunaway. The proof upon this proposition was substantially as follows: Dunaway testified that he bought the property from Wilson; that he wrote Mr. Wilson a letter making him an offer for the property, and received in answer the following letter:

"PETTUS, ARK., May 6, 1897.

"Mr. J. G. Dunaway. Kind Sir: I will take your proposition in regard to my place at Conway. I would have written to you

sooner, but I saw Mr. Collier and Bolton and Young and they advised me to wait until I heard from the. Building & Loan. So I will be up to Little Rock about next Sunday or Monday, and I will stop and see you if you are in. I told your pa that I would let you have the place at your figures. So I will see you soon. Yours truly, [Signed] J. B. WILSON."

He says he paid Wilson $2.50 on the property when he bought it; that this payment was made on the 13th of May, 1897,—two days before the fire; that on the 12th of November, 1897, Wilson tried to get him to take the money back that he had paid. He did not take possession or exercise any control over the property. On May 17, 1897, he wrote Wilson the following letter:

"May 17, 1897.

"J. B. Wilson, Esq., Pettus, Ark.

"Dear Sir: I suppose that you have heard before this that your house was burned on last Friday night. I believe pa wrote me, so I guess this will break into our trade. There was a mistake or two in the deed anyway, and I had prepared new deed for you to sign, but will not send it now until matters are settled. I understand that you have $1,500 insurance on it; so, if you can get that, it will no doubt help you out. Pa stated that there was a man by the name of Jones in the house at the time, and that it was not known how the fire caught. Please bring the deed in with you when you come.

"Yours truly, J. G. Dunaway."

Dunaway says, he supposed he used the language "your house was burned" in the letter just hurriedly, in writing same; says he had written a deed for the property, and Wilson had consented to the terms of it, but had never signed and returned it. The proposition he made Wilson was to give him $100, and assume the mortgage that the building and loan association held, and that was the proposition he answered in the letter of May 6th. Dunaway said he never wrote the building and loan association a letter agreeing to assume the Wilson mortgage, and never told any one representing it that he would assume the mortgage, but considered that he had assumed it. He never took any receipt for the $2.50 he paid

Wilson at the time of the trade; never tried to enforce specific performance.

Wilson on this point testified that he never sold the house to Dunaway; that he borrowed $2.50 from Dunaway, but did not accept it as payment for the house. He and Dunaway were just talking about a trade. He offered to pay the $2.50 at one time when there were no witnesses, and at another time when he took witnesses with him, but Dunaway would not take it.

At plaintiffs' request the court instructed the jury as follows: "The court instructs the jury that if you believe from the evidence that the defendant did insure the plaintiffs' frame building on the lot described in the policy for $1,500 against direct loss by fire from September 29, 1894, to September 29, 1897, and that said building was, between said dates, totally destroyed by fire, and that no condition contained in the policy of insurance was violated, then you will find for the plaintiffs the amount for which said building was insured by said policy." And at the defendant's request, on this point, as follows: "(3. You are instructed that if you find from the evidence that at any time after the issuance of the policy, and before the fire, the interest of Mr. Wilson in the insured property became other than entire, unconditional, unincumbered and sole ownership, you will find for the defendant (except the mortgage of the plaintiff building and loan association.)" But refused to grant defendant the following requests: "(5) You are instructed that the evidence shows that Wilson sold the property to Julian and Sharp Dunaway, and that such sale forfeited the policy, unless you find that the defendant's agreement or consent was indorsed on the policy, or was otherwise given. (6) If you find from the evidence that, after the issuance of the policy, and before the fire, Julian and Sharp Dunaway made to J. B. Wilson a written offer to buy the property insured for $100, and assuming the mortgage to the building and loan association, and that J. B. Wilson before the fire accepted the offer, in writing, you are instructed that this avoided the policy, unless defendant consented thereto, and plaintiffs cannot recover in this action."

The instruction given at plaintiffs' request was proper, as

was also No. 3 given at the request of the defendant. No. 5 was properly refused. The evidence, at most, only showed an executory contract for the sale of the property. There was no sale, but only an offer on the one side and an acceptance of such offer on the other, but the absolute sale could not take place until the execution and delivery of a deed to the property. But as to whether or not the written offer of Dunaway to buy the property, and the acceptance thereof by Wilson, constituted a breach of the policy which barred recovery, was a question for the court, and not for the jury. The offer was shown to have been in writing, and the acceptance was in writing. Judge Parsons, in his chapter on the interpretation and construction of contracts, lays it down as the very first rule "that what a contract means is a question of law." 2 Pars. Cont. (8 Ed.), pp. 492, 610, and authorities cited.

The court, then, should have granted appellant's request No. 6, *supra*, if an executory contract of that kind would avoid the policy, under the provision that "the policy should be void if the interest of the assured became other than the entire, unconditional, unincumbered and sole ownership." This is the real and only serious question in the case. In proceeding to a discussion of this provision of the policy, we must remember that such clauses are always and justly construed, when there is any doubt about the intent, with the utmost strictness against the insurer, and always with reference to their own legitimate object, *i. e.*, the protection of the insurer against risks that are materially different from those which he has undertaken. *Smith* v. *Phœnix Ins. Co.*, 91 Cal. 323. As Judge Dillon expresses it: "The object of the insurance company, by this clause, is that the interest shall not change so that the assured shall have a greater temptation or motive to burn the property, or less interest and watchfulness in guarding and preserving it from destruction by fire." *Ayers* v. *Hartford Fire Ins. Co.*, 17 Ia. 176.

We think there is sufficient ambiguity in the condition under consideration to invoke the application of the rule that courts do not favor forfeitures under such provisions. *Chandler* v. *St. Paul F. & M. Ins. Co.*, 21 Minn. 85; *Symonds* v.

*Northwestern Mut. Life Ins. Co.*, 23 Minn. 491; *Hoffman* v. *Aetna Fire Ins. Co.*, 32 N. Y. 405, 414; *Catlin* v. *Springfiela Fire Ins. Co.*, 1 Sumner, 434–40; *McAllister* v. *New England Mut. Life Ins. Co.*, 101 Mass. 558; *Kentucky Mut. Ins. Co.*, v. *Jenks*, 5 Ind. 103.

It is a matter of nice discrimination to determine whether the word "interest," as used in the condition, is synonymous with the word "title," or whether it means that and something besides. The authorities generally establish the rule that where the condition is against any change in the legal title, an executory contract of sale is not a violation of the condition, so that if the word "interest," as used in this proviso, meant "title," there would be no difficulty in reaching the conclusion that the policy was not forfeited. *Smith* v. *Phoenix Ins. Co.*, 91 Cal. 323; *Kempton* v. *State Ins. Co.*, 62 Ia. 83; *Grable* v. *German Ins. Co.*, 32 Neb. 645; *Washington Ins. Co.* v. *Kelly*, 32 Md. 421; *Home Ins. Co.* v. *Bethel*, 142 Ill. 537; *Masters* v. *Madison Co. Mut. Ins. Co.*, 11 Barb. 624; *Hill* v. *Cumberland Valley M. P. Co.*, 59 Pa. 474; *Browning* v. *Home Ins. Co.*, 71 N. Y. 508.

What, then, does the word "interest" in the provision, "if the interest of the assured be or become other than the entire, unconditional, unincumbered and sole ownership of the property," etc., mean? Is it synonymous with "title"? In *Gibb* v. *Philadelphia Fire Ins. Co.*, 59 Minn. 267, the provision was: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance," etc. The facts, as they pertained to this provision, were that the assured had made a contract in writing whereby he sold and agreed to convey to the grantee the insured premises, by deed of warranty, on prompt and full performance by her of the agreement, which was that she (grantee) was to pay therefor the sum of $2,500, $300 cash, and $1,000 in installments of $50 every sixty days thereafter until paid; the balance to be paid in assuming a certain mortgage. The grantee was to have possession of the premises until default in payment,

and in case of default she agreed to surrender possession on demand, and that the agreement should be void at the option of the vendor. She (the grantee) entered into possession of the buildings and premises, and occupied the same until the time of the fire, and made all her payments during that time, and was not in default in any manner upon said contract. Upon these facts, the court ruled that there was a forfeiture of the policy. In *Germond* v. *Home Ins. Co.*, 2 Hun, 540, a policy of insurance provided that if the property should be sold or conveyed, or the interest of the parties therein changed, it should be null and void. After the issuing of the policy, the owner contracted, under seal, to sell the property conveyed thereby to one S., who paid part of the purchase price. In an action upon the policy it was held that such contract of sale and payment constituted a change of interest in the property insured, and rendered the policy void. These cases are relied upon by the learned counsel for appellant to support his contention for a forfeiture of the policy, and, indeed, they are more nearly in point than any others we have been able to find. In the Minnesota case, there is a very marked difference in the language of the provision from that in the case at bar. That provision is, "if any change, etc., take place in the interest, title, or possession." Here the grammatical arrangement and punctuation (a comma being used between the words "interest" and "title") would indicate clearly that "interest" and "title" were intended to represent different ideas,—were not used synonymously,—while in the provision of the policy under consideration "if the interest of the assured be or becomes other than the," etc., "sole ownership," there is nothing to indicate that the word "interest" was used in any other sense than as synonymous with ownership or title. The New York case, however, on this point is perfectly analogous, and directly decides, under the facts of that case, that the policy was forfeited. But, if we concede upon the authority of these cases, that the word "interest" is not used synonymously with "title," the question still remains, was there such a change of interest under the facts of this case as, in the contemplation of the parties, worked a forfeiture? In the Minnesota case, above, there

could be no question about that, for the reason that the grantee had gone into and was in possession at the time the loss occurred, and had fully complied with the terms of the contract, which was definite as to the manner and time of performance. Likewise, in the New York case, the contract was under seal, and, we may therefore assume, was definite and certain in its terms. A part of the purchase price had been paid,—how much is not stated. In both cases, the courts might very well have concluded that the contracts to convey conferred rights on the grantee therein, capable of enforcement according to their terms, which materially changed the status of the insurer and the insured toward each other, as to the risks to the premises, which such condition is intended to protect against. Not so under the facts here. Dunaway had made a proposition by letter to buy the premises, which is definite in nothing, except the amount he was to pay. Wilson accepted the proposition. There was no proof as to when the contract was to become executed. Dunaway says he paid $2.50 on the purchase price just two days before the fire occurred, and that the money was paid when the trade was made. Wilson denies that the $2.50 was paid as purchase money. But it is evident that, under the indefinite executory contract (if we may so call it) for the sale of the property, same was not to be performed until after the loss occurred, because a part of that performance on the part of Dunaway involved, in addition to the payment of $100, the assumption of a mortgage; and, of course, the deed was not to be executed and delivered, and possession taken by Dunaway, until the purchase money was paid. At least, such would be the presumption, in the absence of proof to the contrary. Under such circumstances, the loss by fire would necessarily fall on Wilson. He still had the insurable interest in the property. He could not, after the fire, have compelled Dunaway to take the place. *Wells* v. *Calnan*, 107 Mass. 514, and authorities cited.

Both parties seemed to have recognized the fact that the letters were simply an offer by the one to buy, and an agreement by the other to sell, at sometime in the future, when the

purchase money should be paid, and the deed made and delivered. Before that time came, both recognized that the consideration had failed, and the contract was not enforceable. We are of the opinion that the alleged contract for the sale of the premises did not in any manner affect the risk which the parties to the contract of insurance contemplated and provided against in the condition named. Hence the court did not err in refusing to grant appellant's request for instruction numbered six.

The other grounds urged for reversal are not well taken. The judgment of the Faulkner circuit court is, therefore, in all things affirmed.

---

67 562
f71 137

## FRANKLIN COUNTY v. MCRAVEN.

Opinion delivered March 3, 1900.

STENOGRAPHER'S SALARY—LIABILITY OF COUNTY.—Under the act of March 16, 1897, providing for the appointment of a court stenographer and allowing such stenographer a salary of $800 "to be paid out of the stenographer's fund by the several counties composing the circuit," a county is not liable for the payment of its *pro rata* of such salary out of the general revenue or any other fund if there is no money in the "stenographer's fund." (Page 566.)

Appeal from Franklin Circuit Court, Ozark District.

JEPHTHA H. EVANS, Judge.

STATEMENT BY THE COURT.

On July 1, 1899, John McRaven filed his claim in the county court of Franklin county against said county for service as court stenographer for the quarter ending July 1, 1899, in the sum of $63.87.

The claim was regularly filed, and the circuit judge duly certified same. The county court at first allowed the claim, and ordered a warrant drawn for the payment of same out of the stenographer's fund. Afterwards, at the same term of court,

the order of allowance and directing the warrant for payment was revoked, as follows: "It since appears to the court that there are no sufficient funds on hand to pay said warrant. It is therefore by the court ordered and adjudged that the action of the court in allowing said claim, and the order to issue said warrant therefor, be and the same is hereby revoked, and the clerk of this court is hereby ordered to cancel said warrant, and that the claim be, and is hereby, dismissed.

From this order of disallowance McRaven appealed to the circuit court, where the judgment was reversed, and judgment was ordered to be entered for McRaven, and the clerk of the county court was ordered to draw his warrant upon the treasury, to be paid out of the circuit court fund of Franklin county. The county filed a motion for a new trial, alleging as grounds that the order and judgment aforesaid of that court in this cause is contrary to the law, contrary to the evidence, and contrary to the law and evidence. The circuit court overruled this motion for a new trial, whereupon the defendant prayed an appeal to the supreme court, which was granted.

The bill of exceptions shows these undisputed facts: That the appellant is the duly-appointed acting court stenographer within and for the fifteenth judicial circuit of Arkansas; that there was due him for services as such the amount of $63.87; that he has presented his claim, which was examined and allowed, and a warrant ordered to be drawn upon the stenographer's fund for that amount, and, it appearing to that court that there were not sufficient funds on hand in the stenographer's fund to pay the warrant, the order issuing said warrant was revoked, and the claim dismissed; that at that time there was only $3 in the stenographer's fund. It was admitted that an appropriation had been made by Franklin county for circuit court expenses generally, but no specific appropriation had been made by said court to pay said stenographer.

The act of March 6, 1897, is entitled "An act for the appointment of a court stenographer," and is as follows:

"Section 1. That the judge of each judicial circuit of the state shall appoint a competent official stenographer for his circuit upon the petition of the majority of the licensed resident

lawyers of his circuit, which petition shall recommend some competent person, who is a resident of the state, who shall be a sworn officer of his court, and whose term of office shall end at the same time as that of the judge who appointed him, and who may be dismissed from office by the judge for incompetency, neglect of duty or misbehavior.

"Sec. 2. The duty of the stenographer shall be to attend all terms of the circuit court held within and for the circuit for which he is appointed, and he shall, when so requested by either party, make a stenographic report of all oral proceedings had in such court, including the testimony of witnesses, with the questions to them, *verbatim*, the oral instructions of the court and any further proceedings or matter, when directed by the presiding judge or upon request of the counsel so to do, and whenever during the progress of the cause any question arises as to the admissibility or rejection of evidence, or any other matter causing an argument to the court, such argument shall not be recorded by the stenographer unless requested by the counsel in said cause, but he shall briefly note the objections made and the ruling thereon and any exception taken by either party or his counsel to such ruling.

"Sec. 3. It shall be the duty of such stenographer to furnish twenty days from the conclusion of the trial thereof, or from the time of the demand, if made after the trial, a long-hand or type-written copy of the proceedings so taken in short-hand with the caption showing the style of the case, its number, the court in which it was tried and when tried, and sign, certify and file the same in the office of the clerk of the court in which the case was tried.

"Sec. 4. Said stenographic notes so taken shall be kept in the office of the clerk of the court wherein such notes were taken; *provided*, that said stenographer shall have the privilege of carrying said notes from one court to another within the judicial circuit for the purpose of transcribing the same for use of the parties or the court, and when the same have been so transcribed shall be returned to the clerk of the court wherein the proceedings were had.

"Sec. 5. The stenographer shall receive a salary of eight

hundred dollars ($800) per annum, to be paid quarterly out of the stenographer's fund by the several counties composing the circuit for which he was appointed, in proportion to the population that each county bears to the population of the whole circuit, as shown by the last and each ensuing federal census, said salary to be adjusted by the presiding judge.

"Sec. 6. A stenographer's tax fee of three dollars shall be taxed in each case in which the stenographer has served upon the request of either party as cost and collected and paid into the treasury of the county in which the case was tried, as the jury tax is by the law collected and paid in, and either party demanding a bill of exceptions shall be charged at the rate of five cents for each hundred words transcribed by the stenographer, the same to be charged by the clerk and collected by the sheriff as costs in the case and paid into the county treasury, together with the tax fee of three dollars, as a stenographer's fund, which shall be kept by the treasurer as a separate fund, to be designated the stenographer's fund.

"Sec. 7. In all cases no party shall be denied his bill of exceptions on account of his inability to pay the stenographer's tax fee and for transcribing the stenographic notes when he makes affidavit that he has no property, and is unable to pay the same.

"Sec. 8. The transcribed notes of the stenographer mentioned in section 6 of this act shall be certified to by the stenographer, and shall be taken as a part of the transcript, and no clerk shall make any additional charge for same other than the five cents per hundred words mentioned in section 6 of this act."

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

It was error to order the stenographer's salary to be paid out of the contingent fund of the court. Acts of 1897, ch. 48, § 5; Sand. & H. Dig., § 1261; 39 Barb. 272.

*Oscar L. Miles*, for appellee.

The court stenographer is an officer of court with a fixed salary, and this salary must be paid. Act March 16, 1897.

*Ed. H. Mathes*, for appellant in reply.

The act of 1897, section 5, makes the stenographer's salary payable out of a special fund—the *stenographer's fund*,—and these words must be construed to have some meaning, rather than to be mere surplusage. 11 Ark. 44. There is no ambiguity in this language, and it should be construed according to its plain and ordinary meaning. 35 Ark. 56; 1 Bl. Com. 58, 60; Sedg. Stat. Const. 231; 17 Ark. 608; Lieber, Herm. 11; 22 Ark. 369; 24 Ark. 487; 28 Ark. 200; 38 Ark. 205. There is no analogy between the compensation of the jurors and stenographers, the compensation of the former coming from the county general funds. Cf. Sand. & H. Dig., §§ 6411, 3335.

WOOD, J., (after stating the facts.) The question is, are the counties of a circuit absolutely liable for their *pro rata* of the stenographer's salary of $800, where there is no money, or not sufficient money, in the "stenographer's fund" to pay such *pro rata?* The question is by no means of easy solution, and the learned circuit judge has favored us with an opinion which is a forcible and plausible presentation of his views. But, after a careful consideration of the whole act, we are constrained to the opinion that he is in error. He suggests that if the fifth section read: "The stenographer shall receive a salary of $800 per annum, to be paid quarterly by the counties composing the circuit for which he was appointed, in proportion to the population that each county bears to the population of the whole circuit as shown by the last and each succeeding federal census, said salary to be adjusted by the presiding judge," then the meaning of the section could hardly be doubted. This omits the important phrase, "out of the stenographer's fund," the basis of the whole contention, which, the circuit judge argues, could not change the liability of the county from an absolute one. These words, "out of the stenographer's fund," are definite, plain, and significant. According to the most familiar canons of construction, they must be retained, and given their obvious and natural meaning, if it is possible to do so without doing violence to the legislative intent, as gathered from the whole act. *Wilson* v. *Biscoe*, 11 Ark. 44. We think it is impos-

sible to retain the phrase, "out of the stenographer's fund," in the connection used, and give the words the full force of their plain meaning, if the act is to be construed as fixing an absolute liability on the counties, regardless of whether there is any money in "the stenographer's fund." But, on the contrary, this phrase can be retained, and given its unambiguous import, by construing the act as intended to fix an absolute liability upon the counties for their *pro rata* only in the event of there being that much money in "the stenographer's fund." "The stenographer shall receive a salary of eight hundred ($800) dollars per annum, to be paid quarterly out of the stenographer's fund," is the language. Designating a particular fund, and prescribing payment out of that fund, excludes the idea that there can be payment in any other way or out of any other fund.

