ERRATUM:

For the head note in *Woolfolk v. Buckner*, 67 Ark. 411, substitute the following:

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, where the holder of the legal title has also remained in actual possession of a portion of the land; the constructive possession of so much of the land as is unoccupied being in the holder of the legal title. (Page 412.)

ARKANSAS REPORTS

Vol. 68

CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

FROM MARCH, 1900, TO FEBRUARY, 1901

T. D. CRAWFORD
REPORTER

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1901

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,[1] - -	ATTORNEY GENERAL.
GEORGE W. MURPHY,[2] - -	" "
P. D. ENGLISH, - - -	CLERK.
J. H. CAMPBELL, - - -	DEPUTY CLERK.

1. Term expired January 18, 1901.
2. Term began January 18, 1901.

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

Opinion delivered March 10, 1900.

1. DEATH BY WRONGFUL ACT—SURVIVAL OF ACTION.—For a death caused by the wrongful act of another, a cause of action survives if deceased lived after the act constituting the cause of action, whether conscious or not. (Page 3.)

2. SAME—DAMAGES.—A verdict of $4,000 in an action by an administrator to recover for pain and suffering endured by deceased will not be allowed to stand if the interval of conscious suffering between the injury and death was not shown to have extended beyond a moment. (Page 4.)

3. ACTION BY PARENT FOR CHILD'S DEATH—CONTRIBUTORY NEGLIGENCE.—A parent, suing in his own behalf, cannot recover for the negligent killing of his infant child if he was guilty of negligence contributing to such killing. (Page 7.)

4. CONTRIBUTORY NEGLIGENCE—WHEN QUESTION FOR JURY.—Whether a parent, in permitting his child six years old to go visiting unattended, when he knew that she would have to cross the railroad tracks where she was killed, and that the train was overdue, without having specially cautioned her to avoid the trains, was guilty of contributory negligence, is a question for the jury. (Page 8.)

Appeal from Woodruff Circuit Court.

HANCE N. HUTTON, Judge.

STATEMENT BY THE COURT.

On the 9th day of June, 1896, Marie Dawson, the daughter of plaintiff, M. L. Dawson, while crossing the railway track of the St. Louis, Iron Mountain & Southern Railway Company at Haynes station, was struck by a locomotive, run over, and killed. She was between six and seven years of

age, and had started on a visit to some companions who lived in the portion of the town across the railway from her home. She was seen on the track a short distance in front of the engine, but no witness saw her at the time she was struck. After the train passed over her, she was discovered lying on the track. She had been pushed along the track, and looked like a bundle of rags. One of her legs was cut off above the knee, and a portion of the entrails protruded. One witness testified that, with these exceptions, the body was not much mutilated, though he said the skull was broken. Those who reached her first testified that she did not move, and did not appear to be conscious, though she was seen to breathe. Some one called her, "Marie! Marie!" but she never spoke. She gave a couple of gasps, and in a moment or so was dead. This action was brought by the plaintiff as administrator of the estate of Marie Dawson. There were two causes of action set up in separate paragraphs of the complaint. One sought a recovery in behalf of her estate for the pain and suffering caused her by the injury. The second paragraph sought a recovery in behalf of plaintiff, and for his use and benefit, as her father and next of kin. The jury found in favor of plaintiff, and assessed the damages on the first count, for pain and suffering, at $4,000, and at $500 on the second count. The railway company appealed.

Dodge & Johnson, for appellant.

The judgment for pain and suffering endured by deceased is not sustained by the evidence. Since the personal representation can recover only such damages as were recoverable by the deceased, there can be no recovery, on this ground, except when the death was not instantaneous; and the burden was on the plaintiff to show that such was the case. 9 Cush. 108, 110, 112; 125 Mass. 93; 1 Cush. 475; 133 Mass. 507, 509; 53 N. W. 750; 53 Ark. 125; 3 Am. & Eng. R. Cas. (N. S.) 373; 69 Miss. 425; 64 Miss. 693; 6 Cold. 45; 31 Am. & Eng. R. Cas. 170. Even if death in this case was not instantaneous, since there was never an interval of *conscious* pain and suffering, there could not be a recovery of more than merely nominal damages. 125 Mass. 90; 134 Mass. 499, 504; 145

Mass. 283, 285; 9 Bush, 728; 11 Bush, 384; 12 So. 954; Sedg. Dam. (3 Ed.) 453, 455, 554; 3 Comst. 489, 493; 11 L.T. (N.S.) 598; 11 Am. & Eng. R. Cas. (N. S.) 614; 145 U. S. 345; 145 Mass. 261; 14 N.E. 106; 56 Fed. 246; 24 Ia. 515; 125 Mass. 90; 134 Mass. 499. The verdict and judgment in favor of the next of kin is contrary to law and without evidence to sustain it. It was erroneous to make the loss of the value of the child's services the measure of the pecuniary loss to the next of kin. 53 Ark. 127. The father was guilty of contributory negligence in allowing the child to go upon the track. 36 Ark. 41.

McCulloch & McCulloch, for appellee:

The evidence is sufficient. The decedent's cause of action survives if he lived for even a single moment after the accident. On this point, and to the effect that the pain and suffering proved was such as warranted a verdict, see 68 Ia. 470 (overruling 24 Ia. 515); 71 Ia. 490; 72 *id.* 201; 30 Conn. 184; 134 Mass. 499; 145 Mass. 281; 11 Allen, 34; 2 Heisk. 580 (overruling 6 Cold. 45); 138 Mass. 87; 64 N. H. 471. The doctrine of imputed negligence is not followed in this state. 63 Ark. 171. That contributory negligence of the parent does not bar a recovery by the administrator, see 78 Ia. 396; 88 Va. 267; Beach, Contr. Neg. 131a.

RIDDICK, J., (after stating the facts.) We think the evidence sufficient to support the finding of the jury that the employees of the company in charge of the train were guilty of negligence causing the death of plaintiff's child. We are also of the opinion that a right of action survived to the personal representative; for the survival of the action depends upon whether the injured child lived after the act constituting the cause of action, and it is not material whether she was conscious or not. If she lived after her right of action was complete, this right, which she possessed, passed by virtue of the statute to her personal representative. *Davis* v. *Railway*, 53 Ark. 127; *Hollenbeck* v. *Berkshire Rd. Co.*, 9 Cush. 478; *Mulchahey* v. *Washburn Car Wheel Co.*, 145 Mass. 281.

But when the administrator sues for the benefit of the

estate to recover for the pain and suffering endured by the deceased, the period for which damages can be assessed ends with the life of the deceased. *Davis* v. *Railway*, 53 Ark. 127. The administrator can recover only such an amount as the deceased might have recovered had she been miraculously restored to life and health at the moment of her death. If plaintiff seeks to recover more than nominal damages, he must show that the deceased, as a result of the injury, underwent conscious pain and suffering. The cases, with few exceptions, hold that, for injury causing instantaneous death, no recovery can be had for pain and suffering. And the same rule is applied when, though life remains a few moments, unconsciousness instantly follows the injury; for in such a case no conscious suffering is shown. Some of the cases go further, and hold that, although a moment's interval of conscious suffering be proved, if this be a mere incident to the death, no recovery can be had for pain and suffering. This question was considered in the case of *The Corsair*, 145 U. S. 335. In that case the person for whose pain and suffering damages were sought was a passenger on the tug Corsair, which was negligently run against the bank of the Mississippi river, and sunk in about ten minutes after the collision. It was contended in that case that the deceased suffered great mental and physical pain and shock, and endured the tortures and agonies of death. "But," said the court, "there is no averment from which we can gather that these pains and sufferings were not substantially contemporaneous with her death, and inseparable as a matter of law from it. Had she suffered bodily wounds and bruises, from the result of which she lingered and ultimately died, it is possible that her sufferings during her illness would give a separate cause of action; but the very fact that she died by drowning indicates that her sufferings must have been brief, and, in law, a mere incident to her death. Her fright for a few minutes is too unsubstantial a basis for a separate estimation of damages." *Kennedy* v. *Standard Sugar Refinery*, 125 Mass. 90; *Moran* v. *Hollings*, 125 Mass. 93; note to *Brown* v. *Electric Ry. Co.*, 70 Am. St. Rep. 667.

There are however cases seemingly in conflict with this

decision. The supreme court of New Hampshire, in a case where damages were sought for death occasioned by drowning, held that the circumstances showing death by drowning in muddy, stagnant and slimy water were such that "the jury might legitimately infer, not only that the death was not instantaneous, but that it was attended with both physical and mental pain and suffering." *Clark* v. *Manchester*, 64 N. H. 471. Of course, these cases turn, to some extent, upon the statute giving the right of action; for at common law there was no right of action for injuries causing death. By a strange fiction the extremity of the wrong precluded the redress. *Goodsell* v. *Hartford R. Co.*, 33 Conn. 55. But whichever view we should adopt as to death by drowning, or when some brief interval of conscious suffering before death was shown, we do not think a judgment for four thousand dollars on the first count of the complaint can be sustained, under the facts of this case; for no appreciable interval of conscious suffering was proved, or, if any was proved, it is not shown to have extended beyond a moment. The burden of showing this suffering was on plaintiff, but we see nothing in the evidence to establish it, unless it may be inferred from the fact that the train was not running rapidly. No witness saw the child at the time she was struck. No one heard any cry or groan, or testified to any act such as might indicate conscious suffering. Those who saw her after the train passed say that she did not move or appear to be conscious. After they reached her she breathed once or twice, and was dead.

Counsel for appellee contends that she was not killed or rendered unconscious by the engine, but by the cars behind the engine, and this, no doubt, was the view taken by the jury in estimating the damages. But plaintiff's case is based on the theory that the child was struck and run over by the engine, and, as no witness saw her after she was struck, until the entire train had passed, the argument that she received her mortal injuries, not from the engine, but from the cars behind, is based on conjecture only. It is pure guess work, and not sufficient to sustain the judgment.

The cases decided by the Supreme Court of Iowa, and

cited by counsel for appellee on this point, do not conflict with this conclusion. Those cases hold that a right of action survives to the administrator of the person injured, though the deceased survived the injury only for a moment. But in that state no damages are allowed for pain and suffering unless the action is commenced by the injured party himself. If the action is brought by the administrator, compensation for pecuniary loss to his estate is alone considered, and the courts then hold that bodily pain and suffering in no manner affect the estate, and that in such actions there is no basis for such damages. *Dwyer* v. *Railway Company*, 84 Iowa, 479. So in this state an action will lie for the benefit of the next of kin to recover damages suffered by them on account of the wrong, though the death be instantaneous. But, when plaintiff seeks to recover for pain and suffering borne by deceased, there must be evidence to show such suffering, before a judgment can be sustained on that ground. In assessing damages for wrongs causing death, the law does not undertake to find a sum equal to the value of life to the deceased, or for which the person killed would have voluntarily suffered death. That would be impracticable; for to most persons life is a priceless gift, which would not be surrendered for the value of an entire railroad paid to their estate. Nor, in allowing a recovery for pain and suffering, does it aim to fix a sum that would lead one willingly to endure such pain; for few would consent to have a leg crushed off, and bear the loss for many times the sums allowed. *Union Pacific Ry. Co.* v. *Milliken*, 8 Kas. 647. "In the absolute sense," said the Supreme Court of Georgia, "damages equivalent to all the assets of a railroad company might not be excessive, nor even adequate, for a serious personal injury resulting from its negligence; but in any practical sense the damages in either case must be graduated, so that there may be railroads left in existence, and so that all like injuries occasioned by their use may be compensated in some reasonable degree." *Western & Atl. R. Co.* v. *Young*, 83 Ga. 512. The injury being irreparable and already suffered, the jury, after hearing the evidence, are allowed to assess a sum which in their judgment they deem a reasonable compensation,

having regard for the severity and duration of the pain and suffering. On this paragraph of the complaint, the only damages sought are for pain and suffering, and this is not shown to have lasted longer than an instant. The jury in such cases are given great latitude, for courts do not undertake to measure pain and suffering; but their judgment is not altogether uncontrolled, and, when such questions are brought before the judge on motion for new trial, in determining whether the proper bounds have been exceeded, he must, to a large extent, be governed by the practice of courts in such cases, as shown in the decision.

In view of these decisions, all of which, so far as we know, hold that in cases of instantaneous death nothing can be recovered for pain and suffering, the judgment on the first count, even if the evidence justifies more than nominal damages, must be regarded as excessive, and probably allowed by the jury on the theory argued here that the child continued to suffer conscious pain and mental agony after the engine had passed over her, of which, as we have stated, there is no evidence. The argument on this point, and the amount of the verdict, convince us that the jury based their assessment of damages on a view of the facts not supported by the evidence, and we think it should be set aside.

On the second count, brought by the father as the personal representative of the deceased, and for his benefit as next of kin, the jury assessed the damages for injury sustained at the sum of $500. The evidence showed that the deceased was a bright, healthy child, between six or seven years of age, and, in view of this and other circumstances in proof, we think, if defendant is liable, the verdict was moderate. But on the trial the court refused to instruct the jury that the plaintiff could not recover on this count if it was shown that he was guilty of negligence contributing to his injury. While the negligence of the parent will not be imputed to the child, and the administrator of its estate, if dead, may recover damages for pain and suffering caused by negligence of defendant, notwithstanding the parent himself was guilty of negligence contributing to the injury, yet the rule is different when the

parent sues, not for the estate, but for his own benefit. In such a case the rule that no one can recover damages for any injury caused by his own negligence applies. If this rule is sound when applied to cases where one sues for an injury to himself, there are stronger reasons to support it when he asks damages for injuries to another. Love of life and dread of pain would usually restrain one from subjecting himself to injury for the purpose of basing thereon an action for damages, even if contributory negligence did not bar a recovery. But it might be different with regard to injuries to others, and it would be specially unwise and dangerous to remove this restraint in such cases. We therefore think that the instruction asked should have been given.

The child was too young to be guilty of negligence, and we do not say that the father was guilty in that regard. But he allowed his young child to go visiting when he knew she would have to pass the railway tracks. The train at that time was overdue, and might be expected at any moment. She was allowed to go unattended, and without having been specially cautioned to avoid the trains. Under these circumstances, it was a question for the jury to say whether he was guilty of contributory negligence, and the instruction asked by appellant on this point should have been given.

For these reasons, the judgment on the whole case must be reversed, and a new trial ordered.

PLANTERS' MUTUAL INSURANCE ASSOCIATION *v.* SOUTHERN SAVINGS FUND & LOAN COMPANY.

Opinion delivered March 24, 1906.

1. INSURANCE—ACTION ON POLICY—MATURITY.—An action on a policy of fire insurance payable to a mortgagee, to the extent of his interest, may, after a loss, be brought before the mortgage debt is due, where the policy is payable within ninety days after notice and proof of loss, and provides that no action thereon shall be sustained unless commenced within six months after the loss. (Page 17.)

2. SAME—WAIVER OF CONDITION.—Stipulations in a policy of fire insurance, held as collateral security to a mortgage, that "assured shall not be entitled to demand or recover any part of the amount insured until he, she, or they shall have enforced and collected such portion of the debt as can be collected out of the primary security," and that, if the insurer shall claim that as to the mortgagor no liability for the loss exists, the insurer may pay the mortgage debt and take an assignment of the mortgage, are waived if the insurer denies liability to either the mortgagor or mortgagee. (Page 18.)

3. ASSIGNMENT OF POLICY—CONSIDERATION.—An agreement between the insurer and the assignee of a policy of fire insurance, which holds a mortgage on the property insured, that, as to the latter's interest, the policy "shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured" is based upon a good consideration, where the assignee agreed to pay for all increased risks, and to give notice of any change of ownership and increase of hazard which should come to its knowledge. (Page 19.)

4. USURY—WHEN NO DEFENSE.—It is no defense to an action on a policy of fire insurance that the policy was assigned as collateral security for a usurious mortgage debt. (Page 21.)

Appeal from Clay Circuit Court, Western District.

FELIX G. TAYLOR, Judge.

J. W. House for appellant:

The court erred in refusing to instruct the jury that the action by appellee company could not be maintained if the debt to it was not due at the commencement of the suit. 17 Ark. 442; 21 Ark. 186; 21 Ark. 499; 42 Ark. 163. No subsequent act or occurence will cure the defect, if the suit is prematurely brought. 22 Ark. 572; 14 Ark. 427; 42 Ark. 163. The question as to whether a suit is prematurely brought may be raised either by demurrer or on trial, under the general issue. 21 Ark. 186. The clause in the policy, providing that it shall be void upon failure to pay the note for which it was issued, conveyed notice to appellee of the existence of said note and of the requirement that it be paid; and the failure to pay this note is not such an "*act or neglect of the mortgagor*" as is contemplated in that clause of the policy which provides that "*this insurance, as to the interest of the mortgagee or trustee only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, etc.*"

It was the duty of the appellee to see that this note was paid, and the failure to pay it rendered the policy void for want of consideration. 47 Am. St. Rep. 147; 4 Joyce, Ins. § 3304; 87 N. Y. 67; 99 N. Y. 37; 17 Pa. St. 253; 68 Ia. 578; 135 Mass. 251, 34 S. W. 460; 35 S. W. 300; 49 S. W. 1032; 34 S. W. 333. The court erred in sustaining the motion to strike out appellant's plea of usury. The indorsement on the policy was only a contingent assignment of what, if anything, might become due under the contract. 2 May, Ins. p. 1021, § 425; 49 N. W. 1033. Appellant merely became a surety or guarantor to pay, in the event of loss, whatever Nance might legally owe and hence it can plead usury in the transaction alleged to have given rise to the debt from him. 32 Ark. 362; 27 Am. & Eng. Enc. Law, 950; 44 N. H. 227; 27 Neb. 401; 13 Ind. 457; 39 Ind. 107; 22 Ala. 262; 9 Paige, 197; 46 S. W. 67.

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

The appellant having denied its liability solely upon the ground that the premium note was unpaid, it waived the defenses that the suit was premature, or that appellee had failed to exhaust the primary security. 53 Ark. 494; 63 N. W. 860; 65 N. W. 236; 35 Atl. 75; 51 N. W. 987; 61 N. W. 740; 49 N. W. 217. The appellant, having assumed the payment of the debt of Nance, can not plead usury. 32 Ark. 347; 62 N. W. 857. The failure of Nance to pay the note at maturity was only a neglect or an act of his, which could in no way defeat appellee, under the provisions of the policy. 73 N. Y. 141; 55 N. Y. 343; 99 N. Y. 36.

BATTLE, J. B. F. Nance and the Southern Savings Fund & Loan Company instituted an action against the Planters' Mutual Insurance Association upon an insurance policy executed by the defendant to Nance on the 15th day of April, 1896, in which it insured a certain dwelling house of Nance for $1,500 against fire for the term of three years. They alleged in their complaint that Nance, on the 9th of June, 1896, executed to Charles B. Stark, trustee for the Southern Savings Fund & Loan Company, a mortgage on the property upon which the dwelling house was located; that the defendant, on the 2d day

of May, 1896, entered into a contract with the Southern Savings Fund & Loan Company to the effect that, in case any loss should occur under the contract for insurance, the defendant would pay to it, as mortgagee or beneficiary, as its interest might appear; that Nance was indebted to the loan company in the sum of $975; that the dwelling house was destroyed by fire on the 28th of January, 1897; that Nance forthwith gave notice of the loss, and would have proved the same, had the plaintiffs not been prevented by the written refusal of the defendant to pay either of them.

To this complaint the defendant filed an answer, the substance of which we give in the language of the abstract of the appellant, as follows: "It admitted the contract of insurance with Nance, but it denied the execution of said mortgage to the appellee, the Southern Savings Fund & Loan Company, and alleged that the said Nance executed a mortgage on the 9th day of June, 1896, to Chas. B. Stark, of the city of St. Louis, as trustee. It admits it entered into a contract with the appellee, the Southern Savings Fund & Loan Company, to the effect that, in case any loss should accrue under said contract of insurance, it should pay the said appellee as its interest might appear. The defendant denies that the sum of $975 is due from the said Nance to the said appellee, and it says that, if the said Nance was indebted to the said company in any sum whatever by virtue of said mortgage, it was not due and payable at the time of the commencement of this suit, nor was it due and payable at the time of the filing of said complaint, and it says that the said appellee could not recover in said cause: First. Because the said debt from said Nance to said appellee, if any, was not due and payable. Second. Because it expressly stipulated in said contract of insurance No. 1340 "that there was a premium note for $73.75 due December 1, 1896, which said note at the time of said alleged fire and loss was past due and unpaid, and under the terms of said policy this contract was thereby rendered null and void." Third. Because it expressly provided in said insurance contract "that, should any loss or damage accrue to the property insured in such case—that is, where a note, or any part thereof, remains past due and unpaid at the

time of said loss or damage,—then said contract shall be null and void, and if any loss accrue to the property insured, and said note for $73.75 was past due and unpaid at the date of such alleged loss, then said contract of insurance is null and void," and the plaintiff is not entitled to recover on the same; and it further states that the said appellee at the time of such alleged loss had knowledge of the fact that said note of $73.75 was due and unpaid long before the time of said alleged loss; that said insurance contract, by reason thereof, was null and void, and that no recovery could be had thereon. Fourth. The defendant also alleges that the plaintiff, the Southern Savings Fund & Loan Company, cannot maintain this action because said policy of insurance sued on was assigned to it merely as collateral security on the mortgage on said property and the real estate on which it was situated, and it was expressly provided in said insurance contract 'that, should any loss or damage accrue to said property insured, the mortgagee shall not be entitled to demand or recover any part of the amount until he, she, or they have enforced and collected such a portion of the debt as can be collected out of the primary security to which this contract is collateral,' and the defendant says that said Southern Savings Fund & Loan Company has not exhausted its security, and that the value of the real estate upon which it holds said mortgage is largely greater than the amount claimed by it under this contract, and is amply sufficient to protect said plaintiff, the Southern Savings Fund & Loan Company, against any loss by reason of said fire. Fifth. The defendant, further answering, states that the note and mortgage executed by B. F. Nance to the plaintiff, Southern Savings Fund & Loan Company, on the 9th day of June, 1896, and the mortgage executed by B. F. Nance to said Chas. B. Stark as trustee of the same date, and to secure said note, being the note and mortgage upon which the plaintiff sues on herein, are both usurious and void, and both said note and mortgage were executed in this state, and are Arkansas contracts, and are to be construed in accordance with the laws of this state; that in said note and mortgage the said B. F. Nance agrees to pay the said plaintiff,

the Southern Savings Fund & Loan Company, interest at the rate of $5 per month on $1,000, which amounts to 6 per cent. per annum, and he also agrees to pay on said note and mortgage a premium of $6 per month on the $1,000, which amounts to 7½ per cent. per annum on said amount, thus making interest charged on said note and mortgage amount to 13½ per cent. per annum; that the monthly payment of $6 as a premium mentioned in said note and mortgage is only an additional interest charged, and is a mere sham, device and subterfuge to cover up the charge of usury; that the said Southern Savings Fund & Loan Company unlawfully and corruptly demands, exacts and receives of and from the said Nance interest on $1,000 at the rate of 13½ per cent. per annum, and is therefore usurious and void, and the said company is not entitled to recover thereon."

The plaintiffs filed a demurrer to so much of the answer as sets up usury, which was sustained by the court. After this they filed a supplemental complaint, in which they alleged that the loan company had collected $250 upon the mortgage by accepting a deed to the mortgaged premises at that price, and had thereby exhausted all security for the payment of the debt of Nance, except the policy sued on; and the defendant answered and denied these allegations.

A jury was impaneled to try the issues in the case; and the plaintiffs introduced and read as evidence the policy sued on, which contained the following clauses: "Planters' Mutual Association of Arkansas, * * * by this contract of insurance, in consideration of note for $73.75 due December 1, 1896, and the stipulations herein contained, do insure B. F. Nance against loss or damage by fire * * to the amount of fifteen hundred dollars as follows: On his dwelling house, $1,500, situate on lots Nos. 10, 11 and 12, block No. 401, Corning, county of Clay, Arkansas, * * * and the said association hereby agrees to make good unto the said assured, his executors, administrators and assigns, all such immediate loss or damage, not exceeding the amount of the sum insured, nor the interest of the insured in the property, nor to exceed three-fourths of the cash value of any building or other property, at

the time of loss, as shall happen by fire * * to the property above specified from the fifteenth day of April, 1896, at 12 o'clock noon, to the fifteenth day of April, 1899, at 12 o'clock noon, except such portions of the above-mentioned period of time as this association shall hold against the assured any promissory note past due and unpaid, in whole or in part, given by the assured for the assessment charged for this contract or any part thereof, and during such portion of time this contract shall be null and void, and so continue until such promissory note is fully paid. * * * The amount of loss or damage to be estimated according to the actual cash value of the property at the time of the loss, and to be paid in ninety days after notice and due and satisfactory proof of the same shall have been made by the assured and received at the association's principal office at Little Rock, Ark., in accordance with the terms and provisions of this contract hereinafter named. * * * When a membership contract is issued upon the interest of a mortgagee, or other creditors, or is held as collateral security to a mortgage or any other debt or demand, the assured shall not be entitled to demand or recover any part of the amount insured until he, she, or they shall have enforced and collected such portion of the debt as can be collected out of the primary security to which this contract is collateral. * * * It is mutually agreed that no suit or action against this association upon this contract shall be sustainable in any court of law or equity, unless commenced within six months after the loss or damage shall occur. And if any suit or action shall be commenced after the expiration of said six months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding."

And they also read as evidence an indorsement upon the policy as follows:

"Policy No. 1340, in the name of B. F. Nance. Loss if any payable to the Southern Savings Fund & Loan Company of St. Louis, Mo., mortgagee, or beneficiary or assigns as hereinafter surviving. It is hereby agreed that this insurance, as

to the interest of the mortgagee or trustee only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy. It is further agreed that the mortgagee or trustee shall notify said company of any change of ownership or increase of hazard which shall come to his knowledge, and that every increase of hazard not permitted by the policy to the mortgagor or owner shall be paid for by the mortgagee or trustee, on reasonable demand, according to the established scale of rates for the use of such increase of hazard during the then current year. It is also agreed that whenever the company shall pay the mortgagee or trustee a sum for loss under this policy, and shall claim that, as to the mortgagor or owner, no liability thereof exists, it shall at once be legally subrogated to all the rights of the mortgagee or trustee under all the securities held as collateral to the mortgage or trust debt to the extent of such payment, or at its option may pay to the mortgagee or trustee the whole principal due or to grow due on the mortgage or trust deed, with interest, and shall thereon receive a full assignment of the transfer of the mortgage or trust deed, and all other securities held as collateral to the mortgage or trust debt, but no such subrogation shall impair the right of the mortgagee or trustee to recover the full amount of his claim. The foregoing provisions and agreements shall take precedence over any provision or condition conflicting therewith and contained in said policy. This clause is attached to and made a part of said policy from the 2d day of May, 1896.

"In witness whereof the duly authorized agent of the said insurance company has hereunto set his hand of said day.

[Signed] "M. MILES, General Agent."

They read the bond of Nance to the loan company, and the mortgage executed to secure the same. The bond was in the sum of $1,000, and contained the following recital and covenant: "Whereas the said B. F. and Lettie J. Nance are the owners and holders of one share of the capital stock of said Southern Savings Fund & Loan Company; and whereas, at the

request of said B. F. and Lettie J. Nance, the said company had loaned the sum of one thousand dollars ($1,000) to said B. F. and Lettie J. Nance, * * * the said B. F. and Lettie J. Nance, in consideration of such loan, * * * do covenant and agree that they will henceforth well and truly pay to said company, its successors or assigns, on or before the 15th day of each month, the sum of fifty cents as a monthly installment on each one hundred (dollars) of stock above named, and also on the same day the sum of five ($5) dollars as monthly interest on said loan, and also the monthly sum of six ($6) dollars as premium on said loan; such payments to continue until each full share of said stock shall be worth on the books of said company the sum of one thousand dollars, according to the by-laws of said company; and that then the sum so expended and loaned as above set out by said company shall be repaid to it by the absolute surrender to and cancellation by said company of said share of stock." The mortgage was executed to secure the performance of the covenants in the bond, and for that purpose conveyed to a trustee certain lots and the dwelling house thereon, which was insured by the defendant. It provided "that if at any time default should be made in the payment of dues, premium, interest, fines, or either of them, and the same shall remain unpaid for a space of six months after payment thereof shall fall due, or if the balance due by the obligors in said bond shall be allowed to accumulate until it equals the sum of six months' dues, interest and premium, then the whole principal debt shall, at the option of said company, or its successors, immediately become due and recoverable, and payment of said principal sum and all interest thereon, as well as the dues, premiums and fines then due, may be enforced and recovered at once by sale of the property described in the mortgage. The mortgage also provided that "B. F. Nance and wife will, during the continuance of the mortgage, keep the building insured in some responsible insurance company or companies in a sum satisfactory to said company, and keep the policy or policies issued thereon constantly assigned to the party of the third part, or to its successors or assigns, as its or their interest in that behalf

may appear, for further securing said loan; and any and all moneys which shall be collected under such policy or policies, less expense of collecting thereof, shall be applied towards payment of said principal debt mentioned in said bond, unless said improvements and buildings be replaced."

Evidence was adduced tending to prove the following facts: The dwelling house insured was totally destroyed by fire on the 29th of January, 1897. In due time the plaintiffs notified the defendant that the house was destroyed. It responded, and refused to pay anything as indemnity for the loss, because Nance failed to pay his note for the premium due for the insurance, and because the same was due and unpaid at the time of the loss. The house was reasonably worth the sum of $2,000. Nance, during the pendency of this action, conveyed the lots described in the mortgage to the loan company, and was credited on the debt secured by the mortgage with the sum of $250. This was the price agreed upon, and the credit for the same was the consideration of the deed, and was all the lots were reasonably worth. The amount of the indebtedness of Nance to the loan company, which was secured by the mortgage, and left unpaid after the credit for $250, was $908.70. There was no security for the payment of this sum, except the policy sued on. Nance paid the sums he agreed to pay monthly on the mortgage debt until December, 1896, or January, 1897, when he made the last monthly payment.

The court refused many requests of the defendant for instructions to the jury, and gave many directions over its objections.

The jury returned a verdict in favor of the loan company for $787.47, and found in favor of the defendant as to the right of Nance to recover; that is, Nance was not entitled to recover anything on the policy. Judgment was rendered in favor of the loan company for the $787.47, and the defendant appealed.

Appellant insists that the judgment against it should be reversed because this action was commenced before the debt of Nance to the loan company was due and payable. This debt was to be satisfied by monthly payments. The mortgage pro-

vided that, if default should be made in these payments and should continue for six months, the whole debt should become due. The last monthly payment was made in December, 1896, or January, 1897, about two or three months before the commencement of this action, which was instituted on the 27th of March, 1897. No default in the payment of the monthly dues occurred six months before that time. But this did not fix the time within which this action should be brought. The amount due on the policy on account of the loss by fire should have been paid, according to its terms, within ninety days after notice and due and satisfactory proof of the loss should have been made by the assured and received at appellant's office at Little Rock, Arkansas. It was mutually agreed by the parties to the policy that no action upon the contract of insurance should be sustainable in any court of law or equity unless commenced within six months after the loss or damage should occur. The policy fixed the time when the right of action accrued, and the time within which it should be commenced.

Appellant also insists that this action was prematurely instituted, because the policy sued on provides that "the assured shall not be entitled to demand or recover any part of the amount insured until he, she, or they shall have enforced or collected such portion of the debt as can be collected out of the primary security to which this contract is collateral," and that was not done in this case. That is true. But, in the indorsement made upon the policy at the time it was formally assigned to the loan company, it was agreed that whenever the appellant "shall pay the mortgagee or trustee a sum for loss under" the policy sued on, "and shall claim that, as to the mortgagor or owner, no liability therefor existed," it may "pay to the mortgagee or trustee the whole principal due or to grow due on the mortgage or trust deed, with interest, and shall thereupon receive a full assignment of the mortgage or trust deed, and all other securities held as collateral to the mortgage or trust debt." Appellant claimed that it was not liable to the mortgagor, Nance, for any loss under the policy. According to its agreement with the loan company, it had the option to pay the whole mortgage debt, and to have the mortgage assigned to it. Until it deter-

mined whether it would exercise this right, the loan company could not foreclose the mortgage after the loss by fire without violating its contract. But it renounced this right when it denied its liability under its contract to compensate the appellees for the destruction of the dwelling house by fire, and waived those conditions made necessary by the contract of insurance for appellees to perform in order to vest them with the right to sue upon the policy. The denial made the performance of the conditions unnecessary, and was virtually a notice to the assured that they need not perform them as a prerequisite to the right to sue, and was a waiver of the ninety days in which appellant could pay the loss. *German Ins. Co.* v. *Gibson*, 53 Ark. 494. All that could have been accomplished by the foreclosure of the mortgage has been done during the pendency of this action. By agreement of the parties, the mortgage debt has been credited with the value of the property held as security for the payment of the same. It does not appear that appellant has been prejudiced by the course pursued. There is no complaint that it has been, and there is no reversible error on this ground.

The parties to the policy agreed that it should be null and void for such portion of time as any note given for the assessment "charged for the insurance should remain" past due and unpaid, in whole or in part, and should so continue until the note should be fully paid. The note executed by the assured for the assessment charged was "past due and unpaid" at the time the dwelling was destroyed by fire. Appellant insists that it was relieved by this failure from liability for the loss. Was it relieved?

Whenever the owner sells property against the loss or damage of which he has been insured, and assigns his policy to the purchaser, "and this is made known to the insurer, and is assented to by him, it constitutes a new and original promise to the assignee to indemnify him in the manner and upon the conditions his vendor was insured; and the exemption of the insurer from further liability to the vendor, and the premium paid for insurance for a term not yet expired, are a good consideration for such promise, and constitute a new and valid

contract between the insurer and the assignee." *Wilson* v. *Hill*, 3 Met. 66. In that case he will not be affected by the subsequent acts or neglect of his assignor. If the transfer be made by a mortgagor to a mortgagee of the insured premises as a collateral security, without any new consideration moving from the assignee to the insurer, the assignee can only recover where his assignor could have done so, had no assignment been made. "Such an assignment does not convert the policy into a contract of indemnity to the mortgagee. It is the interest of the mortgagor alone that is covered by it. The assignee takes it subject to all the express stipulations contained in the policy, and he cannot recover in case of subsequent breach" by the mortgagor of the conditions which render the policy void. *State Mutual Fire Insurance Company* v. *Roberts*, 31 Pa. St. 438; *The Buffalo Steam Engine Works* v. *The Sun Mutual Insurance Company*, 17 N. Y. 401; *Illinois Mutual Fire Insurance Company* v. *Fix*, 53 Ill. 151; *Edes* v. *Hamilton Ins. Co.*, 3 Allen, 362; *Swenson* v. *Sun Fire Office*, 68 Texas 461; 1 Biddle on Insurance, §§ 321 and 322, and cases cited. But where the assignment is based upon a contract between the insurer and the assignee, which is supported by a new and distinct consideration, such contract will govern. *Foster* v. *Equitable Ins. Co.*, 2 Gray, 216; *Hastings* v. *Westchester Ins. Co.*, 73 N. Y. 141; *Davis* v. *German Insurance Co.*, 135 Mass. 251.

In the case before us, Nance, the mortgagor, in consideration of a loan of a certain sum of money, agreed to have the dwelling which was included in the mortgage insured, and to assign the policy to the loan company. He did so. At the time of the assignment the appellant and the loan company entered into the contract which was indorsed upon the policy. In consideration that the loan company would notify appellant of any change of ownership or increase of hazard which should come to its knowledge, and pay for every increase of hazard not permitted by the policy to the mortgagor, it was agreed that the interest of the loan company in the insurance could not be effected by any act or neglect of the mortgagor. At the time this agreement was made the dwelling was in-

sured for about three years, subject to the power of the insurer reserved in the policy to cancel the insurance at any time upon written notice to the assured. Nance had executed his note for the premium charged. The policy was dated the 15th of April, 1896, and the note which was the consideration upon which it was based matured in the following December. At the time the policy was assigned it had not matured, and the insurer, having the power to cancel the policy, deemed it a sufficient consideration. In addition to it, the loan company agreed to pay for all increased risks, and to give notice of any change of ownership and increase of hazard which should come to its knowledge. This notice was important, because it afforded the appellant means of protecting itself to some extent by the exercise of the reserved right to cancel. In view of these facts, we think that the contract of the appellant which was indorsed upon the policy was based upon a valuable consideration, and was valid and binding. Both parties were satisfied with the consideration, and no reason is shown why it was not sufficient. The right of the loan company to recover in this action was not, therefore, affected by the non-payment of the note of Nance at the time of the loss.

The demurrer to so much of appellant's answer as pleaded usury was properly sustained. There was no usury in the contract for insurance or its assignment. Appellant was not surety or guarantor for the payment of the debt contracted by Nance with the loan company, and had no right to plead usury against such debt. *Warner* v. *Gouverneur*, 1 Barb. 36; *Stevens* v. *Reeves*, 33 N. J. Eq. 427.

Judgment affirmed.

HUGHES, J., absent.

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EX PARTE TIMPSON.

Opinion delivered March 24, 1900.

COUNTY CONVICTS—HIRING OUT.—Under Acts 1899, p. 179, §§ 2, 4, providing that in case no contract for the working of county prisoners shall be made by the county court prior to the second Monday of January of any year, such court or judge thereof must make an order for working the prisoners on the public improvements of the county, and shall make an appropriation therefor, *held* that if no contract for the working of such prisoners was made prior to the second Monday in January, nor any appropriation for working the prisoners on public improvements, the county court had authority after the second Monday in January to hire out the prisoners temporarily. (Page 24.)

Certiorari to Lonoke Circuit Court.

GEO. M. CHAPLINE, Judge.

George Sibley, for petitioner.

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

HUGHES, J. The petitioner, Timpson, was brought before the circuit judge of Lonoke county on a writ of habeas corpus, upon the statement in his petition that he was illegally restrained of his liberty. The evidence in the case showed that Timpson had been convicted of unlawfully carrying a pistol, and had been fined $50, and, in default of the payment of the fine and costs, had been committed to the county contractor for prisoners for Lonoke county to be by him worked according to law for a period of time not to exceed one day for each 75 cents of said fine and costs, and that thereupon the prisoner was remanded to the custody of the sheriff, and afterwards delivered to the contractor for the county, said John M. Gracie. The answer to the petition of the prisoner, by Gracie the contractor and the prosecuting attorney, shows that the contract for the hiring of the prisoners of the county was made on the 27th of January, 1900. Wherefore the petitioner's counsel contends that the contract was unlawful, and that the county judge had no authority or power to make a

contract for hiring out the convicts, only before the second Monday of January; that, if not hired out before the second Monday of January, he could hire them out to a contractor afterwards. After hearing the case, the circuit judge remanded the prisoner to the contractor, and he appealed.

The petitioner relies upon act CXI of the Acts of 1899, approved April 12, 1899 (p. 179 of said acts), to support his contention. Section 2 of said act, relating to the matter under consideration, is as follows: "That section 932 of Sandels & Hill's Digest be amended so as to read as follows: "In the event that the county court or judge thereof shall order said prisoners to be worked on roads, bridges, levees or other county improvements, as provided in the preceding section, it shall be the duty of the court or judge thereof to appoint some suitable person as superintendent; * * * and in case no contract as provided in sections 910 and 931 is made by the county court or judge prior to the second Monday of January of any year, then the said court or judge thereof must make the order as provided in section 931 for working the prisoners on the public roads, bridges, levees and other public improvements of the county." Counsel for the petitioner contends this provision is imperative. If this be granted, it does not appear that the county court or judge may not hire out the prisoners after he has made the order to work them on the public roads, bridges, levees and other public improvements of the county. Bids for the labor of convicts of Lonoke county had been invited, and there were no offers prior to the 2d Monday of January. No appropriation had been made to defray the necessary expenses of working the prisoners or convicts of the county upon the public improvements of the county, and, without an appropriation made at the proper time, they could not have been so worked. Section 4 of the act under consideration provides that "the county court at its annual meeting for making appropriations shall make the necessary appropriations to carry out the purposes of this act; *provided*, that no more than ten thousand dollars ($10,000) shall be appropriated for one year." In section 933 of Sandel's & Hill's Digest it is provided that "said

superintendent (of prisoners to work on public improvements), with the permission of the county court or judge thereof, may temporarily contract with any person or corporation for the labor of said prisoners," etc. This shows that the prisoners, by contract in writing, may be hired out temporarily after the order of the county court to have them worked on roads and bridges shall have been made.

The object of all these statutes about hiring out to labor and working county prisoners on roads, bridges, etc., is to keep them from being burdensome to the county, and in this case we think the action of the county judge was legitimate and proper under the law.

Judgment affirmed.

BATTLE, J., dissents.

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PEOPLES' BUILDING, LOAN & SAVINGS ASSOCIATION v. MORRIS.

PEOPLES' BUILDING, LOAN & SAVINGS ASSOCIATION v. QUARLES.

Opinion delivered March 24, 1900.

BUILDING & LOAN ASSOCIATION—MATURITY OF STOCK.—A certificate of shares in a building and loan association recited that the shareholder held 10 shares therein of $100 each, and, in consideration of her compliance with the conditions therein and in its articles of association and by-laws, the association agreed to pay her $100 for each of said shares "at the end of five years from the date hereof or at maturity." The articles of association provided that whenever the dues paid and dividends declared should equal the par value of the shares, the shareholder should be entitled to receive the par value of the shares; that 66 monthly installments of dues were all that should be required of a member; and that, if at the termination of the period of 66 months the stock should not have matured, the holder might withdraw the amount standing to the credit of the certificate, or allow the certificate to remain till it should be matured by subsequent dividends. The prospectus of the association recited that it was the only one that wrote a definite contract, specifying the exact number of payments required from members. There was evidence that the association's agent made representations to the shareholder, when he made his application, that his stock would mature in five years. In an action by the shareholder

to cancel the mortgage given to secure a loan of $1,000 from the association after she had paid 66 monthly installments of dues, but before the dues paid and dividends declared equaled the par value of the shares, *held* that plaintiff was not entitled to the relief sought. (Page 27.)

Appeal from Benton Circuit Court in Chancery.

EDWARD S. MCDANIEL, Judge.

Also appeal from Washington Circuit Court in Chancery.

EDWARD S. MCDANIEL, Judge.

STATEMENT BY THE COURT.

The first case is an appeal by the appellant from a judgment entered in Benton county at the spring term of the Benton circuit court, chancery side thereof, 1897. The suit was brought by Carrie M. Morris to cancel a certain deed of trust which the appellee, together with her husband, had executed on certain lands to secure the fulfillment of a bond in the sum of $2,000 made to the said association at this time to secure the payment of $1,000 borrowed from said association by said appellee; the same being an advancement upon ten shares of the stock of the said association,—maturity value, $100 per share. Appellee alleged that the said stock had matured according to its terms, and prayed cancellation of the mortgage, and for all relief. Appellant association answered, denying the allegations of appellee's complaint, and, by way of cross complaint, alleged that the conditions of the bond had been broken, and asked a decree of foreclosure. To the cross complaint the appellee answered, denying its allegations. The court found that the appellee had the right to discharge the said obligation with sixty-six monthly payments of $18.34 each, and twenty-two quarterly payments of $2.50 each, but that the said appellee had only made sixty of such payments, and gave judgment to the appellant upon its cross complaint in the sum of $119.83, and decreed the same a lien upon the property mentioned in the mortgage. From this judgment appellant excepted, and prayed an appeal which was granted. The facts, as disclosed by the evidence, are that on April 1, 1891, there was issued to R. H. Morris a certificate of stock in the Peo-

ples' Building, Loan & Savings Association of Geneva, N. Y., and that upon the 11th of May of the same year the assignment of the said stock to Carrie M. Morris, wife of the said Richard H., was approved in writing by the secretary of the said association, and that upon the same she borrowed $1,000, executing a bond and trust deed,—she having begun payment upon the stock some time prior to receiving the loan,—and that she paid 60 months, but that the stock at that time was not matured. The proof shows that the actual value of this stock at the time this cause was submitted was $523.72, though the learned chancellor held that the appellee was entitled to have her mortgage discharged upon the payment of 66 monthly installments. The various questions raised are treated as they arise in the discussion of the subject hereafter. In the case from Washington county of Quarles and Quarles, appellees, the facts are that they secured a loan from the association of $1,000, and took a similar certificate of stock, and paid upon their loan for 60 months; and the court held that these payments discharged the obligation.

Nathan B. Williams and *W. L. Stuckey*, for appellant.

The contract in this case is made up of the articles of association, the by-laws and the printed conditions on the back of the certificate, besides the application for and certificate of membership. 52 N. Y. 131; 39 Super. Ct. Rep. 73; 66 N. Y. 533; 94 N. Y. 104; 83 Hun, 92; 92 Hun, 572. The articles of association form the measure of its powers. Thompson, Bldg. Ass. 516; Cook, Stock, etc. § 492; 4 Wheat. 518; Endlich, Bldg. Ass. §§ 65, 232; 20 Ark. 443; 38 Oh. St. 349; 19 Pa. St. 144; Thompson, Bldg. Ass. 18; 11 Oh. St. 96; 73 Ala. 325; 89 N. Y. 467. Appellee's certificate simply conferred upon her the rights of a stockholder, subject to the laws of the corporation. 128 N. Y. 537, 545. Appellee was not entitled to receive payment for her shares in full until the payments made by her upon the same, together with the dividends declared and credited ratably to the stock, shall have brought same to its face value. 140 N. Y. 549; 2 Am. & Eng. Enc. Law, 608. Appellee's contract was made with reference to existing laws of the association, and his stock must be brought to

maturity thereunder before it is due in full. 21 Ark. 85; 25 Ark. 261; 28 Ark. 387, 394. The mere estimate that the stock would mature in five years is not a binding agreement to that effect. 92 Hun, 572; Beach, Cont. 708; 34 Ark. 323; Cook, Stock, etc. § 12, p. 20. The contract was a New York contract, and is governed by the laws of that state. 92 Hun, 572; 30 S. W. 39; 33 S. W. 211. The court should have followed the rule laid down in *Roberts* v. *American Bldg. & Loan Association*, 62 Ark. 572.