The conclusion by the learned judge "that all the provisions of the act about the stenographer's tax fee charged and stenographer's fund are inserted for the purpose of providing complete or partial indemnity to the counties, in return for the burden cast on them by the act," is inconsistent with the language of both the fifth and sixth sections of the act; for, if such had been the design of the legislature, it would have doubtless provided for the collection of the charge of five cents for each hundred words transcribed by the stenographer, and the tax of three dollars, to be charged by the clerk and collected by the sheriff, as costs in the case, and paid into the county treasury, and stopped there; or else said, "paid into the county treasury to the general fund." Such would have been the reasonable and natural way of expressing it if the circuit judge were correct. But the language, "and paid into the county treasury *as a stenographer's fund, which shall be kept by the treasurer as a separate fund, to be designated the stenographer's fund*," shows that the intent of the legislature was not to reimburse the counties, but to provide the only method for raising the fund, and the only fund out of which the stenographer could be paid. This view harmonizes and makes consistent the language of the fifth and sixth sections, but no other view will; for the language of the fifth section, "to be paid quarterly out

of the stenographer's fund," was wholly superfluous, unreasonable and meaningless if the idea was to render the counties absolutely liable, and to provide total or partial indemnity.

Because the sixth section provides for a tax fee of three dollars, to be collected and paid into the treasury "as the jury tax is by the law collected and paid into the county treasury," the circuit judge reasons that, as the juror must serve, and is allowed two dollars a day absolutely for his services, although no statute in express terms provides absolutely or contingently for its payment by the county where the service is rendered, the stenographer's salary should likewise be allowed and paid absolutely by the county in which his service is rendered. Sec. 3335 of Sand. & H. Dig. is as follows: "Jurors shall be allowed compensation as follows: Each grand or petit juror in the circuit court, per day, $2.00." This section provides absolutely for the payment of two dollars per day to each juror. If it had read: "Jurors shall be allowed compensation as follows: Each grand or petit juror in the circuit court per day $2.00, to be paid out of a *jurors' fund,*" and had there been a provision for a separate "*jurors' fund,*" there might have been some analogy. But without such provisions there is none whatever, except in the amount of tax that is collected. There is no valid reason to hold that because a juror is paid his per diem absolutely by the county, the stenographer should also be paid. But, without extending the argument further, it suffices to say that the language of the fifth and sixth sections of the act indicates clearly the legislative purpose to fix the stenographer's salary at $800 per annum as the maximum limit; that this salary was to be paid out of a fund provided by the act for its payment; that it cannot be paid out of any other fund. It follows necessarily that, where there are not sufficient funds in the treasury of a county accumulated and set apart, as provided by the act, to meet the *pro rata* for that county as adjusted by the presiding judge, the salary of the stenographer is lessened *pro rata.* In other words, the stenographer must look alone for his salary to the fund set apart for that purpose. The salary is $800 per annum to be paid quarterly. If, when the stenographer presents his claim for allowance at the end of

each quarter, there is no money, or not sufficient money in the stenographer's fund to pay same, the claim is not for that reason void and non collectible. It is still a good and valid claim against the county whenever there shall be at the end of any quarter or at the end of the year, when final settlement is made, sufficient money in the treasury to the credit of the stenographer's fund to pay same. The phrase "to be paid quarterly" was passed for the stenographer's benefit; and if, at the end of any quarter, there is not sufficient money in the stenographer's fund to pay the *pro rata* of his salary which has then accrued, he is entitled to same, or so much thereof as may then be in the stenographer's fund, not exceeding the amount then due. If there is no money, or not sufficient to meet the salary which has then accrued, the claim is continued in force until the next quarter, and so on to the end of the year, and to the end of his term. The stenographer, under the act, in other words, can and must receive $800 per annum for his services, if the fees which have accumulated under the act for the year amount to that sum; and the salary is payable quarterly. The judgment of the circuit court making the county responsible absolutely for the payment of the stenographer's claim is therefore erroneous, and the cause is reversed and remanded for further proceedings in accordance with this opinion.

BUNN, C. J., (dissenting). John McRaven, a duly-appointed and acting circuit court stenographer for the circuit, filed his claim against the county of Franklin for services, amounting to the sum of $63.87, for the quarter ending July 1, 1899. The account was duly certified by the circuit judge, and the county court made the following order: "Examined and allowed in the sum of $63.87, stenographer's fund, this 24th day of July, 1899. [Signed] L. R. A. Wallace, Judge," and then the following subsequent order, "Order of allowance of this claim made on the 24th day of July, 1899, the day of the present term, is revoked and set aside, and this claim is dismissed, because there is no fund in the treasury upon which to draw. This August 5, 1899. (Signed) L. R. A. Wallace, County Judge."

The court then made its formal order revoking the first order, as stated, and the clerk was ordered to cancel the warrant issued under the first order of allowance, and the claim was dismissed. McRaven appealed to the circuit court, where the judgment of the county court was reversed, and the clerk of the county court was ordered to draw his warrant for the amount on the circuit court fund in the treasury of Franklin county, and from this judgment the county appeals to this court, and the judgment of the circuit court is reversed by a majority of this court on the ground set forth in the opinion.

The county judge manifestly had no right to revoke the order of allowance and for the warrant made in the first instance. The county judge had no right to dismiss a claim because of want of funds in the county treasury. That was a matter he could know nothing about, officially or judicially. His first order was correct, and McRaven was entitled to the warrant at all events. The treasurer of the county, on its presentation, would of course have had the right to refuse to pay the warrant for want of stenographer's funds on hand, and it would be his duty to indorse his refusal and reason on the warrant; but the county judge could not assume to perform this duty, and his statement that there was no fund upon which to draw is no evidence at all of that fact.

The judgment of the circuit court was erroneous in directing a warrant to be drawn on the "circuit court" fund in the county treasury, instead of the stenographer's fund, but in other respects it was proper. The judgment of the circuit court should therefore have been merely modified, and not reversed.

## BOYKIN v. JONES.

Opinion delivered March 10, 1900.

LIS PENDENS—WIFE NOT BOUND BY SUIT AGAINST HUSBAND.—Where land owned by a husband was sold for taxes, and purchased by his wife from the assignee of the tax-title, she was not affected by the pendency of a suit to recover the land from the husband, since her title was in opposition to his. (Page 574.)

Appeal from Lee Circuit Court.

HANCE N. HUTTON, Judge.

*Fletcher Roleson*, for appellants.

A purchaser *pendente lite* takes subject to the result of the suit. Freeman, Ex. § 475. As forcible entry and detainer is an action which excludes inquiry as to all defenses except as to the character of the possession, it was improper in this case. The sheriff was not a trespasser. 137 U. S. 43; 15 Wall. 671. In any event, appellee could not recover more than an individual half of the property held by her in common with appellants. Freeman, Cot. § 295. She could not acquire the interest of her cotenants under a tax sale. 40 Ark. 42. The tax deeds described nothing, and were inadmissible as evidence of the extent of plaintiff's holding, or for any other purpose. 56 Ark. 172; 50 Ark. 484. Appellee, being in possession at the time of the forfeiture, could not acquire title by the tax sale, as against the true owner. 42 Ark. 214.

*McCulloch & McCulloch*, for appellee.

Appellee, being in possession claiming title, could not be lawfully turned out under a writ against her husband. 50 Ark. 451. The instructions given were correct. The remedy of forcible entry is designed to protect only the actual possession, and it is no defense that the defendant is legally entitled to possession. 53 Ark. 94; 106 N. Car. 494; 47 Pac. 1086; 46 Pac. 568. Neither appellee nor her husband was

under any obligation to pay the taxes, and either was in a position to buy in the outstanding tax title. 45 Ark. 177; 33 *id.* 195; 21 *id.* 160; 20 *id.* 381, 17 *id.* 546; 61 Ark. 464. A writ of possession to enforce a judgment for recovery of land must be against the defendant in the action; and one who was not a party to the suit, and not holding under, or in collusion with, the defendant can not be turned out under the writ. 10 Allen, 133; 22 Wis. 655; 25 Mo. 47; 40 *id.* 475; 44 *id.* 180; 36 Ill. 53; 39 Am. Dec. 307, 312; 38 Cal. 241; Freeman, Ex. § 475; 1 Caines, 500; 4 Paige, 204; 8 *ib.* 34; *ib.* 565; 5 Litt. 305; 2 A. K. Marsh. 40; 23 Wend. 480.

BUNN, C. J. This is an action of "forcible entry," by Lydia A. Jones, against the defendants, J. D. Boykin, G. W. Slaughter and DeWitt Anderson, for the possession of a lot in the town of Marianna, Lee county, the possession of which she alleged had been forcibly taken from her by defendants on the 3d day of May, 1897. The plaintiff claimed to be the owner of the lot or lots, and entitled to the possession of the same, and that at the time of said ouster she was in possession, and had been for a long time previously thereto.

The defendants, in their answer, deny that plaintiff was the owner of said land, and deny that she was ever in possession until put in possession under the writ issued in this suit. They also deny that they forcibly took possession from her as alleged, and also that plaintiff has suffered any damage thereby. They say that they (that is, one of them, George W. Slaughter, as sheriff of said county at the time stated in the complaint), acting under and by virtue of a writ of possession against W. B. Jones, took possession as charged, and not otherwise. Wherefore they ask that plaintiff take nothing by her suit.

The evidence shows much controversy as to the description of the lot in controversy, and this was brought about by a change in description. For instance, formerly lot 8 embraced a large plat of ground, owned by several parties, but, after the termination of a certain suit, and when a street, called "Mississippi Street," had been opened through the tract, the part on one side the street still went under the description of lot 8, while on the other side the part was put on the tax

books by the clerk as lot B, block B, and was forfeited by that description to the state. All this controversy was immaterial, except in so far as it went to show the possessory rights of the parties. It appears that on 26th October, 1887, in a suit in the Lee county circuit court, wherein A. Y. Yarborough et al. were plaintiffs, and W. B. Jones, husband of plaintiff herein, was defendant, judgment was rendered against W. B. Jones and for the plaintiffs for the lands in controversy. It also appears that in another suit with same parties plaintiff and defendant, judgment was rendered on 2d day of May, 1890, in favor of plaintiffs and against said W. B. Jones, for the recovery of the possession of said tract—the land in controversy—and that neither of said judgments were appealed from, and that in the last-named judgment a writ of possession was ordered, but never actually issued and placed in the hands of the sheriff until the 1st of May, 1897, when it was served by dispossessing Lydia A. Jones, as she charges. The writ was in fact a command to dispossess W. B. Jones, and not Lydia A. Jones. The latter was not a party to either of said suits.

Lydia A. Jones, on her part, shows that she was at the time of her ouster the owner of said land, and had actual peaceable possession of the same, and had had since October, 1888; that she since that time had resided with her said husband at his home on the opposite side of the street from the land in controversy. The evidence shows that the sheriff first went to the place to execute his writ, and the plaintiff, Lydia A. Jones, made claim to the property, and the possession thereof. He then procured from the plaintiff in that suit an indemnifying bond, and executed the writ as aforesaid. The plaintiff showed title by deed to a portion of the land, by deed to herself and husband from T. C. Gist, dated 10th March, 1881, and to the whole tract by deed from H. N. Hutton, dated October 28, 1887, and that Hutton held deed for same from state land commissioner dated 2d day of October, 1887. She testifies specifically that she had formerly lived in the county three or four years, and in October, 1888, moved back to Marianna, and that she at once took possession of the property in controversy, renting the barns and stalls therein to persons on

occasion, and every year, until dispossessed, cultivated the lot in cotton and corn and garden products, except one year, for which she rented the ground to a tenant, who that year cultivated it. There is no testimony, as far as we have been able to discover, contradictory of this statement of the plaintiff. A trial by a jury was had, resulting in a verdict for the plaintiff for the possession of the property, and judgment was rendered accordingly, and, after motion for a new trial was overruled, the defendants appealed. In the course of the trial the court instructed the jury both orally and in writing, but no exceptions were saved to the oral instructions, and the two written instructions given by the court raise the only question of law for our consideration.

The writ of possession under which the sheriff took forcible possession of the property was ordered in May, 1890, but was not issued until the first of May, 1897, and served the 3d of May, 1897, a period of seven years. This writ was against W. B. Jones, the husband, only, the wife, never having been a party to any of the suits referred to against her husband, was of course not bound by any of them, so far as she had individual and independent rights from her husband. She shows that she took and had held possession of the property distinctly from her husband since October, 1888, as part owner, and that she purchased the whole of it in October, 1890, and has held the same as sole owner since that time. Her title is unimportant, except in so far as it shows that her possession was independent of her relation to W. B. Jones, against whom the writ of possession was issued. Claiming independently of her husband, her purchase of the tax title after the writ was ordered was not affected by the doctrine of *lis pendens*, for the tax sale to the state was in opposition to the title of the husband, and the state's title was the title she purchased from Hutton. *Wright* v. *Walker*, 30 Ark. 44.

We can conceive of a case where a wife, knowing that her husband was liable at any time to be dispossessed of his land by process from a court of competent jurisdiction, might take possession of the property herself, and thus attempt to obstruct the process against the husband. If such were the case here,

or if there was any evidence going to show such a state of case, the exceptions to the instructions would have been well taken, and the judgment would be reversed; but, as we understand the evidence, the plaintiff's testimony as to her possession, why and under what right or claim and circumstances and when she took possession, is wholly uncontradicted. If she were not the wife of the defendant to the writ, but a disconnected party, no one would dispute her right to the possession under the circumstances. The writ of possession was against W. B. Jones, and, if in the usual form, it commanded the sheriff to dispossess him, and deliver the possession to the plaintiff in the writ. The writ itself is not in evidence, and its existence was proved by oral testimony As it should have been returned formally to the court issuing it, it is not shown why it could not have been produced. Such a writ is issued to affect the party named, and those holding under him, and, of course, does not affect those having adverse rights, especially before issue was ordered.

The two instructions complained of in this case may have been erroneous in form—may have presented a principle of the law not exactly applicable to the case—but the evidence fully sustains the verdict of the jury, and, not only so, but could not reasonably have been otherwise. The errors complained of, if errors they were, were therefore not prejudicial, and the judgment is affirmed.

WOOD, J., did not participate.

---

## WYATT v. WALLACE.

Opinion delivered March 10, 1900

67 575
e75 333
f75 335

NOTE FOR PATENT RIGHT—VALIDITY.—Under Sand. & H. Dig., § 493, providing that a negotiable instrument given by a citizen of this state in payment for an interest in a patent right shall be absolutely void unless it shall show upon its face that it was executed for such consideration, a note given by a citizen of this state for an interest in a patent right,

which does not show upon its face that it was given therefor, is void, and cannot be the basis of a recovery in favor of a *bona fide* holder. (Page 571.)

Appeal from Benton Circuit Court.

EDWARD S. MCDANIEL, Judge.

STATEMENT BY THE COURT.

March 10, 1898, appellant brought suit in the circuit court against appellees on a negotiable promissory note for $282, executed by them at Rogers, Ark., December 28, 1896, to one J. O. Grenamyer, and indorsed in blank by Grenamyer. The note is copied in the findings of the court. The plaintiff alleged that the note was transferred to him by Grenamyer for a valuable consideration, and that he immediately notified the makers of the transfer.

Appellees answered setting up the following defenses: First. That the note sued on in this action was given for a patent right obtained by Geo. J. Cline, of Goshen, in the state of Indiana, for improvements in a smooth wire fence machine, for which letters patent were issued, bearing date January 31, 1893, and numbered 490,946; and the payee of said note, J. O. Grenamyer, claimed to be an assignee of a one-third interest in said patent right for all the territory west of the west line of the state of Indiana, and that L. E. Stewart and James Rush of the same place held the other two-thirds interest as assignees in said patent in the same territory with him, and that they empowered him, the said payee of said note, in form and manner provided by law, to dispose of their interests in the said patent to any and all persons who desired to purchase the same for such sums of money or any other consideration which the said payee would choose to accept, and that they would ratify his actions in that behalf. That the said J. O. Grenamyer, payee of said note, drafted and formulated the note sued on herein, without any suggestions whatever from the payers of said note, in violation of the laws of the state of Arkansas, as set out in section 493, Sandels & Hill's Digest, and executed to defendant, Wallace, a patent-right deed for said

improvements in a smooth wire fence machine to one-third interest in and to the state of Arkansas.

Following is a copy of the finding of facts by the court, so far as need be set out for the decision here in this cause: By consent of both parties, the cause was submitted to the court sitting as a jury, and the court, after hearing the evidence, made the following findings of fact: On the 28th day of December, 1896, the plaintiff resided, and has since resided, in Bentonville, Benton county, Arkansas, and defendants resided, and have since resided, at the town of Rogers, in said county, about six miles from Bentonville, all being citizens of the state of Arkansas. On said 28th day of December, 1896, one J. O. Grenamyer sold to the defendant, James Wallace, at said town of Rogers, a one-third interest in patent-right territory in the state of Arkansas for a certain patent wire fence, patented by the United States letters patent to one George J. Cline, and assigned by said Cline to said Grenamyer; one-third interest being all that was claimed by Grenamyer. But the court finds that said assignment has never been recorded in the United States patent office. That such sale to Wallace was on a credit for $282, and that said Wallace at the time executed and delivered to Grenamyer for the purchase money for said patent-right territory a negotiable promissory note for said amount, with the defendant, H. M. McGaughey, as surety.

"No.———. ROGERS, ARK., Dec. 28, 1896.

"One year after date we, or either of us, promise to pay to the order of J. O. Grenamyer, or order, the sum of two hundred and eighty-two dollars, for value received, negotiable and payable at Citizens' Bank, without defalcation or discount, and with interest from date at the rate of 6 per cent. per annum until paid; and, if interest be not paid annually, to become as principal, and bear the same rate of interest. The drawer and endorser severally waive presentation for payment, protest and notice of protest and non-payment of this note.

"Due Dec. 23d., 1897. "JAMES WALLACE.

"H. M. MCGAUGHEY."

Note indorsed on back as follows:

"J. O. GRENAMYER."

The court gave judgment for appellees, to which appellant excepted, filed a motion for new trial, which was overruled, to which he excepted and appealed.

*W. D. Mauck* and *L. H. McGill*, for appellant.

The note was negotiable, and appellant was an innocent holder, and hence entitled to protection. 4 Am. & Eng. Enc. Law (2 Ed.), 310; 118 Ind. 586. The act of April 9, 1891 (Acts, 1891, p. 261, Sand. & H. Dig., § 492), does not apply to an innocent holder of negotiable paper; and the act of April 23, 1891 (Acts 1891, p. 296), is in conflict with art. 4, § 2, of the Constitution of the United States, guarantying to citizens of each state all privileges and immunities of citizens in the several states. The law merchant is a part of the common law, and statutes changing or modifying it should be given a strict construction. 18 La. Ann. 637; 118 Ind. 586; 108 Ind. 365. The act of April 9, 1891 (Sand. & H. Dig., § 492), should be construed strictly, and operates only to make patent right notes subject to defenses in the hands of purchasers with notice. 108 Ind. 365; 118 Ind. 586; 8 Ind. App. 679; S. C. 36 N. E. 551; 44 N. E. (Ind. App.) 563; 44 N. E. 934; 92 Tenn. 252; 109 N. Y. 127; 36 Oh. St. 370; 93 Pa. St. 363; 4 Am. & Eng. Enc. Law (2 Ed.), 136. If a citizen of this state has a right to set up a certain defense in the courts, a citizen of any other state must be allowed the same privilege. 12 Wall. 418; 16 Wall. 36; 131 Ind. 342; 27 Fed. 146; 7 Minn. 13; 6 Houst. 541; 20 N. Y. 608.

*E. P. Watson*, for appellees.

The legislature has the power to change the law merchant by statute. 70 Fed. 498; 17 C. C. A. 203; 108 Ind. 365; 97 U. S. 501; 36 Ohio St. 370; 86 Pa. St. 173; 60 Ark. 114. The note is unenforceable, even in the hands of an innocent holder. Act April 9, 1891. The note is void for want of form and non-compliance with the act of April 23, 1891. Such a note, being void, is not collectible by an innocent holder. 41 S.W. 273; 24 So. 870; 4 Am. & Eng Enc. Law (2 Ed.), 192; 1 Blackf. 256; 117 Ind. 74; 38 Mich. 278; 63 Miss. 231; 9 Neb. 31; *ib.* 221; 10 Neb. 83; 68 N. C. 28; 70 N. C. 191; 14 S. W.

143; 3 Rand. 324; 91 Va. 652; 1 Wis. 436; 4 Ill. 388; 54 Pac. 306.

HUGHES, J., (after stating the facts.) Sec. 493, Sandels & Hill's Digest, provides that "any vendor of any patented machine, implement, substance or instrument of any kind or character whatever, when the vendor of the same effects the sale of the same to any citizen of this state on a credit, and takes any character of negotiable instrument in payment of the same, the said negotiable instrument shall be executed on a printed form, and show upon its face that it was excuted in consideration of a patented machine, implement, substance or instrument, as the case may be, and no person shall be considered an innocent holder of the same, though he may have given value for the same before maturity, and the maker thereof may make such defense to the collection of the same in the hands of any holder of said negotiable instrument, and all such notes, not showing on their face for what they were given, shall be absolutely void."

Sec. 494, Sandels & Hill's Digest. "The foregoing section shall also apply to vendors of patent rights, and family rights to use any patented thing of any character whatever."

Sec. 495. "Any vendor of any patented thing of any character, or any vendor of any patent right or family right to use any patented thing of any character whatsoever, who shall violate the provisions of section 493, shall, upon conviction, be punished by a fine of not more than three hundred dollars."

Sec. 496. "This act shall not apply to merchants and dealers who sell patented things in the usual course of business."

This act is plain and emphatic. The note sued on in this case was void for non-compliance with section 493 of the statute quoted above. The note could not be the basis of recovery in this suit. As an evidence of indebtedness, it was void under section 493.

The judgment is affirmed.

## STATE v. McNALLY.

Opinion delivered March 10, 1900.

COUNTY CONVICT—PER DIEM ALLOWANCE.—The act of April 12, 1899 (§ 3), relating to county convicts, which amended the act of March 13, 1883, upon the same subject by increasing the *per diem* allowance of a county convict delivered to the county contractor from 50 cents to 75 cents per day was not intended to be retroactive, nor to apply to the case of one convicted prior to its passage. (Page 583.)

Appeal from Jefferson Circuit Court.

ANTONIO B. GRACE, Judge.

STATEMENT BY THE COURT.

Petition by appellee for habeas corpus, alleging as follows: On the 6th of April, 1899, appellee was convicted of an assault in the court below, and fined $50, making, with the costs, $109. On the 11th of the month she was committed to the custody of R. R. Adams, contractor for county prisoners of the county, where she has continuously served at hard labor; and she is entitled to credit in the month of April 19 days, May 31 days, June 30 days, July 31 days, August 31 days and September 11 days, in all 153 days, which at 75 cents a day, amounts to $114, or $4.35 more than the amount due.

Adams answered as follows: Defendant entered into contract with the county judge of the county for keeping county prisoners from January 1, 1899, to January 1, 1900. He was to pay all costs of conviction of prisoners; to pay five and a half cents a day for their labor; and to provide them with proper food and clothing, and with medical attendance. Adams gave bond accordingly. He says appellee worked 84 and one-half days, and lost, on account of bad weather, Sundays, and sickness, 51 and a quarter days. Appellee was not allowed for time thus lost; but for the time that she labored she was allowed 50 cents a day, making $45.12½; a statement which was admitted by the petitioner.

The court allowed petitioner for the full time claimed 153 days, at 75 cents a day, and discharged her.

Motion for a new trial was filed by the appellant, raising all questions of law. It was overruled, and appellant excepted. An appeal was prayed and granted.

*Jeff Davis, Attorney General, Chas. Jacobson, W. B. Sorrells, Prosecuting Attorney*, and *Rose, Hemingway & Rose*, for appellant.

The amended statute of 1883 supersedes the statutes of 1877 and 1881, and fixes the amount to be allowed prisoners *per diem* at fifty cents. Compare Act March 10, 1877, (Sand. & H. Dig., § 899), § 4; Acts 1881, p. 150, sec. 5; Acts 1883, p. 126, secs. 3 and 5. That the latter act repeals the former, see: Endlich, Stat. Const. § 196; 67 N. Y. 109; 49 N. Y. 332; Holmes, 245, S. C. Fed. Cas. No. 17,247; 143 U. S. 18; 65 Ark. 210. In allowing compensation by the day, Sundays are not to be counted. 58 Ark. 620; 92 Ala. 96; 77 *id.* 597; 12 Ga. 100; 8 Metc. 496; 26 Enc. Law, 14. The act of 1899 has no application, because it has no retroactive effect. 56 Ark. 495. Habeas corpus cannot be made to perform the office of an appeal or writ of error. Hurd, Hab. Corp. ch. 6, § 2; 166 U. S. 552.

HUGHES, J., (after stating the facts.) The question arises on the construction of several statutes relating to county convicts.

The act of March 10, 1877, provides as follows: "Sec. 4. When any person shall be convicted of any misdemeanor under the laws of this state by any court of competent jurisdiction, the court shall render judgment against the person so convicted, which judgment shall direct that the person convicted be put to labor in any manual labor workhouse, or on any bridge or other public improvement, or that the person be hired out to some person as hereinafter provided, until the fine and costs are paid, and which shall not exceed one day for each seventy-five cents of the fine and costs." Acts 1877, p. 74; Sand. & H. Dig., § 899.

The following is taken from the act of March 22, 1881:

"Sec. 5. That whenever any prisoner shall be convicted of a misdemeanor by any court or justice of the peace, if the fine and costs are not immediately paid or secured to be paid within thirty days to the satisfaction of the constable, sheriff or other officer, in case of conviction before the circuit court, said convict shall be committed to the county jail, and by the jailer delivered to the contractor, who shall keep and work him at the rate of twenty-five cents per day, not including Sundays and days on which said convicts shall be unable to labor, or for any cause, by his consent, shall not labor, and said contractor shall pay said fine and costs, and be liable on his bond for the same; and he shall not be released or excused therefrom unless said convict shall die without working sufficient to pay the same; or unless said convict shall be or become, from continued ill health, unable to work. In such case the county judge may order his discharge without payment of costs; but, unless so discharged, said convict shall work two days for each day lost by sickness, one of which days shall be for compensation of keeping him during a day on which he was sick; and whenever said convict shall be sentenced to jail as a part of his punishment, he shall first work with the contractor to pay his fine and costs, and shall then commence to serve out his term by labor under the contractor as herein provided." Acts 1881, p. 150.

The act of March 13, 1883, provides as follows: "Sec. 3. That section 5 of said act be so amended as to read as follows:

Sec. 5. Whenever any prisoner shall be convicted of a misdemeanor by any court or justice of the peace, if the fine and costs are not immediately paid or secured to be paid within thirty days to the satisfaction of the constable, sheriff or other officer, in case of conviction before the circuit court, said convict shall be committed to the county jail, and by the jailor delivered to the contractor at such place as the contractor may designate, who shall keep and work such prisoners for the time he shall have been adjudged to be imprisoned, and for the further time as will discharge all fines and costs for which he may be committed, at the rate of fifty (50) cents per day. And said contractor shall not be released or excused from paying for

the time of any convict unless such convict shall die without having labored, or unless such convict shall be or become from continued ill-health unable to work. In such case the county judge may order such convict to be discharged without payment of fine or costs, and whenever any convict shall be sentenced to jail, as part of his punishment, he shall first work with the contractor to pay his fine and costs, and shall then commence to serve out his term by labor under the contractor as herein provided." Acts 1883, p. 126.

The title of this act is "An act to amend sections 2, 3, 5, 15 and repeal section 6 of 'an act to reduce the expenses of enforcing the criminal laws of the state,' approved March 22, 1881."

The act of April 12, 1899, p. 180, provides that when no contractor can be found to take convicts they shall be worked on the roads. It contains the following section:

"Sec. 3. For the purpose of further enforcing this act, the county court, or judge thereof, shall designate in its order the road districts which shall be first worked under this act, and the prisoners shall first work in the district or districts so designated until the road or roads therein shall be put in perfect condition, and the disposition of these prisoners, while they are liable to work the roads under this act, and the order of the work shall be in the discretion of the county court or the judge thereof; *provided*, that the convict defendant shall receive seventy five (75) cents per day, including Sunday, for each day he is so hired out to such contractor, in excess of any liability for care or sickness."

The conviction took place on the 6th day of April, 1899, after the passage of the act of March, 1883; and it seems plain that the case is governed by the act in force at the time of the conviction, at least in the absence of any showing that the offense was committed when the previous act was in force.

The court is of the opinion that the act of April 12, 1899, was not intended to have, and does not have, any retroactive operation, and that it does not apply to this case. *Duke* v. *State*, 56 Ark. 495. The act of the 13th of March, 1883, governs this case, and we hold that under that act the prisoner

is entitled to a credit of fifty cents per day for each day she is confined, or has been confined, including Sundays and all the days of her confinement.

But it appears she had been confined at the time of her application 153 days, and was then entitled to a credit for $76.50. The amount of the fine and costs being $109, she was then liable to be held for the payment of $32.50, to pay which at 50 cents per day would require 65 days from that date.

The judgment of the court below is reversed, and the cause is remanded, with directions to enter a judgment in accordance with this opinion, and to remand the prisoner to the custody of the constable to finish the term of her imprisonment.

---

67 584
71 393
72 51
67 584
74 79
75 342
67 584
f79 483
s80 487

## PLANTERS' MUTUAL INSURANCE COMPANY v. LOYD.

Opinion delivered March 10, 1900.

1. FIRE INSURANCE—WHEN FORFEITURE WAIVED.—Where an insurance company's adjuster, having knowledge that the insured had made a false representation which would work a forfeiture of the policy, furnished him blanks and directed him to make out proofs of loss, and thus induced him to incur expense or trouble under the belief that the loss would be paid, the forfeiture is waived. (Page 588.)

2. SAME—EXTENT OF WAIVER.—A waiver by an insurance company of one ground of forfeiture of a policy of which it has knowledge will not affect another forfeiture of which it is ignorant. (Page 588.)

3. BREACH OF WARRANTY—OWNERSHIP OF PROPERTY.—It is a ground of forfeiture of a policy of fire insurance that the insured stated in his application that he was the sole owner of the property insured, and warranted such application to be true, when at the time he made this statement the title to the property had passed to his wife. (Page 589.)

4. FORFEITURE—BURDEN OF PROOF is on the insured to show a waiver of a forfeiture by the insurer. (Page 589.)

5. SAME—STATEMENT AS TO OWNERSHIP.—A statement by insured in his application that he was the sole owner of the premises insured, but that the title was not in his name, was not sufficient to put the insurer on notice that the insured held neither the legal nor the equitable title to the premises, nor to prevent the insurer from insisting upon a forfeiture

of the policy on the ground that the insured's statement that he was the owner was untrue. (Page 589.)

Appeal from Little River Circuit Court.

WILL P. FEAZEL, Judge.

STATEMENT BY THE COURT.

On the 26th day of January, 1897, T. M. Loyd took out a policy of insurance in the Planter's Mutual Insurance Association for the sum of $1,000 upon his dwelling house and certain furniture therein against loss by fire.

Loyd had a short time previously made an application to the Teutonia Insurance Company for insurance upon this same property. The application made by Loyd to that company contained the following questions and answers in reference to the title of Loyd to the property he desired to insure: "Q. Is your title to the above property absolute? If not, state its nature and amount. Ans. Title bond in fee simple." The Teutonia Company, not desiring to insure property outside of Little Rock, turned the application over to the agent of the Planters' Mutual Insurance Association, and afterwards Loyd made an application for insurance in that company. The application contained the following questions, which were answered by Loyd as follows: "Q. Are you sole owner of the property to be insured? A. Yes. Q. Is the title to the land on which the buildings are situated in your name? A. No. Q. Is your property incumbered? A. Yes. Q. To what amount? A. $150. Q. When due? A. In six months. Q. Any suits pending which may effect your title? A. No. Q. Any unsatisfied judgments against you? A. No."

The policy was issued on this application, and by it the association agreed to make good unto the assured "all such immediate loss or damage not exceeding the amount of the sum insured nor the interest of the assured in the property." The policy also contained the following stipulations and covenants: "By the acceptance of this contract the member covenants that the application hereof and by-laws on back of this contract shall be and form a part hereof and a warranty by the assured, and the as-

sociation shall not be bound by any act or statement made by any agent or solicitor unless inserted in this contract."

The property was afterwards destroyed by fire within the time covered by the policy. The association refused to pay the loss, and Loyd brought this action on the policy. The defense set up by the association was that the policy was void on account of false and fraudulent statements made by Loyd in his application upon which the policy was issued; that Loyd was not the owner of the property, and that there were unsatisfied judgments against Loyd; and, further, that the fire which destroyed the property was caused by the negligence, gross carelessness and willful act of appellee. On the trial it was shown that there were unsatisfied judgments against Loyd, which would have been liens upon the property to the extent of one or two hundred dollars, in addition to the sum named by him his application. It was also shown that on the 21st day of January, 1895, before the policy was issued, Loyd had executed a mortgage on the property in controversy to A. J. Kaiser to secure the payment of a note due Kaiser by Loyd; that Kaiser had foreclosed this mortgage in the circuit court of Little River county, and that on the 22d day of December, 1896, the property had been sold under the decree of said court, and purchased by Mrs. Loyd, wife of T. M. Loyd, who executed her note for the purchase money of the same with A. J. Kaiser as surety.

There was a verdict and judgment in favor of Loyd, from which the association appealed.

*J. W. House*, for appellant.

The court erred in its refusal to allow appellant's counsel time to prepare a motion for continuance. 2 Ark. 33; 22 Ark. 164; 21 Ark. 460. The court erred in giving instruction No. 2 asked by plaintiff. In order to establish a waiver of a forfeiture, the jury must show a distinct recognition of liability on the policy, after a knowledge of the forfeiture. 116 N. Y. 106. And there must either be an agreement based on a consideration, or something in the actions of the insurer to estop its pleading the forfeiture. 30 N. Y. 163; 57 N. Y. 505. Appellant's acts were only an effort to "buy its peace," and did

not constitute a waiver of any right or defense. 20 Ill. App. 436; 64 N. Y. 16; 35 Md. 89; 44 S. W. 466; 83 Mich. 512; 65 Ia. 469; 90 Tenn. 218; Ostrander, Ins. 754, 755; 65 Ark. 54. Appellee can not recover because of the false representation made by him as to his ownership of the property. 58 Ill. 159. He really had no interest whatever in the property. 18 Md. 45. The false representations as to liens, judgments and incumbrances are fatal to appellees' recovery. 64 Ark. 590; 65 Ark. 54; 35 Ohio St. 617; 6 Cush. 340; 10 Cush. 444; 11 Cush. 280; 7 Allen, 132; 4 H. L. Cas. 484. If the acts and declarations of the agent of the appellant had constituted a waiver of anything, it was only of proof of loss. 71 N. Y. 272; 7 Gray, 373. If there was a failure as to any warranty, either as to title or liens, appellee could not recover. 47 Me. 403; 102 Pa. St. 335; 35 Ohio St. 606; Wood, Fire Ins. 302; 53 Ark. 353; 57 Ark. 279; 58 Ark. 277; *ib.* 528. The false representations of appellee made the policy void *ab initio*, and it could not be revived except by a new contract based upon a new consideration. 16 S. W. 470; 23 Mich. 486; Ostrander, Fire Ins. 754, 755, 756, 757. This being a mutual insurance company, each member is held to strict good faith and to a knowledge of all the rules. Since the by-laws prescribe that no waiver can be made except in writing, signed by the president or secretary, the agent had no authority to waive the forfeiture, and his actions do not bind appellant. 4 Allen, 116; 9 Allen, 329; 54 N. W. 21; 14 Gray, 209; 17 Allen, 241; 1 Allen, 296.

*L. A. Byrne*, for appellee.

Appellant, having failed to urge the court's refusal to grant him time to file his motion for a continuance in his motion for new trial, cannot urge it here. 43 Ark. 391; 55 Ark. 547; 38 Ark. 413. The jury having found that the facts proved amounted to a waiver, their verdict should be conclusive. That there was a waiver of forfeiture, see 53 Ark. 495. Appellee's answers were such as to put appellant upon notice as to the character of his title, and, having insured him with such knowledge, it cannot now escape the liability. 52 Ark. 16.

RIDDICK, J., (after stating the facts.) This is an action

on a fire insurance policy. The plaintiff, Loyd, in the written application upon which the policy was issued, stated that there were no unsatisfied judgments against him, and that he was the sole owner of the property to be insured. It was conclusively shown at the trial that these statements were not true. There were unsatisfied judgments against him, and he was not the owner of the property. It belonged to his wife. But it is said that if any forfeiture existed by reason of these statements in the application, it was waived. The facts relied upon as a waiver are that, shortly after the loss occurred, the adjuster of the association met Loyd and his attorney at the office of the latter. The adjuster had heard of the judgments against Loyd, and on that ground denied that the company was liable, and refused to pay the face of the policy, but offered to compromise. Loyd declined to accept the compromise, and thereupon the adjuster left, saying: "You can make your proofs. I have ninety days in which to settle." He afterwards furnished blanks for plaintiff to make out his proof of loss. As the adjuster had notice that there were judgments against Loyd, and that the statements in his application with reference to such judgments and liens upon his property were not true, there is ground for the contention that any forfeiture arising from such misstatements was waived by the act of the adjuster in requesting plaintiff to make out proof of loss, and by leading plaintiff to incur expense of making such proof; for when the insurer, with knowledge of any act on the part of the assured which works a forfeiture, enters into negotiations with him which recognize the continued validity of the policy, and thus induces him to incur expense or trouble under the belief that his loss will be paid, the forfeiture is waived. *German Ins. Co.* v. *Gibson*, 53 Ark. 494; *Phœnix Ins. Co.* v. *Flemming*, 65 Ark. 54; 1 Wood on Insurance, § 89.

But if, at the time of such negotiations, the insurer is ignorant of the forfeiture and of the misstatement which causes it, no waiver can be implied. Nor will an act which impliedly waives one ground of forfeiture affect another forfeiture of which the company and its agent were ignorant. *Trott* v. *Woolwich Mutual Fire Ins. Co.*, 83 Me. 362. Now, if we concede that

any forfeiture caused by the statements in the application as to judgments and liens was waived, there is still the forfeiture caused by the fact that Loyd was not the owner of the property insured. He stated in his application that he was the sole owner thereof, but at the time he made this statement the property had been sold under a decree against him foreclosing a mortgage on the property, and had been purchased by another. It makes no difference that the purchaser was his wife, and that the purchase was made by Loyd in her name, as he stated, to avoid other claims against him. The material fact is that by the sale and purchase all interest in the property owned by him passed to his wife. The sale took place in 1896, and he had no right to redeem. *Martin* v. *Ward*, 60 Ark. 510. He stated in his application that he was the sole owner of the property, and the policy stipulated that if this answer was untrue, or his interest any other or less than a perfect legal and equitable ownership, except as stated thereon in writing, the policy should be absolutely null and void. It follows that the policy is void, unless this forfeiture was waived; and the burden of showing such a waiver was on plaintiff. We have stated the only act relied on as a waiver, and there is nothing to show that at the time of its occurrence the adjuster had notice that Loyd was not the owner of the property, or that his statement in the application that he was the owner was untrue. The adjuster testified that he had no notice of these facts until after this action commenced, and his testimony on this point is uncontradicted.

It is said that Loyd, in his application for insurance, stated that the title to the property was not in his name, and that this statement was sufficient to put the company on inquiry by which they could have learned the facts. But all the statements on this point must be taken together, and they are in effect that he was the sole owner of the property, though the title was not in his name, and that there was an incumbrance on the property to the extent of one hundred and fifty dollars. These statements would naturally lead the company to conclude that Loyd owned the equitable or beneficial title, though the legal title was in another.