J. A. Rice, *C. M. Rice*, *W. S. Pollard*, and *Watkins & Walker*, for appellees:

There is nothing in the law of New York prohibiting the corporation from making a contract that stock will mature in a definite time, and the corporation would not be in a position to plead *ultra vires* if there was. 78 N. Y. 159; 24 Law. Ed. Sup. Ct. U. S. Rep. 291; 16 *ib.* 176; 16 *ib.* 498; 22 N. Y. 258; 83 Ill. 137; 55 Ill. 413; 27 Am. & Eng. Enc. Law, *ultra vires*. The contract is void for usury. Const. Ark. art. 19, § 13; Sand. & H. Dig., §13. The contract is governed by Arkansas laws. 33 Ark. 647, 648; Bish. Cont. §§ 1391–5; 27 Law. Ed. Sup. Ct. U. S. Rep. 106. A married woman's executory contract is not valid. 2 Am. & Eng. Enc. Law, 616; 39 Ark. 357; 84 Pa. St. 211. There having been no competitive bidding for the loan; but, same being made simply at a premium priced by the association, it was not a building and loan transaction, but a loan. This being so, it is void for usury, whatever law be applied. Endl. B. &. L. Ass. (1 Ed.) § 394; *ib.* (2 Ed.) 511; 20 C. L. J. 384, S. C. 42 Oh. St. 655; 35 L. R. A. 244n.; 102 Pa. St. 41; 2 N. Dak. 82; 50 N. E. 998. A foreign corporation can make and enforce its contracts here only through comity; and no contract in violation of Arkansas laws will be so enforced here. 2 Beach, Corp. 411; Webb, Usury, § 267; 115 N. C. 825; 50 N. E. 998; 34 S. W. 236; 41 *ib.* 874; 47 Am. St. Rep. 847; 32 S. W. 262; 97 Ala. 417.

HUGHES, J., (after stating the facts.) The question to be determined in these cases is, did 60 or 66 payments by the shareholders respectively discharge their obligations under the

contracts they had entered into with the association, and entitle them to discharge, as held by the circuit court? This association was organized under and in accordance with chapter 122 of the laws of New York for 1851. Its purposes were similar to those of building and loan associations generally. Upon application of the party desiring to become a member, he or she was made such by the action of the board of directors of the association, if the application was accepted, and thence became interested in the business and affairs of the association,—a participant ratably in the profits and losses, and governed by its articles of association and by-laws. Upon the acceptance of the application for membership in these cases, the following certificate of shares was issued to the applicant, to-wit: "Certificate of Shares. The People's Building, Loan & Savings Association, Geneva, New York. Number, 4,988. Shares 10. This is to certify that Mrs. Allie L. Quarles, of Fayetteville, State of Arkansas, is hereby constituted a shareholder in the People's Building, Loan & Savings Association, incorporated under the laws of the State of New York, and holds ten shares therein, of one hundred dollars each; and in consideration of the entrance fee, together with agreements and full compliance with the terms and conditions printed on the back of this certificate, and the articles of association and by-laws adopted by the said association, all of which are hereby referred to and made a part of this contract, the said People's Building, Loan & Savings Association agrees to pay said shareholder, or her heirs, executors, administrators, or assigns, the sum of $100 for each of said shares at the end of five years from the date hereof or at maturity, or, in case of the death of the holder of this certificate before the expiration of said term, then a sum of money equal to the amount of monthly installments paid on said shares, together with all dividends accrued thereon; or the holder of the within certificate may surrender the same to the association at any time after two years from the date hereof, and receive therefor a certificate of paid-up shares for as many shares as the amount credited to such certificate will purchase at the rate of $60 per share, all of which are payable in the

manner and upon the conditions set forth in the articles of association and by-laws of the association, and terms and conditions printed on the back of this certificate. Given under the seal of said association at Geneva, N. Y., this 1st day of April, 1891. [Signed] N. B. Covert, President. [Signed] D. F. Atwood, Secretary. (L. S.)" The certificate of shares provides that the payments which are therein provided for are "payable in the manner and upon the conditions set forth in the articles of association and by-laws of the association, and terms and conditions printed on the back of this contract." Among the terms and conditions printed on the back of the certificate are the following: "First. The shareholder or person who is to pay all installments under this certificate, agrees to pay or cause to be paid to the association a monthly installment of one dollar for each share mentioned in the certificate on or before the last Saturday of the third, sixth, ninth and twelfth month of each year." The second provides for payment of a quarterly installment of 25 cents for each share on or before the third, sixth, ninth and twelfth months of each current year. The third provides for a fine of 10 cents for failure or neglect to pay for first month, 10 cents for second, and 20 cents for each month's neglect thereafter while the policy continues. "Sixth. No agent is authorized to change or alter this certificate, or to waive forfeiture, or to extend credit, or to grant permits, or to alter notices, proofs, or any other matters; and the association assumes no other obligation than contained in its printed literature." "Eighth. The articles of association, by-laws, terms, and conditions, together with the application, are to be construed together as the contract between the shareholder and the association." Article 17, § 1, of the original articles of association, adopted December 22, 1877, which were in force when the certificate in this case was issued by the association, provides: "Whenever the dues paid and dividends declared shall equal the par value of the shares held by any shareholder, said shares of stock shall be canceled, and notice of such cancellation shall at once be given to the shareholder, who shall be entitled to receive upon the return of his or her certificate of stock the par value of the shares named.

in his or her certificate of stock, and no more; and said association shall not be liable to said stockholder for any dividends or interest on said stock so matured, after the stock has matured, and notice of cancellation thereof has been given to said stockholder."

The appellee contends that the language of this certificate, that the association will pay $100 to the shareholder, his heirs or assigns, "at the end of five years, from the date hereof [thereof] or at maturity," bound the association to pay absolutely at the expiration of five years, provided the shareholder had paid the dues, etc., as required, whether the payments, with the dividends, matured the shares or not. The appellee, in her complaint, sets out that representations to this effect were made to her by the agent of the association, and exhibits with her complaint the prospectus of the company, containing this language: "This association is the only one that writes a definite contract, specifying the exact number of payments that will be required from members on each share of stock, and takes a mortgage for a definite period. Bear this in mind, and read carefully the certificate we issue." This has some appearance of a trick to catch the unwary, and seems to have succeeded. There was some evidence that the agent made representations to the shareholder, when he made his application, that his stock would mature in five years, and that he would not have to make payments for a longer time than five years, and that it might mature sooner. But from the reading of the articles of association, the by-laws, and the certificate of shares, which together constitute the contract, it seems that this language of the prospectus and of the agent must be considered merely estimation, it may be of an extravagant character, upon the part of the company, that might have led the applicant to a wrong conclusion in the premises; i. e. that his contract was one for a definite number of payments. The contract is a written contract, and the writing in which it is contained, properly construed, will govern the contract, to the exclusion of any outside oral matters or colloquiums between the parties, because the parties made, or are presumed to have made, the writing the repository of their final agreement. Article 17, § 2, of the

articles of the association, as amended and adopted on December 2, 1893, provides that: "Sec. 2. In class A, sixty-six monthly installments are all that shall be required of members in said class; in class B, ninety-six monthly installments are all that shall be required of members in said class; in class C, one hundred and fifty-six monthly installments are all that shall be required of members in said class. And when the amount of these installments paid into the loan fund, together with the accumulation thereon, shall amount to the par value of such share, they shall be deemed matured. If at the termination of these respective periods the respective classes of stock shall not have matured, the holders of such shares shall have the option of withdrawing the amount standing to the credit of such certificates on the books of the association at the home office, or allowing such certificates of shares to remain until the same shall be matured by reason of subsequent dividends." Under this section the appellee, after making 66 monthly payments, had the option of withdrawing the amount standing to the credit of her certificate of shares on the books of the association, or of allowing her certificate of shares to remain until matured by reason of subsequent dividends, or, if she desired not to suspend payments after 66 payments had been made, she might continue the annual payments until her stock matured, or reached the par value of $100 per share. The certificate of shares does not provide for the maturity of the stock at the end of five years, nor does any provision of the articles of the association or its by laws; and, according to these, the stock must be brought to maturity, or the par value of $100 per share, before the shareholder is entitled to payment, or to have her security canceled or satisfied.

The appellee alleges in her complaint that she was induced by the false and fraudulent representations of the agent of the association, and the language of the prospectus issued by the association and delivered to her, to take stock in said association, and said representations by said agent that he was authorized to say that a definite number of payments were all that would be required to mature the stock, and that it would mature in five years, and might in

less time, but not longer, and that she believed said statements and relied upon them. But in the complaint there is no offer to rescind, and no relief is asked on the ground of fraud. But the complaint alleges that she had complied with the contract, and had paid all she was required by it to pay, and asks on that account to be discharged, and that the security she had given be canceled. It is evident that the appellee had not brought her shares of stock to maturity, or to the par value of $100 each, according to the contract, construed in the light of the certificate of shares, the terms and conditions on the back thereof, the articles of association, and the by-laws of the association. The decree of the circuit court is reversed, and the cause is remanded, with directions to the chancellor to ascertain what is due by the appellee on her certificate of shares, giving her credit for all payments, and charging her with her proportionate part of the losses of the association, and to render a decree for the balance due on the shares of stock, and to ascertain the present value of her stock according to the rule laid down in *Roberts* v. *Am. Bldg. & Loan Association*, 62 Ark. 572.

WOOD and RIDDICK, JJ., dissent.

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

Opinion delivered March 24, 1900.

RAILWAY—STOCK-KILLING.—The *prima facie* case of negligence where stock was killed by a train is not overcome by testimony of the engineer that he was looking ahead and saw the cow step on the track in front of the engine, and that she got on so suddenly that he could not do anything to keep from striking her, as it does not appear that he could not have seen her danger before she came upon the track in time to have used the necessary precautions to avoid killing her. (Page 33.)

Appeal from Miller Circuit Court.

JOEL D. CONWAY, Judge.

STATEMENT BY THE COURT.

This is a suit for damages growing out of the alleged negligent killing of a cow. The proof showed that the cow was struck about 8 o'clock at night by a passenger engine which was provided with a "fine electric headlight." The track was straight at the place where the witness for the plaintiff said she saw the cow killed. She was looking "right down the track, and saw the engine as soon as it came in sight." Witness said there was nothing in the way; the cow was right between witness and the engine, going across the track; was not looking for the cow, but saw her about the time the engine struck her. The engine was right on the cow when the whistle blew. The engineer testified that he struck a cow at the place testified to in the case. He was looking ahead, and saw the cow step on the track in front of the engine. She got on so suddenly he could not do anything to keep from striking her.

Samuel H. West and *Jno. T. Sifford*, for appellant.

Where the uncontradicted testimony of the engineer shows he was keeping a lookout, the statutory presumption of negligence in cases of stock killing is rebutted. 39 Ark. 413; 40 Ark. 336; 41 Ark. 161; 47 Ark. 321; 53 Ark. 96; 51 S. W. 319.

WOOD, J., (after stating the facts.) The *prima facie* case of negligence resulting from the killing was not overcome by the proof of the engineer, nor the witness for plaintiff who saw the killing. The track was straight, and the engine had a fine head light. The engineer says he saw the cow step on the track in front of the engine, but he does not say that he did not see her upon the right of way, or near to the track before she came upon the same. If he did see the cow, and she was so near as to indicate danger to her, he was negligent in not sounding the alarm, slowing up, or doing whatever else was necessary to frighten the cow from the track. If he could have seen her before she came upon the track in time by the use of the stock alarm, or other necessary precautions, in the exercise of ordinary care, to have avoided injuring her, and failed to do so, he was still guilty

of negligence. These propositions are not rebutted by his evidence, nor by the plaintiff's witness, because she says she was not looking for the cow. For aught that appears to the contrary, the cow was or might have been seen by the engineer before she came upon the track in time to have avoided killing her by the use of the ordinary precautions.

Affirmed.

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

Opinion delivered March 24, 1900.

CARRIER—EXCESSIVE CHARGES—PENALTY.—Sand. & H. Dig. §§ 6254, 6256, making it unlawful for railroads to collect from the owner or consignee of freight a greater sum for transporting the same "than is specified in the bill of lading," and imposing a penalty for refusing to deliver freight upon payment or tender of the freight charges due, as shown by the bill of lading, does not apply to a company not a party to the bill of lading, which has not carried the goods under the bill of lading, and has neither authorized nor accepted it. (Page 37.)

Appeal from Hempstead Circuit Court.

RUFUS D. HEARN, Judge.

STATEMENT BY THE COURT.

The plaintiffs, Arthur A. and John S. Gibson, are merchants and dealers in drugs, wines and liquors at Hope, Arkansas. On the 14th day of September, 1895, they had four barrels of whiskey shipped to them from Louisville, Ky. The whiskey was consigned to A. A. Gibson & Son, Hope, Arkansas, via Little Rock, but the bill of lading only stated the freight charges from Louisville to Little Rock, and guarantied the rate between those points to be $1.20 per barrel, weight of 4 barrels 1,600 pounds, subject to correction.

The whiskey arrived at Little Rock over the Little Rock & Memphis Railroad, and soon afterwards the agent of that

line notified Gibson & Son, by letter, of that fact, stating that the charges to Little Rock were $6, and that the Iron Mountain road would not accept freight unless charges to Little Rock were prepaid. Gibson replied that the guarantied rate, as shown by the bill of lading, was $1.20 per barrel to Little Rock, and offered to remit at that rate. To this letter the agent of the Little Rock & Memphis Company replied, asking him to send the bill of lading, and saying he would endeavor to adjust the same. Gibson did not do this, but carried the bill of lading to the local agent of the defendant company at Hope, told him of the shipment, that the goods were at Little Rock, and tendered him $12.64, that being at the rate guarantied from Louisville to Little Rock on 1,600 pounds, with the addition of the local rate of the defendant company from Little Rock to Hope. The agent declined to accept it, but said that he would telegraph the agent of his company at Little Rock. Gibson did not at this time inform the local agent at Hope that the Memphis & Little Rock Company had demanded a higher freight charge than specified in the bill of lading, and the agent at Hope did not know of the controversy on that point. So, without referring to that controversy, of which he was ignorant, he telegraphed to the agent of his company as follows: "A. A. Gibson & Son have four barrels whiskey in L. R. & M. frt. depot. They make tender of the freight charges here. Please wire amount of prepay, and will collect it here. The agent of the L. R. & M. road writes me that you request prepayment. Please answer quick." On the receipt of this telegram from the agent at Hope, the agent at Little Rock, without replying, accepted the shipment from the Little Rock & Memphis Railroad, and paid the $6 charges demanded by that company, and forwarded the whiskey, without knowing that the $6 was more than the bill of lading specified. When the whiskey arrived at Hope, the agent then saw from the way bill that the back charges exceeded those named in the bill of lading, and this was the first information he or any agent of defendant had of that fact. After the whiskey arrived, Gibson was informed that the goods weighed 1,770 pounds instead of 1,600; that the back charges paid were greater

than those named in the bill of lading, and that the total charges due were $14.68. He refused to pay, but tendered $13.50, that being according to the rate named in the bill of lading with weights corrected, and with local rate from Little Rock to Hope added. The company at first refused to accept, but, after holding same for over a month, delivered the whisky to Gibson, and received from him the $13.50 in satisfaction of the freight.

The plaintiffs afterwards brought this suit against the Iron Mountain Company to recover the penalties imposed by the statute against railroad companies for refusing to deliver goods to the consignee after payment or tender of the freight charges due as shown by the bill of lading.

There was a verdict and judgment in favor of plaintiff for the sum of $742.50, from which judgment the company appealed.

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

This being an interstate shipment, it is not governed by the state statute. 158 U. S. 98; 34 S. W. 145; 21 S. W. 554; 45 S. W. 814; 43 S. W. 609; 46 S. W. 633; 74 Fed. 981; 58 Fed. 858; 41 Fed. 592. The statute, being penal, must be strictly construed. 6 Ark. 131; 13 Ark. 405; 43 Ark. 413; 59 Ark. 341; 56 Ark. 45; 40 Ark. 97; 59 Ark. 344; 22 S. W. 1014. Where the bill of lading does not show all the charges that are legally demandable by the carrier, this court has held the penalty not recoverable. 56 Ark. 430. The appellant, being only a connecting carrier, and not a party to the original contract, was entitled to hold the goods for the charges paid by it. 56 Ark. 439; 22 S. W. 1014; 21 S. W. 554; 84 Tex. 194; 21 S. E. 995; 63 Mo. App. 145; 69 N. Y. 230; 25 Wis. 241; 27 Mo. 17. The court erred in refusing to give the instructions asked by appellant under authority of 56 Ark. 439. It was also error to refuse the 8th instruction asked by appellant, telling the jury that, if the bill of lading did not show all the charges that were legally demandable, the the statutory penalty was not recoverable. 41 Fed. 593. The interstate-commerce law governed the rates chargeable in this case, and, the charges being in conformity to that schedule, no

other rate would have been legal, even if agreed upon. 43 S. W. 609; 40 S. W. 899; 158 U. S. 98. The facts are such as to show that appellant was not a party to the bill of lading, and that there was really a new contract of carriage from Little Rock to Hope. In such a case it is not within the terms of the statute. 74 Fed. 858; 63 Mo. App. 145; 55 Am. & Eng. R. Cas. 442, 414, 416; 69 N. Y. 230; 25 Wis. 241; 19 S. W. 470.

Jas. H. McCollum, for appellees.

Appellant's act was a plain violation of the statute. Sand. & H. Dig., § 6256. The application of this statute is not limited to companies issuing the bill of lading, but reaches alike to all companies refusing to deliver the goods to the consignees upon payment, or tender of payment, of freight due under the bill of lading, whether issued by the offending company or not. 49 Ark. 291; 75 Tex. 572; 46 S. W. 33. Notice to the appellant's agent of the provisions of the bill of lading was notice to appellant. Clark, Corp. 502; Wade, Notice, § 672; 1 Ell. Railroads, § 226; 24 Am. St. Rep. 722; 29 Ark. 99; 52 Ark. 11. It was the duty of appellant to deliver the goods in accordance with the bill of lading. 64 Ark. 169; 36 S. W. 183. By accepting the goods for transportation under the bill of lading, with notice of its terms, appellant became bound thereby. 51 Am. St. Rep. 155; 61 *ib.* 679; 63 *ib.* 856; 23 S. W. 1020; 8 Am. & Eng. Enc. Law, §§ 970–1. Connecting carriers which have not agreed upon and filed the schedule of rates with the Interstate Commerce Commission, in compliance with the act, are not exposed to its penalties, or controlled by it. 23 S. W. 732; 158 U. S. 98.

RIDDICK, J., (after stating the facts.) We are of the opinion that the judgment against the railway company for a penalty cannot be sustained under the facts of this case. The statute imposing a penalty upon railway companies for refusing to deliver freight upon payment or tender of the freight charges due, as shown by the bill of lading, does not apply to a company not a party to the bill of lading, which has not carried the goods under the bill of lading, and has neither authorized nor

accepted it. It applies only to railway companies "that are bound by the bill of lading, either as having made, authorized or accepted it" *Loewenberg* v. *Railway Co.*, 56 Ark. 439; *Fordyce* v. *Johnson*, 56 Ark. 430.

The language of the statute clearly shows this to be its meaning; for it makes it unlawful for any railroad in this state to collect from any owner or consignee of freight a greater sum for transporting the same "than is specified in the bill of lading." Sand. & H. Dig., § 6254. And it is evident from this language that the act applies only to a company which carries the goods under the bill of lading, and afterwards endeavors to impose greater charges than are authorized by the contract. Some company carrying the goods under the bill of lading, and whose charges are regulated by it, must refuse to deliver the goods, before the statute applies. If the goods in reaching their destination pass beyond the point named in the bill of lading, and to which the charges are specified, into the possession of a carrier not acting under the bill of lading, and whose charges are not governed by it, the statute does not apply; for the language of the act does not include such a carrier, and the act, being penal, must be strictly enforced, and cannot be extended by implication.

If the act applied to the defendant company in this case, and if it could collect only what was shown in the bill of lading, the result would be that it would get nothing for hauling the whiskey from Little Rock to Hope, for the bill of lading specifies the freight charges only to Little Rock. It is admitted that the defendant company had the right to charge its usual local freight rates for transporting the whiskey from Little Rock to Hope in addition to the charges specified in the bill of lading, and this, of itself, shows that this case is not within the statute; for, to quote the language of the court in *Fordyce* v. *Johnson*, the penalty cannot be recovered "when the bill of lading does not represent the amount of charges that are legally demandable by the carrier to whom the tender is made."

If the defendant company, without right, paid excessive charges to another carrier, and then, in order to compel plaintiffs to pay such charges, withheld their goods, it may be that it thereby subjected itself to an action for damages, but that is

a different matter. In order to recover a penalty, plaintiffs must bring their case within the statute by showing that the defendant carried the whiskey under a bill of lading specifying its charges for such carriage, and then refused to deliver upon the payment or tender of the charges named. The complaint shows on its face that such was not the case; for it states that the whiskey was shipped from Louisville to Little Rock under a bill of lading guarantying the rate to the latter point, and then shipped over defendant's line.

There are other points raised which would probably be equally conclusive against the right of plaintiffs to recover, but we find it unnecessary to discuss them. For the reasons stated, the judgment will be reversed, and the case dismissed.

BEEBE v. LITTLE ROCK.

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Opinion delivered March 31, 1900.

1. COVENANT—CONSTRUCTION.—The original proprietors of the land whereon the city of Little Rock is situated, having preemption rights therein as first settlers, in 1821 dedicated certain streets to the town (afterwards city) of Little Rock. In 1838 Beebe covenanted, if he obtained a patent deed of the land, to quitclaim to the mayor and aldermen of Little Rock and to others any lot or lots in said city claimed by virtue of a regular claim of conveyance from the original proprietors. *Held* that the city of Little Rock was one of the beneficiaries of the covenant, and that the covenant bound Beebe to quitclaim to the city his after-acquired legal title to the streets so dedicated. (Page 54.)

2. MUNICIPAL CORPORATION—AUTHORITY TO EXCHANGE STREETS for other property is not vested in the mayor and council of a city. (Page 62.)

3. SAME—EFFECT OF ULTRA VIRES ACT.—Where city officials, without authority, exchanged certain streets for other land, the transferees cannot bring ejectment for such streets, though the city retained the land for which they were exchanged. (Page 66.)

4. STREETS—ABANDONMENT.—Where the original proprietors of a town site dedicated certain streets to a city, and the patentee of such site obligated himself to quitclaim all lots in said city held under conveyance from the original proprietors, the city will not be held to have adandoned so much of said streets as the patentee failed to include in his quitclaim deed. (Page 68.)

5. SAME.—A city will not be held to have abandoned a street by leasing it or by delaying to open it. (Page 68.)

6. SAME.—A street is not abandoned because another than the city has paid taxes on it. (Page 69.)

Appeal from Pulaski Circuit Court.

ROBERT J. LEA, Judge.

J. M. Moore and *Cockrill & Cockrill*; for appellants.

The recital in the deeds passed between Beebe & Ashley and the city in 1843 that the city had previously accepted the plat and bill of assurances in satisfaction of the covenant is proof of that fact. 2 Pars. Cont. *512; 2 Devlin, Deeds § 845, p. 1134. No part of the property claimed here had ever been dedicated or recognized as a highway before the confirmation of the above mentioned deeds. Russell was not the owner, and therefore his attempted dedication was void. 42 Ark. 66, 68; Elliott, Roads & Streets. Beebe's covenant of 1838 did not refer to a dedication of streets, and the evidence is not of the character to support such dedication. 2 Dill. Mun. Corp. § 639; 63 Ark. 5; 66 N. Y. 261; 87 Ill. 64. The public had no interest in the rights which Beebe's covenant gave to those who claimed under deeds from the "original claimants." 19 N. J. Eq. 386, 393; 18 Mich. 56; 141 Ill. 89; 81 Cal. 70; 122 N. Y. 197, 214, and cases; 144 N. Y. 316, 326; 37 Mo. 13; 72 Mich. 234; 88 Mo. 155; Washb. Easments, * 141, § 22; 21 Col. 1. If it were true that Beebe did dedicate the land by the covenant of 1838, he had a right to withdraw the offer at any time before its acceptance by the city. Washb. Easments, 233, 208, 222; 27 Am. Dec. 564, n.; 124 Ill. 234. 242; 47 N. E. 191; 14 Mich. 12; 39 N. J. Eq. 465; 50 Ark. 53, 57; 58 Ark. 142; 59 Ark. 35, 39; 63 Ark. 5; Elliott, Roads and Streets, 113–114; 2 Smith's Lead. Cas. (Pt. 1), 140, 162 and cases; 88 Mo. 155; 2 Beach. Pub. Corp. § 1454; 72 Mich. 249; 14 Mich. 12; 81 Cal. 70; 67 Tex. 345; 18 Mich. 320, 346; 21 Cal. 1; 144 N. Y. 316, 326; 27 Am. Dec. 562, 563; 117 N. C. 733; 45 N. E. 1050; 37 N. E. 709; 100 Cal. 302; 53 Ark. 191, 194, 195; 2 Dill. Mun. Corp. § 629, and p. 742 n.

As to character of acts required to constitute acceptance, see: 90 Am. Dec. 224; 144 N. Y. 316, 325, 325; 141 Ill. 89, 104, 105, 108; 44 Mich. 468, 477, 478. An acceptance of a part of the streets laid out on a plat is not an acceptance of the whole. 47 N. E. 191; 141 Ill. 109; 14 Mich. 12; 31 Mich. 281; 47 Mich. 389; 75 Mich. 409; Angell, High. § 157; 68 Ia. 296; Washb. Eas. 239; 63 Ark. 5. If there had been both a dedication and acceptance, the city had the power to renounce its rights at any time before the actual opening of the streets and the acquisition of vested rights. 63 Ark. 5; 7 La. Ann. 270; 2 Dill. Mun. Corp. § 712n. and § 632; Ell. Roads and Sts. 119. The presumption is that the council acted rightly. 50 Ark. 266; 31 Ark. 609; 73 Fed. 940, 945; 12 Wheat. 64, 70. If the lot owners were parties to this suit, none but abutters on the property in suit could be heard to complain. 37 N. E. 709; 82 Md. 77; 33 Md. 270; 151 Mass. 79, 81; 129 Mass. 167; 11 Allen, 5, 8; 19 N. J. Eq. 386, 394; 107 Ill. 600; 7 How. 185, 193; 50 Ark. 466, 474. The contract for the acceptance of the dedication having been fully executed on both sides, and the city still retaining the consideration received by it under the contract, it can not now be heard to assert that the act was *ultra vires*. 5 Thompson, Corp. §§ 6024, 6018; 47 Ark. 269, 284; 48 Ark. 254, 256; 1 Dill. Mun. Corp. §§ 444, 675; 2 Herman, Est. §§ 1178, 1222; 96 U. S. 312, 315; 96 U. S. 258, 267; 21 Kent, Com. 381; 64 Fed. 36, 44–7. Further, the city is estopped from denying the terms of its own contract of acceptance. 47 Ark. 317; 53 Ark. 514; 2 Dev. Deeds, §§ 997, 845; 2 Pars. 512; 60 Ark. 212; 18 How. 82; 11 How. 297; 2 Whart. Ev. §§ 1039, 1040. That the mayor was duly authorized by ordinance to make the release is proved by the recitals in the deed. 2 Whart. Ev. §§ 1039, 1040; 1 Greenlf. Ev. §§ 23, 211; 73 Fed. 945, 950; S. C. 20 Ct. App. (U. S.) 122; 101 Cal. 522; 12 Wheat. 945, 950; Tied. Mun. Corp. § 196; 60 Ark. 212; 55 Ark. 289–90. The payment of taxes by Beebe, and acceptance of same by the city, estops the city. 164 U. S. 559, 577; 49 Ia. 630; 50 Ia. 164; 39 Ia 507. The agreement to dedicate did not amount to a dedication. 7 Ark. 253; 48 Ark. 165; 51 Ark. 433; 33 Ark. 78. The city's

laches in enforcing this contract bars its rights. 41 Ark. 45, 50; 2 Dill. Mun. Corp. § 675; 55 Ark. 148; 38 Ark. 81; 43 Ark. 180, 184; 164 U. S. 559, 576; 37 U. S. Ct. App. 220; S. C. 69 Fed. 116; 34 Fed. 701; S. C. 140 U. S. 634; 2 Perry, Tr. § 870; Newell, Ej. pp. 754, 755 and 759, § 68. If the land was ever a street, it reverted to appellants, on being abandoned by the city. 150 Mass. 174; Elliott, Roads & St. 670; 59 Ark. 66, 79; 12 Vt. 15, 20; 7 Wall. 290. If the property in suit were a public street, the plaintiffs, as owners of the fee, could maintain ejectment to remove obstructions. 24 Ark. 102; 50 Ark. 466; 2 Wall. 58.

Dodge & Johnson, and *Carroll & Pemberton*, (for Athletic Association); and *Jno. W. Blackwood* (City Attorney), for appellees.

The appellants are estopped to claim the property. The questions of fact in this case were fully considered and passed on in *Martin* v. *Skipwith*; 50 Ark. 141. The plat shows no north line to Water street. This plat must govern, though in conflict with the bill of assurances. Elliott on Streets & Roads, 111; 100 Ind. 463. Any fragments of land between the river and the street passed in the dedication, since no designation was made of them on the plat. 16 Wis. 19; 1 L. R. A. 856. It was *ultra vires* for the city council to attempt to renounce title in streets once dedicated. 31 S. W. 784; 50 Ark. 473; 51 Ark. 500; Elliott, Roads & Streets, 358; 7 B. Mon. 600; 1 A. K. Marsh. 9; 8 Dana, 50; 3 B. Mon. 437; 14 Pa. St. 186; 2 Dill. (U. S.) 70; 90 Mo. 259; 104 N. Y. 405; 29 Ia. 68; 23 Vt. 92; 1 Whart. (Pa.), 469; 12 Ill. 38; 41 Fed. 649. If this were not true, the facts of the contract of exchange relied on as estopping the city are insufficient, in that the parties clearly did not contemplate that this property was included in the exchange. 34 Me. 394; 50 Pa. St. 17; 103 Pa. St. 631; 10 C. B. 35. Nor did the act of its officers in receiving taxes on the land estop the city. 42 Ark. 121; 39 Ark. 580; 40 Ark. 257. Use of a street by the public, working of it by the authorities, etc., are evidence of acceptance. 58 Ark. 494; 62 *ib.* 408; 58 Ark. 142. Acceptance of part is acceptance of all of a street, as set out on the plat. 8 Am. & Eng. Enc.

Law, 402, 403; Elliott, Roads, 115, 116. The city had the right to say when the street should be opened and worked. 58 Ark. 142. The city is not barred by laches. 50 Ark. 141. Appellants themselves are barred thereby. 17 Fed. 36. There is no land left between the north line of Water street and the highwater mark. The city has never abandoned these streets.

Jno. M. Moore, and *Cockrill & Cockrill*, for appellants, in reply:—A riparian owner takes to the water's edge. Gould on Waters, § 76; 7 Wall. 273; 53 Ark. 314.

S. R. Cockrill and *J. M. Moore*, for appellants, on motion to reconsider.

The officers of the land department could not impose conditions upon the issuance of Beebe's patent. 14 How. 377. The city can not repudiate its contract and retain the benefits of it. 47 Ark. 317; 53 Ark. 514; 48 Ark. 258; 32 Ark 346. Even though the ordinance authorizing the city's deed is not in existence, its recital in the deed is sufficient evidence of it. 1 Dev. Deeds, §§ 348a, 335; 161 U. S. 434, 442. By accepting the deed of Beebe & Ashley, the city agreed to its conditions and the consideration upon which it was executed. Dev. Deeds, § 997; 4 Pet. 1, 5; Big. Est. § 371. The city is bound by the recital, of the covenant, in the deed. 2 Pars. Cont. 512; 2 Dev. Deeds, §§ 845, 1134; 18 How. 82; 2 Whart. Ev. 1039–1040; 118 U. S. 256, 260; 60 Ark. 212; 58 Ark. 289, 290. When a street is bounded on one side by a navigable stream, the vendee of lots abbutting on the street takes only to the center of the street, subject to the public use. 2 Wall. 57. The city cannot retain both the property and its price. 5 Thompson, Corp. § 6018; 12 C. C. A. 14, 22. Even in an *ultra vires* contract, there may be an estoppel, in whole or in part, based upon what has already been done. 1 Dill. Mun. Corp. §§ 444, 675. Public rights in a street may be lost by non-user. 41 Ark. 45; 2 Dill. Mun. Corp. §§ 667, 675.

Walter J. Terry and *Jno. W. Blackwood*, for appellees, on motion to reconsider.

Beebe was estopped from inquiring into Russell's title. For the judicial history of the title set up in this case, see 50

Ark. 147; 14 How. 377, 386; Hempst. 704. This court can take judicial notice of these facts. For many similar instances, see 45 Ark. 87; 37 Ark. 577; 6 Ark. 123; 4 Ark. 302; 27 Ark. 137; 28 Ark. 378; 34 Ark. 224; 16 Ark. 62; 61 Mo. 76; 70 Ia. 275; 21 Ind. 443; 16 Cal. 220; 50 Ala. 537; 93 Mo. 452; 107 Ind. 343; 13 Ct. Cl. Rep. 117; 67 Ga. 260; 18 La. Ann. 497; 49 Ark. 87; 31 L. R. A. 731; 32 *id.* 610; 45 Mich. 135; 56 Ind. 173; 23 Mo. App. 451; 51 Mo. 126; 107 Ind. 343; 78 Mo. 623; 61 Ind. 97. The public streets are trust property, and their trustees cannot sell or dispose of them, either directly or indirectly. 50 Ark. 473; 51 Ark. 500; 41 Fed. 649.

BUNN, C. J. This cause originated in three several actions of ejectment, by the appellants, as the only heirs at law of the late Roswell Beebe. The first suit was against the city of Little Rock, and the City Fuel Company, and W. L. Greer, to recover the tract of land in said city bounded on the east by Cumberland street, on the west by Main street, on the south by Water street, and on the north by the Arkansas river. The second suit was against the city of Little Rock and Neimeyer & Darragh, for the recovery of the tract of land or lot in said city bounded on the east by Broadway street, on the west by Arch street, on the south by a line 140 feet north of and parallel to Water street, and on the north by the Arkansas river. The third suit was against the city of Little Rock and the Athletic Association for the recovery of a strip of land in said city bounded on the south by Water street, on the east by Main street, on the north by the Arkansas river, and on the west by a line one hundred and fifty (150) feet west of and parallel to Main street. The first strip or parcel of land is not further described by reference to plat or numbers. The second tract is further described in the complaint as the northern part of block 185, according to the plat of Beebe, filed with his bill of assurances December 26, 1839, being the north fractional half of that block fronting on the Arkansas river, and therefore with irregular north boundary, the west end being (from the plat exhibited) more than 150 feet, and the east end less than 150

feet wide. The third strip or tract is not further described in the complaint by reference to map or number.

The same plaintiffs, and none others, being in all three of the suits, and the city of Little Rock being the common defendant in all of them, the other defendants being merely tenants and lessees of the city, and withal each of the suits involving identically the same legal propositions for the most part, they were all heard and determined in the lower court as one suit, and will be so heard here.

In support of their complaint as the owners of the tracts of land in question, plaintiffs exhibit and declare upon a patent from the United States government, dated September 25, 1839, which conveyed to Roswell Beebe, ancestor of plaintiffs, the congressional subdivision of the land including the parcels of ground in controversy. They also allege that defendants had been in possession of the ground in controversy without right for ten years next before the filing of their complaint herein. But they say that they instituted suit in the Pulaski chancery court for this same property against these same defendants, on the 2d day of April, 1866, which was dismissed without prejudice on the 18th day of June, 1892, and that within one year thereafter this suit was instituted.

For answer and amendments to answer the defendants say, in addition to special and individual answers, that the defendant, the City of Little Rock, had been in the open, notorious and peaceable adverse possession of the property in controversy for more than fifty years, up to the filing thereof; that all of the same form, include, and constitute part of the streets, alleys and public grounds of the city of Little Rock, deeded to said city and by bill of assurances dedicated to the public use on the 20th day of November, 1821, by William Russell and others, the original owners and proprietors of said lands by right of purchase from the United States government. They say that plaintiffs' right of action did not accrue within fifty years next before the filing of this suit, and that the same is barred by prescription, because neither plaintiffs nor their ancestors had ever before made any claim to the land in controversy. The answer then sets up the several acts of congress passed April

12, 1814, for the final adjustment of land titles in the state of Louisiana and territory of Missouri, and another act approved February 5, 1813, and another April 29, 1810, under which one Benjamin Murphy, under improvements on the land in controversy by one William Lewis, under whom he held, claimed the right of pre-emption on said lands, and a preference right to enter same from the government; that under an act approved March 17, 1820, entitled "An act to authorize the President of the United States to appoint a receiver and register and establish a district land office at Batesville, Arkansas," said office was established, and afterwards, to-wit, in the month of September, 1820, the pre-emption claim was presented and allowed at said land office. Reference is made to transcript of the record of these proceedings marked "Exhibit B," but the exhibits do not appear in the transcript before us. Then the answer contains a history of the transmission of title from Murphy to William Russell and others, constituting what are known and called "original proprietors." The defendants further say that on 20th November, 1821, the said William Russell and others, owning the lands as aforesaid, made, executed and established a plat of survey, laying off the whole of said lands as aforesaid into town lots, blocks, squares, streets, alleys, etc., and called the same the "Town of Little Rock," and also on the same day executed a sealed instrument, called therein a "Bill of Assurances," in which the said owners, as aforesaid, makers thereof, were denominated "owners and proprietors" of the town of Little Rock, declaring therein the size of the blocks, squares, lots, streets and alleys in said town, which said bill of assurances was duly acknowledged and recorded in the recorder's office of Pulaski county on February 6, 1822, and a copy of same is exhibited with the answer, and appears in the transcript. Defendants also present a copy of what is termed "the covenant" of Roswell Beebe, dated July 6, 1838.

In addition to the patent aforesaid, plaintiffs presented in evidence the bill of assurances of their ancestor, Roswell Beebe, to the city of Little Rock, dated and filed for record December 26, 1839, and mutual deeds on exchange of property between

Beebe and Ashley and the mayor of the city of Little Rock, dated 23d day of February, 1843, in which the four blocks constituting Mt. Holly Cemetery were conveyed to the city in exchange for other property. Oral testimony was also taken, and made of record in the bill of exceptions.

In the trial of the cause, plaintiff asked the court to give nineteen several instructions to the jury and declarations of law, which were severally overruled, and plaintiffs excepted, and thereupon the court made the following declarations and instructions in the case:

(1). "The court finds that by the bill of assurances and plat filed by William Russell and others, as original proprietors of the city of Little Rock, the city of Little Rock obtained a proper claim of title through said original proprietors to the land in controversy. (2). That the city of Little Rock accepted the streets under the Russell plat, as shown by said plat, in trust for the use of the public. (3). That no subsequent acts of the officers or municipal council of the city of Little Rock were such as to estop the city from setting up title to the land in controversy as public streets. (4). That, by the covenant of Roswell Beebe to and with the mayor and aldermen of the city of Little Rock, he was bound, upon reasonable demand, upon the emanation of the patent from the United States to him, to have immediately executed a quitclaim deed to said city to the streets as shown by the Russell plat and bill of assurances. And accordingly, upon the undisputed facts of this case, the court finds the law to be for the defendants, and accordingly instructs the jury to return a verdict for the defendants in all three cases herein submitted to them."

The plaintiffs excepted to each of these findings and instructions of the court, and filed their motion for new trial, which was overuled, and they appealed.

The instructions of the court to return a verdict for defendants in effect eliminated all the questions from our consideration, except those arising upon the facts as to ownership of the ground in controversy. This cause was decided once before by us, but a motion for a new hearing was filed, and, while this was pending, the term was about to expire, and

we set aside our decision and judgment, to allow further time to consider the matter. We have examined most carefully all the matters suggested to us both on original argument and on motion for rehearing.

What are known as the "original proprietors," claiming to be the owners of the land upon which the city of Little Rock is now in part located, and of the lands particularly of which the ground in controversy forms a part, by their bill of assurances, dated November 20, 1821, which was immediately put on record in Pulaski county, dedicated certain of said lands, including the ground herein sued for, to the future town and city to be called "City of Little Rock." Accompanying this bill of assurances or dedication deed, and attached thereto as a part of the same, was their map of so much of said city as was conveyed by them therein, and additional land not claimed by them, and the streets, blocks and lots indicated on said map were specifically referred to in said bill of assurances.

The town of Little Rock, which was the territorial capital, was incorporated in 1825, and the city of Little Rock was incorporated in 1832. From its incorporation as a city, the city council took steps to improve the streets dedicated to the city by the "original proprietors," and particularly looking to the improvements of Water street and North street, parts of which comprise the ground now in controversy. There was no statute in force providing for the manner of accepting dedications on the part of towns and cities, but acceptances were under the common-law rule. The evidence, in our opinion, is sufficient to show an acceptance on the part of the town and city of the dedication of these "original proprietors."

It appears that the title of the "original proprietors" had never been perfected, and in the course of time Roswell Beebe, ancestor of the plaintiffs in this cause, made application to enter the congressional sub-division described in his patent, and finally succeeded in doing so, and obtained his patent. The same is exhibited with his complaint herein. But before doing so he made what is here termed his "covenant" with the city of Little Rock and others, a greater part of which it is necessary for us to set out.

The covenant, bearing date July 6, 1838, is an instrument under seal, duly acknowledged and recorded, and purports on its face to be an obligation on the part of Beebe that, as soon as he should receive his patent, if he ever should, from the United States government for the lands including the grounds in controversy as aforesaid he would make quitclaim deeds, on reasonable demand, to parties therein referred to, who should present a claim of title from all or any one of the original proprietors, referring to their plat and plan of the town aforesaid.

The circumstances under and the purpose for which this covenant was made are more fully detailed in decisions of state and federal courts in litigation growing out of the conflicting claims to these lands, made and asserted before the making of this "covenant," for, in truth, no one up to this time seems to have had any perfected title, and all were mere claims of prior rights to enter. For a history of these contentions, the following cases are referred to, in all of which Roswell Beebe, ancestor of plaintiffs, was a party, towit: *Cunningham* v. *Ashley*, 14 Howard, 377; *Russell* v. *Beebe*, Hempstead, 704.

In attempted compliance with this said covenant with the city of Little Rock, Beebe, on the 26th day of December, 1839, made his bill of assurances to her. The description of Water street was different from that contained in the bill of assurances of Russell and others, called the "original proprietors," which was thus: "Water street is and shall be forty (40) English feet wide, and no more, between block numbered one hundred and thirty five (135) and blocks or lots marked 'E,' and numbered one hundred and forty five (145)," and "all the open ground represented on the plat of said town extending along the margin of the Arkansas river, from the eastern part of the block 'A' to the western part of block 'E,' as represented on said plat, is hereby made and declared to be part of and belonging to Water street, and the open ground represented on the margin of said map extending from west side of block 'A' to the east side of block 'B,' as represented on said plat, is hereby made and declared to be part of and belonging to North street." These river margins of

Water street and North street, made part of said streets, and dedicated by the "original proprietors," as shown on their map, were left off said streets in Beebe's map and dedication or bill of assurances, having the effect thus of reserving the same to him. The margins or river fronts of Water street and North street are the property sued for herein by the plaintiffs.

Two main questions are raised in the part of the case we are first called upon to consider. The plaintiffs contend, first, that the city of Little Rock, as the owner of the streets, is not a party obligee in the covenant; and, secondly, that by accepting Beebe's dedication as a full performance of his "covenant" to her, if she is a party beneficiary therein, the city is estopped from claiming other property than is included in Beebe's bill of assurances as represented on his map.