Loyd must have known that his statements would leave this impression, for in his application to the Teutonia Company he had stated that the nature of his title was a "title bond in fee simple," and he had been informed by the Teutonia Company that this application had been delivered to the appellant association. He no doubt intended to make this impression, not necessarily to mislead the association, but probably because he himself regarded the purchase of the property in his wife's name, and the execution of notes by her for the purchase money, as a matter of no importance. This had been done, as he said, to avoid claims against himself, and he still intended to remain the beneficial owner. But the law regards such a transaction in a different light, and the insurance association cannot be bound by Loyd's opinion of the matter. He should have stated the facts, and allowed the association to put its own construction upon them. It is a matter of no moment that the legal title did not pass to Loyd's wife, for the equitable title did pass. The association had been told that the legal title was not in Loyd, but in another. It could not complain of that; but, as before stated, their defense is that, after such sale and purchase by his wife, he was neither the legal nor equitable owner of the property, and that his statement on that point was untrue. Our conclusion is that, under the facts as they appear in the record before us, this contention must be sustained, and the policy held to be void. *Rohrbach* v. *Germania Fire Ins. Co.*, 62 N. Y. 47; *Columbian Ins. Co.* v. *Lawrence*, 2 Pet. (U. S.) 48; 1 Wood, Fire Insurance, § 194.

Counsel for appellant also contends that, as the association, by the terms of its policy, only agreed to pay Loyd a sum not exceeding the value of his interest in the property insured, he could not recover, even if there were no forfeiture, for his wife owned the property. There are cases which hold that, under statutes depriving the husband of the control of the wife's property, he has no insurable interest therein. *Trott* v. *Mutual Fire Ins. Co.*, 83 Me. 362; *Traders' Ins. Co.* v. *Newman*, 120 Ind. 554.

But we need not discuss that question, for, as the facts appear here, no recovery can be had under any view of the law on that point.

Judgment reversed, and cause remanded for a new trial.

---

## DUNN v. LOTT.

Opinion delivered April 8, 1899.

COUNTY SEAT REMOVAL—SUFFICIENCY OF PETITION.—Sand. & H. Dig., §§ 945, 953, which provide that the county court may order an election to submit the proposition for removal of a county seat to the voters whenever one-third of "the qualified voters" of the county petition therefor, and that, in determining whether a majority of the qualified voters have so petitioned, the county court shall be governed by the number of persons liable to pay a poll tax as returned upon the assessor's books," have not been repealed or modified by Amdt. 2, Const. 1874, providing that only those male citizens possessing the other qualifications therein enumerated "who shall exhibit a poll tax receipt or other evidence that he has paid his poll tax," shall be allowed to vote at any election. (Page 592.)

Appeal from Little River Circuit Court.

WILL P. FEAZEL, Judge.

STATEMENT OF FACTS.

Several petitions were filed in the county court of Little River county in 1897, asking for an order for an election for removal of the county seat from Richmond to the places named in the petitions. These petitions were heard by the county court in May, 1897, and the court refused to order the election. An appeal was taken to the circuit court, and the cause heard there upon the petitions of appellees, the answer and remonstrance of appellants, and an agreed statement of facts.

The finding of the circuit court is as follows: "The court finds that the number of persons in Little River county liable to pay a poll tax, as returned by the assessor, is 2,239, and the number of persons appearing on the petitions for removal

and liable to pay a poll is 812. And the court further finds that the number of qualified voters of Little River county, as shown by the official list certified by the tax collector of said county in 1896, and filed with and recorded by the county clerk as required by law is 1813, and that the number of qualified voters upon the petitions for removal, as shown by the said official list, is 664. The court therefore finds that the petitions for removal of the county seat of Little River county contain one third of the qualified voters of said county as contemplated by the law."

The court thereupon gave judgment in favor of petitioners, and ordered an election as prayed. From this judgment an appeal was taken to this court.

*J. C. Head*, for appellants.

*L. A. Byrne*, for appellees.

RIDDICK, J., (after stating the facts.) This is an appeal from a judgment ordering an election on a petition for the removal of a county seat. The only question presented is whether the amendment to the constitution requiring each voter to exhibit a poll-tax receipt or produce other evidence of the payment of his poll-tax before voting affected or changed the statute in reference to the removal of county seats.

The statute in question provides that the county court may order an election to submit the proposition for removal of a county seat to the voters whenever one-third of "the qualified voters" of the county join in a petition to that effect. Sand. & H. Dig., § 945. A majority of the qualified voters must vote in favor of a change to the place named in the petition before the court can make the order for removal. Another section of the act is as follows: "To ascertain the number of qualified voters of any county for the purposes of this act, and the lawful majority necessary to authorize the change or removal of any county seat as herein provided for, the county court shall be governed by the number of persons liable to pay a poll-tax as returned upon the assessor's book." *Id.* § 953.

This act has several times been held to be valid. *Vance* v. *Austell*, 45 Ark. 400; *Saunders* v. *Erwin*, 49 Ark. 376.

These decisions were rendered before the passage of the amendment to the constitution above referred to, but we see nothing in the amendment that conflicts with the statute. The amendment imposes upon the voter the condition that he shall produce evidence of having paid his poll tax before he is allowed to vote, but if a citizen of the county fails to pay his poll tax, he is still a citizen entitled to be considered and protected as a citizen, and the legislature has the right to require that he shall be considered and counted in determining the number of voters there are in the county, and the number of votes necessary for a removal of the county seat. Our constitution prohibits the removal of a county seat without the consent of a majority of the qualified voters of the county (Const. 1874, art. 13, § 3), but it does not prohibit the legislature from requiring a greater number than a majority to vote in favor of removal before changing the county seat. The legislature has the power, if it sees proper to do so, to require a two-thirds or three-fourths vote before authorizing a removal. It certainly has the power to require that the vote in favor of removal shall be a majority of all the citizens in the county who would be entitled to vote upon the payment of a poll tax. This is, in effect, what our statute does require, and it makes the assessor's list of persons liable to pay a poll tax the criterion by which to determine the number of such persons in the county. If we should concede the contention of counsel to be true that such list furnishes an inaccurate method of establishing the number of qualified voters in the county, it would avail nothing; for that was a question within the discretion of the legislature, which we cannot control. As the purpose of the statute is to furnish a criterion, not for determining the number of persons who vote or pay a poll tax, but the number of those entitled to vote upon complying with the law in that respect, it seems to furnish a test sufficiently accurate for practical purposes. We do not undertake to say that such list can in all cases be taken as conclusive; that question not being before us here.

As the statute provides that all persons returned on the assessor's list as liable to pay a poll tax shall be counted as qualified voters, in ascertaining the total number of such voters

in the county, we think that the right to petition for the removal of a county seat is not confined to those only that have paid a poll tax, but extends to all citizens of the county who would have the right to vote upon the payment of a poll tax. In order to carry out the evident purpose of the legislature, the phrase "qualified voters," used in the act, must be given this meaning in determining the qualification of petitioners, and not be restricted to such only as have paid their poll tax. But when the election is held, then, of course, only those can vote who have complied with the law in reference to the payment of a poll tax. Our conclusion is that the judgment of the circuit court ordering an election in this case was proper, and the judgment is therefore affirmed.

---

## MAGNESS v. STATE.

Opinion delivered March 4, 1899.

67 594
69 139
f69 575
67 594
74 258
j74 262
75 353
67 594
80 93
j82 510
67 594
85 52

1. HOMICIDE—EVIDENCE.—In a murder case where a negro was charged with killing a white man, the deceased's companion, also a white man, was the only eye-witness of the killing, and testified that deceased was drunk; that defendant passed them, and, in response to an offensive remark by deceased, turned back, and struck him with a wrench, and inflicted a wound from which he died. On cross-examination witness denied that a short time before the killing he told another negro that "no d—d African could keep him off the track." Defendant offered to prove by the negro last referred to that he met deceased's companion a few minutes before the killing; that the latter hit him a glancing lick with his shoulder, and said, "No African can butt me off the track." The court refused to admit such testimony. Defendant introduced other testimony to the effect that deceased and his companion were both drunk, and that deceased threatened to kill defendant, and made a movement as if to draw a pistol for that purpose. *Held*, that the testimony offered by defendant was improperly excluded, being competent to impeach the credit of the state's witness, and to strengthen the testimony of defendant's witnesses. (Page 598.)

2. TRIAL—ARGUMENT.—In a prosecution of a negro it was error for the court to refuse to allow his counsel to argue that the jury ought not to permit the race or color of defendant to prejudice them against him,

but such error was not prejudicial where the court instructed the jury to try the cause "the same as if defendant was a white man." (Page 606.)

Appeal from Independence Circuit Court.

RICHARD H. POWELL, Judge.

*J. C. Yancey* and *W. S. Wright*, for appellant.

The first instruction of the court was misleading, in that it told the jury that a specific intent "might be conceived in a moment." 25 Ark. 407; 36 Ark. 132; 51 Ark. 189. The court erred in so modifying the fourth and sixth instructions, asked by defendant, as to make them tell the jury that, to justify defendant in acting in self defense, the acts and conduct of deceased had to be such as appeared *to the jury* to be sufficient "to induce a reasonable person to believe that they had a murderous intent." The danger is to be viewed from the standpoint of the defendant at the time, and the honesty, not the reasonableness, of his belief is to be weighed. 59 Ark. 132; Clark, Cr. Law, 152. It was also error to exclude the evidence of witness Miller as to declarations made to him by one Freeze, a witness for the state, who was with deceased at the time of the killing, because: (1.) It tended to affect the credit of Freeze. 37 Ark. 85. (2.) It tended to show animus. 12 Ark. 800, 30 Ark. 340; 34 Ark. 480; 24 S. W. 413; 28 S. W. 817; 42 Ark. 70; 10 Ia. 568; 37 Miss. 383; 6 N. Y. 345; 44 Ill. App. 27; 16 Ark. 534; 17 S. W. 366; *id.* 425; 16 N. Y. Supp. 748; 1 S. W. 459; 42 O. St. 426; 52 Ark. 274. (3.) It tended to show a conspiracy between witness and deceased. 1 Ros. Cr. Ev. 573; 64 Ark. 251. (4.) It tended to prove a threat against defendant. 55 Ark, 593. (5.) It was part of *res gestæ*. 13 Ark. 236; 20 Ark. 216; 59 Ark. 422. (6.) It tended to contradict the evidence of Freeze. 8 Cox, C. C. 44; 3 Russ. Cr. 559 n.; 24 Ark. 620; 40 Ark. 487. It was error to refuse to allow counsel for defendant to tell the jury that the fact that defendant was a negro should not weigh against him.

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

No particular length of time is required for the formation of a specific intent. 51 Ark. 189. The killing must appear to defendant, *as a reasonable and prudent man*, to be necessary, to justify on the ground of self-defense. 29 Ark. 248. The evidence fails to show any conspiracy between deceased and Freeze. Hence evidence of latter's declarations was properly excluded.

BATTLE, J. George Magness was indicted by a grand jury of the Independence circuit court for murder in the first degree, committed by killing one Joe Owen. He was convicted of murder in the second degree, and his punishment was assessed at twenty-one years' imprisonment in the state penitentiary.

To sustain the indictment, the state introduced only one witness who was present when Magness struck the fatal blow. He was Dempsey Freeze, who testified as follows: "I come into Newark on the 11th day of December, 1897, and met up with Joe Owen there. He was drinking or drunk, and I commenced at him to go home. I got him as far as the railroad below Mr. Tom Magness' cotton seed house. There was a boarding car there on the side track. And when we come to the car, we crawled under a part of the car, and this man Magness was coming up the track with a wrench in his hand. Just before he got to us, Owen fell down. Magness remarked: 'He is pretty full, ain't he?' I said 'No; not much.' Owen said: 'If you don't like me, you don't have me to kiss.' The negro said: 'What's that?' and Owen said: 'Go to hell,' and Magness turned back, and struck Owen on the side of the head with the wrench. I was helping Mr. Owen up. He had fallen down, and that was all that was said. I had Owen about half up, and he was making no effort to strike defendant. After defendant struck him, he turned and went the other way up the track." On cross-examination he further testified that he saw John Miller, a short time before he and Owen went to the railroad track, in front of Bud Sturdevant's drugstore, but did not tell him that "no d——d African could keep him off the track," and never had any such conversation with him.

The evidence adduced in the trial by the state showed that

Owen died within a few days from the effect of the blow struck by Magness.

The defendant offered to prove by John Miller that he met Freeze about fifteen minutes before he heard that Owen was killed, near Bud Sturdevant's drug store; that Freeze hit him a glancing lick with his shoulder, and said, "No African can butt me off the track;" but the court refused to permit him to do so; and defendant excepted. The defendant is a negro. He adduced evidence tending to prove that Freeze and Owen were under the influence of intoxicating liquor at the time they approached him; that they denounced him as a "black son of a bitch;" that Owen advanced toward him, and, threatening to kill him, placed his hand to his pocket as if in the act of drawing a weapon; and while Owen was in that position, Magness struck him, knocking him down; and while Owen was down, Freeze took something from his (Owen's) pocket, and placed it in his own.

The defendant asked, and the court refused to give, the following instruction: "The jury are instructed that if you believe from the evidence in this case that the defendant was first assaulted by deceased and his comrade with a murderous intent, defendant was not bound to retreat, but might stand his ground, and, if need be, kill his assailant; and if he struck the fatal blow believing that this was the intention of his assailants, that he was justifiable." But the court modified and gave it as follows: "You are instructed that if you believe from the evidence in this case that the defendant was first assaulted by deceased and his comrade with a murderous intent, defendant was not bound to retreat, but might stand his ground, and, if need be, kill his assailant; and if he struck the fatal blow, believing that this was the intention of his assailants (and the acts and conduct of the deceased were such as to induce a reasonable person to believe that they had a murderous intent), then he was justifiable."

The defendant also asked, and the court refused to give, the following instruction: "You are instructed that to justify a killing in self defense, it is not essential that it should appear to the jury to have been necessary; it is sufficient if the

defendant honestly believed, without fault or carelessness on his part, that the danger was so urgent and pressing that the killing was necessary to save his own life or prevent great bodily injury." And the court modified and gave it as follows: "You are instructed that to justify a killing in self defense it is not essential that it should appear to the jury to have been necessary. It is sufficient if the defendant honestly believed, without fault or carelessness on his part, that the danger was so urgent and pressing that the killing was necessary to save his own life or prevent great bodily injury, (and the acts of the deceased were such as to induce a reasonable prudent person to believe the necessity existed.")

The court stopped the counsel of the defendant, in his argument before the jury after the close of the testimony, when he was referring to the fact that "the defendant was a negro, and that this fact should not be weighed against him by the jury," and told the jury that the argument was improper, and that "they had nothing to do with the question as to whether the defendant was a negro or not, and that they must try him as they would a white man."

The appellant, Magness, insists that the judgment of the trial court should be reversed, and a new trial granted to him, for the following reasons:

(1) Because the court erred in excluding the testimony of John Miller.

(2) Because the court erred in refusing to give the instructions as asked by him, and in modifying them as given.

(3) And because the court erred in interfering with the argument of defendant's counsel.

His first contention is correct. The testimony of Miller should have been admitted. It was competent to impeach the credit of Freeze as a witness, and to show that he was biased against the defendant by prejudice against his race, and to strengthen the testimony of appellant's witnesses by showing that he was in that condition or "frame of mind" their testimony, if true, shows he was in when they testified that he participated with Owen in the attack upon Magness by vilifying him on account of his race.

The court erred in modifying the instructions asked by the defendant and copied in this opinion in the manner it did. Our statutes say: "In ordinary cases of one person killing another in self defense, it must appear that the danger was so urgent and pressing that, in order to save his own life, or to prevent his receiving great bodily injury, the killing of the other was necessary." But to whom must it appear that danger was urgent and pressing?

In Clark's Criminal Law it is said: "The authorities are overwhelmingly to the effect that it need only be apparently imminent, and that whether or not it was so in any particular case is to be determined by looking at the circumstances from the standpoint of the accused, taking into consideration the relative strength of the accused and his assailant, and all the other circumstances. If to the accused there was a reasonably apparent necessity to kill to save himself, he will be excused, though to some one else there might not have seemed to be any such necessity, and though in fact there was no such necessity. Most of the cases are to the effect that the circumstances must have been such as to excite the fears of a reasonable man, and the accused must have acted as an ordinarily cautious and reasonable man would have acted; or, in other words, there must have been a reasonable appearance of danger, or reasonable grounds to believe there was danger. But the court and jury must look at the circumstances from the standpoint of the accused. A coward will fear danger unreasonably, and the mere fear of a coward, without reason therefor, is not enough. A person must not be guilty of negligence in coming to the conclusion that he is in danger." Clark's Criminal Law, p. 152.

In McClain's Criminal Law it is said: "The person assailed in acting upon appearance and taking the life of his fellow man does so at his peril, and will not be excused unless the circumstances are such as would induce a reasonable man to believe it necessary to save his own life or save himself from great personal injury. But the reasonableness of the apprehension is to be judged from the standpoint of the defendant at the time and not from that of the jury. By this is not meant, however,

that the jury should ask themselves the question what they would have done under the circumstances surrounding the accused at the time, but that as sworn officers of the law they should look at all the circumstances surrounding the accused as they appeared to him, and ask themselves: 1st. Did the accused believe himself in imminent danger? and 2d. Were there circumstances such as would justify such a belief in the mind of a person of ordinary firmness and reason?" 1 McClain, Criminal Law, § 306.

Wharton, in his work on Criminal Law, says: "It is conceded on all sides that it is enough if the danger which the defendant seeks to avert is *apparently* imminent, irremediable and actual. But apparently as to whom? * * * The answer given by several of our courts to this question is, that if a 'reasonable man' would have held that the danger was apparent, then the danger will be treated as apparent. * * * But who is the 'reasonable man' who is thus invoked as the standard by which the 'apparent danger' is to be tested? What degree of reason is he to be supposed to have? If he be a man of peculiar coolness and shrewdness, then he has capacities which we rarely discover among persons fluttered by an attack in which life is assailed; and we are applying, therefore, a test about as applicable as would be that of the jury who deliberate on events after they have been interpreted by their results. Or, if we reject the idea of a man of peculiar reasoning and perceptive powers, the selection is one of pure caprice, the ideal reasonable man being an undefinable myth, leaving the particular case ungoverned by any fixed rules. And that this ideal reasonable man is an inadequate standard is shown by a conclusive test. Suppose the ideal reasonable man would at the time of the conflict have believed that a gun aimed by the deceased was loaded, whereas in point of fact the defendant knew the gun was not loaded; would the defendant be justified in shooting down an assailant approaching with a gun the defendant knows to be unloaded, simply because the ideal reasonable man would suppose the gun to be loaded? No doubt that in such case no honest belief of the ideal reasonable man would be a defense to the defendant who

knew that the belief was false, and that he was not really in danger of his life. And if the belief of the ideal reasonable man be not admissible to *acquit*, *a fortiori*, it is inadmissible to *convict*. * * * Viewing the law in this respect on principle, we are compelled to hold that the question of apparent necessity can only be determined from the defendant's standpoint." 1 Wharton's Cr. Law (10 Ed.), §§ 488, 489, 491.

Mr. Bishop says: "In other words, and with reference to the right of self defense and the not quite harmonious authorities, it is the doctrine of reason, and sufficiently sustained in adjudication, that, notwithstanding some decisions apparently adverse, whenever a man undertakes self defense, he is justified in acting on the facts as they appear to him. If, without fault or carelessness, he is misled concerning them, and defends himself correctly according to what he thus supposes the facts to be, the law will not punish him, though they are in truth otherwise, and he has really no occasion for the extreme measure." 1 Bishop's New Crim. Law, § 305, sub. 2.