Appellant's first contention is that the "covenant" of Roswell Beebe, dated 6th July, 1838, does not include the city of Little Rock, as the owner of her streets or in respect to her streets, as one of the beneficiaries therein. The "covenant," or as much of it as is necessary to be copied herein, is as follows, to-wit:

"This instrument of writing, made the 6th day of July, 1838, by and between Roswell Beebe, of the city of Little Rock, in the state of Arkansas, of the one part, and the mayor and aldermen of said city of Little Rock, in behalf of said city, as well as in behalf of the said state of Arkansas, and also in behalf of any person who may have in his own right a proper and regular chain of conveyances, or conveyance of any town lot or lots situated in the first original town (now city) of Little Rock, derived from, by, or under any one or more of the original owners and proprietors of the said town as aforesaid, and as represented upon the first original plans as then surveyed and laid off into town lots, of the other part, [the plan originally referred to is the plat attached to the bill of assurances of the "original proprietors,"] witnesseth: That whereas, the said Roswell Beebe has caused to be located and entered, with pre-emption floating claims, at the land office at Little Rock, and upon which as aforesaid (north of the Quapaw line) the city is

now built, the following described tracts or parcels of lands, to-wit, the northeast fractional quarter of fractional section three (south of Arkansas river) and the west fractional parts of the northwest and the southeast fractional quarter of fractional section two (south of Arkansas river), and west of the Quapaw line, all in township one north of the base line, of range twelve west of the fifth principal meridian; and whereas, the original town of Little Rock as aforesaid (west of the Quapaw line), now comprising a part of said city as aforesaid, is embraced and included within the tracts of land which said Roswell Beebe has caused to be located and entered as aforesaid; and whereas, the said Roswell Beebe is willing and desirous, should patents hereafter be granted and issued to him and his heirs by the United States for the said several tracts of land by virtue of the locations and entries as aforesaid, and which now embraces a part of the said original town as aforesaid, now a part of the city, to convey by quitclaim deed or deeds only to said mayor and aldermen, in behalf of said city, and to said state, and to any person or persons, his, her or their heirs, all and every the right, title, interest, claim and demand which the said Roswell Beebe may acquire to the said tracts of land by reason of the location and issuance of the patents as aforesaid to any lot or lots in said city to which they, or either of them, or their heirs, or either of them, may claim by a proper regular chain of conveyance or conveyances derived from, by, or under some one or more of the said original owners and proprietors of the said original town (west of the Quapaw line), now a part of said city as aforesaid. Now, therefore, know all men by these presents, the said Roswell Beebe, in consideration of the premises, and also in consideration of $1 to him in hand paid by the said mayor and aldermen of said city of Little Rock, at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, doth hereby for himself, heirs, executors, and administrators, promise, covenant and agree that on the first issuance of the patents, by virtue of the said locations and entries, which embrace said original town as aforesaid, he, the said Roswell Beebe, his heirs, executors, and administrators,

will, at the reasonable demand of the said mayor and aldermen of said city, or of the state of Arkansas, or of any person or persons, his, her, or their heirs, who may claim any lot or lots in the said city as aforesaid by virtue of a proper regular chain of conveyance derived from, by, or under some one or more of the said original proprietors as aforesaid, execute or cause to be executed unto the said mayor and alderman, in behalf of said city, and to their successors in office, and unto the state of Arkansas, and unto any person or persons, or his, her, or their heirs, as aforesaid, a quitclaim deed or deeds of relinquishment, thereby assigning, transferring and settling over all and every the right, title, interest, claim and demand whatever which the said Roswell may, might, or shall have acquired to each and every lot or lots so assigned and set over by reason and means of the locations and entries and issuing of the patents as aforesaid, and also with the explicit understanding that, when the said deed is so made, there shall not be had any other or further recovery to or from the said Roswell whatsoever, and such a relinquishment of dower to the premises so assigned as may have been acquired only by the means aforesaid shall be void." Then follows, under a proviso, provisions as to the demand to be made by the claimants within a reasonable time, the payment of the expense of the quitclaims, and other details, principally referring to the compliance with the covenant on the part of Beebe.

In Beebe's bill of assurances, dated December 26, 1839, three months after the date of his patent, the following reference to said "covenant" is made: "And whereas, by a certain instrument of writing duly executed by the said Beebe at the city of Little Rock, on the sixth day of July, A. D. 1838, it was among other things therein mentioned and contemplated by the said Beebe that he would, on the emanation of the said patents, relinquish to the mayor and aldermen of the said city, and their successors in office, in trust for the public use and benefit of said city and the citizens thereof, all right and title, as hereinafter set forth and described. Wherefore it is hereby declared, reference being had to the said plan, that Markham, Cherry, Mulberry, Walnut, Elizabeth, Chestnut, Holly, Hazel,

East, Rock, Cumberland, Scott, Louisiana, Center, Spring, Arch, Gaines and State streets shall each, respectively, as represented upon the said map, be and forever remain sixty feet wide, and no more, throughout their whole extent. East Main, West Main, and Orange streets [afterwards changed to Main, Broadway and Fifth streets respectively] shall each, as represented upon said map, respectively, be and forever remain eighty feet wide, and no more, throughout their whole extent; and Water street shall be and forever remain forty feet wide, and no more, between the front or northern boundary line of block No. 35, and the southern boundary line of lot No. 145, and 182; and the direct continuation of said Water street westwardly shall be throughout its whole extent, and forever remain, 60 feet wide, and no more. Conway and Ashley streets shall be and forever remain as represented upon said map, throughout their whole extent, sixty feet wide, and no more, and all alleys represented upon said map, as running through the center or middle of each square, shall respectively be and forever remain twenty feet wide, and no more, throughout their whole extent. Therefore, be it known by these presents, that pursuant thereto, as well as in consideration of one dollar paid unto the said Roswell Beebe and Clarissa Elliott, his wife, the receipt whereof they do hereby acknowledge at and before the ensealing and delivery of these presents, by [to] the said mayor and aldermen of the said city of Little Rock, the said Beebe and wife do hereby remise, release, quitclaim and set over unto the mayor and aldermen aforesaid, and unto their lawful successors in office, in trust for the sole and only uses and purposes as herein mentioned and expressed, subject, however, to such stipulations, conditions, restrictions, and limitations as are here provided for, all and every of our, and each of our, right, title, interest, claim and demand which we or either of us may, might, or shall have acquired by virtue of the issue of the patents as aforesaid in and to the several parcels of land embraced by and included within the limits of the said several streets and alleys, as well as all and every the rights, privileges, benefits and advantages of every kind appertaining

and incidental thereto, and relating to the said streets and alleys, or any part thereof, which may be comprised in the limits of the said streets and alleys hereby relinquished for public purposes; to be held by them for the free use, benefit and advantage of the city of Little Rock, the citizens thereof, and the public generally, so long and no longer than the same shall remain free and unobstructed public highways, as hereby contemplated, and as the same shall not be used or appropriated for any other or further use or purpose whatsoever. The same to be subject, nevertheless, at all times to such needful ordinances, rules and regulations as may, from time to time, be deemed necessary and proper to be made by the said mayor and aldermen and their lawful successors in office for the gradation, use, public advantage, good government, well-being and police of the same. But the same [this bill of assurances] shall, when taken and recorded in the office of the recorder in and for the county and state aforesaid, be considered by all the parties, as expressed or implied herein, as acquitting and forever discharging the said Beebe from any other or further obligation to make any other relinquishment or writing of any other name or nature to the said mayor and aldermen, or to their successors in office, under and by virtue of said covenant, as first aforesaid, or by any other means, in relation to any of the said streets, alleys, or privileges thereunto belonging, etc." Filed with this bill of assurances there was a map of the platted ground, forming the main three or four blocks south of the river and two or three blocks along the west line of the Quapaw line. Another plat or map covering the same ground as the first partial map, and more of the city, was filed on the 29th February, 1840.

It is manifest from the very language of this bill of assurances or dedication deed that the maker of it held himself bound to make it by the terms of his "covenant," and since this dedication consists entirely in dedicating the streets and alleys of the city to the public use, and does not purport to give or grant to the state, the county or any private individual, leaving that part of his covenant to be complied with, as provided in the same.

The meaning of the "covenant," as regards private per-

sons, is expressed in its first few lines, making use of the words "lot" and "lots," while no such words are used to designate the ground, in connection with the mention of the city as one of the beneficiaries. The reason for that is obvious. In regard to private individuals and such other beneficiaries as could only hold "lots," it was necessary to use this word of general description of a class of real property in order to emphasize the idea that this class of claimants would have to show a claim of title to such from the "original proprietors" elsewhere set forth in the "covenant," whereas the streets had already, to-wit, seventeen years before, been dedicated to the city by a bill of assurances or dedication deed, then on record in the recorder's office of Pulaski county, and had been for years. In this dedication deed, Beebe, like a prudent man as he was, stipulated that his deed should be held as a quitclaim to him and release of all obligation on his part to further comply with the obligation imposed by his covenant. He sought to emphasize the idea that this dedication of the streets was a full compliance with his covenant obligations to the city in that behalf. Taking his bill of assurances in connection with the "covenant," it is impossible, it seems to us, to draw any other reasonable conclusion than that he regarded his covenant as covering the case of the city in its ownership of the streets, as well as that of the state, county and private persons in their ownership of lots—the only description by which they can or do ordinarily own city real estate; and we so hold.

If the "covenant" was binding upon Beebe at all as respects the city and its streets, it bound him to relinquish his fee in the land occupied by the streets as laid off and indicated in the dedication of the "original proprietors." He undertook, by his said dedication, to perform his covenant obligations in this regard, but, instead of making a quitclaim of the title he had acquired by his patent to the ground covered by the streets, he made a dedication deed or bill of assurances. This might have been accepted as a formal compliance with his covenant, had he simply duplicated the bill of assurances of the "original proprietors," for the prime object of the "covenant" according to its very terms, was to confer upon the

covenantees the legal title to the ground which each one of them, respectively, had lawfully acquired from the "original proprietors," and in so far his bill of assurances is all that may have been required of him; but when he left off some of the ground which constituted one of the streets and part of another in the dedication deed and map of the "original proprietors," and thereby reserved that much to himself, in so far he failed to comply with his covenant obligation. We are inclined to think that he was of the opinion then that the city council, in accepting his dedication, assented to this reservation, and could lawfully bind the city by such assent, and that therefore the same was a valid reservation to himself. This is the theory of the plaintiff's heirs, as contended for in this suit. In this there is no certain ground for impugning of motives, and this view of it leads us to assume the correctness of the proposition of plaintiff's counsel in their argument on the motion for a new hearing, to-wit: "It is but fair to say for Mr. Beebe that neither this record nor any other record shows that either he or his heirs ever sought to disclaim his covenant, or ever failed to comply strictly with its terms, except in so far as they were altered by consent of the parties interested."

The only case in which this "covenant" has been interposed as a defense in a suit by Beebe or his heirs, based on his patent, is the case of *Skipwith* v. *Martin*, 50 Ark. 141, in which Martin represented the heirs of Beebe, and Skipwith was the grantee of Pulaski county, one of the beneficiaries in the "covenant." The suit was by Martin and against Skipwith. Judgment in the circuit court for Martin, and Skipwith appealed to this court. Skipwith for defense relied on the superior equities of his vendor—the county—growing out of the covenant obligation of Beebe to it, and adverse possession, and his defense was sustained on both grounds. As to his equities, the court said: "Coming down to the year 1839, our next inquiry is, whether Beebe, when he obtained his patent, was bound to make a deed to Pulaski county for the lots in controversy. This must be determined exclusively by his covenant. Since we have determined that the county had a good

conveyance from the original proprietors [their said bill of assurances], the county seems to have been within the letter of Beebe's covenant, If he had refused to make a deed on demand, he would have been compelled to execute it on a bill for specific performance. If he would have been compelled to make it then, it is difficult to see why his heirs should not be required to make it now. It would hardly be claimed that the right had been lost by the lapse of time. We have never understood that a vendee in possession, who was entitled to a deed, could ever lose his right thereto by efflux of time. If Beebe was bound to make a deed, what kind of a deed was he to make? In view of the emphasis and reiteration in his covenant on this point, it would be unpardonable to raise a dispute as to the character of this deed. It was to be a quitclaim deed. There can be as little controversy as to the effect of such a deed. Since he himself had obtained from the government, by his patent, a perfect title, as all concede, his quitclaim deed then, and that of his heirs and privies now, would pass an indefeasible title."

Our conclusion from what has been shown is that the covenant binds the covenantor to quitclaim his after-acquired legal title to the covenantees respectively, and that the city of Little Rock is one of the beneficiaries in the covenant.

It may be of interest to call attention to the history of these land entries, as detailed by the Supreme Court of the United States, notably in the case of *Cunningham* v. *Beebe*, 14 How. 377, in which the ancestor—the said Roswell Beebe—of the plaintiffs was a party; Ashley having become interested with him after the entries were made. The "original proprietors," that is, William Russell and others, in their bill of assurances to the city of Little Rock, made November 20, 1821, and heretofore referred to, claimed to be the owners of the fractional northwest quarter of section 3, and fractional section 2, (that is, all those portions of the same south of the river, including the ground involved herein), and their accompanying map of the future city covered these tracts, and, as stated in their bill of assurances, covered also additional lands to which they laid no claim. Among these additional tracts was the

southeast quarter of section 3, which comprises the very heart of the city. The patent exhibited with plaintiff's complaint calls for said fractional south part of northwest quarter of section 3 and the fractional northwest quarter of section 2, all south of the river, and bordering on it, and also including the parcels of ground in controversy in this suit.

On the same day, and with the same kind of "floats" issued under the act of congress of 1830 and supplemental act of 1834, Beebe entered, or caused to be entered, the tracts containing the lands in controversy and the said southeast quarter of section 3, and received his patent for each bearing date of that day.

One Matthew Cunningham, claiming pre-emption rights to enter this quarter section by reason of occupation and cultivation prior to Beebe's entry, filed his bill in the Pulaski chancery court, attacking the validity of Beebe's patent and entry in this: that it was made on land subject at the time to plaintiff's pre-emption rights by reason of his prior occupation and improvement. The supreme court of the United States reversed the decree of this court, which was an affirmance of the decree of said chancery court on appeal, and held the entry and patent of Beebe of said quarter section void as against Cunningham, in so far as it affected the 80 acres occupied and improved by him. It was sought to be shown by the defendants in that suit that the land officers of the interior department had suffered the entry to be made, and advised the issuance of the patent, because the law and the rules and instructions of the department had been sufficiently complied with by Beebe's covenant to quitclaim to pre-emption claimants his legal title on the emanation of his patent; but the court held that the occupiers on this quarter section were not included within the terms of the covenant, and decree was for Cunningham as stated. In determining the matter it became necessary for the court to state the circumstances under and purpose for which the "covenant," as applied to the land now in question, came to be made by Beebe. And from this we gather that, upon this covenant being made and recorded, the land department officers deemed that the

occupiers of these lands were sufficiently protected in their pre-emption rights by this obligation to confer upon the applicants the benefit of the entry and patent. Otherwise, it is manifest that there would not have been even an excuse to permit the entry, because otherwise the location of these floats on lands occupied and improved by others was prohibited by law. The covenantees—those claiming and showing title under the "original proprietors"—were necessarily those who had settled upon the city lots, as the same had been laid off and established by these "original proprietors" in their dedication deed and plat of November 20, 1821, and these were named in the "covenant," while those having claims upon the southeast quarter were not named nor referred to in the "covenant," and of course were not protected thereby. The language of the United States Supreme Court on the subject is as follows, to-wit:

"On the 6th of July, 1838, an instrument, under seal [the covenant], was entered into between Roswell Beebe, to whom the patents were issued [both the patents referred to], of the one part, and the mayor and aldermen of the city of Little Rock, in behalf of said city, as well as in behalf of the state of Arkansas, and also in behalf of any person or persons who may have in his own right a proper and regular chain of conveyance or conveyances of any town lot or lots situated in the first original town, now city, of Little Rock, derived from, by, or under, any one or more of the original owners and proprietors of the town, as represented upon the first original plan as then surveyed and laid off into town lots, of the other part, witnesseth, that whereas the said Roswell Beebe has caused to be located and entered with pre-emption floating claims, at the land office at Little Rock, and upon which the city, south of the Arkansas river, and west of the Quapaw line, is now built, the following described tracts or parcels of land, to-wit: the northeast fractional quarter of fractional section three, and the west fractional part of the northwest and southwest fractional quarters of fractional section two, all in township one, north of the base line of range twelve west, etc. And in all cases where purchases of lots had been made in the above tracts, Beebe bound himself to release to the purchaser.

"This arrangement [the covenant] induced the land officers to permit the entries to be made, as well on the southeast quarter in controversy, as on the tracts above described. And it was considered at the General Land Office as a sufficient compliance with the circular of that office, dated the 11th of October, 1837. The patents on this view were issued to Beebe; and on the 11th of January 1842, Beebe conveyed one half of the southeast quarter in controversy to Ashley.

"However satisfactory the agreement of Beebe may have been to claimants of lots on the tracts specified in his agreement [covenant], as it did not embrace the land claimed by the complainant [Cunningham], it was not designed for his benefit. And it is unaccountable that the land officers at Little Rock, and at Washington, should have considered the arrangement as a compliance with the regulations which prohibited the entry of floats upon improved or occupied land."

With this reference, the decision in that case will be understood in its application to the present case, keeping in mind, however, that a reading of the entire opinion gives the best idea of it.

The case of *Russell* v. *Ashley*, Hempstead, page 546, is another case wherein the entry and patent of Ashley (those which are involved in this suit) were attacked as invalid, on account of the manner of making the one and procuring the other. That case but adds to the history of these land transactions. Suffice it to say that the entry and patent were held void.

Some three or four years after making his bill of assurances, after some negotiations, the exact nature of which we have no means of ascertaining, Beebe & Ashley (the latter having purchased an interest in the meantime) on the one part, and the mayor of the city on the other part, made mutual deeds in exchange of certain real estate. In this transaction Beebe and Ashley conveyed to the city the four blocks constituting the present Mt. Holly Cemetery; another lot for a powder-house lot, near the present city park, and the two short streets just east and west of the State House, named Conway and Ashley streets, and took in exchange by conveyance of the mayor two

blocks, one now occupied by Peabody High School, and another in the same neighborhood occupied now by private residence, and the end of Center street, which at that time extended through the State House block. As a response to a further condition of the deed to the city, the mayor's deed attempted to engage the city to ratify the former acceptance of the city council of Beebe's dedication deed, or something to that effect. And this, it is contended, is a part of the consideration inuring to Beebe and Ashley in this exchange of property. We have no way of ascertaining just what were the stipulations of this trade which the city council had under consideration when it accepted the proposition (if it ever did so.) All we have on that subject is that, on the presentation of the report of the committee having that matter in charge, on motion the same was laid on the table; and further that Mr. Beebe, in his own testimony in another case brought forward in this, stated that, so far as concerns the giving of the short streets east and west of the state house, he made them a gift to get control of the extension of Center street through the state house block, so that he might convey the same to the state, so that it could have a whole solid block for the purpose of a state house; and that, as for North street, it was not his intention to deprive the city of that street, but, because of its rugged character, it deemed it impracticable to make a street there, and he therefore included it in adjoining lots or blocks, or words to that effect. But the mayor of the city, nor the city council, nor both acting together, can give away or exchange the streets of the city, and in all attempts to do so, with or without a consideration, not authorized by law, they act *ultra vires*, even although the city has enjoyed the benefit and retains the consideration therefor, where the same cannot in the nature of things be restored. *Newport* v. *Railway Company*, 58 Ark. 270 and authorities therein cited.

Besides, if the acceptance of Beebe's dedication, with the grounds in controversy excepted, amounted to a valid reservation of Beebe and the city council to himself, then it is strange that this same acceptance and cession by the city should afterwards be so far held for naught as that it should require a con-

firmation, and that act of confirmation, the act of the mayor, should be claimed as a part of the consideration in the mutual deeds inuring to Beebe and his grantee, Ashley. But this by way of suggestion only, since a consideration cannot make an *ultra vires* contract good and binding upon a municipal corporation. As to power of municipal council to alienate property dedicated to the public use, see 2 Dillon on Municipal Corporations, § 650, *et seq.*, and numerous cases cited by appellee's counsel.

The second question raised (and we think that is the real question in this connection) is, did the city authorities (if in fact they did so) have the right or power to deprive the city of North street and the river marginal part of Water street, as dedicated to the city for public use, by accepting Beebe's bill of assurances and accompanying plat, which left out this street and part of street, thereby reserving the same to him? Taking up plaintiff's other contentions in the order of their numbering in their brief, they say first: "*By accepting the dedication from Beebe in 1839, as evidenced by his plat and bill of assurances, the city did not release any part of any street to Beebe, because the ground retained by him was not part of any street.*" As Beebe's bill of assurances was professedly in furtherance of his "covenant," by which he obligated himself to quitclaim his legal title, when acquired, to the city and others, referred to therein, claiming under the original proprietors, the duty of Beebe was to quitclaim strictly according to the terms of his covenant and the descriptions given in the bill of assurances and plat attached of the original proprietors. As equity considers as done that which ought to have been done, the original proprietors, in so far as the right of these covenantees are concerned, were the real owners of the ground which ought to have been included in such quitclaim deed. For instance, the ground here involved, North street, and the river margin of Water street, were in equity the property of the city for the use of the public, and not merely for its inhabitants or itself. Therefore, if the city officers had power to do such a thing, by accepting Beebe's dedication deed with all its conditions, they gave him North street and the river margin of Water street, and that,

too, without consideration, if that makes any difference. Whatever absolute or qualified right a city has to dispose of other classes of real estate held by it, it is now too well settled to require extended argument that a city has no power to sell or give away its streets, or any part thereof, without consent of abutting owners and legislative authority, and perhaps the consent of others directly interested.

We do not assent to that proposition, either as to its statement or conclusion. The bill of assurances and plat—that is, the dedication—of the original proprietors, being for the benefit of the city, was, under the common-law rule, presumptively accepted by the city authorities. But we do not need to base an opinion upon this presumption, since from the time Little Rock became a city until Beebe's entry the record shows that the city council had taken sundry steps looking toward the opening and use of the streets of which the pieces of ground in controversy form parts—enough, certainly, to show the real intention of the municipal authorities in relation thereto, and that intention amounts to a sufficient acceptance under the circumstances, and all parties seemed so to have viewed the matter in this light at the time. For several years from 1821, when the original proprietors made their dedication to the prospective city, Little Rock was a village or unincorporated town, and, of course, no official records were kept showing an intention to accept the dedication. It was incorporated as a town in 1825, and remained such until 1832, when it became a city. It could not be expected that the town council proceedings would be kept to any great extent in those primitive days. After it became a city, before Beebe's entry, the various acts of the city council plainly show an acceptance under the laws then existing.

Plaintiffs contended that Russell and others' dedication in 1821 was a nullity, as they had no title to the land, and cited *Moore* v. *Little Rock*, 42 Ark. 66, 68, and Elliott, Roads & Streets, p. 105, in support of that position. That, as we have, in effect, said, is not a question for the plaintiffs to raise. By their ancestor's and grantor's covenant, they have recognized the title of Russell *et al.* (the original proprietors) to the ex-

tent of endeavoring to confirm it, so far as it concerns the defendants. It is readily conceded that one without title cannot confer title upon a city by a deed of dedication, any more than he can by a deed of sale, but in the one case as in the other he confers all the title he has, and all that may thereafter accrue to him. For this reason the authorities cited are not applicable, and for the further reason that Russell *et al.* do not stand in the attitude of persons without title.

Again, it is contended by plaintiffs that "when it is sought to establish the devestiture of the citizen's landed property in favor of the public, the evidence of dedication ought to be so cogent, persuasive, and full as to leave no doubt of the existence of the owner's intent and consent." Is there any doubt that Russell *et al.* made the dedication, and is there any that Beebe attempted to release to the city the property dedicated to it by them in pursuance of his covenant? But it is contended that, under the covenant, the city should have demanded a deed of release from Beebe, as therein provided. Otherwise, it waived its rights to the protection therein provided for claimants. The city was not in the situation of a private donee or purchaser; it required no deed additional. Its deed of dedication was already on record, and all parties interested dealt in reference thereto; and Beebe is presumed to have done and intended to do what his covenant required him to do, the city having really nothing to do on her part to claim the fulfillment of the obligations of the covenant on Beebe's part. Besides, the question in the last clause is settled by *Skipwith* v. *Martin*, *supra*.

The second proposition is "*that, until the dedication was accepted, Beebe had the right to withdraw his dedication, or any part of it, and his bill of assurances made in 1839 was a withdrawal of the dedication of the property in suit.*" In answer to this proposition, we have only to say that, while assenting to the abstract proposition that before acceptance the dedicator ordinarily has the right to withdraw his dedication, yet such is not the case here. We do not treat Beebe as the dedicator, and his bill of assurances purporting to make him such, as we regard it, is valid in so far as it tends to evidence a compliance

with his covenant to release to those holding under the "original proprietors." These last were the real dedicators. The case of *Holly Grove* v. *Smith*, 63 Ark. 5, is not a case in point, for the principle therein established is: "There must be an intent to appropriate the land to public use, and if the intent of the owner is absent there is no dedication. Thus, the dedication of streets and alleys across a tract of land in a town is not established merely by proof of the making and recording of a map showing the streets and alleys, where the land remained enclosed and cultivated by the owners." In such case there is neither an acceptance, actual or constructive, nor a delivery of possession, actual or constructive. The dedication of the original proprietors in this case was something more.

The third proposition is that, "*even after formal acceptance of a dedication, the municipality may revoke it as far as unopened streets are concerned, if the owner assents.*" This presupposes a proposition on the part of the municipality for a revocation of the dedication, and the contention is that this can be done if the owner assents. Of course, this does not refer to Russell *et al.* as the owners, but to Beebe, and the meaning is that Beebe, as the dedicator, consenting to a revocation will make it valid. Beebe's title to the tract of land was on condition that he released so much of the tract to other claimants as might be shown to be the subject of the agreement. Certainly, his consent can have no effect in releasing him from the conditions under which he holds. Finally, there is no showing that the city has ever assented to a revocation of the dedication, even granting that it could do so after acceptance, for the argument under this heading is on the ground that both parties have assented to the revocation.

The fourth proposition is that, "*if lot owners were parties to the suit, none but abutters on the property in suit could be heard to complain.*" Beebe is not sought to be bound by an implied "covenant." He is not the grantor, except in the term of being a mere releasor. And to release he is bound by an express "covenant," executed by him for a valuable consideration, and under which vested rights have accrued, and parties protected by it have been caused to rest in security.

The fifth proposition is: "*The contract for the acceptance of Beebe's dedication has been fully executed by Beebe and the city, and the city still retains the consideration received by it under the contract. If its acts of acceptance were in fact* ultra vires, *it could not be heard to assert it.*" As an introduction to this proposition, plaintiff's counsel say: "We ought to have shortened the brief by resting upon it [the proposition] alone." It may be considered as well settled that municipal authorities cannot sell the streets of the town or city dedicated to the public use, and the reason is, in such case the city or town is a mere trustee for the public, and a trustee cannot dispose of the property of the *cestui que trust*, except by special authority. In *Town of Searcy* v. *Yarnell*, 47 Ark. 269, this court said: "A municipal corporation has power to dispose of property held for general convenience, pleasure or profit." The property there involved was the town's interest in a railroad lying mostly without the corporate limits of the town, and constructed for the purpose of connecting the town with the Iron Mountain railroad, three or four miles away, and that for the general convenience, pleasure and profit of the inhabitants of the town. It was in no wise a necessity in or factor of the municipal government. Streets, however, are prime factors in municipal government, and no town could possibly exist without streets. In the ownership of its streets a town or city exercises the functions of a public corporation purely and solely, while in its ownership of property acquired by it for pleasure or profit it exercises the functions of a private corporation to a great extent, subject, of course, to express conditions upon which any piece of property may have been given or granted to it. Authorities involving the powers of private corporations are not applicable where streets are involved. If the city authorities cannot sell its streets, it follows logically that they cannot exchange them for other property, for there is no difference, on a question of *ultra vires*, between a money consideration and a specific property consideration. Besides, as is contended by defendant's counsel, there is no evidence that the deed from the mayor of Little Rock to Beebe and Ashley, dated 28th February, 1843, was ever au-

thorized to be executed by the council, even if any authority to do so could have been conferred by an ordinance or otherwise.

But it is contended by plaintiffs' counsel that, if the city is allowed to disclaim the deed of its mayor, then a rescission of the mutual exchange evidenced by the deed should result, for they say the city should not be permitted to hold Conway and Ashley streets, therein for the first time dedicated to it, and retain also the controverted parts of Water and North streets, wife correctly understand them. Or, perhaps, they mean that, since the mutual deed of February 28, 1843, was given on the basis of Beebe's dedication, if the mutual deed cannot stand, a rescission should result as to all the property included in the former. This is not a bill to rescind, but a suit in ejectment, and it is impossible for us to determine the consideration for which any piece of property was granted on the one hand or released on the other; but, if such a question were before us, the evidence tends strongly to show that the prime consideration for which Beebe donated Conway and Ashley streets to the city was that he should be clothed with the disposition of Center street through the state house block, as it extended then, and thus be enabled to donate the solid block to the state for the purpose of erecting the capitol thereon, and that this was accomplished as he desired.

But it is contended that if the lease of the property for private use is void, as held in *Marine Ins. Co.* v. *Railway*, 41 Fed. Rep. 643, the plaintiffs as owners of the fee could maintain ejectment. This is a suit by persons claiming under the original owners of the property. The defense is that the ancestor of plaintiffs never in fact was the owner of this property, except for the specific purpose of transmission of title from the government; that Beebe's patent covering the land in controversy was only issued to him on condition that he should release to the city this very property, and thereby perfect its title, and the history of the case clearly sustains the defense, in our opinion. The plaintiffs, therefore, in the first place, are not the unconditional owners of the fee; and, in the next place, if their claim is in the nature of a reversion or forfeiture, it is not shown that plaintiffs are abutting owners, and abutters alone

are entitled where streets have been abandoned. The discussion under this head naturally gives rise to the discussion of the case of a city's lease of property for private use, as in the case at bar. In *Marine Ins. Co.* v. *Railway Co.*, *supra*, Judge Caldwell held, in effect, that a lease by the city authorities of a portion of a street was null and void, and that one permitting a nuisance on the ground so leased could not defend on the plea of his lease against a suit for damages to one of the general public growing out of the nuisance. When set up as a defense in such a case, such a lease may well be held to be null and void; that is to say, it is null and void as to the general public, but not to every special and adverse claimant. It is the duty of a city to open and keep in repair its streets, and it may be compelled to do so by a proper proceeding at the instance of a proper party; and a city cannot divert the grounds given for streets to other uses, but, if it does, its unlawful or negligent acts cannot divest the *cestui que trust*—the public—of title in the streets. To rent or lease a piece of property is but to assert an ownership and control of it, and is never considered as an abandonment. An improper use of property is not a forfeiture or abandonment of it. The only illustration of this principle which readily occurs to our minds is the case of a widow holding a homestead. If she sells outright, she abandons. If, however, she rents or leases for a time, and not for her life, she not only is held as not intending to abandon, but this is regarded as evidence of the opposite intention.

As the city has her own time, unless otherwise compelled, to open her streets, it would be impossible, in a proceeding like this, to determine anything as to its duties in the premises; but, as it cannot do by indirection what it cannot do by direct act, it cannot accomplish by its negligence that which it cannot accomplish by its affirmative wrongful act.

What has been already said virtually disposes of the question of the city's abandonment, as it does of the city's alleged laches in respect to the opening and improvement of the streets. The cases in which private corporations are said to have abandoned rights of way and other grants for public use, or public use in part, do not furnish precedents for the case of

a municipal or public corporation. Since 1885, at least, the city authorities have been authorized by law to rent or lease portions of its streets for which it has no present use, or where it is impracticable or impossible to use them as as parts of streets. Second sub-division, section 5313 Sand. & H. Dig. "Where a city has accepted the dedication of a public street, subsequent continued possession by the dedicator will not be presumed adverse to the city nor to the city's right lost by delay for more than seven years in opening up the streets for public use, in the absence of proof of adverse possession." *Little Rock* v. *Wright*, 58 Ark. 142. In the same case it is held by this court that "it is within the province of the city council of Little Rock to determine when the streets in question should be opened"; citing Mansfield's Digest, § 737. In this case there is no proof of adverse possession on the part of the plaintiff.

There is an effort to show the assertion of an adverse claim by testimony as to the assessment and payment of taxes for a time. If defendant's contention be sound that the parcels of land in controversy were parts of streets, they were not subject to taxation, and the putting them on the tax books and paying the taxes as assessed by another than the city were perhaps of themselves nullities, and were evidence of neither possession nor, perhaps, even a notice of a claim of possession; nor was the act of the city in permitting another to pay such taxes, even with notice, an abandonment or waiver of rights, for, aside from what might be asserted as a general principle, the manner of the alleged assessment is not shown to be as explicit as common fairness demands, in order to bind parties who may have been misled as to what was intended by the assessment. If the alleged assessment and payment of taxes by plaintiffs is introduced to show a change of title, all that may be said is that without default, forfeiture, sale and notice of forfeiture as provided by law nothing can confer title upon the tax-payer. *Bagley* v. *Castile*, 42 Ark. 77.

The piece of ground between North street and the river dedicated to the city by the original proprietors, but withheld in a manner in Beebe's dedication, presents a little different

phase of the case, although the question as to it in a general way may be considered as settled by what has been said in regard to Water street. What is designated on the plat of the original proprietors as half block 344, describing part of a block south of North street, was thrown in with that part of North street, and the river front north of it, and all described by Beebe in his dedication map as block No. 185, thus obliterating North street, taking from the city the river front north of it, and giving the whole to Beebe. The proof adduced plainly shows what was originally understood by all parties as block No. 344, and that North street had a well understood place, for long before Beebe had anything to do with these lands Ashley had purchased that half block from Russell, one of the original proprietors, claiming to own it individually. It appears to have been subsequently reconveyed to Russell by Ashley under the same description. Indeed, Beebe, as a witness in another case, explains that he did not obliterate North street for the purpose of securing the ground to himself, as charged against him, but because of the impracticability of making the rugged ground into a street. Without going into a discussion of this matter, our opinion is that, the river front at this point, having been made a part of North street, and as such dedicated by the original proprietors to the city as a street, the city could not be divested of it by any act of Beebe for the reasons heretofore given, as applicable to both streets.

There is this difference, perhaps, between North street and Water street, or the parts thereof involved in this litigation: In the case of the former the rents and leases of the city extended further back than in the case of the latter; and in the case of the latter the proof tends to show that at some points, if not substantially at all points, the highwater mark of the river extends to the street, treating it as only 60 feet wide, as designated on Beebe's plat, thus leaving no slope or river front.

This disposes of all the questions raised which we deem it necessary to dispose of.

Upon the whole case, we are of the opinion that the cov-

nant of Beebe covered the case of the city in its ownership of the streets included and laid off in the bill of assurances and plat therewith filed by the "original proprietors;" that there was an acceptance of that dedication by the city; that the city could not be deprived of the ownership and possession by its mayor or others pretending to act for it; that Beebe and his heirs and assigns were and are bound by the terms of his covenant, one obligation of which is that he should quitclaim the ground occupied by the streets laid off and dedicated by the "original proprietors," and that the parcels of ground in controversy are parts of Water and North streets respectively, and that the same are still streets of the city of Little Rock as originally laid off; and that in so adjudging, in effect, there was no error in the judgment of the circuit court.

Affirmed.

BATTLE, J., dissents.

RIDDICK, J., dissenting as to North street.

BOONE COUNTY BANK v. BYRUM.

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Opinion delivered March 31, 1900.

1. SUBROGATION—SURETIES OF DE FACTO OFFICER.—Where, although a sheriff failed to file his bond as collector within the time required by law, such bond was duly approved, and he collected the taxes, a portion of which he misappropriated, the sureties on his bond, who made good his deficit, are entitled to be subrogated to the right of the state to proceed against his property. (Page 73.)

2. SAME—FUND IN BANK.—Where a collector deposited in a bank a portion of the taxes collected by him, and the bank, having notice that such money belonged to the state, appropriated it to the payment of an individual indebtedness of the collector, sureties on the collector's bond, who paid to the state the amount misappropriated by the collector, are entitled, as against the bank, to be subrogated to the state's right to the deposit, nor is it a defense in favor of the bank that they did not pay the interest and penalty accruing on account of the collector's default. (Page 74.)

3. APPEAL—REVERSAL.—Where a collector deposited in a bank a portion of the taxes collected by him, and the bank appropriated it to the pay-

ment of an individual indebtedness of the collector, and some of the sureties on the collector's bond, who had paid their *pro rata* of his deficit to the state, sued the bank and the other sureties who paid their *pro rata* of the deficit, asking to be subrogated to the state's rights to the deposit, those of the defendant sureties who failed to appear and ask relief are not entitled to have the decree making distribution among those asking relief reversed, since the error, if any, could have been corrected in the trial court on motion. (Page 75.)

4. TRIAL—RELIEF.—Where a part only of the sureties of a collector who contributed to make a deficit due by him asked to be subrogated to the state's claim against a fund in bank, and the other sureties so contributing, though summoned, did not appear nor ask for relief, it was not error to appropriate the fund so as to indemnify the sureties who asked for relief, without regard to the claims of the sureties not appearing. (Page 75.)

Appeal from Boone Circuit Court in Chancery.

BRICE B. HUDGINS, Judge.

Watkins & Walker, for appellants, Watkins, Parker and Crump.

The decree was erroneous in awarding to appellees the part of the fund due by the bank, and in giving the state any part of the fund. "Equality is equity" is the foundation of the doctrine of subrogation. 3 Pom. Eq. § 1418; 1 *id.* § 406; 31 Ark. 42; 34 Ark. 580. The chancellor erred in refusing appellant's subrogation. Sheld. Sub. § 141. The state had the right of recovery of the trust fund from the bank, and, having received satisfaction, the fund is no longer a trust fund. 2 Perry, Tr. (3 Ed.) § 841; 104 U. S. 54; Wait. Fraud. Conv. § 44. The sureties are not volunteers. 34 Ark. 580.

G. J. Crump, for appellant, Boone County Bank.

Appellees seek to apply the rules of subrogation, and their rights, together with those of appellants, are to be determined according to equity. 2 Brandt, Sur. & Guar. § 305; Sheld. Sub. § 411; 31 Ark. 42; 1 Pom. Eq. 406, 407. The debt must be fully paid before a surety can claim subrogation. 34 Ark. 113; 40 Ark. 132; 121 Ind. 241; Sheld. Sub. § 127. A surety who pays the debt of his principal, when there is no legal obligation resting on him to do so, is a mere volunteer, and not entitled to subrogation. 83 Ky. 49; 3 Allen, 524; 3 Rand.

490; 3 Metc. 327; 15 B. Mon. 134; 21 La. Ann. 722. The office of collector became vacant upon the failure to file the bond in time. Sand. & H. Dig., §§ 6560–3; 37 Ark. 386; 42 Ark. 114; *ib.* 117; 42 Ark. 394; 63 Ark. 337. This being true, the sureties were under no legal obligation to pay the debt.

J. W. Story and *W. S. & F. L. McCain*, for appellees:

The regulations as to the time for filing the collector's bond are intended for the protection of the state only; and the sureties can not plead such a defense. 22 Ark. 237; 28 Ark. 306. The liability of the sureties is all discharged. The sureties who declined to become parties are not entitled to any relief now. 61 Ark. 189; 24 Ill 517; 102 Ind. 581; 88 Ind. 359–361; 51 Ala. 301; 49 Barb. 444; 54 N. Y. 675.

BATTLE, J. The statutes of this state provide that the sheriff of each county shall be *ex-officio* collector of all taxes of his county, and, before entering upon his duties as such collector, "shall give bond and security to the state;" that such bond "shall be conditioned for the faithful performance of the duties of his office, and for well and truly accounting for and paying over all moneys collected by him" in his official capacity; and that, "should he fail to give such bond before the first Monday in December of each year, the clerk of the county court shall immediately notify the governor, and some competent person having the requisite qualifications shall be appointed by the governor to perform the duties of collector." Sand. & H. Dig., §§ 6558, 6560, 6563.

In this case the sheriff filed his bond as collector of the taxes of 1895 on the first Monday in December, 1895. No notice of his failure to file his bond in time was given to the governor, and no one was appointed collector in his stead. His bond was approved by the county court, and he collected the taxes of 1895, and failed to pay a large portion of the same, and the sureties upon his bond made good the deficit. In doing so, they were not volunteers or strangers. He was at least *de facto* collector, and they were estopped from denying their liability on his bond. Having enabled him to get pos-

session of the public moneys, they were responsible for the payment of the same to the proper officers, and, upon payment of the amount due the state on account of the default of their principal, became entitled to be subrogated to the right the state had to the sum in controversy. *People* v. *Beach*, 77 Ill. 52; *Jones* v. *Scanland*, 6 Humph. 195; *Dunphy* v. *Whipple*, 25 Mich. 10; *People* v. *Jenkins*, 17 Cal. 500; *Jones* v. *Gallatine County*, 78 Ky. 491; *Inhabitants of Trescott* v. *Moan*, 50 Me. 347; *Inhabitants of Wendell* v. *Fleming*, 8 Gray, 613; *Byrne* v. *State*, 50 Miss. 688.

Wood v. *State*, 63 Ark. 337, is unlike this case. In that case a county treasurer and his sureties executed a bond for the faithful performance of the duties of his office. The bond was approved by the county judge in vacation, and was afterwards rejected by the circuit court. He was ordered by the court to file a new bond within fifteen days. He failed to file the bond within the time allowed, and the office by virtue of the statute became vacant. Sand. & H. Dig., § 5399. This court held that the sureties on the rejected bond were not liable for moneys received by their principal after the expiration of the fifteen days. The office was then vacant, and the bond was no longer of any force and effect.

The collector in this case, when he was collecting the revenue, deposited in the Boone County Bank $3,178 of the taxes of 1895 collected by him for the state. The bank, having notice at the time that the amount so deposited belonged to the state, appropriated it to the part payment of the indebtedness of the collector in his individual capacity, and refused to pay it to the state or to the sureties on the collector's bond. He collected other taxes of 1895 for the state, and appropriated them to his own use. The sureties paid to the state the amount of the taxes which he collected and misappropriated, but failed to pay the interest and penalty which accrued to the state on account of the default of the collector. The bank insists that the sureties are not entitled to be subrogated to the state's right to the $3,178 in its hands until they pay this interest and penalty. But this is not true. As against it or the collector, the sureties are entitled to be subrogated; it is only the

state who can interpose any objection. Sheldon on Subrogation (2 Ed.) § 128. And it has released the collector and his sureties from the payment of the interest and penalty.

There were twenty-three sureties on the collector's bond. Twenty-one paid to the state the amount for which he was defaulter, and they were liable. Eleven of them brought this action against the collector, the bank, and the ten others who contributed to the payment of the amount misappropriated by their principal; and the plaintiffs asked to be subrogated to the right of the state to the $3,178. Only one of the sureties made defendant asked for any relief against the fund. The others failed to appear, made no defense, filed no answer, and asked no relief. The $3,178 was apportioned among those who asked relief according tothe amounts paid by them. Three of those who failed to answer have appealed from the decree of the circuit court before the clerk of this court, and now insist that they were entitled to share in the distribution of the fund, and that the circuit court erred in denying them this right. But this contention is without merit. They remained silent when they should have spoken. Had they asked for relief, and shown that they were entitled to it, they certainly would have recovered it. On the other hand, had they asked for it, it might have been shown that they were not entitled to share in the distribution. It is now too late to ask for a correction of errors, if any were made, which were solely the result of their own silence. They cannot lawfully complain. Section 1061 of Sand. & H. Dig. provides: "A judgment or final order shall not be reversed for an error which can be corrected on motion in the inferior courts until such motion is made there and overruled." It is obvious that the error of which they complain, if any was committed, could have been corrected in the trial court, and that appellants are not entitled to a reversal on account of it.

The Boone County Bank insists that each surety who contributed to supply the deficit caused by the misappropriation of the state funds is entitled to a *pro rata* share of the $3,178, and that the decree should have been only for the *pro rata* share of those who asked for relief, and that the remainder of the state fund in its hand should have been left where the

court found it. The basis of this contention is unsound. The $3,178 did not at any time become the absolute property of the sureties who paid a portion of the amount necessary to supply the deficit, but a fund which the sureties who contributed had a right, by equitable proceedings, to have appropriated to indemnify them for losses sustained. No surety was entitled to any part of it after he had received or been paid the sum contributed by him. His right as to it extended no farther than was necessary for his indemnity. If he has been repaid, the whole of it became an indemnity to those who were unpaid, and the same was the result of any other act or omission which deprived him of his remedy against it for indemnity.

Decree affirmed.

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FARMERS' BUILDING & LOAN ASSOCIATION v. JONES.

Opinion delivered March 31, 1900.

HOMESTEAD—ABANDONMENT.—The owner of land will be deemed to have abandoned it as a homestead when he removed therefrom and made application for and procured a loan thereon by making a written statement that the land was not his homestead. (Page 78.)

Appeal from Howard Circuit Court in Chancery.

WILL P. FEAZEL, Judge.

J. W. House, for appellant.

The wife's acknowledgment was a substantial, if not a literal, compliance with the statute. 57 Ark. 242, 246. The mortgage carries the wife's interest in the homestead. 58 Ark. 117, 123. The property was not the homestead of appellee at the time of the execution of the mortgage. The act of March, 18, 1887, does not prevent the husband from abandoning the homestead. 57 Ark. 242, 252. His abandonment and his declarations estop the wife. 35 Mich. 150. Appellant would be entitled to subrogation, even if the mortgage was defectively executed. 39 Ia. 657; 128 Ind. 293; 58 Tex. 696; 74 Ala.

507; 32 N. J. Eq. 103; 35 Kas. 495; 48 Mich. 238; 49 Mich. 546; 36 Kas. 680; 6 Abb. N. Cas. 469; 3 Nev. 138; 117 Ind. 551; 93 N. Y. 225; 49 Minn. 386; 55 Tex. 33; 69 Tex. 437; 27 S. E. 459; 73 Am. Dec. 603; 32 Ark. 258; 50 Ark. 361; 39 Ark. 531.