In *Shorter* v. *People*, 2 N. Y. 193, Mr. Justice Bronson, delivering the opinion of the court, said: "When one who is without fault himself is attacked by another in such a manner or under such circumstances as to furnish reasonable grounds for apprehending a design to take away his life, or do him some great bodily harm, and there is reasonable ground for believing the danger imminent that such design will be accomplished, I think he may safely act upon appearances, and kill the assailant, if that be necessary to avoid the apprehended danger; and the killing will be justifiable, although it may afterwards turn out that the appearances were false, and there was in fact neither design to do him serious injury, nor danger that it would be done. * * * * I cannot better illustrate my meaning than by taking the case put by Judge, afterwards Chief Justice, Parker, of Massachusetts, on the trial of Thomas O. Selfridge. 'A in the peaceable pursuit of his affairs sees B walking rapidly towards him with an outstretched arm and a pistol in his hand, and using violent menaces against his life as he advances. Having approached near enough in the same attitude, A, who has a club in his

hand, strikes B over the head, before, or at the instant the pistol is discharged; and of the wound B dies. It turns out that the pistol was loaded with powder only, and that the real design of B was only to terrify A.' Upon this case the judge inquires, 'will any reasonable man say that A is more criminal than he would have been if there had been a bullet in the pistol? Those who hold such doctrine must require that a man so attacked must, before he strikes the assailant, stop and ascertain how the pistol was loaded—a doctrine which would entirely take away the right of self-defense. And when it is considered that the jury who try the cause, and not the party killing, are to judge of the reasonable grounds of his apprehension, no danger can be supposed to flow from this principle.' The judge had before instructed the jury that 'when, from the nature of the attack, there is reasonable ground to believe that there is a design to destroy his life, or commit any felony upon his person, the killing of the assailant will be excusable homicide, although it should afterwards appear that no felony was intended.' (Selfridge's Trial, p. 160; 1 Russ. Crimes, 699, ed. of '24, p. 485, note, ed. of '36.) To this doctrine I fully subscribe. A different rule would lay too heavy a burden upon poor humanity."

In *Batten* v. *State*, 80 Ind. 394, 404, Chief Justice Elliott, in a well considered opinion, said: "In all of the instructions which touch upon the point, the trial court declares that the appearances of danger must be such as would create in the mind of a man of ordinary prudence an apprehension of immediate and urgent danger. An ideal man is thus made the standard by which the guilt or innocence of the accused is to be determined. Is this correct? Should not the standard be the man himself? Ought regard to be had to real things, the man, the situation, the surroundings, or should some imaginary person be taken as the guide? There is some conflict in the cases. Our conclusion is that the question must be decided upon the appearances present to the eyes and mind of the accused himself, and upon the belief actually and in good faith entertained by him. Ultimately, the question whether there were appearances reasonably indicating great and immediate peril, and whether they did

actually inspire the accused with the honest belief of urgent and pressing danger, is to be decided by the jury. But the court is not to set up, as the standard by which the appearances are to be measured or the belief tested, an ideal man. In cases involving life, actual, real things rather than ideal should be taken as standards and tests. It is much safer and better to take the real man, the actual situation, and the real surroundings. There is not, of course, to be any inquiry as to whether he was a brave man or a coward, nor are kindred matters to be investigated."

In *Smith* v. *State*, 59 Ark. 132, this court said: "But to whom must it appear that the danger was urgent and pressing? According to reason and the weight of authority, it must so appear to the defendant. To be justified, however, in acting upon the facts as they appear to him, he must honestly believe, without fault or carelessness on his part, that the danger is so urgent and pressing that it is necessary to kill his assailant in order to save his own life, or to prevent his receiving a great bodily injury. He must act with due circumspection. If there was no danger, and his belief of the existence thereof be imputable to negligence, he is not excused, however honest the belief may be."

There ought not to be any controversy about this doctrine. A man, when threatened with the loss of life or great bodily injury, is compelled to act upon appearances, and determine from the circumstances surrounding him at the time as to the course he shall pursue to protect himself. When the danger is pressing and imminent, his own safety demands immediate and prompt action. Delay may involve the loss of his life or great bodily injury. In such cases he is from necessity the judge of his own action. There is a limitation, however, upon this right. The law imposes upon him the duty to act with due circumspection—without fault or carelessness on his part. If he takes the life of his assailant, the duty devolves upon the jury trying him to determine whether he has done so. To decide in the affirmative, they must find that circumstances and appearances present to him at the time of the killing were sufficient to induce in him a reasonable belief that he was in actual and

imminent danger of losing his life, or suffering great bodily injury. Unless such was the case, it cannot be said that he acted without fault or carelessness, or that he was justified or excused. It is not sufficient, however, to justify or excuse the killing that the circumstances and appearances were sufficient to inspire the accused with such a belief; but the belief must also have been actually and in good faith entertained by him. If he acted from real and honest convictions, induced by reasonable evidence, he cannot be held criminally responsible to the extent of the actual danger. "A contrary rule would make the law of self defense a snare and a delusion. It would become but a mockery of the sacred right of self preservation."

The trial court erred in modifying the instructions asked by the defendant, and in giving them as modified. The instruction asked by the defendant, and first copied in this opinion, is not a correct statement of the law, but the errors contained in it, as a whole, were prejudicial to the defendant. The other instruction as asked was correct as a legal proposition, but, if it had been given in the form asked, it should have been explained by additional instructions, in order to enable the jury to understand it fully.

Should the judgment of the trial court be reversed on account of the errors in the modified instructions? In *Deery* v. *Cray*, 5 Wall. 807, it is said: "It is a sound principle that no judgment should be reversed in a court of error when the error complained of works no injury to the party against whom the ruling was made. But whenever the application of this rule is sought, it must appear so clear as to be beyond doubt that the error did not and could not have prejudiced the party's rights." This rule was laid down in other cases by the same court. *Moores* v. *Nat. Bank*, 104 U. S. 625, 630; *Smith* v. *Shoemaker*, 17 Wall. 639; *Vicksburg & M. Railroad Co.* v. *O'Brien*, 119 U. S. 103; *Gilmer* v. *Higley*, 110 U. S. 50. In *Thacher* v. *Jones*, 31 Me. 534, it is said: "It should appear to be morally certain that erroneous instructions have not been injurious, before the party aggrieved can be deprived of a new trial." In other courts and cases the rule is said to be "that no judgment will be reversed on account of the giving of erroneous instructions, unless it

appear probable that the jury were misled by them," and by others, that it should not be reversed, unless the instructions were calculated to mislead the jury; and by others, that it should be reversed if they tended to mislead. *Smith* v. *Carr*, 16 Conn. 450; *Benham* v. *Cary*, 11 Wend. 83; *Ocheltree* v. *Carl*, 23 Iowa, 394; *Horner* v. *Wood*, 16 Barb. 386; *Hart* v. *Girard*, 56 Pa. St. 23; *Washington, etc., Ins. Co.* v. *Merchants & M. M. Ins. Co.*, 5 Ohio St. 450; *Clarke* v. *Dutcher*, 9 Cowen, 674; 2 Thompson on Trials, § 2401; Elliott on Appellate Procedure, § 632, 643. In *Bizzell* v. *Booker*, 16 Ark. 329, this court said: "We cannot tell what influence the action of the court had upon the minds of the jury in coming to the conclusion which they did. Possibly, the jury would have come to the same conclusion, had the court charged them correctly as to the law of the case, but we cannot undertake to say that they might not have rendered a different verdict. The plaintiff was entitled to have them pass upon the facts with a correct understanding of the law applicable to them, and when this is done, their decision is final." And, so holding, this court reversed the judgment of the trial court on account of errors in instructions, and remanded the cause for a new trial.

According to all authorities, the injurious effects of erroneous instructions determine whether a judgment should be reversed on account of them. But we cannot follow the jury to their room, and ascertain to what extent they were governed by the instructions. In view of this fact and the authorities upon the subject, the writer of this opinion thinks the judgment should be reversed, in cases where the question is properly presented, when it appears that the erroneous instructions in the case probably, or might have, misled the jury to the injury of the appellant; and that, if they reasonably could, they probably did, unless the contrary appears.

In this case the modified instructions were based upon evidence which tended to prove that appellant struck the fatal blow when the deceased was approaching, and threatening to kill him, with his hand to his pocket, as if in the act of drawing a weapon. The evidence, however, did not show that deceased had any weapon. Upon this state of facts the court in-

structed the jury, in effect, that they should not acquit, unless the acts and conduct of the deceased "were such as to induce a reasonable person" to believe that he was in imminent danger of losing his life or receiving a great bodily injury. By these instructions the jury was left to determine who the "reasonable person" should be by whom the apparent danger should be tested. In this manner, the question the jury ought to have determined was not submitted to them. What a reasonable person might have believed, and did the appellant, under the circumstances surrounding him, have reason to believe that he was in imminent danger, are entirely different questions. It does not follow, by any means, because the appellant had reason to believe he was in danger, that a reasonable man would have so believed. Reason and belief do not always concur; and all reasonable men do not always reach the same conclusion upon the same evidence, and the same reasonable man does not always reach the same conclusion upon the same evidence under all circumstances. While there might have been reason to believe the danger in this case was imminent, there might have been other reasons to believe it was not, and, in the mind of the mythical reasonable person constituted by the jury their standard, the latter might have overcome the former. For the reasons given, Chief Justice Bunn and the writer think the instructions were calculated to mislead, and were prejudicial. Justices Wood and Riddick, while they agree as to the law of self-defense, do not think that the court committed a reversible error in giving the instructions as modified.

The circuit court erred in refusing to allow the counsel of the defendant the privilege of making remarks or an argument before the jury to convince them that they ought not to permit the race or color of the defendant to prejudice them against him in his trial. Such remarks were in the interest of justice and for a legitimate purpose. They were for the purpose of urging the jury to discharge a duty which was solemly imposed upon them by the oath they had taken. In *Campbell* v. *The People*, 16 Ill. 17, the prisoner, who was a negro, asked the court to instruct the jury as follows: "It is

the duty of the jury to consider the prisoner's case as if he was a white man, for the law is the same, there being no distinction in its principles in respect of color." The trial court refused it, and the supreme court held that it erred in so doing. In this prosecution, however, the circuit court instructed the jury "to try this case the same as if the defendant was a white man."

For excluding the testimony of Miller we all agree that the judgment of the circuit court ought to be reversed; and Chief Justice Bunn and the writer think it ought also to be reversed for giving the instructions as modified.

Reversed and remanded for a new trial.

Absent HUGHES, J.

WOOD, J. The court was asked to give the following: "You are instructed that, to justify a killing in self defense, it is not essential that it should appear to the jury to have been necessary; it is sufficient if the defendant honestly believed, without fault or carelessness on his part, that the danger was so urgent and pressing that the killing was necessary to save his own life or prevent great bodily injury." The court over the objection of defendant modified it by adding after "injury" the following: "and the acts of the deceased were such as to induce a reasonably prudent person to believe the necessity existed." Section 1675 of Sandels & Hill's Digest is as follows: "A bare fear of those offenses to prevent which the homicide is alleged to have been committed shall not be sufficient to justify the killing. It must appear that the circumstances were sufficient to excite the fears of a reasonable person, and that the party killing really acted under their influence, and not in a spirit of revenge." The modification by the court was substantially in the language of the above statute, and cannot reasonably be construed to have a different meaning than that conveyed by the language of the statute itself.

Such being the case, it was not error to add the modification, although it was unnecessary to do so, as the same idea was conveyed in the instruction as originally asked. If the circumstances were not such as to excite the fears of a reason-

able man in defendant's situation, then defendant would have been at fault or careless in coming to the belief that it was necessary to kill the deceased in order to protect himself from death or great bodily harm at the hands of deceased. Therefore the modification was surplusage. But while the instruction in its present form could not be considered a clever precedent, still it was not prejudicial error to give it, for it was intended to and does state the law of self-defense as approved by this court in *Palmore* v. *State*, 29 Ark. 248, and *Smith* v. *State*, 59 Ark. 132, and other cases; and, as we have said, it was in conformity with our statute. The authorities cited by Judge Battle show "that the circumstances must have been such as to excite the fears of a reasonable man, and the accused must have acted as an ordinarily cautious and prudent man would have acted; or, in other words, there must have been a reasonable appearance of danger, or reasonable grounds to believe there was danger." In determining whether there were reasonable grounds for the defendant to believe, and whether he did honestly believe, that he was in danger of death or great bodily harm at the hands of the deceased, and whether he acted as a man of ordinary prudence would have acted, the court and jury must look at the circumstances from the defendant's point of view. See quotations from Clark's Criminal Law, p. 152; 1 McClain, Crim. Law, § 306; *Shorter* v. *People*, 2 N. Y. 193; *Batten* v. *State*, 80 Ind. 394, in the opinion by Judge Battle. The above I understand to be the law, as declared by our statute, approved by our court, and sustained by the overwhelming weight of authority. And I do not consider the instruction, as modified, to set forth any other doctrine, and the court therefore committed no reversible error in making the modification.

RIDDICK, J. While I concur in the judgment of reversal, and in what is said in the opinion of Mr. Justice Battle concerning the law of self-defense, I do not fully agree with his criticism of the instructions given by the trial judge. I think the instructions referred to are not only defective in form, but that it is hardly correct to say, as these instructions say, that the circumstances under which defendant

acted must have been such as "to induce" a reasonable person to believe that the danger was so urgent and pressing that the killing was necessary to save his own life or prevent great bodily harm. It is sufficient if the circumstances were "calculated to induce" such belief in a reasonable person, or, to put it in different and perhaps clearer language, sufficient if the defendant had reasonable grounds to believe that he was in imminent danger if he honestly entertained and acted upon such belief. But the opinion goes further, and condemns the reference to "a reasonable person" contained in these instructions. The argument is that they thus set up a mythical or ideal reasonable person as a criterion by which to judge the defendant, and are therefore erroneous.

But I do not think the instructions are erroneous in this respect, for on that point they substantially follow the law as stated by this court in the case of *Palmore* v. *State*, 29 Ark. 248, a case which has been often approved in later decisions. In that case, the court, quoting the statute, said: "To excuse homicide, it must appear that the danger is not only impending, but so pressing and urgent as to render the killing necessary; and the circumstances must show that there was sufficient to arouse the fears of a reasonable person, and that the party killing really acted under their influence, and not in a spirit of revenge." *Palmore* v. *State*, 29 Ark. 266; *Levells* v. *State*, 32 *ib.* 585; *Fitzpatrick* v. *State*, 37 *ib.* 257; Sand. & H. Dig., §§ 1675–1676.

The law presumes that men are sane, and have ordinary reason, until the contrary is shown, and, as nothing appears to the contrary here, the judge could assume that the defendant was a sane man, possessed of ordinary reason, and accountable as such. This being so, it seems to me that the instructions given in this case and the law as stated in *Palmore* v. *State* amount to the same thing as saying, though in different words, that to justify homicide on the ground of self-defense the defendant must not only believe that the necessity to take life exists, but there must be reasonable grounds for such belief on his part. If the circumstances under which defendant acted were not calculated to raise in the mind of a reasonable person

placed in defendant's situation a belief of imminent danger, then it cannot be said that he had reasonable grounds for such belief; and if he had no reasonable grounds to believe that he was in imminent danger, he was not justified in taking life. *Shorter* v. *People*, 2 N. Y. 193. To quote the language of the supreme court of Massachusetts, the justification or excuse of self-defense rests on two propositions: "One the reasonable cause, the other the actual apprehension or thought of the defendant, and his purpose or intent. Both must exist, or neither will avail." *Commonwealth* v. *Woodward*, 102 Mass. 155. Not only this, but as a general rule "to justify the taking of life in self-defense the party must employ all means within his power and consistent with his safety to avoid the danger and avert the necessity." *McPherson* v. *State*, 29 Ark. 225.

It is of course true that the danger need not be actual; it is sufficient if it appears to the defendant to be so. If, being without fault himself, he acts upon the honest belief that the danger is actual and imminent, and has reasonable grounds for such belief, he will be excused, though it should turn out that he was mistaken. *Shorter* v. *People*, 2 N. Y. 193. No one would dispute this proposition, and I am inclined to the belief that this court was mistaken in attributing a contrary meaning to the instructions discussed in *Smith* v. *State*, 59 Ark. 132. On other grounds, though, I think the judgment in that case was correct, for that was not an ordinary case of killing in self defense. The defendant there was at the time of the killing assisting a peace officer endeavoring to make an arrest, and under the facts the instructions given seem to have been misleading. But, while the instructions there were misleading, I do not think they quite bear the meaning attributed to them in the opinion, and for the same reason I think the criticism of the instructions in this case is not altogether correct. While, therefore, I agree to the judgment, I must differ from some statements in the opinion.

# APPENDIX.

I.

## IN MEMORIAM.

### SAMUEL WRIGHT WILLIAMS.

At a meeting of the court held on Saturday, June 9, 1900, he Chief Justice, the Associate Justices, and members of thet bar being present, the Hon. Geo. E. Dodge, a member of the bar of this court, addressed the court as follows:

MAY IT PLEASE THE COURT:

On the 14th of March, 1900, departed this life Samuel Wright Williams, for many years a prominent and respected attorney of the bar of this court.

Upon the receipt of this sad intelligence, a largely attended meeting of the Little Rock bar was held in this room, for the purpose of taking action appropriate to the occasion.

Among other proceedings of that meeting, after resolving to attend the funeral in a body, a committee was appointed to draft and present to the meeting suitable resolutions of respect to the memory of the deceased.

These resolutions, accompanied by a report couched in tender and appropriate language, were presented and unanimously adopted by the meeting:

"Resolved. First. That in the death of Samuel W. Williams the bar has lost one of its most useful and honored members, the state an upright and highly-respected citizen, and his family a kind and considerate husband and father.

"Resolved. Second. That we extend to his family and relatives our tenderest condolence and sympathy in their great bereavement.

"Resolved. Third. That the bar attend the funeral of our brother in a body.

"Resolved. Fourth. That Geo. E. Dodge be and he is hereby appointed to present these resolutions to the supreme court, De E. Bradshaw to present them to the Pulaski circuit court, Judge D. W. Carroll to present them to the Pulaski chancery court, and John W. Blackwood to present them to the United States circuit court.

"Resolved. Fifth. That a copy of these resolutions be sent by the secretary of this meeting to the family of our departed brother.

"W. C. RATCLIFFE,
"C. B. MOORE,
"M. M. COHN,
"GEORGE B. ROSE,
"W. S. M'CAIN,
Committee."

It is a trite observation that the history of states and nations is but a record of the lives and achievements of the men who lived and wrought therein; and if history cannot be truly written until the lapse of time has supplied the necessary perspective, neither can we correctly estimate, nor rightly portray, the character of our fellow men, without some such aid. In such case, death alone can furnish the necessary perspective. A portraiture upon canvas carries with it no proper conception of the artist or the subject, until it has received its last finishing touch. It may then be studied in detail, and its merits intelligently passed upon. It is a finished work, and compels the revision of any hasty criticism which might have been passed upon it in its unfinished condition.

Man is not only the architect of his own fortune, but the artist who portrays his true character upon the memory of those who survive him. With what halting and stumbling efforts do most of us perform this task! With the erasing, and retracing, inseparable from our imperfect equipment, the wonder is, not that we fail to produce that which will compel admiration, but that we do not fall below mediocrity, and earn no better reward than to escape censure. In this busy strife of life, a man must be either a giant or a genius to secure a general recognition of his size or worth while the battle rages. It is only after the smoke of conflict has cleared away that it may be ascertained how well each warrior has demeaned himself. As in a dramatic performance, it is only after the curtain has been rung down that it is possible to determine how ill, or how well, each actor has borne his part.

Our judgments of our fellow men, as we meet and greet each other in the daily affairs of life, are faulty, at best, and subject to constant revision. We form a good opinion from some act of today which meets with our approbation. Tomorrow the decision is reversed, and the reason of it is that the subject of yesterday's approbation has today ventured to speak or to act in opposition to some theory or policy to which we adhere.

To be of good repute of all men at all times would be a superhuman achievement. It would be nearer of accomplishment if the means were always at hand for correctly gauging men's motives. If this were so, how much misconception and misunderstanding might be avoided! But, in the nature of the case, it cannot be so while each one's individual opinion depends, not only upon each one's individual view point, but upon his preconceptions, and, too often, his misconceptions.

We do not see clearly, but through the mist and haze of interest, or favor, or prejudice. It is out of such faulty material as this that reputation is formed.

When we speak of a man's reputation being at stake, we speak of something transitory and superficial. It may, or it may not, survive some special crisis; but if it does not, it no more affects the deep elements of character than does the bursting of a bubble on the surface disturb the serene depths below. The bards and the sages of the ages have recognized this truth, and, though men seek it "even in the cannon's mouth," what is it but a bubble? It is, as one has well expressed it, "but a synonym of popularity; dependent upon suffrage, to be increased or diminished at the will of the voters." It is a plaything of gossips, at whose "every word a reputation dies." Since it is that part of a man which is so unstable that effort is necessary to "keep it up," as is so well recognized under its other name of popularity, and since it is so fleeting that, like time, it passes away as does the mortal body, fond memory lays hold on something more substantial when it would recall the solid virtues of character.

We too often speak of death as the opposite of life, as we would contrast darkness with light; without realizing that it is only under the reflection of the cold white light of death that character stands forth for the first time fully revealed. When tired hands are folded, and the busy brain finds eternal surcease, who has not noticed features, once seamed with care and wrinkled with age, take on the calm serenity of death? Instead of the scythe of the grim reaper, the chisel of some supernatural sculptor seems to have been at work, and our gaze lingers, as we behold new beauties of form and expression, which we have either never noticed before, or have for a time forgotten. And so, when we contemplate the life and character of a departed friend or associate, how visible become the finer lines, which we might have seen before, had we stopped to look!

The man who fears God, lives honestly, and works faithfully, cannot but live in the good repute of his fellow men. He exemplifies in his life a character not founded upon mere reputation. The latter is but a superstructure built upon the former. It is not destroyed in the convulsion of earthly dissolution, but is absorbed and blended in the immortal part which survives the wreck of material things. Of such a man we speak when we pay tribute to the memory of Samuel Wright Williams, or, as he attested his desire, by his own familiar signature, to be called: "Sam W. Williams."

Perhaps nothing can be said in this presence, and here upon the scene of his late professional activities, that would convey any additional information as to who and what our friend and associate was. We speak only of familiar things when we pay tribute to his conspicuous virtues of mind and heart, and to his legal ability.

Being a man of marked individuality and strong convictions, these characteristics found room for their fullest scope in his professional life. Not only so, but every question which affected the public interest, and every movement for the betterment of human conditions, found in him a ready champion and a fearless advocate.

Sam W. Williams was a stranger to prevarication or evasion. He did not reach his aims by indirection, nor his conclusions by any process of circumlocution. He did not wait to see whether he was of the majority.

He was no trimmer. It was not difficult to ascertain how he stood upon any question; and, having taken his stand, he was ever ready to give reasons for the faith which was in him. He, and what he conceived to be error, could not exist in the same atmosphere. Gifted with keen perceptions and quick intellect, he was not only prompt, but impetuous, in attack. Yet such was his kindness of heart that he was equally prompt to acknowledge a mistake, or to make amends for an excess of fervor which might otherwise have left a sting behind. This was a conspicuous trait. No one recognized better than he that, in the white heat of an excited controversy, every stroke cannot be tempered with nicety and exactness.

Whenever, in his professional contests, he was a giant, as compared to his adversary, he proved true to the knightly motto that, while "it is glorious to have a giant's strength, it is tyrranous to use it as a giant." It is needless to say that, when confronted with a foeman worthy of his steel, the legend "Woe to the vanquished" lent inspiration to the occasion.

Few men have shown, throughout a long and honorable life, such antipathy to frauds and shams as Sam W. Williams. Freely of his time, his efforts and his means, it was his wont to contribute, when innocence cried out in distress, or arrogant oppression raised its baleful standard.

Knighthood may have withered on its stalk, and the perfume of its white flower be but a memory; but there is a wholesome savor in the character of one who acts and works in this world as if under the vow that while he lives, "no rich and noble knave shall walk the earth unchallenged to his grave." It is well for us to consider, occasionally, the debt of gratitude which we owe to men of this class, who, unlike most of us, are not content to discharge merely the letter of our duty, as to matters outside of our daily avocations. Sticking closely to one's own immediate business is not an unmixed virtue. Homage is due to those exceptional ones whose business and whose concern it is to combat fraud, oppression and imposition, even if it be necessary to go a step beyond their own little environment to grapple with the foes of humanity. To do this, not for gain or personal aggrandizement, but often at personal sacrifice, and at the risk of popularity, is not characteristic of the average man. If nothing save this one characteristic of our deceased friend and associate were the theme for this occasion, it were well worth our while to be here.

It is so easy to beguile ourselves into the belief that we possess the virtue of retiring modesty, when that much vaunted possession may be but a transparent barrier, behind which cowardice hides. We shrink from the lash of unpopularity. We submit to evils because to resist them would compel us to stand out in the open and be conspicuous marks for criticism as to our motives and opinions.

Fortunately, there is a remnant of leaven in the lump of humanity, and, like sturdy sentinels, in the forest of mediocrity there stands a man, here and there, who is not swayed by the *whim* of the moment, or the *fad* of the hour; men of convictions, who dare to utter them; men of opinions, who dare to express them; men "who would not flatter Neptune for his trident, or Jove for his power to thunder."

No one who knew intimately the man to whose memory we this day pay a grateful tribute will fail to class him among those who not only loved right, and truth, and justice, for their own sakes, but who are ever ready

to stand with the minority, if need be, in giving practical expression to that characteristic.

Other occasions are more appropriate to speak of his lengthy and prominent connection with the affairs of his chosen church, in which he stood as a pillar of strength, and as a faithful conservator of its creed. Likewise of the prominence which he attained as an exponent of the tenets of Freemasonry, in which fraternity he was a bright and shining light, selected by the suffrages of his brethren to its most exalted stations.

To refer to Sam W. Williams as a lawyer whose professional and earthly career is closed seems sadly strange when as it were but yesterday his venerable presence and ripe knowledge formed one of the most conspicuous adornments of our bar. It has a doubly sad significance, when we look in vain for his familiar face, and reflect that he was almost the last of his generation, and how few of his contemporaries remain for counsel, for advice, for leadership. His pre-eminent ability as a lawyer was conceded. His fine appreciation of the underlying principles of our jurisprudence, and his familiarity with all the details of its procedure, were universally recognized. Verily, a Nestor of the profession has fallen. In the fullness of his legal experience, and in the ripeness of a well earned legal and moral reputation,—having fought a good fight—he rests from his labors.

Not alone in the memory of surviving friends and associates, but written upon the records of the courts, are to be found the impress of the able advocate who wrought so well, and so long, in his profession. The firm grasp of his judicial mind also finds expression in the opinion books of this our highest appellate court on occasions when he acted, by appointment, as one of its special judges. Not only as an advocate of rare ability, but as a wise and safe counsellor, will Sam W. Williams long be remembered with gratitude by the many who sought his counsel. These believed rightly that when he had given that careful and conscientious consideration to a question involving the rights of a client, as it was his wont to do, they had something substantial to rely upon. And in the maintaining of his client's right, or in the redressing of his client's wrongs, there was no occasion for apprehension that the task would be slighted, or that every energy of mind and soul would not be fearlessly put forth. No opposition daunted him, and the contest which absorbed his energies was that in which shone forth his exceptional abilities, and his resourceful mind. Such a man and such a lawyer leaves a large vacancy in any community and in any bar; and, as he was an honor to his profession, so does the latter honor itself in doing honor to his revered memory.

It would be but to say over, in a form of less adequate expression, what has already been so well said, to speak of other enviable traits of that character which we have briefly and imperfectly contemplated. Thus concludes the report of the committee which presented to a meeting of the bar the original resolutions:

"Another marked trait of character as a practising lawyer, was the kindly and affectionate interest he always manifested towards the younger members of the profession.

"Whatever hard knocks he might give his more experienced opponents he always manifested kindness and sympathy towards the young lawyers; never forgetting that he was himself once young and inexperienced, he was ever ready to guide and direct the young attorney.

"No student or youthful practitioner ever came to him for advice or assistance, and was rudely rebuffed. No ridicule or sarcasm was ever indulged in towards them in the conduct of their cases. He bound the young men to him with cords of love, and no young lawyer, it is believed, can recall an ungracious word uttered by his tongue or show a scar or point to a wound inflicted by his pen.

"A crowning virtue of our departed brother was his old-fashioned, sincere belief in the truths of revelation and Christianity—his child-like faith. This moulded and controlled his actions through life, and cheered and illumined his pathway with radiant light as he descended into the dark valley of death, and left a halo of glory around his name and his memory when he 'passed over the river to rest under the shade of the trees.'

"Such was Samuel W. Williams, as we all knew him, and will love to think of him. He is gone from amongst us, but—

"'His name with us shall live
Through long succeeding years,
Embalmed with all our hearts can give—
Our memories and our tears.'"

Chief Justice Bunn responded as follows:

In responding to the remarks just made in presenting the resolutions of the bar of this court, the court desires to unite most sincerely in all that has been said and resolved in memory of the deceased.

Col. Williams, as has been said, was in many respects a remarkable man and was a great lawyer. He was a man of forceful character, a man whose fault, if that be a fault, was a courage of conviction that sometimes, it is said, did not soften the asperities of differences. He was a man of unquestioned and unquestionable integrity. His life-motive proceeded from a most excellent moral training and careful education of the moral conscience on the great principals of morals and religion, which the enlightened world accepts as the truth.

As a lawyer, he was and had always been, since he began the practice, a systematic student and industrious practitioner. He was true to his clients, and was a worthy foeman of the best and ablest of the profession. He was, with perhaps one or two exceptions, the very Nestor of the bar of this court, and of the state, at the time of his death.

When such a man leaves the walks of life, there is a vacancy of something more than the brief dissolution which follows upon the passing away of the ordinary man.

We all have known him from the earliest years of our residence in the state, and most of us from childhood. There are some of us now being numbered with the old, who have known him so long that with us it is difficult to dissociate the history of the state, especially of the capital city, from his personal life and service. It could not be otherwise than that the departure of such a man should leave behind the very greatest number of sorrowing friends and, as nearly as may be, universal mourning among his fellow citizens.

It is ordered that the resolutions and accompanying remarks be spread upon the records of this court, and that the clerk furnish a copy to the family of the deceased on request, and make such other disposition of them as is customary.

# APPENDIX.

## II.

## OPINIONS NOT REPORTED.

Kansas City, Pittsburg & Gulf Rd. Co. *v.* Disbrow; appeal from Polk circuit court; Will P. Feazel, judge; reversed and remanded November 4, 1899; per Hughes, J.

Shirey *v.* Heath; appeal from Lawrence circuit court in chancery, Eastern district; Richard H. Powell, judge; reversed and remanded February 24, 1900; per Battle, J.

L. H. Moore & Son *v.* E. A. and M. M. Collier; appeal from Lawrence circuit court in chancery, Eastern district; Richard H. Powell, judge; affirmed December 2, 1899; per Wood, J.

White River Stave Co. *v.* Emmerson; appeal from Cleveland circuit court in chancery; Marcus L. Hawkins, judge; affirmed October 8, 1899; per Wood, J.

Walker *v.* State; appeal from Franklin circuit court, Ozark district; Jephtha H. Evans, judge; affirmed March 3, 1900; per Bunn, C. J.

Kansas City, P. & G. Rd. Co. *v.* Pirtle; appeal from Polk circuit court; Will P. Feazel, judge; reversed and remanded March 3, 1900; per Battle, J.

St. Louis Southwestern Ry. Co. *v.* Mahoney; appeal from Columbia circuit court; Chas. W. Smith, judge; affirmed February 24, 1900; per Hughes, J.

## III.

## CASES DISPOSED OF ORALLY.

Conway Cotton Oil etc. Co. *v.* Town of Morrillton; appeal from Conway circuit court in chancery; Jeremiah G. Wallace, judge; dismissed for non-compliance with rule nine, October 16, 1899; *per curiam.*

Hynes *v.* Riley; appeal from Crawford circuit court in chancery; Jephtha H. Evans, judge; affirmed October 21, 1899; per Hughes, J.

Dunavant *v.* State; appeal from Mississippi circuit court; Felix G. Taylor, judge; affirmed October 21, 1899; per Hughes, J.

Saffell *v.* Croom; appeal from Lawrence circuit court; Richard H. Powell, judge; affirmed for non-compliance with rule nine, November 6, 1899; *per curiam.*

Sparks *v.* State; appeal from Clark circuit court; Joel D. Conway, judge; affirmed November 11, 1899; per Wood, J.

Mausur & Tebbetts Implement Co. *v.* Bizzell; appeal from Sevier circuit court; Will P. Feazel, judge; dismissed for non-compliance with rule nine, November 13, 1899; *per curiam.*

Whitehead *v.* Henderson; appeal from Washington circuit court in chancery; Edward S. McDaniel, judge; affirmed November 18, 1889; per Wood. J.

Supreme Lodge Knights of Honor *v.* Johnson; appeal from Pulaski circuit court; Joseph W. Martin, judge; affirmed for non-compliance with rule nine, November 20, 1899; *per curiam.*

Jonesboro, L. C. & E. Ry. Co. *v.* Williams; appeal from Craighead circuit court; Felix G. Taylor, judge; affirmed as a delay case, November 25, 1899; *per curiam.*

Standard Life & Acc. Ins. Co. *v.* Hays; appeal from Miller circuit court in chancery; Joel D. Conway, judge; appeal dismissed November 25, 1899; *per curiam.*

Ware *v.* Citizen's Building & Loan Ass'n.; appeal from Garland chancery court; Leland Leatherman, chancellor; appeal dismissed by consent, November 25, 1899; *per curiam.*

Anawalt *v.* Kennedy; appeal from Pope circuit court; Jeremiah G. Wallace, judge; dismissed for non-compliance with rule nine, December 4, 1899; *per curiam.*

City of Fort Smith *v.* Garrett; appeal from Sebastian circuit court; Edgar E. Bryant, judge; affirmed on motion for non-compliance with rule nine, December 4, 1899; *per curiam.*

St. L. S. W. Ry. *v.* Booker; appeal from Miller circuit court; Joel D. Conway, judge; appeal dismissed for non-compliance with rule nine, December 4, 1899; *per curiam.*

Huffman *v.* Speer; appeal from Logan circuit court; Jephtha H. Evans, judge; appeal dismissed for non-compliance with rule nine, December 4, 1899; *per curiam.*

Rimes *v,* Shadrick; appeal from Little River circuit court; Will P. Feazel, judge; affirmed as a delay case, December 9, 1899; *per curiam.*

Tennis *v.* Ryan; appeal from Garland circuit court; Alexander M. Duffie, judge; affirmed December 9 1899; per Bunn, C. J.

Smith *v.* State; appeal from Cleveland circuit court; Zachariah T. Wood, judge; affirmed December 16, 1899; per Wood, J.

Starks *v.* Monticello Bank; appeal from Chicot chancery court; James F. Robinson, chancellor; appeal dismissed for non-compliace with rule nine, December 18, 1899; *per curiam.*

Prescott N. W. Ry. Co. *v.* Sweeney; appeal from Nevada circuit court; Joel D. Conway judge; appeal dismissed for non-compliance with rule nine, December 18, 1899; *per curiam.*

Kennard *v.* Wood; appeal from Sebastian circuit court; Edgar E. Bryant, judge; affirmed December 23, 1899; per,Hughes, J.

Blass *v.* Anderson; appeal from Little River circuit court; Will P. Feazel, judge; compromised and appeal dismissed by consent, December 23, 1899; *per curiam.*

Mills *v.* Bluff City Lumber Co.; appeal from Jefferson chancery court; James F. Robinson, chancellor; affirmed under rule seven, December 23, 1899; *per curiam.*

Reinsch *v.* Price; appeal from Arkansas chancery court; James F. Robinson, chancellor; appeal dismissed for non-compliance with rule nine, January 1, 1900; *per curiam.*

Whatley *v.* Adie; appeal from Miller circuit court in chancery; Joel D. Conway, judge; appeal dismissed for non-compliance with rule nine, January 1, 1900; *per curiam.*

Matthews *v.* Reid; appeal from Mississippi circuit court; Felix G. Taylor, judge; appeal dismissed on motion of appellant, January 1, 1900; *per curiam.*

Rodgers *v.* Wall; appeal from Lee circuit court; Hance N. Hutton, judge; affirmed January 13, 1900; per Battle, J.

Trimble *v.* Ark. Abstract Co.; appeal from Pulaski circuit court; Joseph W. Martin, judge; affirmed January 13, 1900; per Hughes, J.

Walton *v.* State; appeal from Pike circuit court; Will P. Feazel, judge; appeal dismissed January 13, 1900; *per curiam.*

L. R. Traction Co. *v.* Stiel; appeal from Pulaski circuit court; Joseph W. Martin, judge; appeal dismissed by consent, January 13, 1900; *per curiam.*

Green *v.* Simmons; appeal from Little River circuit court; Will P. Feazel, judge; affirmed on motion for non-compliance with rule nine, January 15, 1900; *per curiam.*

Brady *v.* City of Jonesboro; appeal from Craighead chancery court; Edward D. Robertson, chancellor; affirmed on motion for non-compliance with rule nine, January 22, 1900; *per curiam.*

Rowe *v.* Choate; appeal from White circuit court; Hance N. Hutton, judge; appeal dismissed for non-compliance with rule nine, January 22, 1900; *per curiam.*

Jonesboro Ry. Co. *v.* Lee; appeal from Cross circuit court; Felix G. Taylor, judge; affirmed as a delay case, January 27, 1900; *per curiam.*

St. L., I. M. & S. Ry. Co. *v.* Overton; appeal from Independence circuit court; Richard H. Powell, judge; affirmed January 27, 1900; per Bunn, C. J.

Kohn *v.* Becker; appeal from Pulaski circut court; Joseph W. Martin, judge; affirmed January 27, 1900; per Hughes, J.

St. L., I. M. & S. Ry. Co. *v.* Saulsberry; appeal from Scott circuit court; Edgar E. Bryant, judge; affirmed by consent January 29, 1900; *per curiam.*

St. L., I. M. & S. Ry. Co. *v.* White; appeal from Scott circuit court; Edgar E. Bryant, judge; appeal dismissed January 29, 1900; *per curiam.*

Henning *v.* Beardsley; appeal from Phillips circuit court; Hance N. Hutton, judge; affirmed for non-compliance with rule nine, January 29, 1900: *per curiam.*

Tallman *v.* Lallman; appeal from Prairie circuit court; George M. Chaplin, judge; affirmed under rule seven, February 3, 1900; *per curiam.*

Wagner *v.* Rothchilds; appeal from Jefferson chancery court; James F. Robinson, Chancellor; compromised and dismissed February 5, 1900; *per curiam.*

Sunnyside Co. *v.* Gaines; appeal from Chicot circuit court; Marcus L. Hawkins, judge; appeal dismissed for non-compliance with rule nine, February 5, 1900; *per curiam.*

Jonesboro Ry. Co. *v.* Cravens; appeal from Craighead circuit court; Felix G. Taylor, judge; advanced and affirmed as a delay case, February 10, 1900; *per curiam.*

St. L., I. M. & S. Ry. Co. *v.* Smith; appeal from Faulkner circuit court; Jephtha H. Evans, judge; advanced and affirmed as a delay case, February 10, 1900; *per curiam.*

Ponder *v.* State; appeal from Columbia circuit court; Charles W. Smith, judge; affirmed February 10, 1900; per Hughes, J.

McBee *v.* State; appeal from Lee circuit court; Hance N. Hutton, judge; judgment modified so as to reduce sentence, February 10, 1900; per Hughes, J.