W. C. Rodgers, for appellees.

This land being originally a homestead, until it is affirmatively shown that he has abandoned it, it must continue to be impressed with this character. 28 Ark. 400; 37 Ark. 283; 41 Ark. 309; 35 Ark. 55; 56 Ark. 621; 50 S. W. 100. The finding of the chancellor that the property was the homestead of appellee, being supported by evidence, is conclusive. The mortgage is not good as against the homestead, because of the defective acknowledgment. 62 Ark. 431; 60 Ark. 269; 79 Fed. 826. Appellant was required to support his allegation as to subrogation by affirmative proof. 95 Fed. 325, 331; Sheld. Sub. §§ 11, 19; Speer, 37, 41; 124 U. S. 534; 122 Cal. 669. The mere advancing of money does not entitle the lender to subrogation. 124 U. S. 534; 164 Ill. 640; 47 Ark. 111, 118; 121 Ill. 597; 125 Ill. 412; 35 S. W. 464, 468; 42 La. Ann. 492; 19 Mart. 602; 8 Mart. 706; 75 Miss. 91; 29 S. C. 501. Appellants are not entitled to subrogation to the rights of any one not made a party. 56 Ark. 563; 53 Neb. 545; 144 Ind. 671; 56 Ark. 574. That question can properly be raised here. 65 Ark. 495, 497; 49 N. E. 44; 113 Ala. 402; 9 Wash. 428; 35 S. W. 238; 40 S. W. 773; 6 Cranch, 221. Appellant was a mere volunteer. 10 Ark. 411, 415; 119 N. C. 323; 104 Ind. 41. Hence it cannot claim subrogation. 10 Ark. 411–415; 25 Ark. 129; 29 W. Va. 480; 43 N. J. Eq. 438. It is not material upon which theory the lower court proceeded, so the result is right. 95 N. Y. 278; 52 Miss. 200, 227; 15 Abb. Pr. 280; 12 Utah, 104; 4 Den. 95; 63 Ark. 134; 66 Tex. 103; 15 Wis. 50; 57 Kas. 450; 55 Ark. 14.

WOOD, J. This suit was brought by the building and loan association to foreclose a mortgage executed by Jones and his wife on certain land. The complaint also set up the right of the appellant to be subrogated to a mortgage of one D. L.

Coleman, which a part of the money borrowed from appellant had been used to satisfy. The defense was usury, and the failure of Mrs. Jones to acknowledge the mortgage so as to convey the homestead under the act of March 18, 1887. The trial court held: (1.) That the mortgage was not properly acknowledged in accordance with said act, and was therefore void. (2.) That there was no usury in the contract. (3.) That appellant was not entitled to subrogation. (4.) That appellant was entitled to personal judgment for the amount claimed, and judgment was so rendered.

We have carefully considered all the points raised, and find no error in the ruling of the court except in refusing to foreclose the mortgage.

Peter C. Jones was a married man, and had a large family. At the time of the application for a loan, and the execution of the mortgage, he resided with his family at Mineral Springs, in Howard county, on land which belonged to his wife's mother, where he had lived for several years. In the application which Jones made to the appellant for the loan he was asked this question: "Is this property your homestead?" and he answered, "No." He also swore to the application, using the following language: "I, Peter C. Jones, the above-named applicant, do solemnly swear that the foregoing statements, facts and answers to the questions are absolutely and unqualifiedly true; * * * that I am the same person who made and subscribed the within and foregoing application for the advance; that I made the statements therein for the purpose of obtaining the advance, and that I fully understand that the advance, if allowed, will be made with reliance on the truth of the statements therein given, and that each and every statement made in the foregoing application is true. I also agree that the above application shall be a part of the contract between myself and the association, and I bind myself, heirs and assigns, to faithfully perform all conditions, agreements and promises contained therein. [Signed and sworn to.]

"PETER C. JONES."

The application was made on the 2d day of January, 1895. The mortgage in suit was executed on the 12th day of

March, 1895. The above facts show clearly that Peter C. Jones, the husband and father, before and at the time of the execution of the mortgage, had abandoned his homestead. He was not living on it; and the answer in the application, and his sworn statement, made for the purpose of obtaining the loan, show that he did not claim, nor intend to claim, it as his homestead. While the act of March 18, 1887, is a limitation upon the right of the husband to convey his homestead except by the consent of his wife, it does not in any manner affect or restrict his right of abandonment. This right he has by virtue of his marital and parental authority, and when he has chosen to exercise it, as he did here, he renders the property which had formerly been his homestead the proper subject of alienation without his wife's concurrence. Thompson on Homestead and Exemptions, §§ 42, 276, 483; *Titman* v. *Moore*, 43 Ill. 169, 174, *et seq.*; *Guiod* v. *Guiod*, 14 Cal. 506; *Thoms* v. *Thoms*, 45 Miss. 263, 276; Story, Confl. Laws; *Williams* v. *Swetland*, 10 Iowa, 51.

He could not be heard after the execution of the mortgage, under the circumstances, to say that he had not abandoned his homestead; and if there was an abandonment by him, his wife is bound by it. In *Sidway* v. *Lawson*,58 Ark. 117, we said: "The husband could abandon the homestead, and it would become liable to his debts, notwithstanding the act of March 18, 1887." See also *Pipkin* v. *Williams*, 57 Ark. 242.

The view we have thus taken renders it unnecessary to discuss the other interesting questions upon which we think the court correctly ruled. Reversed, and remanded for further proceedings not inconsistent with this opinion.

GLADNEY v. RUSH.

Opinion delivered March 31, 1900.

ATTORNEY'S LIEN—RECOVERY OF LAND.—Where, in an action by a widow and heirs to recover land which belonged to their deceased, defendant, by showing a purchase from the widow, defeated her claim to the land, and had her dower set apart to him, this was, in effect, only a partition of the land between him and the heirs, and his attorney was not entitled to a lien as for land recovered. (Page 81.)

Appeal from Crittenden Chancery Court.

Edward D. Robertson, Chancellor.

STATEMENT BY THE COURT.

B. F. Bush, as guardian of certain minor heirs, children of John W. Roman, and the widow of Roman brought ejectment against W. C. Stephenson to recover possession of certain lands alleged to have been owned by Roman. Before the commencement of this action, Mrs. Roman had sold and conveyed the land to Stephenson. On the trial the circuit court found in favor of the right of the heirs to recover the land. This ruling was affirmed on appeal, but it was also held that Stephenson was in equity entitled to the dower interest in the land held by the widow of Roman under his purchase of the land from her, and that the recovery in favor of the heirs was subject to the rights of Stephenson in this respect. The case was reversed on that point, and afterwards on motion it was transferred to the equity docket, and Stephenson filed his petition, asking that dower be assigned to Mrs. Roman for his use and benefit. In accordance with this petition, dower was assigned and set aside to Stephenson by virtue of his purchase of the lands from Mrs. Roman. Upon these facts W. G. Weatherford, the attorney of Stephenson, set up a claim for attorney's lien on the land assigned as dower. This claim was resisted by Hill, Fontaine & Co., to whom Stephenson had mortgaged the land after the litigation commenced. The court

refused to sustain the claim of Weatherford, and he appealed.

T. H. Heiskell, of Tennessee, for appellants.

As to attorney's liens in general, see Sand. & H. Dig., §§ 4223–27; 13 Ark. 195; 36 Ark. 604; 33 Ark. 235; 42 Ark. 402; 38 Ark. 233. Appellant's intestate was entitled to a lien on the dower interest.

W. D. Wilkerson, of Tennessee, for appellees.

There can be no attorney's lien for services in merely protecting an existing right. There must be a recovery. 47 Ark. 86; 56 Ark. 324; Sand. & H. Dig., §§ 4223–7; 1 Lea, 398.

RIDDICK, J., (after stating the facts.) We are of the opinion that the judgment of the chancellor was right. Stephenson was in possession of land which was claimed in an action against him by the widow and heirs of Roman. The plaintiffs recovered, except the widow. As to her, Stephenson had a valid defense, and defeated her claim to the land. It is immaterial that, in order to avail himself of that defense, the case had to be transferred to the equity docket, or that this dower interest which he had successfully defended was, on his petition, filed in the same action, assigned, and set apart to him. This was, in effect, only a partition of the land between him and the other plaintiffs, and in this state an attorney acquires no lien on land by obtaining a partition thereof. *Gibson* v. *Buckner*, 65 Ark. 84.

Stephenson, as before stated, was in possession of all the land at the commencement of the action, and the facts show that he recovered nothing by the litigation, but only succeeded in maintaining his right to a small portion of that which he already held. Under former decisions of this court his attorney held no lien on the land set apart to him. *Hershy* v. *Du-Val*, 47 Ark. 86; *Gibson* v. *Buckner*, 65 Ark. 84.

Judgment affirmed.

BUNN, C. J., dissents.

LEE v. SWILLING.

Opinion delivered April 7, 1900.

1. COMPROMISE—CONSIDERATION.—Where a voluntary settlement of a doubtful claim is made in good faith, the agreement to abide by such settlement and the avoidance of the expense and annoyance of a suit at law are a sufficient consideration to support a promise to pay the amount agreed upon. (Page 82.)
2. SAME—WHEN CLAIM DOUBTFUL.—A claim is doubtful if the parties entering into the compromise thought at the time there was a question between them. (Page 83.)

Appeal from Logan Circuit Court.

JEPHTHA H. EVANS, Judge.

Appellant, pro se:

Money voluntarily paid to one under a mistake of law cannot be recovered. 4 S. W. 60; 15 Am. & Eng. Enc. Law, 676; 46 Ark. 167. The burden of proving fraud was on appellant, and the evidence fails to show it. The court erred in disturbing the settlement. 15 S. W. 556; 14 S. W. 909; 4 S. W. 272; 12 S. W. 863; 28 S. W. 590.

Robt. J. White, for appellee:

The statute as to arbitrations was not complied with. Sand. & H. Dig., § 272; *ib.* § 4319. A settlement must be entered into by the parties willingly, and be consummated fairly. 37 Ark. 354. Arbitrators should be impartial. 32 N. E. 1055; 34 S. W. 401. Appellee is not estopped to bring this suit by having delivered up the notes. 36 Ark. 268.

BATTLE, J. The voluntary settlement or compromise of doubtful claims, made in good faith, without litigation, is highly favored and encouraged by the courts. The agreement to abide by such a settlement, and the avoidance of the expense and annoyance of a suit at law, are a sufficient consideration to support the promise to pay the amount agreed upon. Courts will not investigate such settlements or compromises for

the purpose of setting them aside, "it being sufficient if the parties entering into the compromise thought at the time that there was a question between them." *Burton* v. *Baird*, 44 Ark. 556; 1 Parsons on Contracts (8 Ed.), 453.

In this case there was a disagreement between Thomas Lee and Burton Swilling as to the amount of damages the former had suffered by failing to acquire the land the latter had undertaken to sell to him. The damages were variously estimated by many witnesses from $65 to $400. Swilling estimated them at $65 and Lee at $400. Through the intervention of arbitrators they compromised at $375, Swilling agreeing to pay and Lee to accept that amount in full settlement of their differences. Swilling delivered to Lee the notes sued on in part payment of that amount, leaving $50.80 unpaid, which he promised to pay. The notes were canceled by consent of both parties. Swilling is still owing Lee the $50.80 and six per cent. per annum interest theron from the 25th day of October, 1897. The settlement or compromise was entered into and made in good faith. Swilling testified that Lee took no advantage of him. He promised to pay the balance found owing by him to Lee. His promise is supported by a sufficient consideration, and is valid.

The decree of the circuit court is therefore reversed, and the cause is remanded, with directions to the court to dismiss appellee's complaint, and enter judgment against him in favor of Lee for the $50.80 and six per cent. per annum interest thereon from the 25th day of October, 1897.

GARLAND COUNTY *v.* HOT SPRING COUNTY.

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Opinion delivered April 7, 1900.

1. FINDING OF FACTS—CONCLUSIVENESS.—Findings of facts, made by a trial judge sitting as a jury, are conclusive on appeal if based on evidence. (Page 89.)

2. JUDGMENT—WHO BOUND BY.—Where a county is formed partly of territory detached from another county, and a subsequent act of the

legislature makes the former county liable for such part of the latter county's indebtedness existing at the date of formation of the former county as would be a fair apportionment to the citizens of the territory detached from the latter county and attached to the former, a judgment against the latter county for a debt antedating the formation of the former county will be binding on the former county, and cannot be collaterally attacked, even if erroneous in the amount of interest recovered. (Page 91.)

3. STATUTE—PAROL EVIDENCE AS TO INTENT.—Parol evidence that the legislature, in detaching certain territory from a county and attaching other territory thereto, intended that the addition of the latter territory should compensate for the loss of the former is inadmissible, as the intent of the legislature must be derived from the act itself. (Page 92.)

4. NEW COUNTY—LIABILITY TO PARENT COUNTY.—Where a county, from which another county was in part created, was subsequently compelled by mandamus to pay an indebtedness for which the latter county was in part liable, the latter county will not be liable for any of the costs of such proceeding, nor for any part of the costs of collecting a tax to pay such judgment. (Page 92.)

5. COUNTY—LIABILITY FOR INTEREST.—Counties are not liable for interest on their debts. (Page 93.)

Appeal from Garland Circuit Court.

JOHN FLETCHER, Special Judge.

STATEMENT BY THE COURT.

This is a suit by Hot Spring county against Garland county for that part of the indebtedness of Hot Spring county, for which that part of Garland county taken from Hot Spring county was liable.

The findings and judgment of the court were as follows:

"This cause coming on to be heard *de novo* upon the appeal being taken by Hot Spring county from the order and judgment of the Garland county court dismissing her claim filed under the provisions of the act of the general assembly approved March 1, 1897, when Hot Spring county appeared by her attorney, James P. Clarke, Esq., and Garland county by her attorneys, Greaves & Martin and Wood & Henderson, and the court, having heard the evidence and the argument of parties, as well as the argument of counsel for the respective parties, doth find as follows:

"1. That Garland county was formed under authority of

an act of the general assembly approved April 5, 1873, and of territory taken in part from Hot Spring county; that the part so taken constituted on said 5th day of April, 1873, 38.5 per cent. of the assessed value of all the property, real and personal, liable to taxation in Hot Spring county; that the said act of April 5, 1873, made no provision for the assumption by Garland county of the existing indebtedness of any of the counties from which territory and inhabitants were taken in the formation of said county.

"2. That on March 1, 1897, the general assembly passed an act making Garland county liable for such part of the indebtedness of Hot Spring county existing on the 5th day of April, 1873, as would be a fair apportionment to the citizens of the territory detached from Hot Spring county and attached to Garland county.

"3. That on said 5th day of April, 1873, Hot Spring county was indebted on account of ordinary warrants in the sum of $4,957.26. That on the 12th day of February, 1873, the county court of that county entered into a contract with one E. A. Nickels for the erection of a court house at Rockport, in said county, under the terms of which contract the contractor was to receive, on the execution by him of said contract, and a bond for the proper compliance on his part, $22,000 in the bonds of said county, and when said court house had progressed to completion to the extent of two-thirds he was to receive $10,000 of said bonds additional, and upon its completion he was to receive $11,000 more, being the entire price named in said contract. About the date of the execution of the contract and the filing of his bond in the middle of February, 1873, the said Nickels received from the designated depository $22,000 in the bonds of the county, the said bonds being for $100 each and numbered 1 to 220, both inclusive, and bearing interest at the rate of ten per cent. per annum, payable annually, from the date thereof on the delivery of the interest coupons attached; that the court house never reached a stage of completion to the extent of two-thirds. That $10,000 of said bonds, in addition to said $22,000 thereof, were, notwithstanding said failure to so partially

complete said court house, issued, so that the same became and were enforced as liability against said Hot Spring county; these last-named bonds being in denomination of $100 each, and numbered from 221 to 320 both inclusive."

"4. That said last-mentioned bonds, so numbered from 221 to 320, both inclusive, were not issued and delivered so as to constitute a part of the indebtedness of Hot Spring county on April 5, 1873.

"5. That the validity of all of said bonds was disputed by Hot Spring county; and after litigation between said county and the holders of a part thereof as to the liability of said county on said bonds, the same, by the judgment of the United States circuit court for the Eastern district of Arkansas, were declared to be a valid liability of the county at the date of its said several judgments, these said judgments being entered subsequent to January 1, 1876. Judgment against said county on the account of the principal and interest of said bonds numbered from 1 to 220 for the aggregate sum of $45,191.37, and the county from time to time raised taxes under mandamus proceedings in the court in which said judgments were rendered, and paid on account of said judgments, and the interest thereon, the aggregate sum of $45,191.37, and, in addition thereto, paid the sum of $450 as costs that accrued in defense of said actions; and in the recovery of said judgments on the debt mentioned as bonds from 1 to 220 the county also paid in said actions on said bonds and the coupons thereof, as costs in the mandamus proceedings taken by the plaintiffs in said judgments to compel the levy and collection of taxes with which to satisfy said judgments and the interest thereon, the sum of $450; and also to the county collector for collecting the taxes to pay said judgments the sum of $1,335.75 as commissions allowed to him under the law; and to the county treasurer for receiving and disbursing said taxes to the custodian entitled to receive same $903.82, and to the clerk of the United States circuit court as poundage for receiving said fund to the several plaintiffs entitled thereto the sum of $451.90.

"6. That judgments were also recovered in said court against Hot Spring county upon the $10,000 in bonds num-

bered from 221 to 320 for the aggregate sum, on account of principal and interest thereof, of $20,148.63. That the costs of recovering said judgments were $450, the costs of mandamus proceedings therein were $450, the collector's commission $604.44; the county treasurer's commission $402.96; the poundage of the clerk of the United States court $201,48. That all of the judgments rendered against Hot Spring county on account of said bonds and interest on said judgments and all costs have been fully paid off by said county.

"7. That on the 5th day of April, 1873, Hot Spring county was also indebted on account of obligations known as jail bonds to the extent of principal and interest of $1,400, which has been fully paid off.

"8. That on said 5th day of April, 1873, there was in that part of the territory not taken to form Garland county a jail building of the value of $3,600. That there were no other buildings or property belonging to said county which remained in said county after said date, of value to said Hot Spring county."

"9, Of the ordinary county warrants outstanding on the 5th day of April, 1873, there was recovered against Hot Spring county, on account thereof, judgments for $827.26, for principal, and $243.42 for interest thereof, on account of which said judgments and the interest thereon and cost of recovery said county paid the aggregate sum of $1,115.68.

"The court thereupon declares that Hot Spring county is entitled to recover from Garland county 38.5 per cent of the aggregate sum of outstanding warrants, diminished by the sum included as principal in judgments on said warrants; the amount paid on account of said warrants, and the interest thereon so included in judgments, together with interest on said judgments, and the costs of recovery; the sum of all payments made on account of judgments for principal and interest of bonds from 1 to 220 both inclusive, and interest on the said judgments and cost of recovery. No interest being allowed to Hot Spring county on any payment made by her subsequently to the date of making such payment on account of said judgment, nor will costs that accrued in any mandamus

proceeding taken by any of the plaintiffs in any of said judgments to secure the levy and collection of a tax with which to pay off said judgment be allowed to form a part of the claim upon which the liability of Garland county shall be computed, nor collector's commissions for collecting such taxes, nor treasurer's commissions for receiving and paying of same, nor poundage to the clerk of the United States circuit court for receiving and disbursing sums paid him in satisfaction of said judgments. The aggregate indebtedness thus shown shall be diminished as of the 5th day of April, 1873, by the value of the jail building in Hot Spring county $3,600. No liability rests upon Garland county for any part of the principal or interest of the bonds numbered from 221 to 320 both inclusive.

"It is therefore by the court considered, ordered and adjudged that Hot Spring county do have and recover of and from Garland county the sum of $18,880.41 and all her costs in this behalf expended. And the clerk of this court will certify a copy of this judgment to the county court of Garland county, and the said court is hereby ordered to enter the same upon its records as the judgment of that court in this cause, and that said court cause to be issued in satisfaction thereof warrants on the treasurer in accordance with the act of March 1, 1897."

Each side excepted to the findings of fact and declarations of law, and appealed.

Wood & Henderson and *Greaves & Martin*, for appellant.

It was error for the court to refuse to consider the tax books in evidence. Garland county was not responsible for interest and costs accruing on the Hot Spring county debt, after its formation. The legislature not having imposed any such responsibility, the presumption is that it believed nothing was due. 92 U. S. 307. The board of supervisors had power to compromise and settle the suit with the contractor for the court house. Gantt's Dig. § 595 and notes. And the county is bound by its action. Herm. Est. § 435. Appellant county is liable for only such equitable proportion of the debt as can be established by evidence, taking into consideration the value of county property retained by the old county. 52 Ark. 430. Interest must be authorized by statute. 11 Am.

& Eng. Enc. Law, 379–80. Interest is not allowable on claims against counties. 51 Miss. 807; 64 Miss. 534; 13 Ore. 287; 55 Tex. 314.

Jas. P. Clarke, for appellee.

The appellant fails to properly present to this court any of the matters alleged as errors in the findings of law and facts. 65 Ark. 285; 60 Ark. 250. Appellee is not estopped to insist upon appellant's liability to her for her ratable share of the court house debt, by the so-called decree. The decree, if binding on one, binds both, and fixes on appellant the liability of which it sought exoneration. 62 Miss. 325; 120 U. S. 517. The court erred in finding that the bonds numbered 221 to 320 were not issued and delivered so as to constitute a part of the indebtedness of Hot Spring county on April 5, 1873. 62 Miss. 337. Appellant can not escape liability on the second $10,000 of bonds merely because the date upon which they got out is uncertain. The burden will be divided. 48 Ark. 453. Appellant is seeking equity, and must do equity. Bishp. Eq. § 43; 17 Md. 212. The court erred in declaring that appellee was not entitled, as against appellant, to interest upon payments made to satisfy debts existing on April 5, 1873, down to date of judgment adjusting the indebtedness. 51 Ark. 350; 163 U. S. 440; 136 U. S. 211; 5 L. C. P. Ed. U. S. Rep. 693n.; 21 Ark. 329; 73 Wis. 211. Even after the separation of the counties all were to be treated as citizens of the old county for the purpose of adjustment of its debts. 107 N. C. 300. Each county must share the payments and all interest and costs. 2 Rich. Eq. 15; 4 J. J. Marsh. 463; 17 Me. 64; 14 Ired. Eq. 209; 45 Fed. 445; 5 Rawle, 1068; 7 Mass. 169; 3 Strobh. 184; 23 Vt. 581; 18 *ib.* 150; 50 Ark. 416; 12 Ark. 125; 57 Ark. 125.

HUGHES, J., (after stating the facts.) The judgment of the circuit court sufficiently states the facts in this case, without further statement of them by this court.

The cause was tried before the Hon. John Fletcher, a special judge, sitting as a jury, and the findings of facts by the court, where there is evidence upon which they might be sustained,

are conclusive upon this court. We therefore consider these findings of facts first.

We take it that there is no serious question upon the evidence or doubt that the bonds of Hot Spring county for $22,000, numbered from 1 to 220, both inclusive, were issued, and became a part of the indebtedness of Hot Spring county prior to the 5th of April, 1873, when the act was passed for the formation of Garland county out of territory taken from Hot Spring and other counties. While it seems not to be so certain that the bonds numbered from 221 to 320, both inclusive, were not issued till after the 5th of April, 1873, still there is some evidence to support the finding of the circuit court that said bonds were not issued and delivered so as to constitute a part of the indebtedness of Hot Spring county till after April 5, 1873. The finding therefore must stand as to this. The finding that the territory taken from Hot Spring to form part of Garland county constituted on the 5th of April, 1873, 38.5 per cent. of the assessed value of all the real and personal property liable to taxation in Hot Spring county is supported by the evidence in the case. We cannot disturb this finding, nor the finding of the court that the value of the jail remaining in Hot Spring county after the 5th of April, 1873, was $3,600. The fact that it cost originally more than that is not evidence of its value on the 5th of April, 1873. We think the facts and circumstances as proved sustain the court's finding as to its value; at all events, it is not without some evidence in the record to sustain it.

The court found that the court house in Hot Spring county had been one-third completed on the 5th of April, 1873, and that it was of no value to Hot Spring county. The evidence shows that the court house was never turned over to Hot Spring county, but that it was sold in its unfinished condition to Emmerson and another, under a mortgage, and was torn down, and the material removed.

But, says the counsel for Garland county, Hot Spring county, through her board of supervisors, prevented the building of the court house to completion by releasing the contractor, and cancelling the contract; but for this the court house would

have been completed, and Hot Spring county would have had it when completed. But the evidence tends to show that, owing to the condition of things in Hot Spring county, the court house, had it been completed, would have been of nominal value only, at most, to the county. A movement was pending to change the county site of Hot Spring county from Rockport to Malvern in said county, Malvern being on the St. Louis, Iron Mountain & Southern Railway, while Rockport was off the line of said railroad, then approaching completion through Hot Spring county. It was a foregone conclusion that the county seat would be moved from Rockport to Malvern, which was soon afterwards done.

In reality it seems that this decree releasing the sureties on the bond of the contractor Nickles was a nullity, for Hot Spring county was not a party to the proceedings in which this was done, as we think the record shows. This seems to have been an effort to rid the county of Hot Spring of these bonds, for the decree, while it purported to release Nickels and his sureties, directed the delivery of all the bonds issued and put in circulation, and the cancellation thereof, which however was never done.

We are of the opinion that there was no error in the finding of the court that the court house was of no value to Hot Spring county. If it can be said that this decree bound Hot Spring county, it also bound Garland county, for Hot Spring stood for and represented Garland county, so far as the territory in Garland that was taken from Hot Spring county is concerned. *Board of Supervisors of Chickasaw County* v. *Board of Supervisors of Clay County*, 62 Miss. 325.

The judgments of the United States circuit court against Hot Spring county settled the validity of these bonds, and the rate of interest recoverable upon them, and cannot be collaterally attacked, even if erroneous in the amount of interest recovered against Hot Spring county. *Chollar* v. *Temple*, 39 Ark. 238. Garland county is bound by these judgments. She was represented by Hot Spring county. *Board of Supervisors of Chickasaw County* v. *Board of Supervisors of Clay County*, 62 Miss. 325.

These judgments are *res judicatae*, and estop both Hot Spring and Garland counties. 1 Herman on Estoppel §§ 53, 54, 348, 349.

The evidence of Latta and Sumpter that the territory taken from Clark and Montgomery counties, and attached to Hot Spring county when Garland county was established, was intended by the legislature as a compensation to Hot Spring county for territory taken from Hot Spring county and attached to Garland county, was properly excluded by the circuit court. The act of the legislature speaks for itself, and the intention is derived from a construction of the act by the courts. There was no error in refusing to allow Garland county credit for territory taken from Clark and Montgomery counties and attached to Hot Spring county at the time of the formation of Garland county. Why Garland county should claim credit on this account we are unable to see.

It is not insisted that the act under consideration is unconstitutional, though this is made the third ground of the motion for a new trial by Garland county. It is waived in the argument of counsel, conceding that the constitutionality of the act was settled by this court in *Perry County* v. *Conway County*, which we think is correct (52 Ark. 430).

The appellee, in its second assignment of error in its motion for a new trial, says "that the court erred in refusing to include in the sum of the indebtedness part of which Garland county was, by the general assembly, made liable to pay, the costs incurred in the United States circuit court in mandamus proceedings to compel levy of taxes with which to pay judgments on causes of action, which the court in this case held to be such indebtedness as said Garland county was so liable to discharge in part." Hot Spring county might have arranged to meet her indebtedness without being compelled by mandamus, and it was no fault of Garland county that she had to be compelled by mandamus to do so. The court did not err in holding that Garland county was not liable for part of the costs of these mandamus proceedings, or for poundage paid the clerk of the United States court, or the fees paid the tax collector and treasurer of Hot Spring county for collecting and paying out.

In the sixth assignment of error in appellee's motion for a new trial it is said "that the court erred in refusing to allow interest to Hot Spring county on that part of the indebtedness for which Garland county is now adjudged to be liable from the dates upon which Hot Spring county made the several payments that paid and discharged the same down to the date of the judgment of this circuit court adjusting the indebtedness between Hot Spring county and Garland county. We think there was no error in this ruling. Debts against counties do not bear interest as matter of law. There is no statute allowing interest on such debts in this state, and it seems that interest was not allowed at common law. 11 Am. & Eng. Enc. Law, 379, 380; Perley on Interest, 65 (1) and cases cited; 11 Am. & Eng. Enc Law (1 Ed.), 388d, note 3, and 389 note 1.

The judgment of the circuit court is in all things affirmed.

COQUARD v. PEARCE.

Opinion delivered April 14, 1900.

MARRIED WOMEN—SEPARATE PROPERTY—SCHEDULE.—Gould's Digest, ch. 111, § 7, which provides that, "before any married woman shall be entitled to the privileges and benefits of the provisions of this chapter, she shall cause to be filed in the recorder's office, in the county where she lives, a schedule of the property derived through her, and no property belonging to any married woman shall be exempt from the payment of any debts contracted by her husband previous to the filing of the schedule aforesaid," did not enlarge the common-law estate of the husband in the wife's separate property in case she failed to file a schedule, and an execution sale of the husband's interest in a deceased wife's unscheduled land could not convey more than an estate for his life. (Page 97.)

Appeal from Benton Circuit Court in Chancery.

O. W. Watkins, Special Judge.

STATEMENT BY THE COURT.

We adopt appellee's statement of facts, it being correct. It is as follows:

"Appellant Coquard brought his suit by ejectment against the appellees to recover from them the lands mentioned in appellant's complaint. Both parties claim to have derived their title from Nancy A. Pearce, and an abstract of the facts, showing how these adverse claims originated, follows: On and long prior to the 24th day of March, 1869, John Smith owned all the lands in controversy, and on that day, for a valuable consideration, sold and conveyed to Nancy A. Pearce, by a proper deed, said lands, in which the grantor, Smith, reserved to himself and wife for the period of their lives the absolute control and dominion over the lands embraced in the deed, and a portion of the rents thereof. Some ten days after the execution and delivery of the deed to Nancy A. Pearce, wife of N. B. Pearce, she caused the same to be duly recorded in the office of the recorder of Benton county. In December, 1873, nearly five years after the execution of the deed above referred to, the grantors therein, Smith and wife, executed and delivered to Nancy A. Pearce a second deed, by which they conveyed to her all the rights in the land reserved to themselves in the former deed. This last deed was duly recorded in the office of the recorder of Benton county on the 5th day of January, 1874.

"The effect of the two deeds was to vest in Nancy A. Pearce the present absolute fee simple title to the lands, and she thereupon (December, 1873) entered into the exclusive occupancy of the same, and continued to occupy, control and claim the same as her sole and separate property and estate until the time of her death, which occurred in the year 1885. Mrs. Pearce died in Benton county, Arkansas, intestate, leaving her surviving her husband, N. B. Pearce, and the appellee, Bart Pearce, and several other children, as her sole heirs at law. N. B. Pearce died in the year 1893. From the death of his wife to the time of his own death N. B. Pearce occupied the lands as tenant by the curtesy. After the death of N. B. Pearce the children and heirs at law of Mrs. Nancy A. Pearce continued in the occupancy of the lands, claiming to be the owners thereof by inheritance, until the appellee acquired by purchase for fair value from them the shares and interests of his brothers and sisters in the lands. After which appellee

continued in the exclusive possession of the lands, claiming to be the sole owner thereof, and now occupies and claims the same.

"In the years 1870–1–2 John Smith and N. B. Pearce were engaged in the mercantile business as partners, and in those years, 1870–1–2, contracted and incurred a liability of some $1,200. On the 5th day of June, 1873, the account of $1,200 was settled by the firm of Smith & Pearce executing and delivering to the creditors the firm's note. On the 12th day of May, 1874, this note was merged into a judgment in the Benton circuit court against said firm. After the rendition of the judgment no execution or other proceeding was had thereunder or thereon until the 14th day of May, 1884, ten years and two days after the date of rendition, when execution was issued on the judgment, and this execution at a subsequent period was quashed by the Benton circuit court. After suing out the execution on the 14th day of May, 1884, no further proceedings were had on or under the judgment until the 24th day of November, 1884, when the judgment was revived as to N. B. Pearce only. On the 9th day of August, 1886, an execution was issued on this revived judgment, and under this execution the sheriff on the 6th day of October, 1886, exposed for sale, and did sell, all the right and title of N. B. Pearce in said lands, except his estate by the curtesy; the wife of Pearce having failed to file a schedule of the same. On the 11th day of April, 1888, the sheriff, in pursuance of the sale made in October, 1886, executed and delivered to appellant, as purchaser of the lands at such sale, the deed upon which he relies for his title. In his pleadings the appellant claims to be the owner of the lands, and at the trial offered in evidence in support of his title the sheriff's deed mentioned only.

"In his pleadings appellee denies appellant's claim of ownership of the land, or any part thereof, and sets up title in himself, and he further pleads the staleness of appellant's claim; that the same is barred by the statute of limitations; that appellee and his immediate vendors had occupied the lands, claiming to be the owners thereof, since the year 1873 to the present time. He denies that the indebtedness of the

firm of Smith & Pearce, or any part thereof, was incurred or contracted by their creditors upon the faith of the lands in controversy, or that any credit whatever was extended to the firm of Smith & Pearce on account of the lands; that the long period of occupancy and claim of ownership by appellee and his immediate grantors was with the full knowledge and acquiescence of appellant.

"Appellee also demurred to the complaint for insufficient facts to constitute a cause of action against him, and excepted to the introduction of appellant's deeds as evidence in the same. The defendant recovered judgment."

E. P. Watson, for appellant.

The right of the creditors of Pearce to subject the property of his wife to the payment of his debt was governed by the law in force at the time the debt was contracted, and the change from an account stated to a note did not change this right. 45 Ark. 376–384; 36 Ark. 108; 40 Ark. 427; 45 Ark. 108. For the law in force at that time as to the manner in which a wife should claim property as exempt from the husband's debt, see Gould's Dig., chap. 111; 30 Ark. 79; *ib.* 124, 127; 33 Ark. 618; 37 Ark. 17. Mrs. Pearce's property was not exempt from her husband's debts, because she failed to file her schedule as required by §§ 1–8, chap. 111, Gould's Digest. As to what is a compliance, see 14 Ark. 339; 19 Ark. 344; 22 *ib.* 429; 42 *ib.* 359; 30 *ib.* 127; 33 *ib.* 618. The mere filing of the deed for record was not a compliance. 19 Ark. 339; 37 Ark. 22; 38 Ark. 96. So far as creditors were concerned, in March, 1869, married women could hold property only under the provision of secs. 1, 7 and 8, chap. 111, Gould's Digest. They took a "separate statutory estate" which is distinguishable from the "separate estate" in equity. 1 Bish. Mar. Wom. § 796; 2 *id.* § 50–3. The husband had his estate by curtesy, and this estate was subject to his debts; and if she permits him to use and deal with the property as his own, it all becomes liable to his creditors for his debts. 50 Ark. 42. The law in force at the time the debt was contracted governs this case. 40 Ark. 427; 4 Wall. 535; 13 Wall. 646; 122 U. S. 284, 300.

J. A. Rice, for appellees.

As the husband did not have the fee simple, the sale of it passed nothing. The purchaser of a husband's interest in his wife's real estate takes only the rents and profits of the lands. Tyler, Inf. & Cov. 393–4–5. At common law the estate by the curtesy was the only estate the husband had in his deceased wife's realty. 9 Am. & Eng. Enc. Law, 841; 39 Ark. 432. The judgment, not having been revived within ten years, is barred. Sand. & H. Dig., §§ 4208, 4221, 4831. No execution can, therefore, be issued thereon. *Ib.* § 3036. When one of the plaintiffs in execution is dead, the execution must be sued out in the name of the survivor, for the benefit of himself and the representatives of the deceased plaintiff (Sand. & H. Dig., § 4217); or by both the survivor and the representatives, jointly. *Ib.* §§ 4217–19. The property was not subject to the husband's debts. Act April 28, 1873. The sheriff's deed is not properly in evidence. Sand. & H. Dig., § 3124.

BATTLE, J., (after stating the facts.) The greatest estate which N. B. Pearce could have acquired, by virtue of the relation of husband and wife, in the land in controversy was an estate for and during the term of his natural life. The fact that his wife acquired the lands by purchase during coverture did not increase that estate; neither did her failure to file a schedule have that effect. Chapter 111, of Gould's Digest, which is relied upon by appellant, in no case imposed such a penalty upon a married woman for such a failure. The object of these statutes was to increase her rights by the filing of the schedule, and at the same time protect the rights of her husband's creditors.

Pearce's creditors could not sell under execution any greater interest in his wife's lands than he had. When he died, his interest expired with him.

Judgment affirmed.

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BLANKS v. CLARK.

Opinion delivered April 24, 1900.

ADVANCEMENT—TESTATE ESTATES.—The doctrine of advancements does not apply where the deceased left a will, although there be a residue of the estate undisposed of. (Page 100.)

Appeal from Ashley Chancery Court.

JAS. F. ROBINSON, Chancellor.

Z. T. Wood and *J. G. Williamson*, for appellant.

There was no final decree rendered in term time. 5 Am. & Eng. Enc. Law, 373, 379, 380. In construing a will, the testator's intent is paramount, and extrinsic evidence is admissible to show the intent, where the description is equivocal. Schoul. Wills, §§ 522, 576; 1 Am. & Eng. Enc. Law, 543, §§ 5, 6; 117 U. S. 210; 60 Ia. 339; S. C. 46 Am. Rep. 70. The doctrine of advancements does not apply. There must be actual intestacy. Sand. & H. Dig., § 2484; 1 Am. & Eng. Enc. Law, 220; 1 Wait's Actions & Def. 211. The intent of the donor governs. 1 Wait's Actions & Def. 205; 11 Atl. 535.

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

The probate, and not the chancery, court has jurisdiction of matters connected with the administration and distribution of estates of decedents. Const. art. 7, § 34; 48 Ark. 549; 33 Ark. 728; 49 Ark. 55. Advancements are exclusively cognizable in the probate court. 2 Woerner, Administration, § 552; 52 Ala. 238. The deceased having left a will, the doctrine of advancements does not apply. Sand. & H. Dig., § 2484; 2 Woern. Administration, § 553; 70 Ia. 379; 71 Ga. 67; 45 Ala. 554; 17 S. C. 512; 45 Ala. 554. This would be true even in a case where the testatrix left part of the property undisposed of by will. 2 Woern. Administration, 553; 70 Ia. 379; 37 Ala. 532.

BATTLE, J. The validity of the deed executed by Daniel E. White to W. L. Blanks on the 29th of April, 1893, is involved in this appeal. Daniel E. White conveyed to W. L. Blanks, by this deed, all his estate in the north half of the southwest quarter of section seventeen, and north half of the north half of section eighteen, in township nineteen south, and range four west. The land conveyed formerly belonged to Mary A. Sumner. She departed this life on the 18th of November, 1891, leaving surviving her Daniel E. White, her son, Sallie M. Terrell, her daughter, and J. Sumner White, Bettie White, Turner White and Mary White, the children of her son, W. J. White, deceased, as her only heirs at law. On the 8th of September, 1891, she executed the following will: "Know all men by these presents, that I, Mary A. Sumner, of the county of Ashley, state of Arkansas, being in good health and sound mind and disposing memory, do make and publish this my last will and testament, hereby revoking all former wills by me at any time heretofore made. I will that my burial expenses and just debts of every kind be paid. I will the 80 acres of land in section 7, where I now live, to Fannie Byrd and her bodily heirs. I will to D. E. White 80 acres of land in section 17. I will to Sallie M. Terrell the use and income of 160 acres of land in section 18 during her life. At her death, I will it to D. E. White. At his death I will it to Susan Barlow and her children. If Sallie M. Terrell survives D. E. White, at her death the land will go to Susan Barlow and her children. My four grand children, I will them $5 each,—Sumner White, Bettie White, Turner White, Mary White. In testimony whereof, I hereunto set my hand and seal, and declare this my last will and testament in the presence of the witnesses named below, this September 8, 1891."

The probate of the will was contested by the heirs, and the contest was taken by appeal to the Ashley circuit court, where on the 9th day of January, 1894, all the devises therein made, except that to Fannie Byrd, were held to be void. While the contest over the will was pending in the circuit court, Daniel E. White executed the deed to Blanks.

On the 30th of March, 1894, J. P. Clark, as guardian of

the minor children of W. J. White, deceased, brought an action in the Ashley chancery court against Daniel E. White and William L. Blanks, alleging that Mary A. Sumner died intestate, leaving her surviving, as her only heirs at law, the defendant, D. E. White, and the plaintiff's wards, and at the time of her death she was seized and possessed of the land described in the deed of Daniel E. White to Blanks; that in her lifetime she had advanced to her son, Daniel E. White, in lands, money, board and wares, the sum of $3,848.97; and that the real estate and personal property then belonging to her estate amounted to the sum of $3,021.64, which the children of W. J. White, deceased, were entitled to by reason of said advancement; and asked that the entire interest in the land be vested in plaintiff's wards, and that the conveyance of Daniel E. White to William L. Blanks be held to be a cloud upon the title of his wards, and be cancelled.

On the 11th of November, 1896, Daniel E. White filed an answer, and made it a cross-complaint against his co-defendant, William L. Blanks, alleging therein that the conveyance to Blanks of his interest in the lands in controversy was procured by fraud and deception, and asked that it be set aside.

Blanks answered, admitting the execution of the conveyance to him by Daniel E. White, and denying the other material allegations in the complaint and cross-complaint, and alleging that he was entitled to the interest in the lands conveyed to him.

The court found that Mary A. Sumner, in her lifetime, advanced to Daniel E. White an amount exceeding the value of the lands in controversy and the personalty in the hands of her administrator; that the conveyance of Daniel E. White to Blanks was executed for an inadequate and fraudulent consideration; that the property received for the conveyance was of the value of $200; and rendered a decree canceling the deed, and vesting the title to the land in controversy in the children and heirs of W. J. White, deceased, the wards of plaintiff, and rendered a judgment in favor of Blanks for the $200; and Blanks appealed.

Mrs. Sumner having left a last will and testament, the doc-

trine of advancement has no application in this case; and this is true, notwithstanding a part of her estate was not disposed of by her will. *Thompson* v. *Carmichael*, 3 Sandf. Ch. 120; *Snelgrove* v. *Snelgrove*, 4 Desaus. Eq. 274, 292; *Greene* v. *Speer*, 37 Ala. 532; *Bieder* v. *Bieder*, 87 Va. 300, 304; 2 Woerner, Administration, § 553.

In consideration of the sale and delivery to him of a stock of drugs and the furnishing him with a house in which to do business from the 29th of April, 1893, to the first of January, 1894, Daniel E. White conveyed to Blanks all his interest in the lands therein described. White alleged that this conveyance was procured from him by fraud. He says that Blanks induced him to sell his interest for the consideration mentioned by falsely and fraudulently representing the drugs to be worth $800 when they were worth only $60. The burden of proving this allegation rested upon him.

As to the value of the drugs, the testimony of witnesses is conflicting. One witness testified as to the value of drugs which Blanks had in his possession on some day prior to the sale to White. The evidence shows that Blanks purchased other drugs after that time and before he sold. Other witnesses testified as to the value of drugs they saw in the possession of White on a day subsequent to the sale. It is evident that this testimony cannot determine the value of the drugs delivered to White, and that the testimony of those who knew the drugs which were sold and their value at the time of delivery should govern. As to the value of such drugs at such time, White testified that he examined them before purchasing, but that he did not know their value; that Blanks represented that they were worth $800; that he relied upon the representation, but that he had since ascertained from information received from others that they were worth $60. Blanks testified that they were worth from $700 to $800, and another witness testified that they were were worth between $600 and $800. Enough, however, was shown to prove that the representation as to the value of the drugs was only an expression of an opinion, and the evidence fails to show that the opinion was simulated.

At the time the conveyance to Blanks was executed the

contest against the will of Mrs. Sumner was pending. The most valuable part of the land was devised to Sallie M. Terrell for her life, and after her death to Daniel E. White for his life. Mrs. Terrell was then 42 years old, was living, and in good health. The land devised to her was worth $1,600; the other was worth $600. In the event the devises to her and White were sustained, Blanks acquired the tract worth $600 and a very uncertain interest in the other. On the other hand, if these devises were held to be void, he was entitled to only one-third of the land described in his deed, Mrs. Terrell being entitled to one-third, and the children of W. J. White, deceased, to the other part. According to the preponderance of the evidence, it is evident that the value of the estate or interest in the lands conveyed did not so far exceed the value of the consideration received therefor as to raise a presumption of fraud. The chancery court, therefore, erred in setting aside the deed.

There is nothing in the contention that Blanks sold White the drugs and furnished him with a house for the purpose of assisting him in the illicit sale of liquor. The preponderance of the evidence clearly proves the contrary.

The decree of the chancery court is therefore set aside, and the cause is remanded, with directions to the court to dismiss the complaint of appellees and the cross-complaint of White, and for other proceedings consistent with this opinion.

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

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WHITE v. SWANN.

Opinion delived April 14, 1900.

1. EXEMPTION—ABSENT DEBTOR—RIGHT OF CHILDREN TO CLAIM.—Where a resident debtor and head of a family abandoned his minor children, and departed from the state, leaving personal property in their possession, it will be presumed, in the absence of a contrary showing, that he intended to return, and his children, by next friend, may claim his exemptions out of the property. (Page 104.)

2. SAME—WHEN INFORMALITY WAIVED.—Where the minor children of an absconding debtor, in making a claim for his exemptions of personal property, asked the exemption in behalf of themselves, instead of in behalf of the debtor, the informality will be waived if no specific obtion thereto is taken. (Page 105.)

Appeal from Pope Circuit Court.

JEREMIAH G. WALLACE, Judge.

STATEMENT BY THE COURT.