Goodbody *v.* Peters; appeal from Garland chancery court; Leland Leatherman, chancellor; appeal dismissed for non-compliance with rule nine, February 19, 1900; *per curiam.*

Jonesboro, L. C. & E. Ry. Co. *v.* Skelton; appeal from Craighead circuit court; Felix G. Taylor, judge; advanced and affirmed as a delay case, February 24, 1900; *per curiam.*

Harvey *v.* Waits; appeal from Jefferson circuit court; John M. Elliott, judge; affirmed on motion for non-compliance with rule nine, February 26, 1900; *per curiam.*

Williamson *v.* British & Am. Mortgage Co.; appeal from Sevier circuit court in chancery; Will P. Feazel, judge; appeal dismissed for non-compliance with rule nine, February 26, 1900; *per curiam.*

Brown *v.* Whittle; appeal from Johnson circuit court; Jeremiah G. Wallace, judge; appeal dismissed on motion of appellant, March 3, 1900; *per curiam.*

Byrne *v.* Sanders; appeal from Miller circuit court in chancery; Joel D. Conway, judge; compromised and appeal dismissed, March 3, 1900; *per curiam.*

Farmer's Mut. Ins. Assn. *v.* Chamness; appeal from Conway circuit court; Jeremiah G. Wallace, judge; compromised and appeal dismissed, March 12, 1900; *per curiam.*

# INDEX.

ABANDONMENT: See ATTACHMENT.

ACTION: See REPLEVIN; TRESPASS.
when servant may elect among remedies against master. *Kansas City, F. S. & M. Rd. Co. v. Becker*, 1.
when election among remedies not binding. *Dudley E. Jones Co.* v. *Daniel*, 206.

ADMINISTRATION: See PROBATE COURT; WIDOW.
homestead is assets to pay debts when. *Huffstedler* v. *Kibler*, 239.
claim against administrator not barred when. *Jacoway* v. *Hall*, 340.
when attorney's fees allowed to administrator. *Id.*
administrator not allowed to deal with estate. *Id.*
when administrator charged with interest. *Id.*

ADMISSION: See EVIDENCE.

ADVERSE POSSESSION:
when use of right of way by railroad adverse to owner. *Memphis & L. R. R. Co., etc.*, v. *Organ*, 84.

AGENCY: See BANKS.

AMENDMENT: See PLEADING.
affidavit for change of venue in felony case amendable. *Bittick* v. *State*, 131.
of complaint held to be proper. *St. Louis, I. M. & S. Ry. Co.* v. *Power*, 142.
such amendment held to entitle defendant to continuance. *Id.*
affidavit for appeal from justice's court held amendable. *Atkins* v. *Johnson, Caruthers & Rand Co.*, 393.

ANIMALS:
for stock-killing, see RAILROADS.

APPEAL AND ERROR: See BILL OF EXCEPTIONS.
when refusal to set aside default judgment not prejudicial. *Moores* v. *Winter*, 189.
conclusiveness of chancellor's finding of fact. *Irby* v. *So. Bldg. & L. Assoc.*, 287.
motion in regard to costs should be incorporated in bill of exceptions. *Rowland* v. *McGuire*, 320.
finding of jury conclusive though against preponderance of evidence. *St. Louis, I. M. & S. Ry. Co.* v. *Osborn*, 399.
judgment below amended to conform to complaint. *Hess* v. *Adler*, 444.
effect of statement in bill of exceptions that either party might use any part of the records. *Overton* v. *Lohmann*, 464.
presumption where bill of exceptions is confused and contradictory. *Id.*

APPEAL AND ERROR—*Continued.*
judgment not reversed for want of evidence if it does not clearly appear what evidence was. *Id.*
bill of exceptions presumed to contain all the evidence. *Daniel* v. *St. Louis National Bank*, 223.
effect of reversal of judgment confirming sale in attachment. *Stout* v. *Brown*, 481.
verdict on conflicting evidence held conclusive. *St. Louis, I. M. & S. R. Co.* v. *Baker*, 531.
exception to evidence not reserved in motion for new trial held waived. *St. Louis, I. M. & S. R. Co.* v. *Baker*, 531.
ASSAULTS:
evidence of threat in aggravated assault held admissible only in mitigation when. *Stricklin* v. *State*, 349.
ASSIGNMENT FOR BENEFIT OF CREDITORS:
insolvent married woman may prefer husband. *Phelps* v. *Wyler*, 97.
deed of, not void because it provides that property shall not be delivered to assignee until bond and inventory filed. *Id.*
ATTACHMENT:
lien abandoned if no sale made under. *Snell* v. *Cummins*, 261.
effect of reversal of judgment confirming sale. *Stout* v. *Brown*, 481.
BAIL:
surety in bail bond discharged by discharge of principal on habeas corpus. *State* v. *Adler*, 469.
judgment discharging principal not attacked collaterally. *Id.*
BAILMENT:
when compress company liable for negligence in failing to care for cotton. *Union Compress Co.* v. *Nunnally*, 284.
when bailee liable for want of ordinary care. *Id.*
BANK:
authority of cashier to indorse bank's paper. *Auten* v. *Manistee National Bank*, 243.
BETTERMENTS: See IMPROVEMENTS.
BILLS AND NOTES:
possession of negotiable note as evidence of title. *Hays* v. *Dickey*, 169.
note held to have been paid through bank. *Daniel* v. *St. Louis Nat. Bank*, 223.
when no defense to indorser that demand and protest were not made. *Auten* v. *Manistee Nat. Bank*, 243.
authority of cashier to indorse paper owned by bank. *Id.*
in case of note payable at insolvent bank demand and notice may be made and given to examiner in possession. *Id.*
drawing draft on third party in favor of drawer's agent held no appropriation of proceeds. *Sixkiller* v. *Rogers*, 354.
note given for compounding a felony is void. *Kirkland* v. *Benjamin*, 480.
railroad liable on note signed by president, when. *Texarkana & F. S. R. Co.* v. *Bemis L. Co.*, 542.
note given for patent right invalid when. *Wyatt* v. *Wallace*, 575.

BILL OF EXCEPTIONS: See APPEAL AND ERROR.

BILL OF LADING: See CARRIERS.

BOND FOR TITLE:
not color of title. *White* v. *Stokes*, 184.

BURDEN OF PROOF: See PRESUMPTION.
on claimant of homestead exceeding eighty acres to show that value does not exceed $2,500. *Pace* v. *Robbins*, 232.
on party attacking marriage to show its illegality. *Cash* v. *Cash*, 278.
defective instruction as to, cured when. *St. Louis, I. M. & S. R. Co.* v. *Baker*, 531.
on insured to show waiver of forfeiture of insurance policy. *Planters' Mutual Ins. Co.* v. *Loyd*, 584.

CARRIERS: See DAMAGES; EVIDENCE.
purchase of ticket not a prerequisite to relationship of carrier and passenger. *St. Louis & S. F. Rd. Co.* v. *Kilpatrick*, 47.
one who entered car intending to pay fare held a passenger. *Id.*
carrier liable for willful and malicious expulsion of trespasser. *Id.*
carrier liable for wrongful expulsion of passenger by brakeman, whether authorized or not. *Id.*
when brakeman authorized to eject passenger. *Id.*
brakeman's push held proximate cause of injury to passenger. *Id.*
when not liable for damages for anxiety of mind of passenger expelled from depot. *St. Louis, I. M. & S. R. Co.* v. *Stroud*, 112.
liability of railroad for management of leased car. *Texarkana & Ft. Smith Ry. Co.*, 123.
when railroad liable for wrongful exclusion of passenger from leased train. *Moore* v. *St. Louis, I. M. & S. Ry. Co.*, 389.
instruction as to carrier's right to eject passenger from depot for violating company's rule against soliciting for hotel disapproved. *St. Louis, I. M. & S. R. Co.* v. *Osborn*, 399.
switching car at "blind station" held sufficient delivery of contents when. *Hill* v. *St. Louis S. W. R. Co.*, 402.
reasonableness of stipulation in bill of lading as to notice of loss or damage. *St. Louis & S. F. R. Co.* v. *Hurst*, 407.
sufficiency of consideration for restriction of carrier's liability contained in bill of lading. *Id.*
whether feeble passenger negligent in attempting to alight unaided is for jury. *St. Louis, I. M. & S. R. Co.* v. *Baker*, 531.

CASES OVERRULED, DISTINGUISHED, ETC.:
*State* v. *Barnett*, 65 Ark. 80, distinguished. *Hampton* v. *State*, 271.
*Main* v. *Alexander*, 9 Ark. 112, " " " " "
*State* v. *Harberson*, 43 Ark. 378, " " " " "
*McNeil* v. *Carter*, 57 Ark. 579, " *Doster* v. *Manistee Nat. Bank*, 339.
*Cohn v. Hoffman*, 50 Ark. 108, " " " " " " "
*Wormser* v. *Merchants' Nat. Bank*, 49 Ark. 119, distinguished. *Doster* v. *Manistee Nat. Bank*, 339.
*Ringgold* v. *Waggoner*, 14 Ark. 69, overruled. *Doster* v. *Manistee Nat. Bank*, 339.
*Stix* v. *Chaytor*, 55 Ark. 116, overruled. *Doster* v. *Manistee Nat. Bank*, 339.

CIRCUIT COURTS: See JUSTICES OF THE PEACE.

COLOR OF TITLE: See IMEROVEMENTS.

COMMON LAW:

presumed in force in Kansas. *St. Louis, I. M. & S. R. Co.* v. *Brown*, 295.

CONFLICT OF LAWS:

when foreign statute of limitation pleadable in tort. *Moores* v. *Winter*, 189.

where loan made. *Farmers' & Mechanics' Savings Co.* v. *Bazore*, 252.

loan valid where made is valid here. *Id.*

fact that loan is secured by land here, though made elsewhere, is immaterial. *Id.*

law governing right to recover and amount of recovery in personal injury suits determined by law of place of injury. *St. Louis, I. M. & S. R. Co.* v. *Brown*, 295.

common law presumed in force in Kansas. *Id.*

CONSPIRACY: See EVIDENCE.

CONSTITUTIONAL LAW:

constitution does not forbid creation of improvement districts embracing entire city or town. *Crane* v. *Siloam Springs*, 30.

CONTINUANCE:

not error to refuse continuance for cumulative evidence. *St. Louis & S. F. R. Co.* v. *Kilpatrick*, 47.

nor for absent and non-resident witness. *Id.*

amendment of complaint held to entitle defendant to continuance. *St. Louis, I. M. & S. R. Co.* v. *Power*, 142.

admissibility of counter-affidavits on application for. *Lane* v. *State*, 290.

good faith of application for, disproved how. *Id.*

refused when asked for absent witness, when. *Id.*

CONTRACTS: See HUSBAND AND WIFE; SCHOOLS AND SCHOOL DISTRICTS; CONFLICT OF LAWS; USURY; PUBLIC POLICY.

construction of agreement of prior lienor to accept rents. *Anderson* v. *Wainwright*, 62.

when party may recover for partial performance of. *Eastern Ark. Hedge Fence Co.* v. *Tanner*, 156.

when agreement to build practical railroad complied with. *Coffin* v. *Black*, 219.

non-performance of, held waived by pleading. *Id.*

when agreement to support another during life broken. *Salyers* v. *Smith*, 526.

meaning of contract is question of law. *Arkansas F. Ins. Co.* v. *Wilson*, 558.

CONVEYANCES: See DEEDS.

CORPORATION:

where stockholders of insolvent corporation direct apportionment of funds, directors cannot make preference. *Dozier* v. *Arkadelphia Cotton Mills*, 11.

CORPORATION—*Continued.*
as to when party aggrieved should object to illegal preference by insolvent corporation. *Id.*
railroad company liable on note signed by president though he had no express authority to sign, when. *Texarkana & Ft. S. Ry. Co.* v. *Bemis L. Co.*, 542.

COSTS:
motion in regard to, should be incorporated in bill of exceptions. *Rowland* v. *McGuire*, 320.
plaintiff liable for fee of infant defendant's guardian *ad litem*. *Id.*

COUNTY:
extent of liability of, for salary of court stenographer. *Franklin County* v. *McRaven*, 562.

COUNTY CONVICTS:
*per diem* allowance of. *State* v. *McNally*, 580.
act of April 12, 1899, relating to, held not retroactive. *Id.*

COUNTY SEAT:
sufficiency of petition asking for election to remove county seat. *Dunn* v. *Lott*, 591.

COURT STENOGRAPHER: See STENOGRAPHER.

COURTS: See PROBATE COURTS.

CRIMINAL LAW: See LARCENY; LIQUORS; EVIDENCE; ASSAULTS; COUNTY CONVICTS.
finding second indictment on same testimony, though irregular, is not ground for reversal. *Hampton* v. *State*, 266.
effect of failure to allege place of crime. *Id.*
indictment of agent of insurance company held uncertain. *Gage* v. *State*, 308.
when unnecessary to negative defenses in indictment. *State* v. *Mullins*, 422.

DAMAGES: See NEGLIGENCE; CARRIERS.
what recoverable for unlawful appropriation of land for railway purposes. *Memphis & L. R. R. Co., etc.*, v. *Organ*, 84.
when damages not recoverable for mental suffering. *Texarkana & Ft. Smith Ry. Co.* v. *Anderson*, 123.
damages recoverable of railroad for carrying passenger beyond station. *Id.*
measure of damages for destruction of growing trees. *St. Louis, I. M. & S. R. Co.* v. *Ayres*, 371.
how damages by fire mitigated. *Id.*
damages for deceased's pain and suffering and for pecuniary loss to children held not excessive. *St. Louis, I. M. & S. Ry. Co.* v. *McCain*, 377.
exemplary damages not given for taking of wife's goods under process against husband when. *Brown* v. *Allen*, 386.
damages recoverable for breach of agreement to support. *Salyers* v. *Smith*, 526.
damages recovered for physical suffering held not excessive. *St. Louis, I. M. & S. R. Co.* v. *Baker*, 531.

DEEDS:
effect of deed of separation as release of real and personal property. *Bowers* v. *Hutchinson*, 15.
conveyance of land by corporation for educational purposes with reversion in the stockholders creates reversion in corporation and is valid. *Pettit* v. *Stuttgart Normal Institute*, 430.
effect of sale of grantee's interest upon reversion. *Id.*
deed to grantee and bodily heirs conveys life estate to grantee with remainder in fee to children. *Wilmans* v. *Robinson*, 517.
remedy for failure of consideration. *Salyers v. Smith*, 526.

DEFINITIONS:
local. *Crane* v. *Siloam Springs*, 34.
local improvement. *Id.*
concerned in. *State* v. *Bach Liquor Co.*, 167.
interest. *Arkansas Fire Ins. Co.* v. *Wilson*, 559.
qualified electors. *Dunn* v. *Lott*, 592.
color of title. *White* v. *Stokes*, 188.
void. *Doster* v. *Manistee Nat. Bank*, 329.

DOWER:
statutory mode of relinquishing is exclusive. *Bowers* v. *Hutchinson*, 15.

ELECTION OF REMEDIES: See ACTION.

ELECTIONS:
sufficiency of petition asking for election for removal of county seat. *Dunn* v. *Lott*, 591.
who are qualified electors. *Id.*

EMINENT DOMAIN: See RAILROADS.

EQUITY: See INJUNCTION.
conclusiveness of chancellor's finding. *Irby* v. *Southern Bldg. & L. Assoc.*, 287.

ESTATE TAIL: See DEED.

ESTOPPEL:
procuring oneself to be indicted for obstructing the highway does not estop one from denying that it is a public highway. *Halliday* v. *Smith*, 310.
acceptance of part of amount apportioned on probated judgment will not estop creditor from collecting residue. *Jacoway* v. *Hall*, 340.

EVIDENCE: See WITNESSES; PRESUMPTION; BURDEN OF PROOF; JUDICIAL NOTICE.
objection to character of evidence waived by introducing similar evidence when. *St. Louis & S. F. Rd. Co.* v. *Kilpatrick*, 47.
when contents of writing proved by parol. *Id.*
written contract not changed or added to by parol evidence. *Anderson* v. *Wainwright*, 62.
general objection to reading of letter unavailing if any part admissible. *Id.*
in action against carrier to recover for wrongful expulsion of passenger by servant, evidence of previous acts of misconduct by servant inadmissible. *Id.*

EVIDENCE—*Continued.*
of unpleasant conditions in freight train held not admissible, when. *St. Louis, I. M. & S. Ry. Co.* v. *Power*, 142.
proof of sad plight of plaintiff's son inadmissible when. *Id.*
statement of supposed agent of defendant insurance company held inadmissible. *Pacific Mut. L. Ins. Co.* v. *Walker*, 147.
evidence held not sufficient to sustain conviction of larceny. *Sutton* v. *State*, 155.
nor to sustain conviction of selling liquor to minor. *State* v. *Bach Liquor Co.*, 163.
possession of negotiable note as evidence of title. *Hays* v. *Dickey*, 169.
held to sustain action of trespass when. *Moores* v. *Winter*, 189.
admissibility of declarations of co-conspirators. *Willis* v. *State*, 234.
effect of exclusion of incompetent evidence as to one of two defendants jointly tried. *Id.*
plaintiff's admission of infamy held to dispense with proof. *Cash* v. *Cash*, 278.
evidence as to marks of cattle alleged to have been stolen held to have been improperly rejected. *Leach* v. *State*, 314.
evidence of threats in aggravated assault held admissible only in mitigation. *Stricklin* v. *State*, 349.
when exclusion of, not prejudicial. *Lackey* v. *State*, 416.
evidence held to show sale of whisky by defendant, but not time of sale. *Dixon* v. *State*, 495.
exceptions to, waived by failure to reserve in motion for new trial. *St. Louis, I. M. & S. R. Co.* v. *Baker*, 531.
evidence in homicide held admissible as impeaching witness for prosecution and strengthening defense. *Magness* v. *State*, 594.

EXCEPTIONS: See APPEAL AND ERROR.

EXECUTIONS:
sheriff's deed not reformed where it does not appear that printed advertisements of sale were posted. *Russell* v. *Williamson*, 80.

EXEMPTION: SEE HOMESTEAD.

FEES: See OFFICES AND OFFICERS.

FEE-TAIL: See DEED.

FENCE: See MECHANIC'S LIEN.

FINDING:
of chancellor conclusive when. *Irby* v. *Southern Bldg. & L. Assoc.*, 287.
of jury conclusive when. *St. Louis, I. M. & S. Ry. Co.* v. *Osborn*, 399.

FORFEITURES: See INSURANCE.

FRAUD AND FRAUDULENT CONVEYANCES:
when deed by husband to wife fraudulent. *Morris* v. *Fletcher*, 105.
when improvement of wife's land by husband fraudulent. *Id.*
deed absolute on face, but intended as security, held not fraudulent when. *Davis* v. *Jones*, 122.
land fraudulently conveyed not subject to lien of judgment against grantor. *Doster* v. *Manistee National Bank*, 325.
effect of fraudulent conveyance. *Id.*

FRAUDS, STATUTE OF:
express trust cannot rest in parol. *Salyers* v. *Smith*, 526.

GAMING:
evidence held not to prove a dealing in margins to be. *Johnston* v. *Miller*, 172.

GARNISHMENT:
exemption of proceeds of sale of homestead from. *Wheeler* v. *Eatman*, 133.
practice in justice's court where garnishee fails to answer satisfactorily. *Nelson* v. *Blanks*, 347.

GOOD FAITH: SEE IMPROVEMENTS.

GUARDIAN AND WARD:
fee of infant defendant's guardian *ad litem* charged to plaintiff. *Rowland* v. *McGuire*, 320.

HABEAS CORPUS:
effect of discharge of principal in bail bond. *State* v. *Adler*, 469.

HOMESTEAD:
proceeds of sale of, exempt from garnishment. *Wheeler* v. *Eatman*, 133.
burden on claimant to show value when. *Pace* v. *Robbins*, 232.
is assets to pay debts when. *Huffstedler* v. *Kibler*, 239.
when probate court may order sale of. *Id.*

HOMICIDE:
exclusion of evidence not prejudicial when. *Lackey* v. *State*, 416.
evidence impeaching credit of state's witness and strengthening defendant's testimony held admissible. *Magness* v. *State*, 594.
instruction as to self-defense discussed. *Id.*

HUSBAND AND WIFE: See DOWER; MARRIED WOMEN; FRAUD AND FRAUDULENT CONVEYANCES.
when contract between, enforceable. *Bowers* v. *Hutchinson*, 15.
deed of separation held operative as release of personal property. *Id.*
wife not bound by pendency of suit against husband. *Boykin* v. *Jones*, 571.