H. J. White in January, 1895, commenced suit by attachment before a justice of the peace against H. E. Wheeler for the sum of $33.84; alleging as grounds of attachment that the defendant, Wheeler, concealed himself so that summons could not be served upon him. The attachment was levied upon the personal property, and a judgment obtained, ordering it to be sold to satisfy the debt of plaintiff. Thereupon S. W. Swann, the grandfather of the children, appeared as their next friend, and filed a schedule for them, claiming the property as exempt from execution. In the petition and affidavit to the schedule as amended in the circuit court he stated that Wheeler had abandoned his family and left for parts unknown; that at the time of the abandonment he was, and still is, a resident of the state of Arkansas, and the head of a family, consisting of himself and four minor children, the oldest of whom was twelve years of age; that the mother of the children was dead, and that the property claimed as exempt was left by Wheeler in the possession of the children; and that, with the exception of said property, the children were left destitute.

The plaintiff demurred to the petition, affidavit and claim of exemption, but it was overruled, and the claim of exemption was sustained both by the justice of the peace and the circuit court, and the exemption allowed. Plaintiffs appealed.

Dan B. Granger, for appellant.

The exemptions given by our constitution are for *residents of the state* only. Const. art. 9, §§ 1–2. The person who claims them must be a resident of the state, against whom there is issued an execution, process or attachment against his property, and who may *desire* to claim them. Sand. & H. Dig.,

§ 3718; 34 Ark. 111. Exemptions must be claimed, else they are deemed to be waived. Thompson, Hom. & Ex. § 829; 52 Ark. 547; 43 Ark. 17; 53 Ark. 540. The claim must be made by the debtor himself. 13 L. R. A. 719; 80 Am. Dec. 536; S. C. 39 Pa. St. 513; 21 Pa. St. 40; 36 *id.* 380; 31 *id.* 225; 32 *id.* 277. The claim for exemptions should have been made before the property was condemned for sale. 46 Ark. 43. Thompson, Hom. & Ex. § 826.

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

The protection of the family being the object of the homestead law, the desertion of the family by the husband, they being still left in occupancy of the homestead, is not an abandonment of it. 42 Ark. 541; 81 Am. Dec. 301; 59 Ark. 213. The husband who deserts his family cannot claim exemptions as the head of the family. 56 Ia. 386; 41 Am. Rep. 107. But the right of claiming them for the family naturally devolved upon appellant, on their abandonment by the father. The father's domicile was still in the state. He was entitled to make the claim for exemptions. 52 Ark. 91. The provision allowing exemptions, being remedial, should be liberally construed. 38 Ark. 112. The rule that the claim must be made by the debtor applies only to mere outsiders, and does not preclude appellee. Thompson, Hom. & Ex. 67.

RIDDICK, J., (after stating the facts.) The question in this case concerns the right of the children of Wheeler, acting by their grandfather and next friend, to claim for their father, in his absence, certain personal property belonging to him as exempt from execution. The statements in the affidavit attached to the schedule of property claimed as exempt show that Wheeler is a resident of the state and head of a family. So it is clear that, if he had himself made this claim of exemption, it would have been sustained. But one of the chief objects of the homestead and exemption laws is to protect the family of the debtor from destitution and want. The exemption allowed the individual debtor is small, compared with that allowed him as the head of a family. Such laws are given a liberal construction, in order, as far as possi-

ble, to carry into effect the beneficent purpose for which they are intended. For this reason it has been often held that the desertion of the family by the husband, still leaving them occupying the homestead, is not an abandoment of the homestead by him; the presumption in such cases being that he is but temporarily absent, and intends ultimately to return to his home and family. *Hollis* v. *State*, 59 Ark. 211; *Moore* v. *Dunning*, 81 Am. Dec. 301. And so in this case, nothing being shown to the contrary, we must presume that Wheeler, in leaving his home and family, did not intend permanently to abandon them. The presumption is that he was only temporarily absent. But when the head of the family, having the right to claim exemptions, is absent, it has been decided that not only his wife, but a son or daughter, may interpose and claim the exemption for him. Any person may do this who is authorized to take charge of and protect the property and rights of the debtor during his temporary absence. And this authority need not be expressly given, but may be presumed from circumstances. *Wilson* v. *McElroy*, 32 Pa. St. 82; *Waugh* v. *Burket*, 3 Grant's Cases, 319; *Regan* v. *Zeeb*, 28 Ohio St. 483; Thompson on Homesteads, § 829; Waples on Homesteads, p. 877.

Now, in this case the debtor left his household furniture and other personal property in the possession of his children; intending, no doubt, that it should be preserved and used for their benefit. They being young, their grand-father took charge of them, and, acting for them and the absent debtor, claimed the property as exempt from execution. Under these circumstances, with nothing to show to the contrary, we think it should be presumed that the debtor consented to this action taken for the benefit of himself and children by one who had rightfully assumed control of them in his absence. To hold otherwise would be to say that, if the absconding debtor had left a wife or an adult son or daughter, the law would allow the exemption to be claimed, but would refuse its protection when the deserted family consisted only of the young and helpless. Such a construction of the statute would overlook entirely the main purpose of the exemption law; for, although the exemption is

allowed the debtor, it is given to him in part at least for the protection of his family, who need it all the more when deserted by him during early infancy. The claim of exemption, being made in behalf of the children, and not for the debtor as head of the family, was somewhat informal; but, as before stated the affidavit attached to the schedule states all facts required to show that the debtor was entitled to the exemption. As no special objection was made to the form, the court will consider the substance rather than the form of the proceeding.

A majority of the judges are of the opinion that this case comes within the scope and purpose of the exemption law, and think that the exemption was properly allowed.

Judgment affirmed.

LITTLE ROCK TRACTION & ELECTRIC COMPANY v. TRAINER.

Opinion delivered April 21, 1900.

STREET RAILWAYS—TRANSFERS—INSTRUCTIONS.—Where a passenger sued a street car company to recover damages for the rough conduct of a conductor in threatening to put her off a car to which she had transferred, and in taking her to police headquarters, it being a question whether, as she contended, the conductor of the car from which she transferred misled her by representing that it was unnecessary to procure a transfer ticket, or, as defendant contended, she was negligent in entering the second car without having procured a transfer ticket before leaving the first car, it was error for the trial court to refuse instructions presenting the defendant's theory. (Page 109.)

Appeal from Pulaski Circiuit Court, First Division.

ROBERT J. LEA, Judge.

Rose, Hemingway & Rose, for appellant.

It was error for the court to give the first instruction asked by plaintiff, and to modify the seventh and ninth asked by defendant. The conductor could not waive the requirement of the company's rule that passengers should obtain transfer tickets. 64 Tex. 144; 92 Pa. St. 21; 11 So. 506, 511; 13 S. W. 19; Booth,

St. Rys. § 237; 93 Mich. 612; 52 Fed. 197; 34 W. Va. 65; 21 Ore. 121; 135 Mass. 407. There is nothing stated contrary to this principle in 65 Ark. 181; 143 U. S. 60; or 68 Miss. 165. As appellee gave another reason in explanation for her not asking for a transfer, she cannot now excuse it on the new ground that the conductor led her to believe it unnecessary. 96 U. S. 258; 45 Ark. 40; 57 Ark. 632. Knowing the rule as to transfers, she would not fail to obtain one, and then obtain damages for incorrect information. 17 Pac. 54, 59; 47 Ark. 74. The evidence did not warrant any damages. Mere words are not actionable. 17 N. Y. 54; 64 Ark. 538.

J. H. Hamiter and *T. J. Oliphint*, for appellee:

The actions of the conductor were tantamount to an expulsion, and appellee was entitled to damages for the humiliation suffered by her. 65 Ark. 177; 43 Ark. 535; 43 L. R. A. 707. The damages were not excessive.

BUNN, C. J. This is a suit for damages for injury suffered by plaintiff, by reason of the rough and uncouth conduct of one of the street car conductors of defendant, and manifest indifference to her rights, exhibited by him towards her while a passenger on his car some time in June, 1897. Damages laid at $5,000. Trial by jury, and verdict for $200, and defendant appealed.

The evidence shows that plaintiff boarded one of the street cars of defendant at Fifth and Main streets, intending to go on Main and West Markham to Cross street; and the plaintiff's evidence showed that on boarding the car she asked the conductor if that car went to West Markham, or was for West Markham, and, being answered in the affirmative by him, she paid her fare, but that, on arriving at Markham street and turning the corner, the car was stopped in front of the Metropolitan Hotel, when and where the conductor informed her that his car would go no further, but that an approaching car indicated to her by him would take her on West Markham. It does not appear that anything else was said by the conductor or by the plaintiff, and the latter got off the first car and stood on the street or side walk in front of the Metropolitan Hotel

until that car moved back out of the way, and the second car moved up and took its place, when plaintiff boarded that one; and it proceeded on West Markham until, somewhere between Center and Spring, the conductor came around and demanded his fare of plaintiff, who refused to pay the same, informing him that she had paid her fare on the car from which she had alighted as stated. He informed her that she would have to pay or get off, and after some other words he informed her that he would see that she was put off if she would not pay her fare, and, this being refused, he ran the car back to police headquarters, and called to his assistance a policeman; but nothing was done by the latter, as the chief of police appeared on the scene at this time, and asked the plaintiff what was the matter, and, on being informed by her, he paid the plaintiff's fare to the conductor, and the plaintiff and conductor boarded the car and proceeded on their way without further trouble. The conductor on the first car testified that he had no conversation with plaintiff as to the running of his car, except at the intersection of Main and Markham as detailed by plaintiff. The conductor on the second car denies all rudeness of conduct toward the plaintiff, and that he did anything more than he was required to do in a case where a passenger refused to pay fare or present a transfer ticket. The plaintiff's evidence tends to show that a considerable crowd had gathered at police headquarters, and that she was thus made the object of their gaze and attention, to her great humiliation. Nothing very definite is shown as to the numbers so collected together, and nothing as to their conduct. Plaintiff herself testifies that the conductor on this second car almost disputed her word, but in what connection or in what respect she fails to state. There is much other evidence, but this is all that is necessary to rehearse at this juncture at least.

The court gave on its own motion several general instructions of the usual and merely formal kind, and at the instance of the plaintiff, the following, numbered 1, to-wit: "If you believe from the evidence that it was the rule or custom of the company to require a transfer ticket at the point at which plaintiff made the change, but you should further find that her

entering the car without procuring a transfer ticket was the result of the negligent conduct of the conductor of the first car, and that the plaintiff, as a reasonably prudent person, had a right, under the circumstances, to assume from the conduc and statements of the first conductor that she would be carried on West Markham without such transfer ticket or further payment of fare, then she was entitled to be carried by the second car without further payment of fare."

The defendant asked nine several instructions based on its evidence and in support of this theory of the case, only one of which (the fourth, as to punitive damages) was given by the court. The others were refused, but afterwards the seventh and ninth were modified by the court, and then given as modified. They are as follows, with the modifications expressed in italics, and the other portions embodying what was asked by the defendant, to-wit: "7. The regulation of the defendant company that persons transferred from one car to another can ride upon the second car without paying fare only upon the production of a transfer check from the conductor of the first car is a reasonable, valid and binding regulation; and if the plaintiff knew of it, and transferred from one car to another without asking the conductor for a transfer check, and without his telling her none was necessary, she cannot recover, *unless she was induced to do so by the conduct and statements of the conductor of the first car.*" The testimony of H. G. Fleming, which was substantially uncontradicted, was to the effect that he had been manager of defendant's street car service since 1893, and was well acquainted with its rules and regulations, and that "a conductor is not authorized to pass a passenger from another car without the production of such ticket, except in case of emergency, such as a break down or something of that kind. If a car was running extra from Fifteenth street to Main and Markham, and a passenger on it wished to go out West Markham [such was the case in this instance], the conductor on the latter car has no authority to pass him except on a transfer ticket." "If any person, having paid on one car, wishes to ride on another without paying a second fare, he must ask and get a transfer ticket." He also stated that

these rules and regulations were kept posted in all the cars for a long time, and they were so posted at Ninth and Main up to the time of testifying. The plaintiff herself testified that she was well acquainted with and knew the rules as to transfers; that she knew that when she went from one car to another she had to pay or have a transfer; that there was a notice in the cars, stating that persons wanting to transfer must ask the conductor for a transfer check. There was ample evidence to sustain the instruction as asked, and the defendant was entitled to it, without the modification, as presenting its case or its side of the case. The same may be said of the ninth instruction, which is as follows: "9. The court instructs the jury that if, by the custom or regulation of the defendant company, passengers paying on one car could ride on another one by presenting upon the second car a transfer check procured from the first, and the plaintiff failed to procure such transfer check and present it on the car to which she transferred, then she was not entitled to ride on the car to which she transferred, without the payment of fare. The conductor was not authorized to allow her to ride on his car without the payment of fare or the presentation of such transfer check, *and the company would not be liable unless the jury should find that her entering the car was the result of the conduct of the conductor on the Main street car, and further find that she, as a usually prudent and business person, had a right to suppose from the conduct and statement of the first car conductor that she would be carried on West Markham without such transfer ticket or further payment of fare.*" The modification changes the issue from that made in the complaint and answer, from mistreatment on the part of the conductor on the second car, as charged in the complaint, to a charge against the conductor of the first car to the effect that he had in some way produced or been the cause of the alleged injury to plaintiff on the second car. There is no evidence to support that theory. What was said by the conductor of the first car to the plaintiff before his car reached Markham street, according to her testimony, had reference solely to the running of his car, and not transfers. What he said to her after his car reached Markham was

a simple statement that his car went no further, and that the approaching car would take her on West Markham. Neither plaintiff nor the first conductor seems to have given any thought to the subject of transfer, or of procuring a transfer ticket. Which of the two should have taken the initiative in regard to the transfer ticket is a matter of dispute between the plaintiff and defendant, and can only be settled by the evidence and instructions thereon. The court gave the plaintiff an instruction on her evidence and theory of the case, but refused to give any instruction to the defendant presenting its side of the controversy, and upon its evidence as to that part.

The instructions, as given, were confusing. The only conduct or statement of the first car conductor made to plaintiff, upon which she claims she had a right to rely in going from one to the other, and to ride thereon without payment of additional fare, was a misstatement merely as to the running of his car. If it is sought to make the statements of the first car conductor serve the place of representations which would justify the plaintiff in refusing to present a transfer ticket or pay fare on the second car, as seems to be the effort in this connection, it cannot be permitted, for the plaintiff ought not to rely on representations of the servant which she knew were in contravention of the rules and regulations of the company on the subject.

To try the issue made by the complaint and answer, the simple inquiry was whether or not plaintiff had a right under the circumstances to refuse to pay her fare or present a transfer ticket to the conductor of the second car. If she had such a right, that ends the case for her, leaving only an assessment of damages to be had on the evidence in relation thereto. If she had not such right, then the case is ended against her. That was purely a question of fact. The court gave plaintiff's instruction on her theory and evidence of the case, and should have given the defendant's instruction on its theory, without the modifications, and, failing to do so, its judgment is reversed, and the cause remanded for a new trial.

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MEYER BROTHERS DRUG COMPANY *v.* DAVIS.

Opinion delivered April 21, 1900.

PRINCIPAL AND SURETY—SUBROGATION.—Where judgment was recovered against a constable and his sureties for the wrongful seizure and sale of property under process, and such judgment was paid by the sureties, the constable having in the meanwhile died insolvent, the sureties will be subrogated to the rights of the constable to sue on the note given for the purchase money of the property sold under process. (Page 000.)

Appeal from Garland Chancery Court.

LELAND LEATHERMAN, Chancellor

J. D. Kimbell, for appellants.

Davis' sureties cannot claim any rights by subrogation. Sheld. Sub. p. 8, § 6; *ib.* § 40; *ib.* p. 6, § 4. No one can secure by subrogation a greater right than that held by the one for whom he is substituted. 37 Atl. 886. Subrogation is founded, not on contract, but on principles of equity. 50 N. E. 376; 70 N. W. 244; 45 S. W. 500.

Wood & Henderson, for appellees.

The benefit received by appellants from the sale was a valuable consideration, and clearly sufficient to support the promise in the note. 41 Ark. 285; 45 Ark. 112. The rule that there can be no contribution as between joint tort feasors does not apply in cases where there is no intentional wrongdoing. 7 Am. & Eng. Enc. Law (2 Ed.), 395, and notes.

BATTLE, J. On the 14th day of September, 1896, Allen Davis brought a suit against Meyer Brothers Drug Company, J. D. Kimbell, and others, in the Garland circuit court, on a note executed to them for $800, payable to plaintiff, "Allen Davis, constable of Hot Spring township, Garland county, Arkansas."

J. D. Kimbell filed an answer on the 30th of September, 1896, and an amended complaint and cross-complaint on the

23d of the following October. As a defense he stated that the note was given for the purchase price of a stock of drugs and fixtures which had been seized by the plaintiff, Allen Davis, as constable, in pursuance of certain orders of attachment against O. A. Johnston, and had been sold under an order of court, and purchased by the defendants, who sued out the orders of attachment, and their attorneys.

Kimbell moved the court to transfer the action to equity, which was done. After this, S. A. Sammons and others, on their application, were made parties plaintiff to the action. They stated, by way of amendment to the original complaint, that they were the sureties on the official bond of Allen Davis; that Nancy Davis, who claimed to be the owner of the property seized by the constable under said orders of attachment, had sued the constable, and them as his sureties, for the value of the property so attached and sold; that at the trial in the suit brought by Nancy Davis judgment was rendered in her favor, against the constable and his sureties for the sum of $1,200, the value of the property attached; that they, as the sureties of the constable, had been compelled to secure the payment of the judgment by giving a stay bond; that Allen Davis, in order to indemnify them against loss on account of the judgment recovered against him by Nancy Davis, sold and transferred to them the note sued on, together with certain indemnity bonds given to him, as constable, by the attaching creditors; and that Allen Davis was insolvent, and had died since the commencement of this action.

The facts connecting Meyer Brothers Drug Company and J. D. Kimbell with this action, as shown by the evidence, are as follows: On the first day of July, 1895, Meyer Brothers Drug Company sued out an order of attachment in an action instituted by it against O. A. Johnston, and then pending in the court of common pleas of Garland county; the said action having been commenced on the 24th day of May, 1895. This order of attachment was directed to the sheriff of Garland county, and was by him executed by levying upon certain fixtures, shelving and counters, which belonged to Nancy Davis, as the property of O. A. Johnston, the same then being in the

possession of the constable under prior orders of attachment, which had been placed in the hands of the constable, and by him served by levying on a stock of drugs, the property of Nancy Davis, and upon the fixtures, counters and shelves; all of which drugs and other property were seized and held by the constable as the property of O. A. Johnston. Meyer Brothers Drug Company recovered a judgment for the full amount of its claim against Johnston, and its attachment was sustained by the court.

On the 16th of December, 1895, the drugs, fixtures, counters and shelves attached as the property of O. A. Johnston were sold under an order of the court by the constable, Allen Davis, for the sum of $800. Meyer Brothers Drug Company and the other attaching creditors were the purchasers, and they and J. D. Kimbell and others executed the note sued on for the purchase money, and made it payable to "Allen Davis, constable of Hot Springs township, Garland county, Arkansas."

During the pendency of the attachment proceedings, Nancy Davis instituted an action in the Garland circuit court against Davis, the constable, and the sureties on his official bond, for the value of the property seized, and on the 15th of October, 1895, recovered a judgment against the defendants sued by her for the sum of $1,200, as the value of the property attached. The sureties stayed the execution of the judgment, and afterwards paid the amount for which it was rendered. During the pendency of this action, Davis, the constable, transferred the note sued on and certain indemnity bonds which he had taken from the attaching creditors, to his sureties, for the purpose of holding them harmless against the judgment recovered by Nancy Davis. Allen Davis was insolvent, and died after making the transfer; and his sureties, after his death, prosecuted this action to judgment.

The chancery court found the facts to be substantially as stated above; that the makers of the note sued on executed it with the understanding that each attaching creditor "was to pay his proportional amount, and be interested in the purchase to the extent of the amount of his or their respective demands

against O. A. Johnston; that each of the purchasers of the property sold were responsible and liable to the constable for their proportional amount of the purchase money; and that the proportional amount of Meyer Brothers Drug Company was $172.40;" and also found that the sureties on the constable's bond were entitled to be subrogated to the rights of their principal, and to recover of Meyer Brothers Drug Company and J. D. Kimbell, its surety, the $172.40; and rendered a decree accordingly.

The decree was based upon a correct theory. Upon the satisfaction of the judgment recovered against him and his sureties by Nancy Davis for the value of the property attached, the constable would have been entitled to the property so seized. The judgment and satisfaction thereof would have vested the title in him, and he could have recovered the proceeds of the sale in lieu of the property, if he so elected. *Lovejoy* v. *Murray*, 3 Wall. 1; *Elliott* v. *Hayden*, 104 Mass. 180; *Dow* v. *King*, 52 Ark. 282; 1 Freeman on Judgments, § 237. But, inasmuch as he did not pay the judgment, and his sureties have, they are entitled to the same right by subrogation.

There is no error in the decree prejudicial to appellants.

Decree affirmed.

BATESVILLE TELEPHONE COMPANY *v.* MYER-SCHMIDT GROCER COMPANY.

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Opinion delivered April 21, 1900.

CORPORATION—PLEDGE OF STOCK—RECORD.—Sand. & H. Dig., §§ 1337, 1338, providing that whenever a stockholder in a corporation shall transfer his stock in a corporation a certificate of such transfer shall be deposited with the county clerk, who shall note the time of said deposit and record it, and that no transfer shall be valid as against any creditor of such stockholder until such certificate shall have been deposited, do not apply to transfers by way of pledge, but only to absolute sales. (Page 119.)

Appeal from Independence Circuit Court.

RICHARD H. POWELL, Judge.

J. C. Yancey, *J. W. Butler*, *Rose*, *Hemingway & Rose*, and *J. M. Moore*, for appellants.

The statute (Sand. & H. Dig., § 1338) requiring that all transfers of corporate stock be recorded does not apply to a pledge of stock. 45. Pac. 320; 93 Fed. 603; 1 Sumn. 133; 34 Atl. 1127; 34 S. W. 209; 18 *id.* 549; 87 Fed. 58; 4 Mass. 511; 3 Binn. 394; 2 Cow. 526. In New York it is held that the registration laws have no effect as to equitable claims. 49 N. Y. 222; 14 *id.* 560; 22 Wend. 362; 34 N. Y. 80. See also, 3 How. 512. The stock, being under pledge, was not subject to sale under execution. 42 Ark. 236; 58 *id.* 291; 64 *id.* 215. Actual notice of the transfer was equivalent to registration. Even in cases of the grossest fraud, fraud and injury must concur, to give a right of action. 12 Pet. 178; 43 Ark. 462; 11 *id.* 370. That actual notice should be tantamount to the registration prescribed by the statute, see: 16 Ark. 543; 3 Atk. 646; S. C. 2 Lead. Cas. Eq. 35; 26 Ark. 523; 30 *id.* 114; 47 Ark. 540; 58 Ark. 252; 42 *id.* 450; 53 *id.* 139; 34 *id.* 92; 33 *id.* 336; 28 *id.* 85; 93 Fed. 607; 11 Wall. 369; 15 Fed. 501; 30 Conn. 270. The doctrine regarding the registration of mortgages laid down in *Main* v. *Alexander* (9 Ark. 112) does not invalidate this position. That case has been restricted to the narrowest possible limits. *Cf.* 61 Ark. 125; 60 *id.* 595; 43 *id.* 464; 37 *id.* 511; 37 Ark. 632; 49 *id.* 270; 52 *id.* 385; 42 *id.* 66. Also that case has been much doubted. 39 Ark. 386; 42 *id.* 148; 41 *id.* 92. The literal construction of the statute, contended for by appellee, can not be maintained. Broom, Leg. Max. 536; 4 H. L. 97. "Any creditor," as used in the statute, should be given a usual and fair construction. 51. S. W. 633; Endl. Stat. §§ 44, 67, 118, 225, 167, 405, 278, 258, 338e, 114, 291, 296, 125, 142, 381, 299, 166, 65, 216, 225b, 115, 228, 249, 62, 173, 385r, 151, 345, 248, 227, 340, 121, 334, 251, 170c, 335, 340, 174. An unregistered transfer of stock is good as against an attaching creditor with notice. 7 Fed.

369; 15 *id.* 494; 1 Sumn. 153; 3 How. 483; 118 U. S. 9; 116 U. S. 8. Further on the general proposition that actual notice dispenses with necessity of registration, see:—Lowell, Transf. of Stock, §§ 91, 96, 105; 2 Freeman Ex. § 348; 1 Mor. Corp. § 196; Cook, Stock, etc. § 489; 2 Thomps. Corp. § 2410; 26 Fed. 94; 2 E. & B. 624; 29 Pa. St. 398; 137 *id.* 138; 50 N. H. 571; 52 Vt. 73; 52 N. W. 268; 35 *id.* 578; 86 Ky. 408; 78 S. W. 295; 6 Mo. App. 454; S. C. 74 Mo. 77; 61 Tex. 114; 12 So. 6; 3 Daly, 219; 48 N. Y. 585; 132 N. Y. 251; S. C. 30 N. E. 644; 46 N. Y. 332; 34 N. Y. 79, 85; 4 Halst. Ch. 167; 29 Pa. St. 146; 63 Fed. 900; 1 Oh. St. 305; 21 Fla. 1; 35 Cal. 655; 58 *id.* 603; 64 *id.* 388; 40 *id.* 614; 26 Minn. 55; 45 Pac. 329; 87 Fed. 58; 26 Atl. 882; 13 N. J. Eq. 24; 49 N. Y. 222; 14 *id.* 560; 22 Wend. 362; 34 N. Y. 80; 2 Wheat. 393; 137 Pa. St. 147, 148; 3 Binn. 401; 6 Whart. 116; 146 Pa. St. 356; 44 *id.* 5; 29 Mo. App. 492; 10 Mo. 388; 52 N. Y. 203; 17 N. J. Eq. 119; 76 N. Y. 371; 31 La. Ann. 149; 30 *id.* 714; 33 *id.* 1286; 11 S. Car. 520; Jones, Stockholders, § 160; Cook, Stock, etc. § 465; 111 U. S. 479; 103 Mass. 306; 34 Atl. 1127; 34 S. W. 209; 18 *id.* 549; 50 Conn. 472; 47 Am. Rep. 663; 3 Paige, 350; 40 Cal. 614; 35 *id.* 653; 10 Bush, 54; 33 N. W. 897; 32 Am. St. Rep. 624; 3 Binn. 394; S. C. 5 Am. Dec. 375; 6 Wash. 597; S. C. 61 N. W. 839.

H. L. Coleman and *Robert Neill*, for appellees.

It was necessary that the transfer be recorded. Sand. & H. Dig., § 1338; 13 Am. & Eng. Enc. Law, 655. Such a construction will be placed upon a statute as will not suffer it to be eluded. 3 Ark. 285. *Byers* v. *Engles*, 16 Ark. 543, relied upon by appellants, is applicable to *real estate conveyances*; while *Main* v. *Alexander*, 9 Ark. 112 applies to *mortgage* registration. The rule in the latter case—that actual notice does not dispense with the necessity for registration—applies to the case at bar. This still is the rule in Arkansas. 20 Ark. 193; 37 Ark. 91, 94; 18 Ark. 85, 105; 42 Ark. 140; 32 Ark. 598; 22 Ark. 136; 33 Ark. 63, 68; 41 Ark. 186; 35 Ark. 62, 68; 40 Ark. 536; 35 Ark. 365; 49 Ark. 83; 49 Ark. 83; 61 Ark. 123; 54 Ark. 179. As showing the rule

in other states see 108 Ill. 459, 461, construing statutes requiring record of conveyances, etc. *Cf.* 51 Ill. 217, 219; 122 Ill. 657, 668; 53 Ill. 478; 83 Ill. 538; 50 Ill. 444; 128 Ill. 29—all recognizing the distinction as to mortgages. Compare, also, 26 Ind. 124 and 38 Ind. 474, 476, with 125 Ind. 432, 439. See also, in Massachusetts, 13 Metc. 200, 202–3; *id.* 304; 1 Allen, 373–4; 137 Mass. 460—to the effect that notice is not tantamount to registration of mortgages. See, also, 48 Me. 458; 108 Mo. 451, 458; 31 Mo. 437; 63 Mo. App. 315; 89 Wis. 61, 64; 80 Wis. 339; 24 Wend. 115; 31 Barb. 590, 613, 619; 27 N. Y. 568, 581–2–3; 3 Cranch, 140; 40 Oh. St. 569; 7 *ib.* 199; 42 Oh. St. 360; 103 Ia. 437; 7 Colo. App. 129; 49 Me. 315; 5 Cal. 186; 7 N. M. 611; 7 Col. 129; 51 Wis. 519; 5 Cal. 186; 9 Cal. 78; 20 Cal. 529.

BATTLE, J. Section 12 of an act entitled "An act to provide for the creation and regulation of incorporated companies," approved April 12, 1869, which is sections 1337 and 1338 in Sandels & Hill's Digest, is as follows:

"The president and secretary of every corporation organized under the provisions of this act shall annually make a certificate showing the condition of the affairs of such corporation, as nearly as the same can be ascertained, on the first of January or July next preceding the time of making such certificate, in the following particulars, viz: The amount of capital actually paid in; the cash value of its real estate; the cash value of its personal estate; the cash value of its credits; the amount of its debts; *the name and number of shares of each stockholder;* which certificate shall be deposited on or before the 15th day of February or of August with the county clerk of the county in which said corporation transacts its business, who shall record the same at length in a book to be kept by him for that purpose; and whenever *any stockholder shall transfer his stock* in any such corporation, a certificate of such transfer shall forthwith be deposited with the county clerk aforesaid, who shall note the time of said deposit and record it at full length in a book to be kept by him for that purpose; and no transfer of stock shall be valid as against any creditor of such stockholder until such certificate shall have been deposited."

Does the transfer of stock mentioned in this section include pledges of stock, or those transactions by which liens upon the same are acquired? This is the only question necessary for us to decide in this case. Eliminating from the section all except what has reference to the question, it reads as follows: "The president and secretary of every corporation organized under the provisions of this act shall annually make a certificate showing the condition of the affairs of such corporation, as nearly as the same can be ascertained, on the first day of January or July next preceding the time of making such certificate, in the following particulars, viz: * * * the name and number of shares of each stockholder; which certificate shall be deposited on or before the 15th day of February or of August with the county clerk of the county in which said corporation transacts its business; * * * and whenever any stockholder shall transfer his stock in any such corporation, a certificate of such transfer shall forthwith be deposited with the county clerk aforesaid, who shall note the time of said deposit and record it at full length in a book to be kept by him for that purpose; and no transfer of stock shall be valid as against any creditor of such stockholder until such certificate shall have been deposited." It is evident that the object of the certificate of the president and secretary as to the name and number of shares of each stockholder and that of the transfer of the stock by the stockholder are the same; and that the latter is intended to carry into effect the intention of the former; and that the object of both is to make known the names of the stockholders and the number of shares owned by each of them. This being true, it is obvious that the transfer of stock referred to was the absolute transfer of the legal and equitable title to stock, and not pledges or liens. This section does not undertake to regulate the creation or protection of liens, and hence does not affect those transactions by which liens are created without the transfer of stock, or any indorsement and delivery of stock which do not transfer, and create only a lien.

Section 12 of the act of April 12, 1869, was construed, in part, by the circuit court of appeals of the Eighth circuit of the

United States, and the same question we have under consideration was decided in *Masury* v. *Arkansas National Bank*, 93 Fed. Rep. 603. Judge Thayer, speaking for the court, said: "Looking at the two sections (sections 1337 and 1338 in Sandels & Hill's Digest) in the form in which they were originally enacted, the inference is a reasonable one that the legislature had in mind transfers whereby a shareholder parted with his entire legal and equitable title to the stock transferred, when it declared, in the concluding clause of the section, that whenever a stockholder transferred his stock a certificate of such transfer should be deposited with the county clerk. While the act does not in terms prescribe by whom the certificate of transfer shall be filed, whether by the corporation or by the person receiving a transfer of stock, nor what the certificate shall contain, yet it is fair to presume that the lawmaker intended to say that a person purchasing stock should obtain a certificate from the proper corporate officer to the effect that he had acquired certain shares of stock from a certain person or persons, and cause the same to be deposited with the county clerk as one of his muniments of title. The object of the legislature in requiring the county clerk to receive and record semi-annual reports from the officers of corporations, showing their financial condition and who were the shareholders, and to register transfers of stock made in the meantime in a book kept for that purpose, would seem to have been to provide a convenient record which might be consulted for the purpose of taxation, or for the purpose of ascertaining who had control of a corporation, and were responsible for its management, or who might be proceeded against as shareholders to enforce a stock liability in case a corporation became insolvent. All of these objects will be substantially subserved by holding that the section of the act now in question has reference to absolute sales of stock, and that it does not comprehend transfers which are effected by a simple indorsement and delivery of stock certificates as collateral security, inasmuch as creditors who thus hold stock in pledge which has not been transferred on the books of the corporation are not entitled to vote the stock or take part in the manage-

ment of the corporation, and ordinarily cannot be proceeded against as stockholders to enforce a stock liability. *National Bank of Commerce* v. *Allen*, 33 C. C. A. 169; *Vowell* v. *Thompson*, 3 Cranch, C. C. 438; *Brewster* v. *Hartley*, 37 Cal. 15; Cook, Stock & S. § 468, and cases there cited."

Our conclusion, as already indicated, is that the transfer of stock mentioned in section 12 of the act of April 12, 1869, does not include pledges or transactions by which liens only are acquired.

The judgment of the circuit court is reversed, and this action is dismissed.

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

BUNN, C. J., (dissenting.) It is argued in the opinion of the court that the object of the certificate mentioned in section 1337 and that mentioned in section 1338 of the digest have the same object. The object of the first is not definitely stated in the section itself, but the inference undoubtedly is that the public may know, periodically, at least, what is the capital stock actually paid in, the cash value of the real estate of the corporation, the cash value of the personal estate, the cash value of the credits, and the amounts of the debts of the corporation. The requirement that these things should be frequently shown, it is said, is an exercise of the state's police power over these institutions. It is for the protection of the public generally, or rather for the purpose of enabling the state to so control the corporation that the public, as such, may not suffer detriment thereby.

The object of the certificate mentioned in section 1338 of the digest connected with its recording is plainly expressed in the section itself. It protects the creditors of a stockholder from his secret transfers, and to accomplish this end it makes all transfers of stock void unless a certificate thereof is filed for record in the county clerk's office; that is, they are void as against the creditors of such stockholders. The one is a certificate of the standing of the corporation itself as appears upon its books at stated periods, and the other is a certificate of such transfers of stock as may be made by the stockholders of their individual stock. Therefore the two certificates have

not only different objects, but are evidences of different things entirely.

The fact that section 12 of the original act, entitled "An act to provide for the creation and regulation of incorporated companies," approved April 12, 1869, included both sections 1337 and 1338, as now appears in the digest, is relied on in argument to sustain the theory of the court as to similarity of the object of the two certificates and their recording. The rule in construction of statutes is that, in construing any clause, section, or part of an act of the legislature, consideration must be given to the whole of it, in order that the full meaning of the legislative mind on the subject should be ascertained, as far as possible. And this is necessary; for one clause, section or part of an act may explain one or more of the others in the act, or at least throw light upon them. Nothing, therefore, that the mere arrangement of the digester may effect, for the purposes of convenient reference, indexing, and so forth, can or does affect the real meaning of any clause, section, or part of an act. So far as meaning is concerned, there is no difference between a clause when coupled with another in the same section and when the two clauses are separated into different sections. There is no more nor less virtue in a clause because it begins with a lower-case letter, and is separated from the preceding one by a period, and is designated by a separate number, and called a section of itself; for, after all, its meaning is subject to all the influences the preceding clause or section may legitimately and reasonably exert upon it.

Again, if this argument be sound, it would have the same effect in a case of an absolute transfer of stock as in a case of a collateral transfer of the same. But it is manifest that the court does not mean to say that the rule it has laid down is applicable to an absolute sale and transfer of stock. Hence we think its argument, if carried to its logical sequence, simply would show more than the court desires to say.

The principal case cited and relied upon by the court in support of its opinion is the case of *Masury* v. *Ark. Nat. Bank*, 93 Fed. Rep. 603. It is undoubtedly true that that case

is strictly applicable to the case at bar, and, since it accords with the opinion of the court in this case, we have nothing to do but to controvert the doctrine of that case, as expressing the true interpretation of our statutes on the subject, as embarrassing as that may be. The court in this case largely quotes substantially from the decision of *Masury* v. *Ark. Nat. Bank*, and other portions, the following, to-wit: "While the act does not in terms prescribe by whom the certificate of transfer shall be filed, whether by the corporation or by the person receiving a transfer of stock, nor what the certificate shall contain, yet it is fair to presume that the lawmaker intended to say that a person purchasing stock should obtain a certificate from the proper corporate officer to the effect that he had acquired certain shares of stock from a certain person or persons, and cause the same to be deposited with the county clerk as one of his muniments of title." Of course, the proper thing for one acquiring from another certain shares of stock is to obtain a certificate of the secretary or other proper custodian of the corporation books, a certified copy of the fact of the transfer of the stock, and then to deposit the same with the county clerk, not as *one* of his muniments of title, but as *the* muniment of his title, just as one who has procured a mortgage from another would be expected to carry it to the recorder of the county, and cause it to be filed for record by the recorder. There does not appear to be any mystery in this matter, as provided by statute.

The quotation continues: "The object of the legislature in requiring the county clerk to receive and record semi-annual reports from the officers of corporations, showing their financial condition and who were the shareholders, and to register transfers of stock made in the meantime in a book kept for that purpose, would seem to have been to provide a convenient record which might be consulted for the purpose of taxation, or for the purpose of ascertaining who had control of a corporation, and were responsible for its management, or who might be proceeded against as shareholders to enforce a stock liability in case a corporation becomes insolvent. All of these objects will be substantially subserved by holding that the sec-

tion of the act now in question [1338] has reference to absolute sales of stock, and that it does not comprehend transfers when they are effected by simple indorsement and delivery of stock certificates as collateral security." These extracts from the opinion of the court are but extracts taken from the opinion of the Federal Court of Appeals of the Eighth circuit, in *Masury* v. *Ark. Nat. Bank*,, 93 Fed. Rep. 603, which is a case exactly applicable to the case at bar, and the only case applicable to this one in all essential particulars. The objects of the statute referred to in the extract are fully attained in other sections of the act than 1338, for we find that by section 1342 no transfer of stock can be lawfully made by a stockholder except on the books of the corporation. These books therefore show all that is necessary for the purposes of taxation. The same may be said as to the purpose of ascertaining who had lawful control of the corporatian from time to time, and who are responsible for its management, and for its debts as stockholders. It is true that the court of appeals contended with its usual ability to weaken the force, if not destroy the effect, of section 1342, but it was compelled to the conclusion at last that a transfer of stock by indorsement and delivery of the certificates, notwithstanding the inhibition of the statute, was good as against subsequent *bona fide* purchasers for value, forgetting, perhaps, that the case in hand had nothing whatever to do with the subsequent *bona fide* purchasers, but with creditors of the stockholders only. It is sufficient to say, in response to all this reasoning, that the statute attributes no such purposes to section 1338 as are attributed to it by the court of appeals.

It is argued that a collateral assignee cannot vote or otherwise take part in the management of the corporation. Is not that merely begging the question? Why can he not vote if the record shows him to be the holder of a certificate of stock? Is not that a mere assumption at least, which is necessary to give the contention a basis to rest upon? By what authority can we say that? The law declares who are and are not stockholders, and it also gives stockholders the right to vote. It simply says no one is a stockholder unless his name appears

on the books as such. What interest in stock will constitute him a stockholder is not defined in the act, nor is there any expressed limitation. Therefore the term "transfer of stock," a broad expression in itself, must be allowed its full and unrestricted meaning, and allowed to cover all interests that can be or are shown by the record to be transferred. Cases are cited in support of the theory of the court of appeals, but they are cases from jurisdictions uninfluenced and uncontrolled by statutes such as section 1338.

The last argument of the court of appeals we shall notice is involved in the following quotation from the decision, to-wit: "Moreover, if the section of the act now under consideration is construed so as to embrace a pledge of stock certificates, as well as absolute sales of stock, such securities will needlessly embarrass and restrict the circulation of such securities, and prevent their use for legitimate business purposes. It is a well known fact that stock certificates frequently circulate in places far removed from the home of the corporation by which they were issued, that in all commercial centers they are commonly transferred from hand to hand like negotiable paper, and that they are hypothecated for temporary loans by a simple indorsement and delivery thereof, the latter being perhaps the most common use to which such securities are put. In the great majority of cases, when stock is merely pledged for a loan, no record of the transfer is made on the books of the corporation, and, in the judgment of laymen, the making of such a record seems to be a needless formality. The trend of modern decisions has been to encourage the free circulation of stock certificates in the mode last indicated, on the theory that they are a valuable aid to commercial transactions, and that the public interest is best subserved by removing all restrictions against their circulation, and by placing them as nearly as possible on the plane of commercial paper. In the state of Massachusetts, where a different rule once obtained and was for a long time adhered to (*Fisher* v. *Bank*, 5 Gray, 373; *Newell* v. *Williston*, 138 Mass. 240), a law has recently been enacted which makes the delivery of a stock certificate, with a written assignment indorsed thereon, effectual to convey a title to the stock as against all parties, thereby conforming

the law of that state to the law as it has been established by the great weight of judicial opinion in most of the other states." It seems from this that Massachusetts formerly had a statute similar to our own, and the courts of that state construed the statute according to its expressed language, and continued to do so; and the legislature had to change the law before the new policy could be adopted and put in force. In our way of thinking that is exactly against the reasoning of the court. The policy of the law is established and regulated by the legislative branch of the government. It will be observed that in the last extract the basic idea of the opinion is still the theory that stock can be lawfully transferred by indorsement on and delivery of the certificates of stock, notwithstanding the prohibition of section 1342.

We regard the decision in the case of *Masury* v. *Ark. Nat. Bank* as being applicable in all respects to this case, and that the decision of the majority of this court is simply an adoption of that decision. Therefore we have deemed it necessary to make our criticism upon it in the main.

The provision as to registration, and its effect, contained in section 1338, is a valid provision, and must be complied with strictly according to its terms, after the rule pertaining to the registration of mortgages. It constitutes the notice, and no other can supply its place. There is no conflict between *Byers* v. *Engles*, 16 Ark. 543, and *Main* v. *Alexander*, 9 Ark. 112. Each construes a statute, and the statutes are differently worded, and that creates the difference.

BOWMAN *v.* PETTIT.

Opinion delivered April 21, 1900.

TENANCY IN COMMON—LIEN FOR ADVANCES.—Where a tenant in common expended money in improving the common property, and defended the title thereto, he has a lien on the interest of his cotenant for his advances, which will be enforced against one purchasing the latter's interest with notice of the facts constituting the lien. (Page 130.)

Appeal from Arkansas Chancery Court.

JAMES F. ROBINSON, Chancellor.

P. C. Dooley, for appellant.

There was no partnership. The parties were simply tenants in common. Sand. & H. Dig., § 704; 31 Ark. 580. The parol agreement to perfect title could not not give any lien on the lands as against a *bona fide* purchaser. Sand. & H. Dig., § 3469. Pettit's possession was the possession of both. 100 U. S. 37. When a good consideration passes from the grantee to the grantor, and he buys in good faith, a conveyance will be upheld. 46 Ark. 542, 551; 49 Ark. 20; 39 Ark. 75. There must be a fraudulent intent on the part of both parties. 23 Ark. 258; 41 Ark. 316; 17 Ark. 146; 31 Ark. 554; 41 Ark. 316. The evidence fails to show fraud. 18 Ark. 123; 9 Ark. 482; 26 Ark. 20. Appellee had no right of lien. 56 Ark. 624; 61 Ark. 547; 52 Ark. 473; 82 Ky. 622; Jones, Liens, § 1155; 1 McMull. Eq. 69; 7 J. J. Marsh, 138; S.C. 23 Am. Dec. 387. Under Sand. & H. Dig., §§ 5918, 5919, the co-tenant has a right of action, but no lien, for the costs of improvements. 64 N. W. 790; 14 Am. Dec. 585. There is no charge for taxes paid upon the land purchased from a co-tenant without notice. 53 Ia. 708. Bowman is an innocent purchaser.

Cockrill & Cockrill, for appellee.

No particular formalities are essential to a partnership. George, Part. 20, 21, 30. There was a partnership relation here. 17 Am. & Eng. Enc. Law, 854; 27 Am. Dec. 618. The law gives one partner a lien on the partnership lands for whatever he pays in excess of his share of the firm debts. Tied. Real Prop. § 245; Freeman, Coten. etc. § 120. Even if the parties were only tenants in common, appellee had a lien for the cost of improvements. Jones, Liens, 1149–50; 10 Barb. 626; Freeman, Coten. etc. § 263; 2 Story, Eq. Jur. §§ 1234, 1237; 2 Sugd. Vend. § 426; Dart, Vend. & Pen. §§ 433, 434; Pars. Cont. § 282; Jones, Liens, §§ 1154, 1174; 3 Dana, 321; S. C. 28 Am. Dec. 74; 107 Wis. 8; 107 Ia. 124; 42 Ia. 36; 54 Miss. 323; Tied. Real Prop. § 254. On partition appellee was entitled to compensation for advances. 21 Ark. 539; 67 Ark. 455.

Appellant is not an innocent purchaser. Possession of the lands by appellee was construction notice to him. 16 Ark. 543; 33 Ark. 465; 54 Ark. 499. The circumstances in evidence show actual notice.

HUGHES, J. This is a suit in which appellee seeks to partition a ranch jointly owned by him and Husted Osterhaudt, and to charge Osterhaudt's half interest with half of the money expended by appellee in the defense of the title and in the repair of the ranch. Appellee alleged that he and Osterhaudt were partners in the purchase of the ranch; that, in pursuance of their agreement, he (appellee) took charge and possession of the ranch and of the defense of several suits which were instituted against them by parties holding tax titles; that he expended in looking after and taking care of the ranch, in payment of back taxes, expenses of litigation, and current taxes, $1,424.02. He attached an itemized statement, which showed in detail expenditures aggregating the above amount, one half of which, to-wit: $702.01, was claimed to be due from Osterhaudt, less a credit of $289.01, leaving balance due appellee of $423, with interest. Appellee further alleged that Osterhaudt on February 7, 1897, conveyed the ranch to appellant Bowman; that said conveyance was without appellee's knowledge or consent, and was made with fraudulent intent to defeat appellee out of the sum now sued for; that Bowman had notice of the partnership, litigation, etc.; that he (appellee) had a lien upon all of said lands for the payment of said $423, and that Bowman took subject to it. Appellee prayed for partition, and that Bowman's half interest be sold to satisfy his claim and lien.

Bowman, appellant, answered, consenting to a partition, but denying the partnership between appellee and Osterhaudt, denying that appellee had made advancements for which Osterhaudt was liable, and claiming to be an innocent purchaser. Husted Osterhaudt did not answer. Appellee filed a motion and amended complaint, asking that Mrs. Osterhaudt be made a party defendant, and for cause of action against her alleged that appellant Bowman, as part of the purchase price of the half interest from Osterhaudt, executed a mortgage for $400 to Mrs. Osterhaudt, the mother of Husted Osterhaudt; that

Mrs. Osterhaudt gave no consideration for the mortgage; that Osterhaudt caused the mortgage to be executed to his mother to prevent appellee from collecting the sum due him; that Osterhaudt was a non-resident, and had no property of any kind in this state except the mortgage. Appellee prayed that Bowman be restrained from paying anything on said mortgage, and that any judgment that might be rendered for appellee be declared a lien upon said mortgage, and for all other proper relief. Mrs. Osterhaudt did not answer.

Pettit and Bowman each testified in his own behalf. Their testimony, with some documentary proof, was all the evidence in the case. A decree by default was rendered against the Osterhaudts, declaring the mortgage to Mrs. Osterhaudt void, and a decree was rendered in favor of appellee against appellant, Bowman, declaring appellee's claim of $423, with interest, a lien upon the half interest of Bowman, and ordering it sold to satisfy the lien. The court in its decree found as follows: "Plaintiff had full charge and control of said lands; that there was considerable litigation over said land, in regard to the title, and that improvements were made on said land, and that the plaintiff paid out in cash, in defending the title to said land and in making improvements, the different items set out in the account filed with the complaint, and offered in evidence, to the amount of $1,424.02, of which amount Osterhaudt has paid $289.01, leaving a balance due plaintiff from Osterhaudt the sum of $423, with legal interest on same. That defendant Osterhaudt had full knowledge of the expenditure so made, and consented to the same, and agreed to pay to the plaintiff half of said money so paid out by the plaintiff in perfecting their title to said lands, defending the suits growing out of said lands, and the improvements made on same. The court further finds that the defendant B. F. Bowman purchased Osterhaudt's one-half interest in said land, and took a quitclaim deed for same, and that said Bowman had notice and knowledge at the time he made said purchase that said Osterhaudt was indebted to the plaintiff for expenditures on account of said lands, as above stated, and took the land subject to plaintiff's claim for one-half of the amount so expended by him as aforesaid, and

the court further finds that plaintiff has a lien on the half interest in said land purchased by Bowman of Osterhaudt as aforesaid."

Appellee Pettit and Osterhaudt were shown by the evidence to have been tenants in common, before the sale to Bowman, of the lands partition of which is sought. By consent of Osterhaudt, Pettit, the appellee, made the expenditures upon and for the benefit of the property owned by them as tenants in common. Bowman, the appellant, at the time he took a quitclaim deed to the one half-interest in the land from Osterhaudt, and at the time of his purchase from Osterhaudt of said interest, knew that said Osterhaudt was indebted to Pettit, the appellee, on account of expenditures by appellee as aforesaid. It seems to follow as a clear proposition that in equity Bowman took the land subject to the right of Pettit to reimbursement for one half the expenditures made by Pettit by the consent of Osterhaudt. It is the doctrine of the decisions of the court that where one tenant in common expends money on the common property with the consent of the cotenant, the former has a lien on the share of the latter for his advance. *Cocke* v. *Clausen*, 67 Ark. 455, and cases cited.

We are of the opinion that the findings and judgment of the court are warranted by the evidence.

The decree is affirmed.

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MILLS v. SANDERSON.

Opinion delivered April 21, 1900.

1. ELECTION CONTESTS—JUDGMENT FOR COSTS—NOTICE.—Under Sand. & H. Dig. § 2704, providing that if in election contests "judgment shall be rendered against the contestant, judgment shall be immediately rendered against him and his sureties" for the costs of the case, no notice is necessary to such sureties before judgment is rendered against them. (Page 133.)

2. STATUTES—GENERAL AND SPECIAL.—Where there is a special act applicable in particular cases, a general act on the same subject is not applicable. (Page 134.)

Appeal from Little River Circuit Court.

WILL P. FEAZEL, Judge.

STATEMENT BY THE COURT.

The appellant Mills contested the election of the appellee to the office of sheriff of Little River county, and gave a bond for costs, as required by the statute. Pending the cause, it seems, the bond for costs was lost or mislaid. The court ordered the contestant to give a new bond for costs, or substitute the original bond. This he failed to do. On motion of appellee his suit was by the court dismissed, with judgment against contestant for the costs, without notice to the sureties of the motion, and with an order for execution. Execution issued against said S. S. P. Mills and J. P. Head and W. M. Sykes the sureties on the bond of said Mills for costs in the sum of $1,260.80 as costs acrued in the action.

Mills and said sureties filed a motion to set aside the judgment and quash the execution, and prayed for a restraining order, which was issued. The material grounds alleged and relied upon were that judgment was rendered against the sureties, Sykes and Head, without notice to them as required by law; that said bond was signed, delivered and approved on Sunday, and had never been ratified or approved [by them], and was therefore void." Sanderson demurred generally, ruling on which was reserved. The appellee specially demurred to said paragraphs second and third of the petition. The court sustained the demurrer to said second paragraph, and overruled the demurrer to the third paragraph. Appellant excepted to the judgment of the court sustaining the demurrer to said second paragraph, and appellee excepted to the court's judgment in overruling the demurrer to the second paragraph.

The court then heard the testimony, and found that all the costs were duly and legally taxed; that all the cost was incurred before the agreement of counsel and the order of court that no further steps would be taken in the case pending the decision of *Walker* v. *Cheever*; that the bond for costs was delivered to the clerk on Saturday, September 15, 1894, and by him filed on Monday, September 17, 1894; and that all the

proceedings thereafter had were had by reason of said bond—and denied the motion, and dissolved the temporary restraining order, adjudging 6 per cent damages against the petitioners by reason of the issuance of said restraining order. The court then overruled defendant's general demurrer.

Appellants duly excepted to the findings, rulings and opinion of the court and to the judgment, and filed their motion for a new trial, which being overruled, they excepted and prayed an appeal.

T. E. Webber, for appellants.

The court erred in sustaining defendant's demurrer to the second paragraph of appellant's petition because there was no *trial* had, as is required by Sand. & H. Dig. § 2704. Rap. & Law. Law Dict. "*Trial.*" It cannot be said that the above cited statute repeals by any *necessary implication* the provisions of Sand. & H. Dig., § 796, providing for notice to the surety. 29 Ark. 225; Black, Interp. Laws, 112; 48 Ark. 159; 56 *ib.* 45; 45 Ark. 93. If the two provisions can be so construed as to both stand, such construction should be given them. 106 U. S. 668; 10 Mo. 410; 33 N. J. L. 263; 2 Grant's Cas. (Pa.) 455. The obligation is unenforceable because it was signed, delivered, approved and filed on Sunday. 2 Beach, Mod. Law of Cont. 1618; 2 Pars. Cont. 762; Bish. Cont. § 507; 24 Am. & Eng. Enc. Law, 558; 29 Ark. 386. Nor could it be validated by the clerk dating the filing as of a secular day. 73 Ind. 597; 24 Am. & Eng. Enc. Law, 566, 567; 8 *id.* (2 Ed.) 733; 35 Ark. 470; 40 *ib.* 144; 1 Gr. Ev. § 285; Bish. Cont. § 178.

Oscar D. Scott, *Paul Jones*, *L. S. Solinsky* and *John C. Head*, for appellee.

The circuit court was warranted in dismissing the original action on account of the failure of the plaintiff in that action to comply with the order of court requiring security for costs. 11 Ark. 9; 14 Ark. 47. If there was a failure to give proper notice for judgment on the bond, appellant's remedy was certiorari or by bill in equity. 29 Ark. 183; 39 Ark. 347; 32 Ark. 778; 50 Ark. 458; 52 Ark. 80. The circuit court has no

power to vacate the order after term time. Sand. & H. Dig., § 4197; 46 Ark. 552; 33 Ark. 454. The ruling of the court sustaining the demurrer to the second paragraph of the motion was correct. The act of February 24, 1879, repeals the former statute upon the subject of costs in contested election cases, because it covers the entire field anew, and supersedes the old statute. 31 Ark. 19; 46 Ark. 450; 43 Ark. 425; 29 Ark. 225. Even if the bond had been executed on Sunday, it would have been enforceable in this case. The ground for declaring Sunday contracts void is that the parties are *in pari delicto*. 24 Am. & Eng. Enc. Law, 386; 31 Ark. 518; 38 Ark. 661. The rule does not apply when the party seeking to enforce the contract was not a party to the illegality. 40 Ark. 545; 31 Ark. 128. The subsequent filing of the bond on a secular day was an affirmance of the contract. 29 Ark. 386; 2 Pars. Cont. 762; 25 Ind. 503; 38 Minn. 395; 41 Ala. 132.

HUGHES, J., (after stating the facts.) There is evidence to sustain the finding of the court that the bond for costs was delivered to the clerk on Saturday, the 15th of September, 1894, and by him filed on Monday, the 17th of September, 1894. Was the judgment rendered without notice? When the sureties signed and delivered the bond, they were in court, and were bound to take notice of any proceedings in the case that affected them. Section 2704, Sandels & Hill's Digest, provides that "if, upon the trial of any such suit as is mentionod in section 2702 [contests for offices named], judgment shall be rendered against the contestant, judgment shall be immediately rendered against him and his sureties in the bond for costs in favor of the contestee or defendant in the action, and the officers of the court, for the amount due them as costs in the case." Act February 24, 1879, §§ 1, 2 and 4.

The general statute is found in section 796, Sand. & H. Dig., and provides that "in all cases where there is security for costs * * * in which the plaintiff shall be adjudged to pay the costs, judgment may be rendered against such security * * * on motion of the party entitled to such costs, notice of such motion having first been given to such security," etc. Rev. Stat. chap. 34.

There is no conflict between the two sections. One applies in actions at law generally, while the other applies in contested election cases, and is a special statute enacted to be applied specially in reference to contested election cases. The general act applies in all actions at law, whenever there is not a special statute. Where there is a special act made to apply in particular cases, it only applies, and not the general act Endlich, Interp. of Statutes, § 223 *et seq.*

The judgment of the court in sustaining the demurrer to the second paragraph of the petition is correct, and the findings of the court and judgment upon the facts is sustained by the evidence.

The judgment is in all things affirmed.

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BROWN v. WYANDOTTE & SOUTHEASTERN RAILWAY COMPANY.

Opinion delivered April 21, 1900.

1. CHANCELLOR'S FINDING—CONCLUSIVENESS.—Where there is not a clear preponderance of the evidence against a chancellor's finding, it will not be set aside on appeal as contrary to the evidence. (Page 139.)

2. CONDEMNATION—ULTERIOR MOTIVES.—If land sought to be condemned is needed for legitimate railroad purposes, the motives which influenced the railroad managers in undertaking the work will not take from it its public character. (Page 140.)

3. RAILROAD CORPORATION—CONDITION SUBSEQUENT—FORFEITURE.—Sand. & H. Dig., § 6149, providing that the articles of association of a railroad company "shall be null and void unless there shall be filed in the office of the secretary of state a preliminary survey of the road and five per cent. on the original amount of stock subscribed thereto shall have been paid in cash to the directors named in such articles within two years after such articles of association shall have been filed," was not intended to work a forfeiture *ipso facto* upon default of the company, but to declare a ground of forfeiture available at the state's election, and its failure to comply with the statute could not be availed of as a defense in a proceeding by a railroad company to condemn land. (Page 140.)

4. REDUCTION OF STOCK—INFORMALITY.—An informality in the vote taken to reduce the capital stock of a railroad corporation would not affect the corporate existence of the company. (Page 144.)

5. EMINENT DOMAIN—DAMAGES.—Where parties engaged in the lumber business agreed that a railroad used for hauling logs should remain where located for five years, and, if the party of the first part wished to discontinue or remove said road at any time thereafter, the party of the second part should have the preferred privilege of buying the same by paying the market price for old iron, a railroad company which, with the consent of the party of the first part, undertakes to condemn the log road for its right of way will be liable to the party of the second part for the present value of the road without the iron. (Page 144.)

Appeal from Garland Chancery Court.

LELAND LEATHERMAN, Judge.

STATEMENT BY THE COURT.

This suit was brought by the Wyandotte & Southeastern Railway Company to condemn a right of way over a logging road owned mainly by J. H. Hamlin & Son, in which Joseph Brown also had an interest. Hamlin & Son and Joseph Brown were made defendants, and also Mrs. Brown, the wife of Joseph Brown. Hamlin & Son answered, and asked that their rights under the contract with Brown be protected.

Brown answered, denying the corporate existence of the Wyandotte & Southeastern Railway Company; denying that it had filed the preliminary survey required by section 5169 of Sandels & Hill's Digest, or that five per cent. of the original stock had been actually paid in cash; stating that he had a sawmill plant and property at Gifford and in its vicinity worth $500,000, and 17,500 acres of land, accessible over this logging road, worth $25 per acre for timber, and, if deprived of the logging road, his property would be destroyed; etc.; and claiming the right to buy the logging road, under his contract with Hamlin & Son, at the price of the old iron on the road. He alleged that the suit was a scheme to transfer his interest in the property to the Malvern Lumber Company; that the incorporation of the plaintiff was not in good faith, but to promote private interests only; and that there was no public necessity for the road. He made his answer a cross complaint against Hamlin & Son, and asked that the cause be transferred to equity, which, on his motion, by consent, was transferred to equity. Brown filed an amendment to his answer, stating that on June 23, 1896, Hamlin & Son had given him notice that they would no longer op-

erate the logging road jointly with him, and that on July 16, 1896, they notified him to stop using it, and alleged that by the terms of the contract Hamlin & Son were bound to keep the logging road in a condition to permit the safe running of cars at the rate of twenty miles an hour, which they had failed and neglected to do, to his damage in the sum of $7,000; that Hamlin & Son tore up two miles of road, running through sections 32 and 33, in township 4 south, 15 west, called the "northeast spur," thereby damaging him $2,000. He claimed damages for terminal facilities, worth $50 per month, according to his estimate.

Plaintiff answered; denied the incorporation was fraudulent; charged Brown with selfish motive in his opposition, etc. Brown filed an amendment to his answer, alleging that the plaintiff had forfeited its corporate existence by failing to construct and put in operation five miles of its railroad within the period prescribed by the statute.

The chancellor sustained the incorporation as valid; held that Brown, under the contract with Hamlin & Son, had the right to buy the road at the value of the old iron delivered at Gifford; sustained the right of condemnation of the logging road by the Wyandotte & Southeastern Railway Company; and found the value of the road to be $5,040 without the iron, or that Brown was damaged in this amount by the condemnation of the property, and in the sum of $75 dollars for injury to lands adjoining, and that Mrs. Margaret Brown was damaged $35 on account of land of hers taken by said company,—and decreed accordingly. The court also found that the road had been kept in good repair by Hamlin & Son, and that Brown was not entitled to recover on account of taking up the "spur track," nor for terminal facilities at Gifford, for which Brown claimed compensation, nor for moneys expended by Brown in repairing the logging road, nor for failure of Hamlin & Son to keep said logging road in good condition; and that he was not entitled to claim any set-off by reason of such claim for damages; and dismissed his cross-complaint against Hamlin & Son, except as provided for in the conract between Hamlin & Son and Brown, and that the railway company, Hamlin & Son, and Joseph

Brown each pay one-third of the costs, to all of which Joseph Brown and Margaret Brown excepted at the time, and have appealed to this court. Hamlin & Son have taken a cross-appeal.

Wood & Henderson, for appellants, Brown *et al.*

The railway company had neither authority nor right to condemn the logging road, because it has failed to comply with the requirements of the law governing the formation of corporations in this state. Sand. & H. Dig,, §§ 6148, 6149, 6152. The evidence shows that the railway company was fraudulently incorporated: also, the filing of the profile map required by section 6170 of Sandels & Hill's Digest was a condition precedent to the right to construct any part of the road, or to institute condemnation proceedings. To the point that a railway company, in order to have the right to exercise the power of eminent domain, must comply with the statute granting such right, see:—7 Enc. Pl. & Pr. 468–9, 536, 542 and notes; 10 Am. & Eng. Enc. Law, 1053–4, 1057; 58 Fed. 751, 756; Lewis, Em. Dom. § 600; 37 Am. & Eng. R. Cas. 430; 36 *id.* 234; 44 *id.* 193; *ib.* 43; 57 *id.* 536; 57 *id.* 612; 19 Wis. 459; 40 Wis. 157; 10 Am. & Eng. R. Cas. 23; 120 Mass. 352; 55 Pa. St. 16; 23 Conn. 189; 73 Am. Dec. 17. The company had no power of condemnation for the additional reason that it had failed to build any part of its road within the limit fixed by the act of March 31, 1885 (Acts 1885, p. 170). The forfeiture of the company's charter for non-compliance with this act can be set up by the owner of property which the company is seeking to condemn. 72 N. Y. 245; 106 Mo. 566; 30 Me. 498. The evidence shows that the company has no real right to take Brown's property; and a court of equity has power to grant him relief by injunction. 7 Enc. Pl. & Pr. 708; 62 Am. Dec. 372; 32 Atl. 680; *id.* 381; 32 *id.* 19; 18 *id.* 431; 9 *id.* 754; 3 Pom. Eq. § 1345; 6 Thomps. Corp. § 7772; 4 L. R. A. 275; 31 N. J. Eq. 475; 75 Ill. 113; 68 Ia. 164. The court will, under some circumstances, control the location of a railroad. 7 Am. Rep. 385; Rand, Em. Dom 167. Under his contract with Hamlin & Co., Brown was entitled to the rails at their market price elsewhere, with necessary freight

subtracted. 13 L. R. A. 770; 23 Wall. 471; 1 Benj. Sales, 102, 978, 1120–1; 69 N. Y. 384; 47 N. Y. 167. Brown should also be allowed damages to compensate him for the loss to his other property, by the removal of the road. 45 Ark. 252; 44 Ark. 258; 39 Ark. 107; 42 Ark. 528; 54 Ark. 140; 35 Ark. 622; 10 Am. & Eng. Enc. Law, 1169, 1173, 1174, 1175.

Hill & Auten, and *Rose, Hemingway & Rose*, for appellees, and cross appellants.

Under the decision in 43 Ark. 112, cited by appellants, there is nothing in the evidence that points to fraud on the part of the incorporators of the railway company. "The making of a public improvement cannot be enjoined because it is unnecessary, or is being made to further private ends." Lewis, Em. Dom. § 646; 57 Ark. 359, 364. On condemnation proceedings, valid corporate existence is presumed from the face of a valid charter. Mills, Em. Dom. 82. The failure of a corporation to fulfill what the law requires of it can be urged, as a ground of forfeiture of its charter, by the state alone. In like manner it has been held that only the state could assert a a forfeiture of a donation of public lands. 46 Ark. 97; 47 Ia. 200. So it is with railroad corporations which have failed to construct their road within the time limit prescribed by law. 2 Wall. 44, 63; 5 *id.* 267; 92 U. S. 50, 66; 106 U. S. 360, 368; 115 *id.* 470, 473; 103 *id.* 739, 744. The word "void," as applied in the statute to charters of companies failing to comply with the requirements of the law, means *voidable at the instance of the state*. Endl. Int. Stat. § 269. These requirements were mere conditions subsequent, and must have been acted on by the state, to effect a forfeiture. 5 Ark. 604; 18 Ark. 338; 20 Ark. 204. They cannot be raised as grounds for attack upon the corporate existence in a collateral proceeding by a private party. 20 Ark. 450; 31 Ark. 476; 43 Ark. 120; 47 Ark. 269; 167 U. S. 646; 20 Am. & Eng. R. Cas. 17; 79 Mo. 632; 10 N. E. 349; 57 N. Y. 401; 70 N. Y. 327; 2 Mor. Corp. §§ 1015, 1023; 10 Am. & Eng. R. Cas. 306; S. C. 105 Ill. 73; 7 Cold. 420; 13 La. 497; 32 Barb. 358; Pierce, Rys. 11, 12; 14 Am. & Eng. R. Cas. 43; 33 *id.* 84; 4 Am. & Eng.

Corp. Cas. 53; S. C. 89 Md. 410. Applying the maxim, *Id certum est quod certum reddi potest*, the preliminary survey was sufficient. 3 Ark. 18; 2 Dev. Deeds, § 1020. That the survey was sufficient, see: 1 Zab. 448, 450; 9 Kas. 137. The required 5 per cent of the capital stock was paid—invested in rails. The fact that these rails were bought of one of the directors is no objection. 59 Ark. 562. The reduction of capital stock was authorized and legal. Acts 1895, p. 19. There being no fixed period for the duration of the contract between Brown and Hamlin & Son, it was terminable at will. 3 Kent's Comm. 53; 2 Bates, Part. 571; Laws. Bail. § 29; 13 Am. & Eng. Enc. Law, 977; Wood, L. & Ten. §§ 14, 15. There can be no such thing as a *constructive removal* in this case. A right of way is an easment—an interest in land. 10 Mass. 188; 12 Allen, 461; 101 Mass. 68; 113 *id.* 59. There was no legal abandonment. 2 Wash. R. Prop. (4 Ed.) 370. The measure of Brown's damages is the value of his land that was taken, together with incidental damages to his other lands. 39 Ark. 168; 47 Ark. 527; 55 Ark. 333; 57 Ark. 207; 53 Ark. 434. Brown should be charged for the rails, the market price, plus freight to Gifford. 5 Am. & Eng. Enc. Law, 31. 14 *id.* 467; 23 Wall. 471. Brown is estopped, by his acquiescence in the change of the northeast spur, from claiming damages for its removal. 51 Ark. 492; 18 Ark. 143; 24 *id.* 373; 38 *id.* 572; 37 *id.* 48; 33 *id.* 465. Brown has no claim for rent. 33 Ark. 215; 47 *id.* 239. That the forming of a corporation to operate and extend the road was not an abandonment of the original franchise see: 39 Pac. 628.

HUGHES, J., (after stating the facts.) The counsel for the appellant Brown insist in their brief that there were not one thousand dollars per mile subscribed as stock in the railroad before the articles of incorporation were filed, and that this, being a condition precedent to the legal existence of the corporation, is fatal, and that the Wyandotte & Southeastern Railway Company never existed as a legal corporation, and therefore had no power to exercise the right of eminent domain. We understand this to be the gist of the argument on this point. The chancellor found that one thousand dollars

per mile had been subscribed as required by law before the articles of incorporation were filed and certificate issued. We are unable to see that there is a clear preponderance of evidence against the chanchellor's finding, as this question does not seem to have been raised in the pleadings below, and therefore should not be considered here.

It is contended that the incorporation of the Wyandotte & Southeastern Railway Company was not in good faith, that there was no intention to corporate the road as a railroad, that its purpurpose is to take the logging road from Brown, that the region through which the road is projected to run is wet, poor and thinly populated. We do not think that this contention is so clearly sustained as to warrant this court in saying that the chancellor's finding is clearly against the preponderance of the evidence. "It should be a very clear and palpable fraud which would justify the courts in stopping this work at once, and perhaps forever." *Niemeyer & Darragh* v. *Little Rock Junction Railway*, 43 Ark. 112. It is said in *Railway* v. *Petty*, 57 Ark. 359, 364, "If the land is needed for legitimate railroad purposes, the motives which influenced the railroad managers in undertaking the work will not take from it its public character." That it will injure one and benefit another is no argument against the right of condemnation, which is in the public interest. "The making of a public improvement cannot be enjoined because it is unnecessary, or is being made to further private interests." Lewis on Eminent Domain, § 646.

The counsel for appellant in their brief say that "the form of the articles of association filed in the office of the secretary of state * * * show on their face a substantial compliance with said section 6148, but when the pretended incorporators undertook to meet the requirements of section 6149 they fell short." Section 6149 provides that "such articles of association shall be null and void, unless there shall be filed in the office of the secretary of state a preliminary survey of the road and five per cent. on the amount of the original stock subscribed thereto shall have been actually and in good faith paid in cash to the directors named in such articles within two years after said articles of association have been filed," etc.

Now, it is apparent that this is a condition subsequent, and that the failure to comply with it will be only a ground of forfeiture, which will expose the corporation to be proceeded against for a forfeiture, and does not, *ipso facto*, amount to a forfeiture which may be taken advantage of in a collateral proceeding, as in a proceeding to condemn, unless the words "shall be null and void" constitute a self-executing provision. It is the doctrine of the Arkansas supreme court decisions that "the existence of a corporation, once formed, can be questioned only by a direct proceeding, and that at the suit of the state." *Town of Searcy* v. *Yarnell*, 47 Ark. 269; *Niemeyer & Darragh* v. *L. R. Junction Ry.*, 43 Ark. 120; *Mississippi, O. & R. R. Rd. Co.* v. *Cross*, 20 Ark. 450; *Hammett* v. *Little Rock & N. Rd. Co.*, 20 Ark. 204. Forfeiture can be claimed only by the government, unless the statute expressly provides for the forfeiture of a charter at the suit of an individual, and, though grounds for forfeiture may exist, they cannot be shown by individuals in collateral proceedings. 3 Wood on Railroads, § 497. But see Commentaries on the Law of Corporations by Thompson (Vol. 5, §§ 6586 and 6587), in the latter of which he says: "The sound doctrine is that, where a statute creating a corporation declares that, unless the corporation performs certain acts within a prescribed time, its corporate existence and powers shall cease, or its powers and franchises shall terminate, the statute executes itself; so that, if the prescribed acts are not done within the prescribed time, the corporation, *ipso facto*, ceases to exist, without the necessity of any further action by the state, either by a legislative declaration of forfeiture, or by a judgment of forfeiture in a judicial proceeding. In such a case, whether the corporation has lost its existence is a fact *in pais*, which may be ascertained in any judicial proceeding, whether the question arises directly or collaterally, whenever its ascertainment becomes necessary for the protection of rights or the redress of wrongs." In "the regrettable conflict of judicial opinion" on this question, it is quite reasonable to believe that the doctrine of the section 6587 is the sound doctrine. Yet this by no means solves the question we have in this case, for the language of

the section of our statute under consideration is not like nor of the same import as the language quoted above.

Section 6149 of Sandel's & Hill's Digest is as follows: "Such articles of association shall be null and void, unless there shall be filed in the office of the secretary of state a preliminary survey of the road, and five per cent. on the amount of the original stock subscribed thereto shall have been actually and in good faith paid in cash to the directors named in such articles within two years after said articles of association have been filed." This provision of the statute is not self-executing, and declares only a ground of forfeiture, or, in other words, exposes the corporation to proceedings by the state to declare a forfeiture, in the event of non-compliance with the requirements of the statute, provided the state sees fit to proceed for a forfeiture on account of failure to comply with the statute. It has been held that "if the charter of a corporation provides that the corporation shall cease to exist if a certain thing is not done in a certain time, the question whether the corporation has ceased to exist can be judicially determined only in a suit in which the commonwealth is a party." *Briggs* v. *Cape Cod Ship Canal Co.*, 137 Mass. 71.

"Unless the statute expressly provides for the forfeiture of a charter at the suit of an individual, only the government can assert the right to have it forfeited; and the mere circumstance that the corporation has done acts which are a good ground for a forfeiture cannot be shown by individuals in collateral proceedings, because the state may waive the forfeiture, or enforce it, as it pleases; and, until a forfeiture has been declared, it is not deprived of any of its corporate powers or functions, * * * nor does the fact that a cause of forfeiture exists work a forfeiture or operate as a defense to an action against it; and this has been held to be so, although there is a provision in the charter or general law providing that if the corporation shall do, or omit to do, a certain act, its charter shall, after a certain number of days, be, *ipso facto*, forfeited, and the period so limited has elapsed. A forfeiture can only be declared by a direct judicial proceeding, and the question whether the company has done or omitted acts which

amount to a forfeiture cannot be inquired into collaterally." 3 Wood on Railroads, § 497 and cases cited; *Miss., O. & R. R. Rd. Co.* v. *Cross*, 20 Ark. 443; *Hammett* v. *L. R. & N. Rd. Co.*, 20 Ark. 204.

In the matter of N. Y. & Long Island Bridge Co., 148 N. Y. 540, it is said (in the syllabus): "The question whether a forfeiture clause in an act of incorporation is or is not self-executing depends wholly upon the language employed by the legislature. The legislature has undoubted power to provide in an act of incorporation that corporate existence shall cease by the mere failure of the corporation to perform certain acts imposed by its charter. It requires strong and unmistakable language to authorize the courts to hold that the legislature intended that a forfeiture of corporate existence should be effected without judicial proceedings on the intervention of the attorney-general. The words 'all rights and privileges granted hereby shall be null and void' do not render a forfeiture clause in a charter self-executing; but the meaning of 'null and void' in such a connection is that the corporate existence shall be voidable, i. e., that in case of default the corporation may be dissolved through appropriate legal proceedings by the attorney-general."

We hold, under the authorities above cited, that the provisions of section 6149 of our Digest (Sandels & Hill's, p. 1359) that "such articles of association shall be null and void unless there shall be filed in the office of secretary of state a preliminary survey of the road and five per cent. on the original amount of stock subscribed thereto shall have been actually and in good faith paid in cash to the directors named in such articles within two years after said articles of association have been filed," etc., was not intended by the legislature to work a forfeiture, *ipso facto*, upon default of the company, but was intended only to declare a ground of forfeiture, upon default of the company, which might, at the election of the state, or not, be taken advantage of in a direct judicial proceeding to have the charter of the corporation declared forfeited for failure to comply with the statute, and that such failure could not be availed of as a defense in this action. The failure of the cor-

poration, under the authorities cited, to build five miles of its road within two years did not forfeit its charter, nor annul its powers of association. This is a condition subsequent.

We think it was competent for the company to reduce its capital stock as it did, under the act of February 12, 1895 (Acts 1895, page 19), which provides: "Any corporation organized under the laws of this state may reduce its capital stock." If it was not done by proper vote, we cannot see how this would affect the corporate existence of the corporation.

The remaining question of importance to be determined is what are the rights of the parties under the contract between them? Is Brown, the appellant, entitled to the right to buy the logging road at the price of the iron delivered at Gifford; and, if so, what are his damages by reason of the condemnation which the Wyandotte & Southeastern Railway Company has a right to make of the logging road? The solution of the question, has Brown the right under the contract to buy the road on the terms indicated? depends upon the construction of the language of the contract between Hamlin & Son and Joseph Brown, which is as follows: "It is further agreed that the above-mentioned railroad shall remain where located for a period of five years from the date of this agreement, or longer, if the party of the first part so desire; but if the party of the first part [Hamlin & Son] wishes to discontinue and remove said railroad at any time after the period of five years, the party of the second part [Brown] shall have the preferred privilege of buying the same, or any portion thereof, by paying therefor the then market price of such old rails, splices, bolts and nuts, based on the delivery of same at Gifford, Ark., and their actual weight shall be determined as accurately as can be reasonably done, and the said party of the second part [Brown] shall then become the sole owner of that portion of railroad, and its then located right of way, but not south of boundary line of five (5) south, range fifteen (15) west, nor is this meant to convey any right of way over any lands not owned by said party of the first part." It is contended with much force and ingenuity that the contract means that, before Brown could have the right to purchase,

there must be a discontinuance and removal of the logging road shown, and that, as the fact is that the railway does not intend to remove it, but to build its road on the same route, there is therefore no removal, within the meaning of the contract, which would give Brown the right to purchase. But we cannot put this construction upon the contract. Brown doubtless sought by this contract to prevent being cut off from access over this road to his timber lands, many of which were situate along the line of this logging road. When the logging road was discontinued, and the iron was to be removed to convert into a standard gauge road, it was as much removed as a logging road, so far as Brown's interest was concerned, as if the rails and cross ties, etc., had been actually removed. It deprived Brown of the use of the logging road, over which to haul his timber. This is what this provision of the contract was intended to prevent, and in our judgment this is the reasonable and inevitable proper understanding of the meaning of the parties to the contract. There is no contention that Brown did not give proper notice of his election to purchase the road on the terms set out in the contract. His right to purchase it therefore seems clear to us.

What was the road worth without the iron? Mr. Hartman, a civil engineer and railroad man, examined and measured it, and made an estimate, showing the length to be $9^3/_5$ miles; that the cost per mile, according to his estimate, was $1,200, which would give an aggregate for the whole of $11,520, with estimated cost of bridge added, $1,000, which would aggregate $12,520. Buchanan, another civil engineer, made measurement and estimation of the costs of the road at $8,026. Putting the two estimates together, we have the total of $20,546. The mean cost (one-half of the above amount) will give $10,273. From this we deduct Hartman's estimate of amount necessary to restore road to its original cost price $3,000, which leaves the sum of $7,273 as the total present value. To which add value of Brown's right of way $75, making $7,348, present value of road and right of way, exclusive of iron. This we have concluded to be the value of the road without the iron,

and the amount Brown is entitled to recover. Mrs. Brown is entitled to a decree for $35.

The testimony tends to show that the road was kept in good condition for a logging road, and Brown has made no proof of damages sustained by him by reason of the road not being kept in good condition. He does contend that it was not kept in such condition that cars could be safely run over it at the rate of twenty miles an hour, and contends that Hamlin & Son were bound by the contract to keep it in such condition. But the contract shows that this construction cannot be maintained. The contract is this: "Provided that, if neither party to this agreement purchase the railroad belonging to the Hearne Lumber Company, then the party of the first part [Hamlin & Son] shall have the privilege of furnishing T iron or steel rails of not less than thirty pounds weight per yard, with spikes, splices, bolts and nuts, to complete the road from the east end of the line owned by the party of the second part [Brown] at Wyandotte and Gifford switch to as far as said road may be constructed; * * * road to be well constructed, and safe to operate a locomotive and train of cars at a speed of twenty (20) miles per hour." This shows that the provision for twenty miles an hour relates only to a road Hamlin & Son might build in the event neither party bought the road of the Hearne Lumber Company, but which was never built; they having bought the road of the Hearne Lumber Company. The chancellor was correct in denying Brown damages on this account.

We find no error in the decree denying Brown's claim for damages for the removal by Hamlin & Son of the Northeast spur. We think the circumstances in proof show that Brown consented to its removal. Besides, it is not certain that they did not have the right under their contract with Brown to remove it. We deem it unnecessary to make a statement of the facts relating to its removal here.

It appears to us that there is no error in refusing to allow Brown damages for terminal facilities at Gifford, for it seems he did not intend or expect to charge for them at the time they were allowed Hamlin & Son. Having granted the

privilege of terminal facilities without intention of charging for them, he could not afterwards change his mind and charge for them. *Osier* v. *Hobbs*, 33 Ark. 215; *Cantrell* v. *Clark*, 47 Ark. 239.

The judgment and decree of the chancellor is affirmed, except as to the amount of damages allowed Brown for condemnation of the logging road, as to which it is reversed, with directions to enter a decree below in accordance with this opinion.

BATTLE, J., concurs, but does not agree as to the reasons given for the construction of that part of the contract which provides what shall be done when the road is removed or discontinued.

RIDDICK, J., (dissenting.) While I agree with most of the propositions of law stated in the opinion of my associates in this case, I am not able to concur in the meaning given by them to the contract between Hamlin and Brown, or in their finding in reference to the removal of the road. To recapitulate the facts briefly, Brown and Hamlin were both engaged in the business of sawing and manufacturing lumber. Hamlin purchased of the Hearne Lumber Company a logging railroad running from Wyandotte, on the St. Louis, Iron Mountain & Southern Railroad, across lands owned in part by Brown and in part by Hamlin. Brown had a logging railroad of his own, connecting with or crossing this road purchased by Hamlin; and he and Hamlin entered into a contract by which each gave to the other the right of way over his lands, and the right to push cars and haul logs over the road of the other. The contract also contains the following provision in reference to the railroad which had been or was about to be purchased by Hamlin, who is designated in the contract as party of the first part: "It is further agreed that the above-mentioned railroad shall remain where located for a period of five years from date of this agreement, or longer if the party of the first part so desire; but if the party of the first part wishes to discontinue and remove said railroad at any time after the period of five years, the party of the second part shall have the preferred privilege of buying

the same, or any portion thereof, by paying therefor the then market price for such old rails, splices, bolts and nuts, based on the delivery of same at Gifford, Ark." Now this contract, which it is unnecessary to read in whole, may be in some respects a little vague and uncertain, but the clause above quoted very clearly sets forth the conditions or circumstances under which Brown had the option of purchasing Hamlin's road. He had this only in the event that Hamlin should wish to "discontinue and remove" the railroad. In that event Brown had the option to purchase by paying the price of the iron, which is about all of a railroad that could be removed. The Wyandotte & Southeastern Railway Company now seeks to condemn this logging road for its right of way, and Brown contends, because Hamlin is interested in that company and consents to the condemnation, that Hamlin has removed the logging road or intends to remove it, and that therefore he has the right to purchase it under his contract with Hamlin.

But how can we say that there has been a removal of this road, when it has remained and is now in the same place as it was when this contract was made? To say that there has been a removal as to Hamlin only, in other words, a constructive removal, is to announce something that cannot be true. A railroad cannot at one and the same time remain stationary and be removed. To say so is just as absurd as to speak of a train running forty miles an hour while standing still. Moreover, the contract, the circumstances under which it was made, and the language used show that the parties contemplated that Brown should only have the option to purchase in the event that Hamlin desired to discontinue and actually remove the road. If Hamlin intended to abandon and remove his road, it would then only be worth to him the value of the iron, for that is all of the road that it would pay to remove. And this explains why the value in the event of a removal was fixed at the price of the iron. It is hardly conceivable that Hamlin would have agreed to sell his right of way, roadbed, ties and rails at the price of the rails only, unless he intended to abandon his roadbed and right of way. But in this case he does not wish to either abandon or remove his road, and yet the

court holds that he has removed or intends to remove it, and in assessing the damages for the right of way treats Brown as the owner of the entire road except the rails.

The court, as a reason for this judgment, says that Brown by this contract intended to prevent Hamlin from discontinuing the road as a logging road, but the contract does not support this view. It states that Brown shall only have the right to purchase in the event Hamlin desires to discontinue and remove his road. It may be that it would have been prudent for Brown to have written his contract differently. But it takes two to make a contract, and, if he had done so, it is possible that Hamlin would not have agreed to it. In any event, the contract as written only permits Brown to purchase when Hamlin concludes to remove the road, and I think to construe it as the court has done is to make a new contract much more favorable to Brown than the one agreeed to by Hamlin.

If the Wyandotte & Southeastern Railway Company is lawfully incorporated, and had the right to condemn this logging road purchased by Hamlin from the Hearne Lumber Company, as the court declares in its opinion, then I think the damages assessed for the taking of such road should be the same as if Hamlin had no connection with the road seeking to condemn. If this is a fraudulent scheme on the part of Hamlin, then no condemnation should be permitted; but if the corporation has the right to condemn, as the court holds, and with which ruling I concur, then the damages for the taking of the logging road should be assessed just as if neither Brown or Hamlin had any connection with the railroad company asking the condemnation.

If the Iron Mountain or some other railroad in which neither Brown or Hamlin was interested was seeking to condemn this road, it would be unjust to allow Brown damages for that portion of the road owned by Hamlin, and in this case I think it is equally wrong and unjust to allow him such damages. Whatever right or interest Brown had in this road should be fully paid for, and one of his rights, which should be considered in assessing his damages, is the right given him by

the contract to purchase in the event Hamlin removed the road. But there has been no removal of the road, and he has no right to claim pay for Hamlin's interest in the road because Hamlin consents to the condemnation and he opposes it.

Taking the basis on which the court assessed the damages, I think the amount allowed is moderate; but, for the reasons stated, I think the assessment is based on an erroneous view of Brown's interest in the road condemned, and I therefore dissent.

COOPER v. NEWTON.

Opinion delivered April 21, 1900.

1. EJECTMENT — DEFENSE.— A defendant in ejectment having no title to, or right to possession of, the land in controversy is not in a position to invoke the doctrine of estoppel or laches, nor to question the *bona fides* of plaintiff who holds under a perfect record title. (Page 153.)

2. DEED—PATENT AMBIGUITY.—A deed which describes the land sought to be conveyed as "3.05 acres in unplatted lands of Gurdon, situated on the east side of southwest quarter of southwest quarter of section twenty-eight, township nine south, range twenty west," without further means of identification, is void for patent ambiguity. (Page 154.)

3. BONA FIDE PURCHASER—WHO IS NOT.—One who took a quitclaim deed from the holder of the legal title of land, knowing that such grantor had previously sold the land to another, who had paid a valuable consideration therefor, and taken and maintained possession thereof, but whose deed was void for a patent ambiguity, is not a *bona fide* purchaser. (Page 155.)

Appeal from Clark Circuit Court.

OSCAR D. SCOTT, Special Judge.

STATEMENT BY THE COURT.

This suit was brought at law for the following lands, to-wit: "A strip of ground lying north of and adjoining block No. 2, being 525 feet in length on its east and west sides, and 280 feet in width on its north and south sides, being in Huff-

man's survey, and being also a part of the southwest quarter of the southwest quarter section 28, in township 9 south, range 20 west; lot 6 in block 1; lots 5 and 6 in block 2 [and other lots and parcels which defendant disclaims to own],—all in the town of Gurdon, Clark county, Arkansas." The plaintiff deraigns title by quitclaim deed from N. M. Huffman, a married woman. The deed is regular on its face, and expresses a consideration of $5.

The defendant admits the claim of title set out by plaintiff as being correct down to the quitclaim deed under which plaintiff claims, but says that, at the time this deed was executed, Mrs. Huffman, plaintiff's grantor, had no title to said lands. Defendant claims title to lot 6 in block 2 by virtue of a deed from A. J. Widener and wife to the firm of Newton & Co., and to lot 5 in block 2, by virtue of a deed from Nee Anderson to Newton & Co., and to lot 6 in block 1 by virtue of a deed from G. W. Skinner, and to the residue of the land in controversy here, *i. e.* the tract or parcel described as "a strip of ground lying north of and adjoining block No. 2," etc., as set out *supra*, by virtue of a deed from Mrs. N. M. Huffman, plaintiff's grantor, executed to the firm of Newton & Co. in November, 1891. This deed is exhibited. The consideration therein named is $150 for the said tract and other lands. This particular tract is described in said deed as "three and five hundredths (3.05) acres in unplatted lands of Gurdon, situated on the east side of southwest quarter of southwest quarter of section 28, township 9 south, range 20 west." The defendant, Newton, alleges that the firm of Newton & Co. was dissolved, and that in the division of the assets of said firm the deeds and the interest in the lands mentioned above of the firm of Newton & Co. were transferred to him. He alleged that he went into possession under the deeds, and that his possession of lots 5 and 6 in block 2, and that of his grantors, was open, exclusive, continuous, and hostile for a period of more than seven years. He denies that the plaintiff Cooper paid any sum whatever for the lands, and says that, if he purchased, it was with actual notice of defendant's equities. Estoppel and laches are pleaded. The answer prays that the

conveyance from N. M. Huffman to plaintiff, in so far as it attempts to pass title to the lands claimed by defendant, be declared a cloud upon his title, etc., and for all other relief.

The cause was by consent transferred to equity. The decree of the court was in favor of the plaintiff, Cooper, for lot 6 in block 1 and lots 5 and 6 in block 2, and other lots and parcels which defendant disclaimed, and in favor of defendant Newton for the 3.05 acre tract. Both parties appealed.

Jno. E. Bradley, for appellant.

Appellee is not a *bona fide* purchaser from Mrs. Huffman. A *bona fide* purchaser is one who, in all honesty and good faith, has purchased, without notice of the intervening rights of another, for valuable consideration actually paid in full before notice. 16 Am. & Eng. Enc. Law, 828–834; Bishp. Eq. §§ 275, 262; 30 Ark. 417; 37 *ib.* 195; 47 *ib.* 533. Taking the quitclaim deed for a nominal consideration is sufficient to put a subsequent purchaser on notice. 50 Ark. 322; 23 *ib.* 735; 49 *ib.* 207. Even if the description be defective, neither the grantor nor her subsequent grantee can take advantage of it. 50 N. E. 1071. The deed will be construed most favorably to the grantee. Tied. R. Prop. §§ 827, 841; 1 Demb. Land Tit. 34, 39. The deed may be aided by reference to the plat in evidence. 40 Ark. 237; 28 Ark. 146; Bisph. Eq. 258; 1 Greenleaf, Ev. §§286–8. Laches and fraud estop both Mrs. Huffman and appellee. 55 Ark. 85. 56 *ib.* 497; 58 *ib.* 84; 63 Am. St. Rep. 169; S. C. 20 So. 727. On the question of fee in roads, streets, etc., see 1 Demb. Land Tit. 177, 72–81; 39 S. W. 978.