IMPROVEMENTS: See TENANTS IN COMMON.
for local improvements in cities and towns, see MUNICIPAL CORPORATIONS.
must be antecedent litigation before occupant can claim. *White* v. *Stokes*, 184.
bond for title is not color of title on which to base claim. *Id.*
what is not good faith. *Id.*

INDICTMENT: See CRIMINAL LAW.

INFANT: See GUARDIAN AND WARD.

INJUNCTION:
will not lie to prevent cutting timber when. *Myers* v. *Hawkins*, 413.
will not lie against attachment suit if remedy at law is adequate. *Polk* v. *Gardner*, 441.
but not an unknown forfeiture. *Id.*

INSOLVENCY: See CORPORATION; ASSIGNMENTS FOR BENEFIT OF CREDITORS.
INSTRUCTIONS:
erroneous instruction cured by more explicit one when. *Kansas City, F. S. & M. R. Co.* v. *Becker*, 1.
no reversal for erroneous instruction which the verdict shows were not prejudicial. *Bittick* v. *State*, 131.
instruction as to effect of insurer's failure to notify assured of non-payment of order disapproved. *Pac. Mut. L. Ins. Co.* v. *Walker*, 147.
instructions should assume undisputed facts as true. *Id.*
instruction as to contributory negligence in emergency approved. *St. Louis, I. M. & S. Ry. Co.* v. *Touhey*, 209.
instruction as to view held properly refused. *Fitzgerald* v. *La Porte*, 263.
instruction as to reasonable doubt discussed. *Lackey* v. *State*, 416.
how incompleteness of court's charge remedied. *Id.*
instruction not objectionable as ignoring particular theory, when. *St. Louis, I. M. & S. R. Co.* v. *Baker*, 531.
instruction as to negligence of feeble passenger in alighting from train approved. *Id.*
appellant cannot complain of abstract instruction given at appellee's instance, if appellant asked instruction on same subject. *Id.*
when abstract instruction not prejudicial. *Id.*
defective instruction as to burden of proof cured by another when. *Id.*
instruction as to self-defense discussed. *Magness* v. *State*, 594.
INTEREST:
when administrator charged with. *Jacoway* v. *Hall*, 340.
INSURANCE:
statement of supposed insurance agent held inadmissible. *Pacific Mut. L. Ins. Co.* v. *Walker*, 147.
indictment of insurance agent for acting as agent for unauthorized company held defective in failing to allege that such company was an insurance company. *Gage* v. State, 308.
when insurer bound by "binding receipt" though policy not issued. *Phœnix Ins. Co.* v. *Hale*, 433.
benefit society held liable where member has paid dues though local lodge has been suspended. *United Brothers of Friendship* v. *Haymon*, 506.
policy of fire insurance not forfeited because insured made agreement to sell. *Arkansas Fire Ins. Co.* v. *Wilson*, 553.
courts do not favor forfeitures. *Id.*
asking for proof of loss waives known forfeiture. *Planters' Mut. Ins. Co.* v. *Loyd*, 584.
breach of warranty as to ownership of property insured a ground of forfeiture when. *Id.*
burden on insured to show waiver of forfeiture. *Id.*
statement as to ownership held not to put insurer on notice that title was not in insured. *Id.*
JUDGMENT AND DECREE:
judgment not a lien on land which judgment debtor has conveyed in fraud of creditors. *Doster* v. *Manistee National Bank*, 325.
judgment lien prior to unlevied attachment. *Goddard-Peck Grocery Co.* v. *Adler-Goldman Com. Co.*, 359.

LIMITATION OF ACTIONS—*Continued.*
what is not judicial sale. *Id.*
trustee will not acquire title to trust funds by lapse of time when. *Jacoway* v. *Hall*, 340.
actual possession necessary to set two-years' statute as to tax lands running. *Woolfolk* v. *Buckner*, 411.

LIQUORS:
evidence held not to sustain conviction of selling. *State* v. *Bach Liquor Co.*, 163.
sufficiency of indictment for unlawful sale of wine. *State* v. *Mullins*, 422.
evidence held to show sale of whisky by defendant, but not time of sale. *Dixon* v. *State*, 495.

LIS PENDENS:
wife not bound by pendency of suit against husband. *Boykin* v. *Jones*, 571.

LOCAL IMPROVEMENTS: See MUNICIPAL CORPORATIONS.

MARRIAGE: See SEPARATION.
presumption in favor of validity. *Cash* v. *Cash*, 278.

MARRIED WOMEN:
saving clause as to, in suits to recover land not repealed. *Memphis & L. R. R. Co., etc.*, v. *Organ*, 84.
may prefer husbands. *Phelps* v. *Wyler*, 97.

MASTER AND SERVANT:
form of action by employee against master for breach of statutory duty. *Kansas City, Ft. S. & M. Rd. Co.* v. *Becker*, 1.
railroad liable to employee for co-employee's negligence when. *Id.*
immaterial that contract of service was entered into in another state. *Id.*
employee may recover for concurring negligence of two co-employees when. *Id.*
engine inspector and fireman not fellow servants. *Id.*
scope of brakeman's employment discussed. *St. Louis & S. F. Rd. Co.* v. *Kilpatrick*, 47.
yard foreman a vice principal as to switch crew under his control. *St. Louis, I. M. & S. Ry. Co.* v. *Touhey*, 209.
risks assumed by servant. *Id.*
fireman and switchman held fellow servants. *St. Louis, I. M. & S. R. Co.* v. *Brown*, 295.
proof held to show negligence in railway in shunting car against a car which deceased was engaged in coupling. *St. Louis, I. M. & S. Ry. Co.* v. *McCain*, 377.
deceased held not guilty of contributory negligence, when. *Id.*
foreman of switch crew and member of another switch crew held not fellow servants. *Id.*

MAXIMS:
*vigilantibus, non dormientibus, aequitas subvenit.* *Doster* v. *Manistee Nat. Bank*, 329.

MECHANICS' LIEN:
hedge fence not an improvement within the mechanics' lien law. *Eastern Ark. Hedge Fence Co.* v. *Tanner*, 156.

MORTGAGES:
in indictment for removing mortgaged property failure to allege place of crime not material. *Hampton* v. *State*, 266.
lien may exist without record. *Id.*

MUNICIPAL CORPORATIONS:
constitution does not prohibit local improvement districts embracing entire city or town. *Crane* v. *Siloam Springs*, 30.
cities and towns may create improvement districts for purpose of constructing waterworks. *Id.*
construction of statute regulating creation of local improvements. *Id.*
construction of statute regulating cost of single improvement. *Id.*
local improvement defined. *Id.*, p. 37.

NEGLIGENCE: See BAILMENT; RAILROADS; MASTER AND SERVANT.
brakeman's push held proximate cause of passenger's injury. *St. Louis S. F. Rd. Co.* v. *Kilpatrtck*, 47.
instruction as to contributory negligence by employee in emergency approved. *St. Louis, I. M. & S. Ry. Co.* v. *Touhey*, 209.
when negligence for railway company to move damaged cars rapidly. *Id.*
switchman killed while coupling cars held not negligent, when. *St. Louis, I. M. & S. Ry. Co.* v. *McCain*, 377.
whether passenger negligent in alighting from train unaided is question for jury. *St. Louis, I. M. & S. R. Co.* v. *Baker*, 531.

NEW TRIAL:
not granted for surprise if no postponement asked. *St. Louis & S. F. Rd. Co.* v. *Kilpatrick*, 47.
party's contradictory statements not ground for, when. *Id.*
when not error to refuse, on ground of surprise. *State* v. *Bach Liquor Co.*, 163.
misconduct of juror not shown by testimony of fellow juror. *Hampton* v. *State*, 266.
exceptions not reserved in motion for, held waived. *St. Louis, I. M. & S. R. Co.* v. *Baker*, 531.

OFFICES AND OFFICERS: See SHERIFF; STENOGRAPHER.
*de facto* officer not entitled to fees. *Stephens* v. *Campbell*, 484.

PARTIES;
who may be made parties defendant to action against sheriff for trespass. *Moores* v. *Winter*, 189.

PATENT:
note given for patent right invalid when. *Wyatt* v. *Wallace*, 575.

PAYMENT:
transaction through collecting bank held to constitute payment of note. *Daniel* v. *St. Louis National Bank*, 223.

PERSONAL INJURIES: See DAMAGES; NEGLIGENCE; MASTER AND SERVANT.
venue of actions for, is transitory. *St. Louis, I. M. & S. R. Co.* v. *Brown*, 295.
law governing right and amount of recovery. *Id.*
damages recovered held not excessive. *St. Louis, I. M. & S. Ry. Co.* v. *McCain*, 377.

PLEADING: See ACTION; AMENDMENT.
answer held defective in form. *Bowers* v. *Hutchinson*, 15.
answer held to be in effect a plea of payment. *Hays* v. *Dickey*, 169.
answer held not to be waiver of objection to complaint. *White* v. *Stokes*, 184.
sufficiency of complaint against sheriff individually for deputy's trespass. *Moores* v. *Winter*, 189.
answer held to waive non-performance of contract. *Coffin* v. *Black*, 219.
when pleading amended to conform to proof. *Bank of Malvern* v. *Burton*, 426.
complaint amended by answer when. *Hess* v. *Adler*, 444.
when judgment modified to conform to complaint. *Id.*
asking affirmative relief by answer is irregularity which may be waived. *Cocke* v. *Clausen*, 455.
POSSESSION:
of negotiable note as evidence of title. *Hays* v. *Dickey*, 169.
holder of void tax title has no constructive possession. *Woolfolk* v. *Buckner*, 411.
PREFERENCE:
by insolvent corporation, see CORPORATION.
married woman may prefer husband. *Phelps* v. *Wyler*, 97.
PRESUMPTION:
that bill of exceptions contains true statement of evidence. *Daniel* v. *St. Louis Nat. Bank*, 223.
that marriage is legal. *Cash* v. *Cash*, 278.
presumption of evidence stronger than presumption of continuance. *Id.*
that common law is in force in Kansas. *St. Louis, I. M. & S. R. Co.* v. *Brown*, 295.
when statutory presumption of negligence in running train not overcome. *St. Louis, I. M. & S. Ry. Co.* v. *Ayres*, 371.
no presumption that restriction of carrier's liability in bill of lading is without consideration. *St. Louis & S. F. R. Co.* v. *Hurst*, 407.
when bill of exceptions is confused and contradictory. *Overton* v. *Lohmann*, 464.
of negligence in stock killing overcome when. *St. Louis, I. M. & S. R. Co.* v. *Landers*, 514.
PRIORITY: See JUDGMENTS AND DECREES.
PROBATE COURTS:
jurisdiction to order sale of decedant's homestead. *Huffstedler* v. *Kibler*, 239.
no jurisdiction to audit claim against administrator for heirs' attorney's fee. *Paget* v. *Brogan*, 522.
PUBLIC POLICY:
note given for compounding a felony is void. *Kirkland* v. *Benjamin*, 480.
QUESTIONS OF LAW AND FACT:
contributory negligence of passenger in alighting from train a question of fact. *St. Louis, I. M. & S. Ry. Co.* v. *Baker*, 531.
what a contract means is question of law. *Ark. F. Ins. Co.* v. *Wilson*, 558.
RAILROADS: See CARRIERS; MASTER AND SERVANT; NEGLIGENCE; TAXATION.
when possession by railway of right of way adverse. *Memphis & L. R. R. Co., as Reorganized*, v. *Oaden*. 84.

RAILROADS—*Continued.*
when action to recover for right of way barred. *Id.*
damages recoverable for unlawful appropriation of land. *Id.*
when agreement to build "practical railroad" complied with. *Coffin* v. *Black*, 219.
when railroad liable to build stock guard. *St. Louis, I. M. & S. Ry. Co.* v. *Hood*, 357.
when presumption of negligence in running of train not overcome. *St. Louis, I. M. & S. Ry. Co.* v. *Ayres*, 371.
width of right of way of St. Louis, Iron Mountain & Southern Ry. Co. *St. Louis, I. M. & S. R. Co.* v. *Miller County*, 493.
presumption of negligence in stock-killing overcome when. *St. Louis, I. M. & S. Ry. Co.* v. *Landers*, 514.
liable on note signed by president when. *Texarkana & Ft. S. Ry. Co.* v. *Bemis L. Co.*, 542.
RATIFICATION: See SCHOOLS AND SCHOOL DISTRICTS.
REAL PROPERTY: See LIMITATION OF ACTIONS; DEEDS.
REMOVING MORTGAGED PROPERTY: See MORTGAGES.
REPLEVIN;
when action of, lies. *Carpenter* v. *Glass*, 135.
REVERSION: See DEEDS.
ST. FRANCIS LEVEE DISTRICT: See LEVEE DISTRICT.
SALES OF CHATTELS:
title to goods sold but not segregated held not to pass. *Carpenter* v. *Glass*, 135.
SALES OF LAND: See VENDOR'S LIEN.
remedy for failure of consideration of deed. *Salyers* v. *Smith*, 526.
SCHOOLS AND SCHOOL DISTRICTS:
act April 1, 1891, requiring school district of Ft. Smith to sell lands at public auction held not to apply when. *DuVal* v. *School District of Ft. Smith*, 67.
contract by two directors at special meeting invalid when. *Springfield Furniture Co.* v. *School District No. 4 of Faulkner Co.*, 236.
such contract may be ratified. *Id.*
SEPARATION:
effect of deed of, as release of real and personal property. *Bowers* v. *Hutchinson*, 15.
SHERIFF:
liability for deputy's acts. *Moores* v. *Winter*, 189.
STATUTES: See LIMITATION OF ACTIONS; FRAUDS, STATUTE OF.
act providing for court stenographer and giving him salary construed. *Franklin County* v. *McRaven*, 562.
act April 12, 1899, relating to county convicts, held not retroactive. *State* v. *McNally*, 580.
Sand. & H. Dig., § 5336, held mandatory. *Crane* v. *Siloam Springs*, 44.
rule "*ejusdem generis*" applied. *Eastern Arkansas Hedge Fence Co.* v. *Tanner*, 159.
penal statute, in derogation of common right, strictly construed. *St. Louis, I. M. & S. R. Co.* v. *Hood*, 359.

STATUTES—*Continued.*

all the words of a statute must be retained and given their obvious and natural meaning, if it be possible to do so without doing violence to the legislative intent, as gathered from the whole act. *Franklin County* v. *McRaven*, 566.

STATUTES CITED:

ACTS OF CONGRESS:
May 2, 1890 . . . . . 301

REV. STAT. U. S.:
§ 752 . . . . . 477
753 . . . . . 477
763 . . . . . 477

CONST. U. S.:
art. 6 . . . . . 302

CIVIL CODE:
§ 57 . . . . . 324

CONST. 1868:
art. 1, § 18 . . . . . 504
5, 48 . . . . . 504
12, 3 . . . . . 241

CONST. 1874:
art. 2, § 8 . . . . . 166
13, 3 . . . . . 593
17, 12 . . . . . 5, 394
19, 27 . . . . . 34
amdt. 2 . . . . . 592

SANDELS & HILL'S DIGEST:
§ 3 . . . . . 282
4 . . . . . 282
74 . . . . . 282
75 . . . . . 283
493 . . . . . 579
494 . . . . . 579
495 . . . . . 579
496 . . . . . 579
600 . . . . . 520
700 . . . . . 520, 521, 522
899 . . . . . 581
945 . . . . . 591, 592
953 . . . . . 591, 592
1476 . . . . . 350
1498 . . . . . 488
1634 . . . . . 176
1635 . . . . . 176
1643 . . . . . 421
1675 . . . . . 607, 609
1676 . . . . . 609
1812 . . . . . 168
1814 . . . . . 168
1816 . . . . . 168
1868 . . . . . 272, 273
2075 . . . . . 497
2082 . . . . . 274
2193 . . . . . 418, 419
2213 . . . . . 419

SANDELS & HILL'S DIG.—*Continued*:
2269 . . . . . 273
2871 . . . . . 501
2909 . . . . . 166
2978 . . . . . 56, 57
2979 . . . . . 56
3049 . . . . . 327
3095 . . . . . 83
3328 . . . . . 489
3335 . . . . . 563
3472 . . . . . 329
3480 . . . . . 530
4204 . . . . . 327
4402 . . . . . 158
4420 . . . . . 349
4794 . . . . . 463
4798 . . . . . 364
4815 . . . . . 95, 322
4818 . . . . . 320
4819 . . . . . 411
4851 . . . . . 425
4867 . . . . . 423
5158 . . . . . 491
5204 . . . . . 491
5321 . . . . . 40
5322 . . . . . 34, 40, 42
5323 . . . . . 42
5324–5331 . . . . . 42
5332 . . . . . 40, 41
5333–5336 . . . . . 42
5692 . . . . . 299
5769 . . . . . 429
5917 . . . . . 460
6206 . . . . . 394
6213 . . . . . 53
6238–9 . . . . . 358
6248 . . . . . 384
6249 . . . . . 5, 384
6250 . . . . . 5
6352 . . . . . 513
6467 . . . . . 501
6468 . . . . . 501, 503
6475 . . . . . 505
6544 . . . . . 505
7371 . . . . . 493

OTHER ACTS:
Act April 28, 1873 . . . . . 95
" Feb. 3, 1875 . . 271, 272
Acts 1877, p. 74 . . . . . 581
" 1881, p. 150, § 5 . . . . 582
" 1883, p. 106, §§ 1–4 . . 187
" 1883, p. 126, § 3 . . . . 582
Act April 1, 1891 . . . . 67, 70
" Feb. 23, 1893 . . . . . 215

STATUTES CITED—*Continued.*

OTHER Acts—*Continued.*
" Mch. 14, 1893 . . . 11, 14
" April 12, 1893 . . 41, 14
Acts 1893, p. 173, § 1 . . . 415
Act April 19, 1895 . 102,103,104
Acts 1897, p. 92 . . . . . 443
Act Mch. 6, 1897, §1 . . . 563
" Mch. 6, 1897, §§ 2–4 . . 564

OTHER Acts—*Continued.*
" Mch. 6, 1897, § 5 564,566,567
" Mch. 6, 1897, § 6 565,567,568
" Mch. 6, 1897, §§ 7–8 . 565
" June 26, §§ 1–4 . 423,425
Act Mch. 29, 1899, §§ 1–3 424,425
Acts 1899, p. 180, § 3 . . . 583

STENOGRAPHER:
liability of county for salary of court stenographer. *Franklin County* v. *McRaven*, 562.

STOCK GUARD: See RAILROADS.

SUBROGATION:
right of creditor to avail himself of security held by surety. *Whitehead* v. *Henderson*, 200.

SURPRISE: See NEW TRIAL.

TAXATION: See LIMITATION OF ACTIONS.
for local improvement taxes, see MUNICIPAL CORPORATIONS.
railway stockyards assessed by board of railway commissioners. *St. Louis, I. M. & S. Ry. Co.* v. *Miller County*, 498.
railroad lands not used for railroad purposes assessable by local assessor. *Id.*
land which have never been assessed assessable how. *Id.*
wife may acquire tax title in opposition to husband's title, when. *Boykin* v. *Jones*, 571.

TENANCY IN COMMON:
right of co-tenant in possession, when sued for partition, to offset improvements against rents received. *Cocke* v. *Clausen*, 455.

TENDER:
tender of part of claim with demand of receipt in full held bad. *Jacoway* v. *Hall*, 340.

TIMBER AND TREES:
measure of damages for destruction of growing trees. *St. Louis, I. M. & S. R. Co.* v. *Ayres*, 371.
injunction will not lie to prevent timber cutting, when. *Myers* v. *Hawkins*, 413.

TRESPASS: See INJUNCTION.
liability of sheriff for deputy's acts. *Moores* v. *Winter*, 189.
who may be sued for sheriff's trespass. *Id.*
venue in actions of. *Id.*
sufficiency of proof. *Id.*
exemplary damages allowed for taking stranger's goods under process when. *Brown* v. *Allen*, 386.

TRIAL: See INSTRUCTIONS; VIEW.
when misconduct of prosecuting attorney and his assistant in their arguments cured by withdrawal from jury. *Henshaw* v. *State*, 365.
refusal to permit counsel to argue that defendant's color should not prejudice his cause held error. *Magness* v. *State*, 594.
when such error not prejudicial. *Id.*