J. H. Crawford, for appellee.

The deeds to Newton & Co. were void. 36 Ark. 456, 464; 60 *ib.* 562; 135 U. S. 634; Tied. Real Prop. § 789; 162 Ill. 222. A purchaser is not affected by constructive notice of anything which does not lie in the line of his title. 35 Fed. 446; 48 Ark. 409. Appellee is not estopped. Estoppel must be specially pleaded. Bliss, Code Pl. § 364; 93 Ind. 570; 12 Ark. 773. In order to work an estoppel *in pais*, the party estopped must have remained silent when a duty to speak de-

volved upon him. 55 Fed. 895, 901; 33 Ark. 465; 50 *ib.* 128; 2 Herm. Est. § 787. The one pleading it must have been misled to his prejudice. 36 Ark. 97, 114; 96 U. S. 659; 52 Pa. St. 498; 2 Pom. Eq. § 808. No estoppel is created by mere silence unless there are some special circumstances which render it necessary to speak. 2 Herm. Est. § 937; 50 Ark. 128; 39 Ark. 131; 63 Ark. 289, 300; 49 Ark. 336; 53 Ark. 196; 64 Ark. 628. The deed to appellant was void for patent and incurable ambiguity. A patent ambiguous description in a deed cannot be cured by parol. 30 Ark. 657; 40 Ark. 237, 241; 41 Ark. 495; 60 Ark. 487.

WOOD, J., (after stating the facts.) The defendant concedes that the title to the lands in controversy is deraigned through Mrs. N. M. Huffman. Plaintiff, Cooper, by his quitclaim deed from Mrs. N. M. Huffman, shows a *prima facie* perfect title to the lands claimed in his complaint, which gives him the right to recover same, unless there is proof that defendant has a better title. There is no proof whatever of any title in Newton to lot 6 in block 1. No proof of the allegations in the answer as to the purchase of this land from Skinner is adduced, no deed is exhibited from N. M. Huffman to Skinner or other grantee, nor from Skinner to Newton.

As to lot 5 in block 2, Newton testified that it was sold to Newton & Co. by Nee Anderson on the 13th of June, 1891; that the company took immediate possession, and held same until it passed to him by dissolution of the firm, and that he had held exclusive and adverse possession until the institution of this suit. A deed, executed June 13, 1893, from Anderson to Newton & Co. was exhibited, but no title whatever is shown from N. M. Huffman to Anderson. This suit was begun September 22, 1896. It is not shown how long Anderson had been in possession, nor the character of such possession. There is therefore no proof of title to this tract by adverse possession.

As to lot 6 in block 2, Newton testifies of its purchase by Newton & Co. on June 13, 1891, from A. J. Widener and wife. A deed from them is exhibited, and Newton shows that the firm went into immediate possession of same under this deed. He also shows that Widener had been in the exclusive possession

of this lot prior to his conveyance to Newton & Co. for about one year. Here, again, there is a missing link in the chain of title from N. M. Huffman, the common source of title. No deed is shown from her, or any grantee of hers, to A. J. Widener, defendant's grantor. Proof of the possession of this lot by Newton and his immediate grantor is shown for a period of more than seven years before the institution of this suit. But, Mrs. Huffman being a married woman, the statute of limitations did not begin to run as to her. *Fox* v. *Drewry*, 62 Ark. 316; *Rowland* v. *McGuire*, 64 Ark. 412. The deed from Mrs. Huffman to Cooper was executed on the 12th day of August, 1896. The statute of limitations therefore as to this lot did not begin to run against Cooper before that date. Under the pleadings and proceedings here, the doctrine of estoppel and laches as against Mrs. Huffman, and Cooper as her grantee, cannot be applied. Newton himself, having no title or right to the possession of these lots, so far as the record discloses, is not in a position to invoke the doctrine of estoppel or laches, nor to question the *bona fides* of one who does show a perfect record title.

The decree of the court as to the other tract is as follows: "As to the 3.05 acres tract, lying in said Huffman's addition, and north of block 2 therein, the deed thereto from Mrs. N. M. Huffman is a nullity as a conveyance; but the evidence shows that the defendant orally purchased this particular tract from Mrs. N. M. Huffman or her agent, and paid her for the same; was in possession thereof ever afterwards, and at the time plaintiff purchased." The court was correct in finding the deed void for patent ambiguity. It would be impossible to locate or identify the lands from the description contained in the deed, nor is there any reference therein to any map, plat, record, or any extraneous objects or boundaries, by the aid of which the lands might be definitely ascertained. If, as alleged in the answer, the lands had been described in the deed as 3.05 acres in unplatted lands in Huffman's addition to Gurdon, situated on the east side of the southwest quarter of southwest quarter section 28, etc," the description in the deed might have been aided by reference to the plat of

Huffman's addition, and might have been effectual to convey the title, if the 3.05 acres could have been located by reason of said plat. But an inspection of the deed shows that there is no mention in it of "unplatted lands in Huffman's addition to Gurdon," but only of "unplatted lands of Gurdon." The plat of Gurdon in evidence shows unplatted lands, or lands not laid off into town lots or blocks, in other additions than Huffman's. The deed was a nullity as a conveyance because of the imperfect description of this 3.05 acres. *Fuller* v. *Fellows*, 30 Ark. 657; *Dorr* v. *School Dist.*, 40 Ark. 237, 41; *Freed* v. *Brown*, 41 Ark. 495; *Tatum* v. *Croom*, 60 Ark. 487.

The only question, then, is, did the defendant have equities in the land superior to the rights of the plaintiff under his quitclaim deed? There is no controversy here, as we understand it, but what the tract of land (other than the lots) for which Cooper sues, and which is described by a correct and definite description in his quitclaim deed from N. M. Huffman, is the identical tract of land which was attempted to be conveyed by N. M. Huffman to Newton & Co. under the imperfect description above mentioned. Cooper himself testified: "I know the lands in controversy in this action. I remember about the time that a deed from N. M. Huffman to Newton & Co. was executed, conveying certain lots in the Huffman's addition to the town of Gurdon. Prior to the time Mrs. Huffman made said deed to Newton & Co., she had a three-acre fractional tract lying on north end of said Huffman's addition enclosed. My impression is that all the rest of the land in controversy was not enclosed at the time said deed from N. M. Huffman was made to Newton & Co." And on cross-examination: "I have known the land in controversy since 1881. Mrs. Huffman was the owner and in possession of the land in controversy about that time. I know of no change of possession of ownership of said land from that time until the purchase of Newton & Co." This testimony shows clearly that Cooper knew that the tract of land we are now considering was purchased by Newton & Co. of Mrs. Huffman. He had actual knowledge of it, according to his own proof, and that there was a change of possession by virtue of such sale from Mrs. Huffman to Newton & Co. His language plainly implies this. What more is necessary to

determine this case? The answer alleges that Cooper was not a *bona fide* purchaser. It would be a fraud to permit Cooper, who had actual knowledge of the purchase of this very tract of land by Newton & Co. from Mrs. Huffman, and who, the proof shows, knew of the deed in which the land was imperfectly described, to take advantage of the imperfect description, buy the same land for almost a nominal consideration from Newton & Co.'s grantor, and, under a quitclaim with a perfect description, to oust the one whom he knew had been in possession for several years under a *bona fide* purchase.

Not only does Cooper's own testimony show the purchase of this tract of land from Mrs. Huffman by Newton & Co., but T. D. Huffman testified "that in the making of the said deed I acted as the agent of my wife, and conducted all the negotiations leading up to said deed as her agent." The deed here referred to was the deed of Mrs. Huffman to Newton & Co. of November 30, 1891, which was intended to convey the tract of land now under consideration. In one place in his testimony, Huffman states that he never put Newton & Co. in possession of the lands sued for, except to turn over the deed, and again he says: "I know I only sold Newton & Co. or A. W. Newton the lands contained in that deed, and did not put him or either of them in *possession of any other lands.*"

Newton testified in part as follows: "About two years prior to the date of the deed from N. M. Huffman and T. D. Huffman, I made a contract verbally with T. D. Huffman, the the husband of N. M. Huffman, for the purchase of a portion of the land described in the deed from said Huffman to Newton & Co., as 3.05 acres in unplatted lands in Gurdon. Later, on the 30th day of November, 1891, said Huffman and wife executed and delivered their deed to said lot, together with other lots, to said Newton & Co., and authorized said company, through me, to take immediate possession of the same, which was done within two or three days after the execution of said deed. Two or three days before said deed was executed and delivered, T. D. Huffman went with me to the land, and showed it to me, with the metes and bounds. This lot was at the time enclosed under a fence, the fence running

practically with the line or boundary of the lot." After the dissolution of said firm [Newton & Co.] said lot, together with other land named in said deed to Newton & Co. as part of the assets of said firm, immediately passed into my possession." This proof, together with the deed itself, which the court properly held might be taken to show a receipt of $150 from Newton & Co. to Mrs. Huffman, shows clearly, we think, that Mrs. Huffman sold the land in controversy to Newton & Co., and that the purchase money was paid, and that under such sale Newton & Co. took possession. The deed was void as an instrument to convey the title to the land, but it was good as an evidence of the receipt of the purchase money, and that such purchase money was for land. What land the parties intended to convey is shown clearly by the proof. We are of the opinion that the evidence was sufficient to show a contract for the sale of this particular tract of land; that possession was obtained solely under such contract, and with reference exclusively to it, taking the case out of the statute of frauds, under our decisions. *Keatts* v. *Rector*, 1 Ark. 391; *Cain* v. *Leslie*, 15 Ark. 312; *Rhea* v. *Puryear*, 26 Ark. 344; *Pindall* v. *Trevor*, 30 Ark. 249; *Pledger* v. *Garrison*, 42 Ark. 246.

Certainly, under the facts disclosed by this record, Mrs. Huffman could not be permitted to eject Newton & Co., or A. W. Newton, who succeeded to the firm's equities in this land. Cooper purchased with full knowledge of all the facts, and is in no sense an innocent purchaser. He has no greater equities than Mrs. Huffman herself would have.

If the deeds made in the firm name were void at law (*Percifull* v. *Platt*, 36 Ark. 456–64; *Riddle* v. *Whitehill*, 135 U. S. 634), still, in equity, the real parties in interest and in possession may retain same until they can have the deed reformed to carry out the intention of the partners to the contract of purchase. *Percifull* v. *Platt*, *supra*; *Silverman* v. *Kristufek*, 162 Ill. 222.

Under the prayer that the conveyance from N. M. Huffman to plaintiff be declared a cloud upon defendant's title, and for all other relief, the court was justified, under the proof, in refusing to disturb defendant's possession of the 3.05

acre tract of land. To have gone further, and reformed the deed of H. M. Huffman to Newton & Co., and annulled and cancelled the deed of Cooper, would have required additional parties and pleadings. Finding no error, the decree is in all things affirmed.

CREWS v. CREWS.

Opinion delivered April 28, 1900.

DIVORCE—BOTH PARTIES AT FAULT.—Under Sand. & H. Dig., § 2505, giving the circuit court power "to dissolve and set aside a marriage contract not only from bed and board, but from the bonds of matrimony," upon certain grounds mentioned, that court has the discretion, in an action wherein both parties ask for absolute divorce, to grant a divorce from bed and board to the party least in fault, although neither party is entirely blameless. (Page 159.)

Appeal from Clay Chancery Court, Eastern District.

EDWARD D. ROBINSON, Chancellor.

J. D. Block, for appellant.

Indignities, to constitute ground for divorce, need not be offered to the person, but may consist of reproaches, etc. 9 Ark. 1, 516; 33 *id.* 156; 38 *id.* 1, 131; 44 *id.* 429. In testing the conduct of a complainant who has proved a cause for divorce, the provocation under which he acted, etc., must be considered. 53 Ark. 486. The jurisdiction of chancery courts to grant divorces is statutory in Arkansas. 24 Ark. 552; 9 Am. & Eng. Enc. Law, 726. The statute (Sand. & H. Dig., § 2505) confers power to grant divorces "not only from bed and board, but from the bonds of matrimony," upon the same grounds. Hence, if the facts do not justify a decree *a vinculo*, they do not a decree from bed and board. No divorce can be granted on the unsupported testimony of the complaining party. 34 Ark. 37; 38 *id.* 119. When the evidence shows that parties are *in pari delicto*, neither will be granted any relief. 53 Ark. 484; 2 Bish. Mar. & Div. (Ed. 1891) §

475. Alimony should be limited not by the life of the wife, but by the joint lives of husband and wife and remarriage by the latter. 24 Ark. 522; 38 *id.* 119.

L. Hunter, for appellee.

The evidence shows that appellant subjected appellee to intolerable mistreatment. Hence, even if she were equally to blame, he is entitled to no relief. 53 Ark. 484. In view of appellant's conduct, appellee's accusations against him would not justify a decree in his favor. 42 N. W. 372. Appellant's conduct toward appellee amounted to cruelty. 51 Md. 72, 75; 53 Ia. 511; 53 Ark. 484; 44 Ark. 429. Our statute authorizes divorces from bed and board. Sand. & H. Dig., § 2505. The court was correct in applying the analogy of the ecclesiastical law to the case, when it was not in conflict with the statute. 18 Ark. 330.

BUNN, C. J. This is a bill for divorce by T. J. Crews against his wife, Ann Crews, in the chancery court of the Eastern district of Clay county. Answer and cross-bill by defendant. The same grounds and prayer for divorce from the bonds of matrimony were made in the bill and the cross-bill. The cross-bill contained certain property allegations, and prayer for alimony, Upon the testimony in the case the chancellor granted the defendant a divorce "*a mensa et thoro*," and an allowance of $80 per annum, payable quarterly to her, as alimony.

In the findings of the chancellor is this expression: "Upon consideration the court finds that both parties are to a degree in fault, and that neither is entitled to an absolute divorce, but finds that a decree of divorce from bed and board should be rendered, with alimony to the defendant in the sum of $80 per annum." It is contended by appellant that this finding of the chancellor is tantamount to finding that both are equally at fault, and that, under the rule laid down in *Cate* v. *Cate*, 53 Ark. 486, neither was entitled to a divorce. But we do not think that the language of the chancellor has that meaning, but rather that, while neither was blameless, yet there was a difference in their guiltiness in degree. In *Rose* v. *Rose*, 9 Ark.

507, it was held that it is not necessary that one be entirely without blame to entitle him or her to a divorce. The decree of the chancellor in favor of the defendant, as between her and her husband, clearly indicates in whose favor were his findings.

The statute on the subject of divorce is as follows, to-wit: Section 2505. "The circuit court shall have power to dissolve and set aside a marriage contract, not only from bed and board, but from the bonds of matrimony, for the following causes." Then follow the seven causes in their order, some of them being the same as at common law, and others being additional causes or grounds.

Section 2508. "The action for alimony or divorce shall be by equitable proceedings."

The decree from bed and board and the divorce from the bonds of matrimony both rest upon the same ground, and the same evidence will sustain either, with this qualification: Upon the evidence the chancellor has a sound discretion to grant the one kind of divorce or the other as he may deem best under the circumstances. The text writers generally, and many jurists, declaim against divorces from bed and board as useless, if not absolutely wrong in principle, but we cannot enter upon a discussion like that. The law authorizes divorces of that kind, and the implication, at least, is that circumstances must determine when they should be granted. The chancellor has exercised his discretion, and we cannot say that his discretion has been abused. His decree is therefore affirmed.

NEVADA COUNTY *v.* DICKEY.

Opinion delivered April 28, 1900.

COUNTY—LIABILITY TO REFUND PURCHASE MONEY OF TAX LAND.—Upon failure of title of land forfeited for taxes and sold by the state, and conveyed to the purchaser by quitclaim deed from the state land commissioner, the county, which received 60 per cent. as its share of the purchase money, is not liable to refund same to the purchaser. (Page 161.)

Appeal from Nevada Circuit Court.

JOEL D. CONWAY, Judge.

STATEMENT BY THE COURT.

The appellee bought of the state, through the state land commissioner, forty acres of land at $1.25 per acre, and received a deed therefor from the land commissioner, which conveyed to him whatever interest the state had in the land. The land had been certified to the land commissioner as forfeited to the state for the nonpayment of taxes. It proved to be United States government land, not subject to taxation. Of course, the assessment for taxation and forfeiture thereon were void, and no title passed to the appellee by virtue of the sale of the tract to him by the land commissioner. The appellee filed in the county court of Nevada county his claim for $30, 60 per cent. of the amount of the purchase money paid for the land, which, under the statute, went to the county. The county court refused to allow the claim, from which he appealed to the circuit court, which allowed the claim, and the county appealed to this court.

W. V. Tompkins, for appellant.

Sand. & H. Digest, § 4569, authorizes only a quitclaim deed. 49 Ark. 275. Under a quitclaim deed the grantee has no remedy against the grantor for failure. 3 Kerr, Real Prop. 2322. This case does not fall within Sand. & H. Dig., § 6700, requiring *taxes erroneously paid* to be refunded. Counties are *quasi* corporations of limited powers, and are not liable beyond these by any implication. 26 Ark. 39; 49 Ark. 140. Appellee voluntarily paid the money, and can not now receive it back. 65 Ark. 155.

HUGHES, J., (after stating the facts.) We find no provision in our statute authorizing the county to refund the purchase money of lands sold by the state, the title to which has failed by reason of the fact that the land was forfeited to the state upon an assessment of it for taxation which was void. Sections 6700, 6701, Sand. & H. Dig., do not apply to this case. The state did not warrant the title, and gave only a

quitclaim deed to the land. Section 4569, Sandels & Hill's Digest, same as section 4246 Mansfield's Digest, referred to in the case of *Scott* v. *Mills*, 49 Ark. 275.

Under a quitclaim deed a grantee cannot recover the purchase money, upon failure of title. 3 Kerr on Real Property, p. 322. It is sometimes thought that in such case the grantee has or should have strong equities to have his purchase money money refunded. While this may be so, there is no provision of law allowing it. Counties have been said to be "*quasi* corporations possessing no power and incurring no obligations save those especially conferred or imposed by statute." *Granger* v. *Pulaski County*, 26 Ark. 39.

The judgment of the circuit court is reversed, and the action is dismissed.

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LEONHARD v. FLOOD.

Opinion delivered April 28, 1900.

1. USURY—EVIDENCE.—Usury will not be inferred where from the circumstances the opposite conclusion can be reasonably and fairly reached. Thus, where the evidence shows that a broker who received a commission from the borrower for effecting the loan had been acting generally as the agent of the lender in assisting him to loan money, but in the particular transaction acted for the borrower, signing his note as surety and procuring an additional surety thereto, it will not be inferred that the commission was paid to the broker or the lender's agent, nor will the loan be rendered usurious thereby. (Page 164.)

2. ACKNOWLEDGMENT—INTEREST AS DISQUALIFICATION TO TAKE.—A surety on a note secured by mortgage has such an interest therein as will disqualify him from taking the mortgagor's acknowledgment. (Page 165.)

3. UNRECORDED MORTGAGE—VALIDITY.—An unrecorded mortgage is valid between the parties, and as against persons holding the property by voluntary conveyance. (Page 166.)

4. FRAUD—CONSIDERATION—BURDEN OF PROOF.—Where a debtor conveyed his property to his son, and to a corporation owned and controlled by his family, the circumstance is such as to raise a suspicion of fraud in

a suit by his creditors attacking the conveyance as fraudulent, and to cast upon him the burden of showing a consideration, nor are the deed's recitals competent to show a consideration. (Page 166.)

5. BURDEN OF PROOF—CONSIDERATION.—One who purchases property, knowing that it is subject to a valid but unrecorded mortgage, must show that his purchase was for a valuable consideration. (Page 168.)

Appeal from Arkansas Chancery Court.

JAS. F. ROBINSON, Chancellor.

STATEMENT BY THE COURT.

Henry Flood and his wife, Catherine Flood, borrowed $2,000 from John Leonhard. To secure the payment of this loan, Edwin Pettit and J. F. Swanson signed and indorsed the note given by the Floods to Leonhard. In order to further secure the payment of the note, and to protect their sureties, the Floods executed and delivered to Leonhard a mortgage upon certain real estate owned by Mrs. Flood. This loan was obtained by the Floods for the purpose of equipping and operating a brick plant. The Floods afterwards conveyed a portion of the mortgaged property to the Flood Brick & Tile Company, a corporation, the stockholders of which consisted of Flood, his wife, and three sons. The remainder of the property they conveyed to Harry Flood, one of their sons. This action was brought to foreclose the mortgage, and to enforce a lien which the sureties, Pettit and Swanson, claimed to hold on certain brick manufactured by the Floods and sold to one Searan. The defendants Henry and Catherine Flood set up the defense of usury in the loan. The Flood Brick & Tile Company and Harry Flood, for their answer, alleged that they had purchased the property for a valuable consideration; that the mortgage had never been properly acknowledged and recorded, and was no lien on the property as to them. The defendant Searan denied that plaintiffs had any lien on the brick purchased by him. Plaintiffs replied to the answer and cross complaints of Harry Flood and the Flood Brick & Tile Company, and denied that they or either of them had paid any consideration for the property conveyed to them by the Floods, and alleged that these conveyances were without consideration, and fraudulently made

to cheat and defraud the creditors of the Floods, and asked that such conveyances be declared void as to them. The court found that the mortgage had never been properly acknowledged, and that the note and mortgage were usurious and void, and gave judgment in favor of defendants. Plaintiffs appealed.

Parker & Parker, and *Norton & Prewett*, for appellants.

The evidence shows that no usury was charged. Pettit was not disqualified from taking the acknowledgments. 56 Ark. 511. Even without acknowledgment the mortgage would be good between parties. Searan bought the bricks with notice of the charge on them in favor of the indorsers, and must be bound. 50 Ark. 314.

Geo. C. Lewis, for appellees.

Under the rule in this state the evidence here establishes usury. 51 Ark. 534; 51 Ark. 546; 54 Ark. 40; 54 Ark. 155; 57 Ark. 251; 63 Ark. 249; 62 Ark. 92. Pettit was an interested party, and was disqualified from taking the acknowledgments. 56 Ark. 511; 43 Ark. 420; 40 S. W. 599; 33 L. R. A. 332; 1 Am. & Eng. Enc. Law (2 Ed.), 493. An unrecorded mortgage, or one not entitled to record on account of defective acknowledgment, is not binding on a third person, though he have actual notice of it. Sand. & H. Dig., § 5091. The burden of alleging and proving fraud was on appellant. 51 Ark. 390; Bump, Fr. Con. § 611; 46 Ark. 542.

H. A. & J. R. Parker, for appellants, in reply.

On the question of usury, see 51 Ark. 534; *ib.* 546; *ib.* 548; 54 Ark. 572; 63 Ark. 385; 57 Ark. 256. The mortgage is certainly valid as to Swanson. 42 Ark. 500. On the question of fraudulent sale, see 40 Mo. App. 664; 15 Pac. 635; 8 Ark. 510; 43 Ark. 84; 23 Ark. 494; 55 Ark. 42.

RIDDICK, J., (after stating the facts.) We are of the opinion that the defense of usury has not been established by the evidence. Our law visits on a lender who contracts for usurious interest, however small, a forfeiture of his entire loan and the interest thereon. It follows from the plainest principles of justice that such a defense should be clearly shown

before the forfeiture is declared. For this reason, usury will not be inferred where, from the circumstances, the opposite conclusion can be reasonably and fairly reached. *Berdan* v. *Trustees*, 47 N. J. Eq. 8, 21 Atl. 40; Webb, Usury, p. 481. In this case it is claimed that Pettit acted as agent of Leonhard in making the loan, and that the Floods agreed to pay him for his services, in addition to the interest reserved in the note, and this made the loan usurious. The evidence shows that Pettit had been acting generally as the agent of Leonhard, assisting him to loan money and looking after his other interests. We must take it as true that he acted for Leonhard to a certain extent in making this loan to the Floods, for it is so stated in the complaint; but it is clearly shown that he also acted for the Floods. This is shown by his conduct when Leonhard, not being satisfied with the security offered by the Floods, refused to make the loan. Pettit then, in order to obtain the loan for the Floods, signed the note for the Floods, and also induced Swanson to sign it. Pettit and Swanson thereby became liable with the Floods for the payment of the note. This indisputable fact conclusively shows that Pettit did not act altogether as the agent of Leonhard in procuring the loan. He certainly did not sign the note as agent of Leonhard; for this would, in effect, be Leonhard becoming surety on a note to himself. The contract by which the Floods agreed to pay Pettit for his services recites that Pettit had negotiated a loan for them, secured in part by his indorsement of their note, for which services the contract states they were to pay him a specified sum, but they have paid nothing. They did not agree to pay him for services performed for Leonhard, but for services performed for them. The circumstances do not satisfy us that there was usury in the loan, and we are of the opinion that such defense should be overruled.

The complaint states, and the evidence shows, that the mortgage was made mainly to protect the sureties on the note of the Floods. Leonhard declined to make the loan on the mortgage security offered by the Floods. He made the loan on the credit of the sureties, Pettit and Swanson, and the mortgage was executed and delivered to him to protect the

sureties. The pleadings of both parties state this to be true. Under these circumstances, Pettit was directly interested in the mortgage given for his benefit, and the acknowledgment taken before him was void. This being so, the mortgage could not legally be recorded, and the record thereof was without effect. *Penn* v. *Garvin*, 56 Ark. 511.

But, though the acknowledgment was void, the mortgage was good between the parties, and valid against a voluntary conveyance; for, while an unrecorded mortgage, in this state, constitutes no lien as to third parties, still the mortgagor cannot relieve his property of a valid lien which exists on the property as to him by giving it away. As to one holding the property by a conveyance entirely voluntary, it would be presumed that the conveyance was made subject to the mortgage. Now, plaintiffs allege that the conveyance made by Henry and Catherine Flood to the Flood Brick & Tile Company and to Harry Flood were without consideration, and made to defraud the creditors of the Floods. A consideration is recited in each of these conveyances, but there is no other evidence thereof; and the question presented is whether the burden rested on the grantees to show a consideration for such conveyances, and, if so, whether the recitals in the deed, to which neither of the plaintiffs was a party, can be used as evidence against them. It has been several times decided by this court that when the creditors of a vendor attack his conveyance as fraudulent, and introduce proof making out a *prima facie* case of fraud against the vendor, the burden of showing a consideration is on the vendee, and that in such a case the recital in the deed is regarded as only *res inter alios acta*, and not competent to prove a consideration as against the creditor of the vendor. *Valley Distilling Co.* v. *Atkins*, 50 Ark. 289; *Foster* v. *Haglin*, 64 Ark. 505, 43 S. W. 763. An examination of these cases will show that, as to the vendor, in each of them a *prima facie* case of fraud had been made out by the evidence. The court, applying the law to the case in hand, held that the burden of showing a consideration was on the vendee. It was not called on to consider whether evidence tending to cast suspicion on the conveyance, though not sufficient to establish fraud

on the part of the vendor, would not put the burden on the vendee to show that there was some consideration for the conveyance. The court cannot be said to have expressed an opinion on that matter, for the question was not before it. Now, in this case it was not shown that Flood or his wife was insolvent at the time of the conveyances; but it was shown that they were in debt, and that there were many unpaid judgments against Flood. He and his wife could not borrow money on their own notes or on the mortgage offered by them, but were compelled to hire third parties to become sureties on their note in order to obtain a loan. After obtaining this loan, they sold the property mortgaged as security for the loan, in part to their son, and in part to a corporation of which Flood was president, and of which the only stockholders were himself, wife, and three sons. They have not paid the loan, but they and their vendees are now seeking to defeat the collection thereof on various grounds. The circumstances surrounding these conveyances to his son, and to a corporation owned and controlled by himself and family, are certainly sufficient to arouse suspicion and throw doubt upon them as legitimate transactions. We therefore think that the burden was on these vendees to show that their conveyances were based on a sufficient consideration. Whether or not there was such a consideration was a matter peculiarly within their knowledge, and when, under such circumstances, they offer no proof, the presumption arises that there was no consideration. There are cases that go further, and hold that, as against creditors of a grantor, his deed is regarded as voluntary until the payment of a consideration is shown. The rule of these courts is that a *prima facie* case is made for the party attacking the conveyance by showing that he was a creditor of the grantor at the time the deed was made, and the burden of showing a consideration is then cast upon party holding under the deed. "These decisions," says Mr. Jones in his work on Real Property, "tend to the suppression of fraud." *Prescott* v. *Hayes*, 43 N. H. 593; *Lipscomb* v. *McClellan*, 72 Ala. 151; Jones, Real Prop. § 310, and cases cited. We are not required to go so far as these cases go, but we do hold that, where the evidence not only

shows that the plaintiff was a creditor at the time of the conveyance, but the circumstances are such as to raise a suspicion of fraud, and cast doubt upon the legality of the transaction, the burden is on him holding under the deed to show a consideration.

Leaving out the question of fraud, our conclusion is supported in this case by another reason. Leonhard, by the note and mortgage, showed that he had a valid lien on the property as against Henry and Catherine Flood. The defendants, who claim as purchasers from them after the execution of the mortgage, must, in order to sustain their claim, show facts making such purchase superior to the rights of Leonhard, and to do this they must show a consideration for such purchase. The case of *Challis* v. *German National Bank*, 56 Ark. 88, is not in conflict with this ruling, for in that case the party claiming against the mortgagee proved a consideration, and there was no dispute on that point. As no proof was offered in this case tending to show a consideration for these conveyances except deeds, the recitals in which are not evidence against plaintiffs, we must presume that these conveyances were voluntary, and the grantee therein held subject to the lien of the mortgage.

As to the claim against Searan, we think the chancellor rightly held that plaintiffs have no lien on the bricks sold by the Floods to him. The judgment as to him is affirmed. In other respects it is reversed and remanded, with an order to enter a decree forclosing the mortgage, and for other proceedings not inconsistent with this opinion.

BUNN, C. J. (dissenting). I concur in the conclusion of the court that this case should be reversed, but on a different ground from that upon which the court bases its opinion. It is, perhaps, not well to declare a conveyance fraudulent without some more direct evidence than is here adduced against the deed to Henry Flood and others, although the suspicions are great, and the inference to be drawn from the relation of the parties and other circumstances is more or less morally convincing. The objections to the mortgage from John Flood and wife to Leonhard to secure the note of $2,000, upon which Edwin Pettit and Swanson were indorsers, is of the

most technical kind, and utterly without reason to support it. It appears, or is alleged, that Pettit was a notary public, and took the acknowledgment of John Flood and wife to the mortgage; and the objection and sole objection is that, being an indorser on the note, he was disqualified to take the acknowledgment. We have had but two cases, so far as I have been able to recall, on that subject: First, *Green* v. *Abraham*, 43 Ark. 420, where the officer was a party to the instrument acknowledged; and *Penn* v. *Garvin*, 56 Ark. 511, 20 S. W. 410, where this court said: "A notary public is not disqualified to take an acknowledgment to a mortgage by reason of the fact that he had acted as agent for the mortgagor in obtaining the money which the mortgage was given to secure." In other words, the courts will determine first whether or not the officer has any pecuniary interest in the instrument acknowledged, and then whether that interest, under the circumstances, could possibly influence his conduct to the detriment of others interested. There is no plea of *non est factum* against the mortgage; there is no contention that it was not executed as it purports to be, nor that the mortgagor did not have Pettit to take the acknowledgment voluntarily; and the certificate of acknowledgment is in due form. In other words, the notary public did his whole duty in the premises, and nothing but his duty. The only objection is that, as he was remotely interested in the mortgage, the same inferentially having the effect of being for his benefit, or might be so, he was not competent to take and certify the acknowledgment. It seems, in a case like this, that the officer's personal interest and his duty as an officer perfectly coincided, and yet the theory is that in some way his personal interest did influence or might have influenced his official conduct. It could only have influenced him to do right as an officer,—take the acknowledgment properly, and certify it in form. Is the rule so inexorable that it will be enforced under circumstances where it has not one particle of evidence to sustain it? I think not. Most of the cases cited in support of the rule are cases in which the officers are parties to the instruments. The rule ought to go no further, where everything appears fair on the face of the papers. In every case going further than that the extraneous facts alleged

to show disqualification should not only be established, but shown to be such as show some opportunity for the officer to take advantage of his official character to inflict an injury on some of the parties concerned. His act is a mere ministerial act, defined and prescribed, and in the doing of which, or the manner of doing which, he has no discretion, but must follow the formula. The only case I have been able to find which definitely carries the rule beyond the parties to the instrument is *Wilson* v. *Traer*, 20 Iowa, 231, and that has little or no support, even from the authorities cited. I think, in many cases, and under the circumstances of many cases, in the very nature of things, it is impossible to say that an officer's interest does or can influence him to take and certify a wrong acknowledgment, and when that appears, as in the case at bar, the officer ought not to be regarded as disqualified. The contention is that this defect invalidates the recording of the mortgage, and thus there is no notice to third parties.

ADKINS *v.* LACY.

Opinion delivered May 5, 1900.

DAMAGES—WRONGFUL ATTACHMENT.—For an order of attachment sued out wrongfully, but not maliciously, only compensatory damages can be recovered. (Page 170.)

Appeal from Pulaski Circuit Court, Second Division.

Joseph W. Martin, Judge.

W. S. & F. L. McCain, for appellants.

Unless an attachment be sued out maliciously, no damages not compensatory merely can be recovered; and all in excess thereof were erroneously allowed in this case. 34 Ark. 710; 51 Ark. 382; 37 Ark. 608; 55 Ark. 332; 39 Ark. 387; 58 Ark. 29; 65 Ark. 537; 21 Ark. 451; 34 Ark. 184.

BATTLE, J. It has been repeatedly held by this court that, unless an order of attachment has been sued out malic-

iously, the defendant in the attachment is entitled to recover of the plaintiff no damages, except compensatory, on account of the order of attachment having been wrongfully issued. *Holliday* v. *Cohen*, 34 Ark. 710; *Goodbar* v. *Lindsley*, 51 Ark. 382.

The only loss the evidence shows that the plaintiff in this case suffered on account of the order of attachment sued out against him by the defendant was the value of the use of his team for two days and his loss of time. The evidence does not show that the value of his time was a proximate loss, yet, conceding that it was, the evidence does not show that his damage exceeded $4. The value of the use of the team was three dollars, and of his own time was one dollar. Appellant conceded in the circuit court, and concedes here, that the plaintiff was entitled to $4 for his damages. Now, if the plaintiff will, within fifteen days, remit all of the $46 recovered by him, except $4, the judgment for the remainder will be affirmed; otherwise, it will be reversed, and the cause will be remanded for a new trial.

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LITTLE ROCK & FT. SMITH RAILWAY COMPANY *v.* DANIELS.

Opinion delivered May 5, 1900.

1. RAILROAD—STOCK KILLING—LIABILITY OF LESSOR.—Under Sand. & H. Dig., §§ 6321, 6338, empowering a railroad company to lease its road, with all the property, rights, privileges and franchises thereto pertaining, a railroad company which has leased its road to another company is not liable for stock killed by the latter's train. (Page 174.)

2. SAME—LIABILITY FOR DAMAGES.—Under Sand. & H. Dig., § 6349, providing that "all railroads which are now or may be hereafter built or operated in whole or in part in this state shall be responsible for all damages to persons and property done or caused by the running of trains in this state," one who has obtained a judgment against the lessee of a railroad can enforce payment by seizure and sale of the road itself. (Page 175.)

3. LEASED RAILROAD—PARTIES TO ACTION AGAINST.—In an action against the lessor of a railroad to subject the road to seizure and sale to satisfy a judgment for damages caused by the running of a train, both the lessor and lessee have interests in the road, and should be made parties. (Page 177.)

Appeal from Crawford Circuit Court.

JEPHTHA H. EVANS, Judge.

Dodge & Johnson, and *Oscar L. Miles*, for appellant.

The leasing of the road of appellant company was authorized by statute. Sand. & H. Dig., § 6338. The rule of liability for injuries, in cases where one railroad company leases the line of another, is that the lessee company is liable for all those injuries occasioned by the negligent operation of the road while under its control; and the lessor company, for all those injuries which flow from the negligent original construction of the line. 7 Am. & Eng. R. Cas. 656; Patt. Ry. Acc. Law, §§ 130, 131; Hutch. Carriers, § 575; Wood, Rys. § 400; Pierce, Rys. § 283; Elliott, Railroads, § 467, *et seq.;* 28 Kas. 622; 80 Me. 62; S. C. 12 Atl. 797; 57 Fed. 165. If the lease had not been legally authorized, appellant would have been liable as the principal of the lessee. 57 Fed. 165; 101 U. S. 83; 17 How. 30; 17 Wall. 445; 88 Tenn. 138; S. C. 12 S. W. 537; 20 Ill. 623; 68 Tex. 50, S. C. 3 S. W. 457; 26 Vt. 717. The language used in section 1 of the act of February 3, 1875, and in section 12, article 7, of the constitution—that "all railroads which are now or may be hereafter built and operated in whole or in part in this state shall be responsible for all damages to persons and property done or caused by the running of trains in this state"—was never intended to make all railroad companies liable for all damages to persons and property, which were the result of negligence on the part of the company (such liability already existing); but it was intended to fix a lien on the franchise and property held thereunder for all damages to persons and property for which the law made the company liable, to the end that the person damaged, having fixed a liability on the company for such damages, might not be defeated of his recovery by any selling, leasing or conveying of such franchise and property. A literal construction will be given to constitutional provisions, unless it would lead to absurdity. 10 Minn. 107; 7 Ind. 44. A state constitution should be construed according to the sense of the terms used (9 Ark. 270); and with a view to giving effect to the whole of its every pro-

vision (4 Ark. 18–32; 26 Ark. 281–6); and in the light of its obvious sense and spirit. 52 Ark. 339; 60 Ark. 343. There is nothing in 33 Ark. 816 inconsistent with the construction contended for by appellant. Nor are decisions in 65 Ark. 235 and 63 Ark. 636 necessarily in conflict with it. These decisions are explicable on grounds of public policy (41 Ark. 161; 49 Ark. 535), and on the law of invitation (63 Ark. 636.)

J. E. Cravens, for appellee:

A railroad company, being a *quasi* public corporation, can not enter into any contract whereby it is to be released from any of its obligations to the public. 19 Am. & Eng. Enc. Law, 816. It owes the public the duty of careful management of its road, and is liable for failure therein. Upon the principle involved, see: 80 N. Y. 27; 20 Ill. 623; 26 Vt. 717; 49 Ga. 355; 17 Wall. 445; 5 Wall. 90.

BATTLE, J. A. E. Daniels commenced an action against the Little Rock & Fort Smith Railway Company, before a justice of the peace of Crawford county, to recover damages caused by the killing of his cow. He recovered a judgment, and the defendant appealed to the Crawford circuit court, and he recovered judgment against the company in the latter court for thirty five dollars.

The issues in the case were tried, and the judgment was recovered, upon the following agreed statements of facts: "It is agreed that the Little Rock & Fort Smith Railway is a railway corporation, organized under the laws of the state of Arkansas, and that the Little Rock & Fort Smith Railway owns a line of railroad extending from Little Rock, Ark., to Fort Smith, Ark., and through Crawford county; that the animal herein sued for was killed by the operation of a train on the line of said road, under such circumstances as to make the company operating the train liable to plaintiff for the amount sued for. That the St. Louis, Iron Mountain & Southern Railway is a corporation organized under the laws of the state of Arkansas, and that it owns various lines of railroad in the state of Arkansas; that on the 1st day of January, 1890, the

Little Rock & Fort Smith Railway leased its aforesaid line of road regularly and lawfully to the St. Louis, Iron Mountain & Southern Railway Company for the term of fifty years. * * * It is admitted that since the 1st day January, 1890, the St. Louis, Iron Mountain & Southern Railway Company has operated the lines of railroad known as the Little Rock & Fort Smith Railway, and was so operating it at the time of the injury herein complained of, and that the train and engine which caused the injury herein complained of was operated by the employees of the said St. Louis, Iron Mountain & Southern Railway Company. It is admitted that the Little Rock & Fort Smith Railway corporation is still in existence, but has not been engaged in operating its line of road since the aforesaid 1st day of January, 1890; that the animal killed was the property of the plaintiff, and of the value sued for."

According to this statement of facts, the judgment was improperly rendered against the Little Rock & Fort Smith Railway Company. That company was empowered by the statutes of this state to lease its road, with all the property, rights, privileges and franchises thereto pertaining. Sandels & Hill's Digest, secs. 6321, 6338. In the exercise of this power, it leased to the St. Louis, Iron Mountain & Southern Railway Company its railway, extending from its terminal point in the town of Argenta, to Fort Smith, in this state, together with all the branch roads and sidings, depots, stations, buildings, equipments, machine and other shops, machinery, tools, appurtenances, and property, real and personal, to the demised road belonging and appertaining. After this it was not responsible for injuries caused by the negligence of its lessee in the operation of trains on its railway, or in the omission of any statutory duty connected with the management of the road—matters over which it had no control. We are aware that there is a wide diversity of opinion upon this subject. But we think that the weight of authority and reason sustain the view we have expressed. In granting the authority to lease, the statutes empowered it to transfer the possession and control of the demised property, together with the duty of operating the road, to the lessee, to the exclusion of the lessor; and this

transfer carried with it to the lessee the responsibility for injuries caused by its negligence in the discharge of such duty, and exonerates the lessor from the same. The authorities which hold to the contrary do so upon the ground that the legislature must expressly exempt the lessor from responsibility, in order to exonorate him from liability. They concede that the legislature may by express enactment exonerate the lessor, and, in the absence of such enactment, they limit the effect of the lease when the legislature or the parties have not done so. They grant the right to a railway company to relinquish control of its railroad under the authority vested in it by the statute to lease, but hold that it is still liable for the injuries caused by negligence in the exercise of such control, unless the statute expressly exempts them from such liability on account of the lease. They tacitly assume "that, in granting authority to lease, the legislature granted something less than an authority to lease. We believe that the only theory that can be defended on principle is that, in granting authority to execute a lease, the legislature conferred authority to execute an effective instrument, with all the qualities and incidents with which the law invests a lease. If this be true, then the lease does transfer possession and control from one party to the other for the term of the lease, and the rights and obligations of the parties are such, and such only, as the law annexes to the relation of lessor and lessee. For negligence in managing and using the demised premises the lessor is not responsible." *Railway Co.* v. *Curl*, 28 Kas. 622; *Nugent* v. *Railroad Co.*, 80 Me. 62; *Arrowsmith* v. *Railroad Co.*, 57 Fed. Rep. 165; Elliott on Railroads, § 469, and cases cited.

While the lease of a railway relieves the lessor from liability for injuries caused by the negligence of the lessee in operating it, the railway is responsible for the damages resulting from such injuries to persons or property. The constitution of this state declares: "All railroads which are now or may be hereafter 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 12, article 17, of the constitution

of 1874. The statute of this state enacted for the purpose of carrying into effect this section of the constitution provides: "All railroads which are now or may be hereafter built and operated in whole or in part in this state shall be responsible for all damages to persons and property done or caused by the running of trains in this state." Sandels & Hill's Digest, § 6349. The word "railroads," used in the constitution, does not mean railroad corporations or companies, but the railroad owned or operated by them. The words "built and operated in whole or in part," used in connection therewith, show that such is its meaning. Corporations and companies are not built in part. They never become corporations and companies in part in one state or in different states. They are organized under the laws of one state, and not under the laws of two or more, and they are not built. The object of the constitution and the statutes was to subject the railroad, the property itself, whether it be operated by the owner or another, to liability for all damages to persons and property done or caused by the running of trains, for which the law made the company operating it at the time of the injury liable, to the end that the person damaged might not be defeated in the recovery of his damages by any selling, leasing or conveying the road. If this was not so, "a corporation might own a fully equipped railroad, it might convey the road and the property used upon it and with it to a lessee corporation owning no property whatsoever, and leave the conduct and operation of its property entirely to the lessee. A judgment creditor seeking to make good his claim against the operating company would find no property owned by it upon which it could levy. To prevent this and many other such evasions as might be instanced, the constitutional provision in question was adopted. So far as the case at bar is concerned, it can have but this application, and no more. It would enable the plaintiff injured by the negligence of his employer, the lessee, to make good his judgment, under appropriate procedure, out of the leased property; but it would not operate to give the plaintiff * * * a right of action against the lessor company." *Lee* v. *Southern Pacific Railroad Company*, 7 Am. & Eng. R. Cases (N. S.),656.

The sections of the constitution and statutes in question have been construed in part by this court in other cases. In *Little Rock & Fort Smith Railway Company* v. *Payne*, 33 Ark. 816, this court held that, under these sections, railroads were responsible for injuries and killings done or caused by the running of trains in a negligent manner, and for no others, and that, the injury or killing by the running of a train being shown, the presumption is that it was caused by the negligence of the company operating the train which caused the injury or killing, and that the burden was upon the company to prove the contrary. Under these sections the company has been held liable only for such injuries and killings, and it has been held, in actions against the company on account thereof, that the presumption is that the same were the result of negligence, until the contrary is shown. This necessarily follows, because the object of the statute is to subject the railroad to the same liability for damages on account of such injuries and killings as the company whose negligence caused them is, and because the presumption as to negligence applies only to the company which operated the train causing the injury or killing; the railroad, an inanimate thing, being incapable of negligence.

In an action to subject the Little Rock & Fort Smith railroad to seizure and sale to satisfy a judgment for damages in in this case, the lessor and lessee, the Little Rock & Fort Smith Railway Company and the St. Louis, Iron Mountain & Southern Railway Company should be made parties defendants. Both have interests in the road liable to be affected by the sale of the road, and both should be made parties for the purpose of giving them an opportunity to protect the same, if they can.

The judgment of the circuit court is therefore reversed, and the cause is remanded for proceedings consistent with this opinion.

BURROW v. FOWLER.

Opinion delivered May 5, 1900.

1. LABORER'S LIEN—WHEN LOST.—If a ginner has a lien at common law for cotton ginned by him, such lien is lost when he surrenders possession of the cotton, and it comes into the hands of a *bona fide* purchaser. (Page 179.)

2. SAME—PRIORITY OF MORTGAGE. If a ginner has a lien for work and labor on cotton ginned by him, under the act of March 11, 1895, such lien, by the express terms of the act, is subject to a prior mortgage lien. (Page 180.)

Appeal from Conway Circuit Court.

JEREMIAH G. WALLACE, Judge.

STATEMENT BY THE COURT.

The appellee ginned or had ginned for Perry Leverett two bales of cotton. The price of the ginning was five dollars. Perry Leverett hauled the two bales of cotton to Morrilton, and had not paid for the ginning. He sold the two bales to the appellants, who knew nothing of any claim for ginning. He then carried the cotton to appellant's warehouse, had it weighed, came back to appellant's store to settle, and asked appellant to pay him five dollars to pay for the ginning, which the appellant refused to do, as he had a mortgage on the cotton of Leverett for more than it was worth, but gave Leverett a receipt for the proceeds of the cotton, to be applied upon his mortgage. Leverett informed Fowler that Burrow & Sons refused to pay for the ginning, and Fowler then demanded of them pay for the ginning, which they refused. Fowler then filed before a justice of the peace the following affidavit:

"I. Fowler v. H. W. Burrow & Sons. Affidavit for attachment, before N. E. Hawkins, J. P., etc. The plaintiff, I. Fowler, states that the claim in this action against the defendants, H. W. Burrow & Sons, is for money due upon ginning two bales of cotton; that it is a just claim; that he ought, as he believes, to secure thereon five dollars; and that the defendan

refuses to pay said sum of money, and is about to remove said two bales of cotton from this county, and for the purpose of delaying or defeating said claim for ginning said two bales of cotton. Wherefore he prays an order of attachment, and that he have judgment for the sum aforesaid, with interest, and also for costs of suit, and for other proper relief." A specific attachment was issued by the justice, and served merely by leaving a copy with defendants, without taking the cotton.

The parties appeared, and upon a trial before the justice a judgment was rendered against appellants, and appeal taken to the circuit court. Upon a trial *de novo* in the circuit court, verdict and judgment again went in favor of appellee. Appellants pleaded orally in the circuit court, denied generally, and claimed to have bought the cotton before suit from one Perry Leverett.

J. F. Sellers, for appellant.

Appellee was not entitled to any lien, as against appellants. A public ginner is not a "laborer," nor does he "produce" the cotton ginned at his gin, so as to entitle him to a lien under Sand. & H. Dig., § 4766. 43 Ark. 170; 50 Ark. 244; 54 Ark. 522; 12 Am. & Eng. Enc. Law, 532; 18 L. R. A. 305. Nor was appellee entitled to a lien under the act of March 11, 1895. Having parted with possession, he could not enforce any common-law lien. Schoul. Bail. § 122; 2 Am. & Eng. Enc. Law, 50; 6 L. R. A. 82; 49 Neb. 869; 12 Neb. 66. 120 N. C. 402; 20 Atl. 346; Hale, Bailm. § 227–233; Laws. Part. 5–8; Jones, Liens, § 20, *et seq.*

HUGHES, J., (after stating the facts.) We cannot see that the appellee had any lien upon the two bales of cotton for ginning that he could enforce against the appellants. If he had a lien at common law for the amount due for ginning, it existed while he retained possession of the property; but when he surrendered possession of it, and it went into possession of another, who knew nothing of his claim, and who gave value for it, his lien, if he had one, no longer existed. If he might have had a lien, as for labor performed, under the act of March, 1868, he does not claim under that act, and makes no proof to

bring himself within its terms. The claimant of a laborer's lien under that act must bring himself strictly within the terms of the act. "The plaintiff must perform manual labor, and there must be some product of his labor, to which the lien must attach." *Flournoy* v. *Shelton*, 43 Ark. 170.

If Fowler had or could have had a lien for work and labor under the act of March 11, 1895, by the express terms of the act it was subject to prior liens. Acts 1895, p. 39. Appellant's mortgage was recorded January 11, 1897; the cotton was ginned in the fall of same year, 1897. Therefore Burrow's had the prior lien. While, in justice, Fowler was entitled to pay for his ginning, we think that under the law Burrow & Son were not liable for it.

The judgment is reversed, and the cause is remanded for a new trial.

GUNTER *v.* EARNEST.

Opinion delivered May 5, 1900.

1. PLEADING—AMENDMENT.—Where a replevin suit instituted in a justice's court by a husband was tried on the theory that he was suing on behalf of his wife, his affidavit was amendable on appeal to the circuit court, so as to show that the property was his wife's, and that he was suing as her agent. (Page 182.)

2. WITNESSES—HUSBAND AND WIFE.—Under Sand. & H. Dig., § 2916, allowing the husband or wife to testify for the other in regard to any business transacted by the one for the other in the capacity of agent, in a suit brought by a husband as agent of his wife, the husband may testify touching the matter of the agency, and the wife may testify in her own behalf. (Page 182.)

3. JUDGMENT—RES JUDICATA.—Where the parties to an action before a justice of the peace agreed upon a settlement, and entered the agreement on the docket, which provided for dismissal of the action, payment of costs, and disposition of the property involved, and the docket was signed by the justice, the docket entry was not a judgment, and did not bar a subsequent action to try the title and right of possession to the same property. (Page 183.)

Appeal from Saline Circuit Court.

ALEXANDER M. DUFFIE, Judge.

Murphy & Mehaffy, for appellant.

The amendment should not have been allowed for the purpose of enabling plaintiff, who had failed to show a cause of action, to make one a party who seemed to have such right. 34 Ark. 144; 41 Ark. 165; 17 Am. & Eng. Enc. Law, 495. Even if appellee was the agent of his wife, he could not sue in his own name. Sand. & H. Dig., § 5623; 42 Ark. 433; 15 Am. & Eng. Enc. Law, 665. The judgment in the former suit was conclusive, and the court had no jurisdiction a second time. 2 Black, Judg. § 522. Parol evidence should not be admitted as to a justice's judgment. 49 Ark. 156; 1 Black, Judg. §§ 285, 625, 260.

E. H. Vance, Jr., for appellee.

The consent entry upon the justice's docket was not a final judgment. 1 Black, Judg. § 2; 1 Bouv. Dict. 760; 47 Ark. 378. The amendment was properly allowed. Sand. & H. Dig., § 5769; Ark. Code, p. 61, § 155; 25 S. W. 1111; 3 Estee, Pldg. § 4447. Appellee was authorized to sue. Sand. & H. Dig., §§ 4958, 6384.

WOOD, J. Gip Earnest brought this suit before a justice of the peace to recover the possession of a certain cow and calf. The affidavit recites: "The plaintiff, Gip Earnest, states that the cow and calf claimed by him in this action is [here describes the cow]; that he is the owner of said cow and calf, and is entitled to the immediate possession of them," etc. The record shows that the defendant, Gunter, filed before the justice a motion "to dismiss on the ground that the court had no jurisdiction of the subject-matter, as the cause had been adjudicated in the case of *Frank Bowen, Administrator*, v. *Nannie Earnest*." No written answer was filed in the justice's court. The case was tried by jury, judgment entered in accord with its verdict, and an appeal taken to the circuit court. In the circuit court, Gip Earnest testified that "this case was tried in the justice court as the property of my wife." The reason he

brought the suit as he did, he explains, was "because what is mine is my wife's, and what is my wife's is mine." Mrs. Nannie Earnest testified: "I am the wife of Gip Earnest. He brought this suit at my request. I authorized him to bring it." The circuit court allowed an amendment to be made to the affidavit showing that, "as agent of his wife Nancy," he claimed the cow and calf, and that he was the owner "of said cow and calf as such agent." It is urged:

First, that the court erred in permitting the amendment. The court was warranted in the conclusion that the cause was begun and prosecuted before the justice by Gip Earnest for his wife. That being true, there was no error in allowing the amendment, for it did not in any manner change the cause of action. It would have been more formal, to be sure, to have the docket entries of the proceedings in the name of Nancy Earnest instead of Gip. But there is no doubt from the proof that the cause progressed before the justice upon the theory, on behalf of the plaintiff, that the cow was the property of Nancy Earnest. The defendant himself, while claiming to own the cow, yet admitted or conceded that the cause was in fact being prosecuted by Gip Earnest for his wife Nancy. His motion to dismiss before the justice for the reason stated was tantamount to this, for how could he have pleaded that the title to the cow in controversy had been previously adjudicated in a suit between Bowen and Nancy Earnest, without recognizing that she was the proper party in the present suit? The real party in interest was revealed, and the failure to have the name of Nancy Earnest entered as the plaintiff in the justice's and circuit courts was a mere irregularity of form. The court below evidently treated the affidavit as hers, although it was signed by Gip Earnest. The body of the affidavit, as amended, disclosed that Nancy Earnest was the real party in interest, and that Gip Earnest was acting as her agent. The proof was taken, and the case progressed to judgment, upon the theory that it was her title and right to the possession that was being litigated in the name of her husband and agent. The law looks to the substance rather than the form.

Second. From this point of view neither the testimony

of Gip or Nancy Earnest was improper. Section 2916 of Sandels & Hill's Digest allows the husband or wife to testify "for the other in regard to any business transacted by the one for the other in the capacity of agent."

Third. It is contended that "parol evidence was not admissible to contradict the record of the justice of the peace," and that "the court erred in refusing to instruct the jury, at request of defendant, that the judgment of C. A. Gunter, J. P., introduced in evidence, was valid and binding upon the parties until reversed by appeal or otherwise."

C. A. Gunter testified: "I am a justice of the peace of Saline county. Two suits were brought in my court by W. T. Bowen, as administrator of Seth Bowen; one against Gip Earnest and the other against his wife, Nannie Earnest, for cow and calf and bed. The parties to the suit against Nannie Earnest and their attorneys had a consultation, and the attorneys said they had agreed upon a settlement without jury trial, and wanted me to make a record of same on my docket. The attorney for Mrs. Earnest dictated and the attorney for the administrator wrote it upon my docket, and at their request I signed it as justice of the peace." Witness then read from his docket entry, showing the beginning of replevin suit, the issuing of the necessary writs, the day set for trial, etc., and then read the following from his docket:

"W. Frank Bowen v. Nannie Earnest. On this day, March 31, 1897, comes the plaintiff, W. F. Bowen, administrator, and comes the defendant, Nannie Earnest, being the return day of the writ, and asked to have this suit dismissed, the plaintiff, W. F. Bowen, administrator, paying all the costs; and it is agreed by the parties, and ordered by the court, that the defendant, Nannie Earnest, take and retain possession of the bed, and that the plaintiff, W. F. Bowen, take possession of said cow and calf on the day of the administrator's sale, the said Nancy Earnest delivering the same at the place of sale on the day of sale; and John Bowen agrees to pay Nancy Earnest four dollars out of his part of the estate on the day of sale, as a part payment on the cow and calf, if Nancy Earnest or Gip Earnest buys the same, the defendant waiving all damages. C. A. Gunter, Justice of the Peace."

Gip Earnest testified concerning the suits brought by the administrator against himself and wife, *inter alia*, as follows: "The administrator was to have the cow and calf in controversy, and Nannie Earnest was to have the feather bed. Nannie Earnest was to keep the cow and calf until the day of the administration sale, and on that day deliver them, so they might be sold with the other personal property of the estate. There was also an agreement that, if my wife bid in the cow and calf at the sale, John Bowen on the day of sale was to pay five dollars of the purchase money out of his pocket, and the balance was to be taken out of my wife's part of the estate. My wife was to be charged in her part of the estate for balance of the purchase money of the cow. My attorney told me that was the agreement the plaintiff had consented to, and I told him I would agree to it; but I never did agree nor did I authorize my attorney to compromise the case according to the terms of the docket entry. My wife bought the cow and calf at the sale for $11.75. John Bowen was present, as he had agreed to be, at the sale, and did not pay the five dollars, and I refused to pay any part of the purchase money or to give note for the same. * * * My wife had kept the bed, and we had delivered the cow and calf at the sale. I left the cow and calf in the hands of the administrator, and he advertised them again for sale. At this second sale I appeared and forbade the sale, claiming them as my wife's property, but the administrator sold them to the defendant, C. A. Gunter, who bought them for nine dollars, and he took possession of them, and I instituted this suit against him as the agent of my wife." There was evidence tending to show that Seth Bowen gave the cow in controversy to his daughter, Nancy Earnest.

Mr. Black defines a judgment as "the determination or sentence of the law, pronounced by a competent judge or court, as the result of an action or proceeding instituted in such court, affirming that upon the matters submitted for its decision a legal duty or liability does or does not exist." 1 Black, Judg. § 1, p. 2. See also Bouvier's Law Dict., "Judgment."

The docket entry of C. A. Gunter, *supra*, does not come within this definition. There is nothing in it of the authorita-

tive character of a judgment determining the rights of parties to the controversy, and capable of enforcement by the court on whose docket it was entered. It was nothing more nor less than a dismissal of the suit at plaintiff's cost, by the consent of both parties; a compromise settlement of the differences upon certain terms and conditions, which were entered upon the record, and which, Mrs. Earnest contends, were never complied with. Neither of the parties to the above settlement nor their privies could plead this docket entry as *res judicata* in a suit afterwards brought to try the title and right of possession to the same property.

We find no error, therefore, in the ruling admitting the evidence and refusing the instruction. We deem it unnecessary to discuss other instructions. The objection urged here to them relates to matters already discussed, and it follows that there was no reversible error.

Affirmed.

BATTLE, J., dissents.

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OZAN LUMBER COMPANY *v.* HAYNES.

Opinion delivered May 12, 1900.

CONTRACT—ADMISSIBILITY OF EVIDENCE.—Notwithstanding a contract for hauling logs provides that the measurement of the logs at the mill shall be the criterion by which the hauling shall be estimated, evidence of measurement made elsewhere is admissible to show fraud or such gross mistake as would necessarily imply bad faith. (Page 187.)

Appeal from Nevada Circuit Court.

JOEL D. CONWAY, Judge.

C. C. Hamby, for appellant.

Under the evidence, it was error to allow appellee to recover anything for the spur. The contract specifies that the scaling done at the mill shall be the basis of payment for the

logs; and it was error to admit testimony as to any other scalage. Where the findings of a chancellor are against the evidence, his decree will be reversed. 41 Ark. 292; 42 Ark. 521; 43 Ark. 307; 50 Ark. 185; 55 Ark. 112.

J. H. Crawford, for appellee.

The evidence is sufficient to sustain the verdict. The pleadings should be treated as amended to conform to the evidence. 54 Ark. 289, 304; 59 Ark. 215.

BUNN, C. J. The appellee, Pat Haynes, sued appellant company on an open account, claiming judgment for a balance of $750 in his favor. Prior to the institution of this suit, another suit was pending in the court below in replevin for several head of oxen (also involved in some way in this suit), wherein the Ozan Lumber Company was plaintiff and Pat Haynes was defendant; and on motion of the Ozan Lumber Company the two were consolidated, and the consolidated suit was transferred to the equity docket. The case is one of fact mostly, and there are about four items of account about which the parties are contending, namely, the construction of spur-track, a matter of interest, the value of certain houses for laborers and corrals for cattle built by appellee on appellant's land, and the price of hauling saw logs, the difference being the alleged difference in the measurement of the same, or, as it is called among mill men, "the scaling."

There is a controversy as to which of the parties should pay for the spur-track, the appellee contending that each should pay half, according to agreement, while the appellant company contends that it had no interest in it, but that the spur track was altogether for the benefit of the appellee, and that it therefore should not be required to pay anything for its construction. Appellee valued it at $300, and charged appellant $150 on that item. It seems that appellant caused another party to cut some of the timber, which appellee claimed the right to cut and deliver to appellant company under their contract, and, to do so, would have to carry it over this spur track. At least, that is the contention of appellee. When appellee discovered that appellant was permitting a third party

to cut this timber, he refused to carry out the contract, and the appellant agreed to bear a part of the expense of constructing the spur track if appellee would continue to carry out his part of the contract.

Appellant claimed that appellee should pay it interest on the price of the oxen, amounting to the sum of $230.50. The whole question turned upon whether appellee had really bought the oxen from appellant company at the time claimed, and whether any interest was contemplated under the transaction. These were the oxen for which appellant had brought his suit in replevin against appellee.

Appellant contends that the allowance made to appellee for the houses and corrals was illegal, and appellee contends that it was a proper charge for hire and against appellant, claiming that the lumber in the houses belonged to him, and that appellant took possession of same without his permission, and moved the houses off, appropriating the same to his own use.

In the matter of the logs, the contention of appellant is that the log hauling should be paid for by the scaling at its mill, and by that only, because in their contract they had agreed to make the scaling at the mill the criterion by which the hauling should be estimated; and that evidence of scaling made elsewhere would be inadmissible. It is contended by appellee, in effect, that the correctness of the scaling at the mill may be impeached by correct scaling elsewhere, and that his testimony was for that purpose, and to that effect. The rule laid down in *Hot Springs Ry. Co.* v. *Maher*, 48 Ark. 522, is applicable to a question like this. Where a question as to quality, quantity or manner of construction of work to be done is left to be decided by an engineer in charge, and it is agreed that his decision shall be final, his decision cannot be questioned by either party, except for fraud or such gross mistake as would necessarily imply bad faith or a failure to exercise an honest judgment. The same would be true of an agreement as to one person to scale, or one place of scaling. Notwithstanding the agreement, neither decision nor manner of estimating is conclusive on the parties, but evidence may be adduced to show fraud, gross mistake or bad faith, and the matter corrected in this

way, so as to do justice. This appellee claims to have sought to accomplish in introducing his testimony on the subject, and we see no error in it.

These items of account were all referred to a master, who took testimony and made his report to the chancellor, and, this being excepted to, the same was by the chancellor approved, and, making this report the basis of his findings, the chancellor rendered the decree from which this appeal is taken.

We see nothing to justify us in reversing the decree, and the same is affirmed.

WOOD, J., not participating.

SIMS *v.* STATE.

Opinion delivered May 12, 1900.

CRIMINAL PROCEDURE—ORDER OF TRIAL OF DEFENDANTS.—The statute providing that when defendants jointly indicted elect to sever and fail to elect the order in which they shall stand upon the docket for trial, "they shall stand in the order in which their names appear upon the indictment" (Sand. & H. Dig., § 2189), does not contemplate that a defendant jointly indicted shall not go to trial until final disposition has been made of the case of his co-defendant, which stands first on the docket for trial. (Page 180.)

Appeal from Pope Circuit Court.

WM. L. MOOSE, Judge.

J. T. Bullock, for appellant.

The evidence is not sufficient to sustain the verdict. It was error to require appellant to go to trial upon his co-defendant's second trial. Sand. & H. Dig., § 2189.

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

There was no error in the court's ruling requiring appellant to go to trial before the re-trial of his co-defendant.

BATTLE J. Two questions are presented in this cause for decision:

First. Did the court err in requiring appellant to go into trial before W. V. Davis, a co-defendant, was acquitted, convicted, or finally discharged?

Second. Was the verdict of the jury sustained by evidence?

First. The appellant insists that the court erred in requiring him to go into trial before his co-defendant, W. V. Davis, was again tried, after he (Davis) had been on trial, and the jury impaneled to try him had failed to agree as to his guilt or innocence, and had been discharged. He cites a statute to sustain his contention, which is as follows: "When jointly indicted for a felony, any defendant requiring it is entitled to a separate trial, and, when the trials are severed, the defendants may elect the order in which they shall *stand upon the docket* for trial; but if no such election is made, they shall stand in the order in which their names appear upon the indictment." Sand. & H. Dig., § 2189. The statute does not provide that they shall be tried in any particular order, without regard to circumstances, but prescribes the order, as to themselves, in which they shall stand on the docket. When they elect in what order they shall stand for trial, they stand in court as they would, had they been indicted separately, and the indictments against them had been docketed in the order they elected. The statute provides only how their cases shall be called for trial. If one is not ready or is not tried when his case is reached, the next in the order of succession stands for trial, like all other cases upon the criminal docket of the court. Because one case stands first on the docket, all other cases coming after it are not postponed when it is continued or passed until after it is tried, yet it stands first upon the docket for trial. The statute fixes only the order in which the cases of defendants jointly indicted shall be called for trial after they have severed, and elected the order in which they shall stand upon the docket for trial, and provides that, if no such election is made, they shall stand in the order in which their names appear upon the indictment.

Second. We have carefully examined the record, and find sufficient evidence to sustain the verdict of the jury.

Judgment affirmed.

MATTHEWS *v.* FREKER.

Opinion delivered May 12, 1900.

SALE—MUTUAL ASSENT.—Where a broker sent to his principal an order for a car load of potatoes, which was subsequently countermanded by the purchaser without the broker's knowledge, and afterwards, in response to a telegram from the principal, the broker telegraphed to rush the potatoes and send him the papers, he will not be liable for the value of the potatoes in case of their loss, as for goods sold, if by his telegram he did not mean to buy the potatoes, but only meant that in his opinion the purchaser would take them if delivered immediately. (Page 196.)

Appeal from Sebastian Circuit Court.

EDGAR E. BRYANT, Judge.

STATEMENT BY THE COURT.

L. A. Freker & Co. commenced an action against J. P. Matthews & Co. and J. Foster & Co. before a justice of the peace of Sebastian county, upon an account in the following words and figures:

"St. Louis, Mo., Feb'y 26th, 1897.

J. P. Matthews & Co.,
Fort Smith, Arks.

Bought of L. A. Freker & Co.

48 bbls. E. Rose	1.60	$76	80
35 bbls. Peerless	1.60	56	00
17 bbls. Burbanks	1.60	27	20
5 bbls. E. Ohio's	1.60	8	00
40 sks. Rurals (5760 lbs).	60	55	70
		224	70
Less freight, 49 100		96	00
		$126	70."

At the time of the giving of this account an affidavit was appended, which was in the words and figures following:

"State of Missouri, City of St. Louis—ss.:

"Before me, August H. Bush, a notary public within and for the city of St. Louis, and state of Missouri, duly commissioned, qualified and acting, on this day personally appeared L. A. Freker, who, being duly sworn, on his oath deposes and says that he is the sole owner doing business as L. A. Freker & Co., a firm composed of L. A. Freker; that the annexed and foregoing account in favor of said firm to [against] said J. P. Matthews & Co., of Fort Smith, Ark., for goods, wares and merchandise sold and delivered by said firm to said J. P. Matthews & Co., showing an amount due of $126.70, is, within the knowledge of this affiant, just, true and correct in all particulars, due and unpaid, and that all just and lawful offsets, credits, deductions and payments have been allowed.

[Signed] "L. A. Freker.

"Subscribed and sworn to," etc.

The defendants denied being indebted to plaintiff in any sum whatever, and in a trial before the justice of the peace recovered judgment; and the plaintiff appealed to the Sebastian circuit court for the Fort Smith district.

In the circuit court J. P. Matthews & Co. answered orally, and substantially as follows: "Said Matthews & Co. denied being indebted to the plaintiff in any sum whatever; denied receiving, ordering or buying the potatoes in said account named; denied buying any other potatoes from the plaintiff; and denied being indebted to the plaintiff in any sum whatever, and alleged in this answer that they (Matthews & Co.) were the brokers of the plaintiff in the sale of the potatoes mentioned in said account to defendants, J. Foster & Co., and that said Matthews & Co. had, as plaintiff's brokers, fully and in a business-like manner, discharged their duty as plaintiff's brokers; and that they were in no way liable for said car of potatoes; and, further answering, denied the right of the plaintiff to sue said Matthews & Co. jointly with J. Foster & Co. Said Matthews & Co., further answering, state that, as the brokers of the plaintiff, they had negotiated the sale of the potatoes

named in the account herein, and had duly performed all their duties with reference to said sale, both to plaintiff and to J. Foster & Co. and that Matthews & Co., were not liable to said plaintiff in any sum whatever."

The issues in this case were tried before a jury, and the plaintiff recovered a verdict and judgment against J. P. Matthews & Co. for $126.70, and Matthews & Co. appealed.

Evidence was adduced in the trial tending to prove the following facts: L. A. Freker was engaged in business in St. Louis, Missouri, and dealt in potatoes. J. P. Matthews & Co. were brokers at Fort Smith in this state, and were authorized by Freker to sell potatoes for him. J. Foster & Co. were merchants at Fort Smith. On the 23d of February, 1897, Matthews & Co. ordered Freker to send a car load of potatoes to Foster & Co. at Fort Smith. Freker shipped the potatoes, on the 25th of the same month, to Foster & Co., and they received them at Fort Smith, and paid for them. There is no controversy about these potatoes. On the morning of the 25th of February, 1897, Freker received a letter from Matthews & Co., offering him, for Foster & Co., one dollar and sixty cents per barrel and sixty cents per bushel for a car load of potatoes to be shipped to Mena, in this state. He immediately accepted the proposition by telegram. On the same day he received a message from J. Foster, asking if both cars were shipped. These cars were the the car load of potatoes which were shipped to Fort Smith, and were received and paid for, and the car load to be shipped to Mena. Freker replied to Foster's message by telegram as follows: "Fort Smith shipped to-day Mena car to-morrow." In the afternoon of the same day Freker received a telegram from Foster & Co. countermanding the order, which he answered as follows: "J. Foster & Co., Fort Smith. Ark. Fort Smith car loaded and ticket signed. Mena order received by mail to-day, and are loading." Freker commenced loading a car with potatoes to be shipped to Mena for J. Foster & Co. on the 26th of February, when he received a telegram from Foster & Co., saying that they would not accept the Mena car under any circumstances. The car was then more than half loaded, and the remainder of the potatoes

were ready to be taken to the car. Freker thereupon, on the morning of the 26th of February, sent a telegram to Matthews & Co. in the words following: "Mena car loaded. Goes forward to-day. We are not at fault. Convince Foster." Later in the same day he received a telegram as follows: "Rush both cars. Send papers of Mena cars to ourselves. [Signed] J. P. Matthews & Co." He then shipped the car loaded, last ordered, according to directions, and sent the bill of lading to Matthews & Co. The other car load had already been shipped as before stated, and was afterwards received and paid for by Foster & Co. The last shipment was on the 26th of February, 1897. On the 11th of March following, Freker drew a draft on Matthews & Co. for $126.70, the price of the last car load. This draft was returned by Matthews & Co. unpaid. Another draft for the same amount was drawn by Freker on the same persons, and was returned with this indorsement on it: "Not correct. Insist on Foster & Co. paying the draft. Draw on them again. [Signed] J. P. Matthews & Co." Afterwards this action was brought for $126.70, the price of the car load last shipped.

J. P. Matthews testified that he completed the negotiations for the sale of both car loads of potatoes, and heard no more of the matter until the morning of the 26th of February, 1897. "That morning I called at the office of Mr. Foster,—rather, I saw him as I was passing his place of business. He stated to me that he did not understand the delay, and that he must have his potatoes to fill his orders. Immediately I sent the following telegram to Freker: "Rush both cars. Send papers of Mena cars to ourselves." Foster asked me from whom he had purchased the potatoes, and I told him Freker & Co., of St. Louis. He then said that he did not like to buy from Freker, because there was always something wrong with his potatoes; but he did not countermand the order. Soon after that, and after I had sent the above telegram, I received the following telegram: 'Mena car already loaded. Goes forward to day. We are not at fault. Convince Foster.' * * * Neither Freker nor Foster had said anything to me about telegraphing with each other on the subject of these two cars, and I did not

know, and had no means of knowing, what Freker meant by saying, "Convince Foster."

W. F. Latham testified: "I was present on February 26, 1897, and heard J. Foster ask J. P. Matthews from whom the cars were coming; Matthews said, 'Freker.' I heard Foster countermand the orders previously given to Matthews. I walked on, and heard no more of the conversation."

J. P. Matthews further testified: "The next morning, the 27th of February, 1897, I saw Foster's son, and was told by him that his father had declined to take either car. That same day (27th) I received the invoice and bill of lading for the car sued for in this action, and, having been notified that morning by Mr. Foster's son, who was in Mr. Foster's office attending to his (Foster's) business, that Foster would under no circumstances receive the said car, I at once and about noon of said 27th day of February, 1897, returned said invoice and bill of lading to Freker. I mailed said bill of lading and invoice about noon, and placed thereon the necessary stamps, and addressed the same to L. A. Freker & Co., 1139 North Third street, St. Louis, Missouri. In due course of mail said letter containing said invoice and bill of lading would reach St. Louis, Mo., on the next morning, February 28th, 1897, and before the said car of potatoes could possibly have reached its destination at Mena, Arkansas. * * * Under the custom of the railroad and under the bill of lading the car of potatoes would not have been delivered to any one without the bill of lading. I had this car of potatoes sent in my name in order to get the benefit of a certain freight rate. In telegram ordering car freight was to be sent as to Poteau. I had a guaranty from the railroad that such rate should obtain. I explained to Freker to ship in my name unless he could get that rate. Fearing that he could not get that rate, I wired him to send the papers to Matthews & Co. Both he and Foster knew the reason. I did not buy the potatoes. I did not receive any of them. I never received any notice from the railway company that said potatoes were there." Freker testified that he heard nothing of the last shipment after he sent the bill of lading to Matthews & Co.

J. Foster testified that they "declined to receive the Mena

car, both because of too much delay in shipping same, and because their dealings with Freker had never been satisfactory." The cars of potatoes they bought from Freker through Matthews & Co. were to be shipped immediately, and when they learned on the 26th that they had not yet been shipped, for that and other reasons they declined to take the same. Their customers were crowding them for potatoes. They had to have them as soon as possible.

Read & McDonough, for appellants.

There was no contract between appellee and appellant brokers by which *title* was passed to appellants. 40 Ark. 216; 60 Ark. 357. If appellee could recover at all, it would be in an action based on conversion by sending the unauthorized telegram. 36 N. H. 324; 12 N. H. 384; 22 N. H. 572; 14 Johns. 128; 14 Vt. 366; 10 Vt. 208; 31 Ark. 286; 14 Ark, 505; Jaggard, Torts, 706, 717. A factor or broker in possession of goods is only a bailee. Laws. Bail. § 5. Assumpsit it will not lie for such a conversion. 17 Ark. 509; 25 Ark. 100; 27 Ark. 365; 31 Ark. 155; 31 N. Y. 676. No amendment of pleading can be made to change an action begun in *contract* to *tort*. Sand. & H. Dig., §§ 5703, 5769n.; Bliss, Code Pld. 233, 429; 34 Wis. 378; Fitnam, Trial Proc. 513; 7 Hun, 525. In actions of tort the measure of damages is at value of the property at time of conversion. 14 Ark. 505; 31 Ark. 256; 39 Ark. 387; 36 Ark. 268; 51 Ark. 19. Appellee could have resold the potatoes, and thus prevented their loss. Hence he cannot recover for whatever of the loss was occasioned by his failure to do this. 57 Ark. 264; 105 U. S. 224; 80 Fed. 818; 37 S. W. 868. It was error to refuse the instructions asked by appellant.

Jo Johnson, for appellee.

The transaction was a sale of the Mena car to appellants. 44 Ark. 556; 43 Ark. 353; Benj. Sales (4 Am. Ed.), 181, 693. Recovery may be had as in *assumpsit*. 15 Ark. 444; 5 Ark. 651; 4 Enc. Pl. & Pr. 923. A sale to an agent for an undisclosed principal is a sale to the agent. 2 Kent's Comm. 630, 631; Story, Ag. 267; Whart. Ag. 500; 50 Ark. 439; 8

S. W. 183; 1 Am. & Eng. Enc. Law (2 Ed.), 1080–1. The instructions of the court were correct. On the fourth instruc-, tion, see 7 Ark. 365; 9 Ark. 85; 22 Ark. 258; 2 Enc. Pl. & Pr. 1022.

BATTLE, J., (after stating the facts.) This action was for the price of a car load of potatoes, which were alleged to have been sold by L. A. Freker & Co. to J. P. Matthews & Co. In the account filed with the justice of the peace Matthews & Co. were charged with having bought the potatoes. In the affidavit annexed to the account Freker swore that the account "for goods, wares and merchandise *sold and delivered* by said firm (Freker) to said J. P. Matthews & Co. was just, true and correct in all particulars." Matthews & Co. denied having purchased the potatoes, or being indebted to Freker for the same. The cause of action was the sale of the potatoes. The justice of the peace could not have acquired jurisdiction of the suit as an action *ex delicto*, the amount involved being $126.70, and his jurisdiction in matters of damage to personal property being limited by the constitution to cases where the amount in controversy does not exceed the sum of one hundred dollars. The circuit court acquired by the appeal no jurisdiction except that which the justice of the peace had; neither could it try any cause of action except that tried by the justice of the peace. The only question in the case, then, is, did Freker sell to Matthews & Co. the car load of potatoes?

In Benjamin on Sales it is said: "To constitute a valid sale, there must be a concurrence of the following elements, viz.: (1) Parties competent to contract; (2) mutual assent; (3) a thing, the absolute or general property in which is transferred from the seller to the buyer; and (4) a price in money paid or promised." Sec. 1.

Did the mutual assent necessary to constitute a valid sale exist in this case? The right of Freker to recover of Matthews & Co. is based upon the telegram in which they said: "Rush both cars. Send papers of Mena car to ourselves." Matthews & Co. did not expressly agree to purchase the potatoes, or to pay for them. The word "rush" might imply that they

were of the opinion that Foster & Co. would accept the potatoes if they were promptly shipped. Foster & Co. wanted the potatoes, and were impatient on account of the delay in their shipment. Foster testified that they were to be shipped immediately; that their "customers were crowding them for potatoes, and they had to have them as soon as possible." The order for the potatoes was received by Freker on the morning of the 25th of February. On the same day he received a telegram from Foster & Co., asking if both cars were shipped, and Freker replied: "Fort Smith shipped to-day; Mena car to-morrow." In the afternoon of the same day Freker received another telegram from Foster & Co. countermanding the order, which he answered by saying: "Fort Smith car loaded, and ticket signed. Mena order received by mail to-day, and are loading." Foster & Co. replied by saying "they would not accept the Mena car under any circumstances." They did not countermand the order for the potatoes which were sent to Fort Smith. They had been shipped. When Freker received the last telegram from Foster & Co. countermanding the "Mena order," he wired to Matthews & Co. as follows: "Mena car nearly loaded. Goes forward to-day. We are not at fault. Convince Foster." After this he received a telegram from Matthews & Co. saying: "Rush both cars. Send papers of Mena car to ourselves." J. P. Matthews testified that Matthews & Co. did not receive the telegram asking them to "convince Foster" until after they had sent the telegram to Freker. But, assume that it was received before, did they thereby intend to propose to purchase or pay for the potatoes which were ordered to be shipped to Mena? If so, their telegram might also mean that they proposed to purchase or pay for the car load which had been shipped to Fort Smith, for they said, "Rush both cars." No one contends for this construction, for that order was not countermanded.

The direction in the telegram to "send papers of Mena car to ourselves" did not necessarily imply that they would purchase or pay for the potatoes shipped to Mena, for Matthews testified: "I had this car of potatoes sent in my name in order to get the benefits of a certain freight rate. * * * I had a guaranty from the railroad that such rate should obtain.

I explained to Freker to ship in my name unless he could get that rate. Fearing that he could not get that rate, I wired him to send the papers to Matthews & Co. Both he and Foster knew the reason."

The jury might reasonably have inferred from all the evidence in the case that Matthews & Co. did not intend by their telegram to Freker to purchase the potatoes, but they showed thereby that they were of the opinion that Foster & Co. would pay for the potatoes if they were promptly shipped to, and received at, Mena. But the jury were not permitted to take this view of the facts. The court, over the objections of Matthews & Co., instructed them as follows:

"3. But if they sent said telegram without the authority of J. Foster & Co., and at the time they sent it they knew that Foster had countermanded the order for the Mena car of potatoes, or if at that time they had received the telegram from plaintiffs, 'Mena car loaded. Goes forward to-day. We are not at fault. Convince Foster'—then defendants J. P. Matthews & Co. are liable for the contract price of the car.

"4. But if Matthews & Co. sent the telegram ('Rush both cars,' etc.) before receipt of the telegram of plaintiff stating that 'We are not at fault. Convince Foster,' and if said telegram, 'Rush both cars,' etc., was without authority of Foster & Co., then the liability of Matthews & Co. depends on whether or not, after subsequent receipt of the telegram, 'Mena car nearly loaded. Goes forward to-day. We are not at fault. Convince Foster,' Matthews & Co. acted with ordinary care

"5. Ordinary care means the care that would be expected of a reasonable, careful, prudent and competent broker, under all the circumstances. Now, if, after sending the telegram, 'Rush both cars,' etc., Matthews & Co., received the telegram sent by plaintiff, stating, 'We are not at fault. Convince Foster,'—and if ordinary care under all the circumstances would have led them to make inquiries, and they could have thereby ascertained the state of affairs, and informed plaintiffs thereof, and they failed to use such care, then they are liable. But if they did use ordinary care, or if they failed to make inquiry,

and such failure was want of ordinary care, then they are liable."

In giving these instructions the court erred.

Reversed and remanded for a new trial.

BUNN, C. J., (dissenting.) This is a suit originally before one of the justices of the peace in the Fort Smith district, Sebastian county, by the appellees, L. A. Freker & Co., grocery merchants of St. Louis, Mo., against J. Foster & Co., retail grocery merchants of Fort Smith, and J. P. Matthews & Co., brokers, also of Fort Smith, for the sum of $126.70, the price of a car load of potatoes. Judgment for the defendants, and the plaintiffs appealed to the circuit court, where a jury trial was had, resulting in a judgment for the defendants, J. Foster & Co., and against the defendants, J. P. Matthews & Co., who appealed to this court.

J. P. Matthews & Co. were brokers, and on the 23d of February, 1897, sold for plaintiffs a car load of potatoes to J. Foster & Co. at a stipulated price, to be shipped to Fort Smith, Arkansas. This car was loaded on the track in St. Louis on the 24th and 25th of February, and went forward on the 25th. On the morning of the 25th plaintiffs received another offer from J. Foster & Co., through J. P. Matthews & Co., to purchase another car load of potatoes at a stipulated price, to be shipped to Mena, Arkansas, which order was at once accepted by plaintiffs. This last order was made by letter, the first one was made by telegram. Immediately upon receiving the letter, on February 25th, plaintiffs accepted the order by telegram, thus: "Will accept Mena car. Will ship Saturday;" and they at once began loading that car, which was done on the 26th, and on the same day that car went out. In the letter J. P. Matthews & Co. had given direction to plaintiff to ship to R. S. Owen, Mena, Arkansas. After receiving the letter on the morning of the 25th, plaintiffs later on that morning received a telegraphic message from J. Foster & Co., asking if both cars were shipped, which was replied to by telegram at once, thus: "Fort Smith shipped today. Mena car tomorrow." In the afternoon, February 25th, plaintiffs received another telegram from J. Foster & Co. countermanding the order. (This appears to have been a telegram countermand-

ing both orders.) Plaintiffs at once answered this telegram thus: "J. Foster & Co., Fort Smith, Ark. Fort Smith car loaded and ticket signed. Mena order received by mail to-day, and are loading." On the morning of February 26th, plaintiffs received a telegram from J. Foster & Co., saying they would not accept the Mena car under any circumstances. The car was then more than half loaded, and the balance of the potatoes ready to be taken to the car.

The foregoing is taken from plaintiffs' testimony. It will be observed that, on receiving J. Foster & Co.'s telegram countermanding both orders on the 25th, plaintiff continued to load the car for shipment, if indeed he had begun to do so at that time, and on receipt of telegram of J. Foster & Co., on 26th, refusing to take the Mena car under any circumstances, plaintiffs say that they had half loaded the car. The other car had been sent forward the day before, and was received and paid for at Fort Smith by J. Foster & Co., as stated above.

J. Foster in his testimony states that on the morning of the 26th he met J. P. Matthews, of the firm of J. P. Matthews & Co., in front of his place of business in Fort Smith, between 10 and 11 o'clock, and asked him from whom the potatoes were coming. Matthews informed him that they were from Freker & Co., of St. Louis, Mo. Foster then told Matthews that he would not buy potatoes from Freker under any circumstances, and that he would not take either car, and he immediately sent a telegram to Freker, telling him that he would not accept the potatoes under any circumstances.

The telegrams he received are set out in Freker's deposition. He states that he (Foster) never in any manner authorized Matthews & Co. to send the telegrams "Rush both cars." Continuing, the witness said: "The Fort Smith car came, and I received it, and paid for that. The Mena car was intended for R. S. Owens of Mena. I never received or accepted that car. I declined to receive the Mena car, both because of too much delay in shipping same, and because my dealings with Freker had never been satisfactory. The cars of potatoes I bought from Freker through Matthews & Co. were to be shipped immediately, and when I learned on the 26th that they had

not been shipped, for that and other reasons I declined to take the same. My customers were crowding me for potatoes, and I had to have them as soon as possible. I am not indebted to the plaintiff in any sum whatever."

There was, therefore, testimony to justify the finding of the jury that J. Foster & Co. countermanded the order for the Mena car, and so notified both Freker & Co. and J. P. Matthews & Co. before the car was loaded for shipment and (from which the jury might find) before anything was done towards its shipment. And there was evidence to justify the jury in finding, as they did in effect, that, after the order was countermanded, J. P. Matthews & Co. sent the telegram to plaintiffs to "rush both cars," and that upon this telegram the Mena car was sent out.

It is manifest that Freker & Co. never were informed as to the reasons, or as to all the reasons, why J. Foster & Co. countermanded the order, and that they were evidently laboring under the impression that the complaint was on account of the delay only; for, having received the countermanding order from J. Foster & Co. on the morning of the 26th, Freker telegraphed to Matthews & Co. at once, as follows: "Mena car nearly loaded. Goes forward to-day. We are not at fault. Convince Foster." It is equally evident that Foster's principal reason for countermanding the orders—his desire not to deal with Freker—was withheld from Freker by Matthews & Co., or at least was never communicated to him by them.

There can be but one reasonable conclusion, I think, on this part of the case, and that is that the Mena car was actually shipped on the order of J. P. Matthews & Co. to "rush both cars," and that that order was unauthorized by J. Foster & Co. It is shown in evidence, without controversy, that J. P. Matthews & Co. were the agents and brokers of Freker & Co. in selling these car loads of potatoes. It is rudimentary law that a broker must act in the utmost good faith towards his principal. In this instance the unauthorized act of the broker was the cause of plaintiff's parting with the possession of the car load of potatoes, without the security in fact of the consignee being under any obligation to receive and pay for it, or at least the jury were justified in so finding.

When J. P. Matthews & Co. sent the telegram, "Rush both cars," they also included a direction to Freker thus: "Send papers of Mena car to ourselves," and accordingly Freker shipped the car out, the other having already gone; and the papers were sent to J. P. Matthews & Co., and were received at once by them. Subsequently plaintiffs drew on J. P. Matthews for the price of the car load of potatoes, $126.70, but the draft was not paid. Matthews says in his testimony that the only object he had in directing the papers to be sent to them was to get the advantage of a lower rate of freight, which they had arranged for. Be this as it may, the car was not deliverable to any one at Mena, except on presentation of the bill of lading; that is to say, any one except J. P. Matthews & Co. or order.

This suit was for the contract price of the potatoes, as agreed upon in the sale by Freker & Co. to J. Foster & Co., through J. P. Matthews, and it is contended by defendants J. P. Matthews & Co., the appellants here, that, as they are only brokers, and not purchasers, they could only be held for damage to the property, if at all, and that no damages were proved or assessed. If that be the status of the case as made by the evidence, the circuit court was without jurisdiction to hear the case on appeal from the justice of the peace, since the latter had no jurisdiction, the amount claimed being in excess of his jurisdiction to assess damages to personal property.

But the contention is that, having drawn the plaintiff into this controversy without his knowledge, and so manipulated matters as to let J. Foster & Co. out as purchasers, and in that view having directed plaintiffs to send "all papers" to them, and no delivery of the freight being possible except on presentation of these papers, therefore J. P. Matthews & Co. voluntarily assumed the place of the original purchasers, and are liable accordingly. This was the theory upon which the circuit court tried the case. J. P. Matthews & Co. claimed to have returned the papers to Freker about noon on the 27th February. These consisted of invoice and bill of lading. We hear no more of them however. Why they should have sent them back on the 27th when they had directed them to be sent

to them on the day before is something that needs explanation. If the theory of the circuit court be the correct one, its instructions were correct. The contention of appellee is that, by directing the invoice and bill of lading to be sent to themselves direct, and no one else except the holder of the bill of lading being entitled to claim and receive the car load of potatoes, the appellants voluntarily assumed the rights, and the corresponding responsibilities, of consignee and purchasers—stood in the place of the purchasers, so far as the plaintiff vendor was concerned.

There is sufficient evidence to show that the plaintiff was in no fault in this matter, and they so find in effect. It follows that either J. P. Matthews & Co. or J. Foster & Co. were responsible for this car load of potatoes, for that it was lost appears evident. The evidence, as we have seen, was sufficient to justify the jury in finding that J. P. Matthews had caused the shipment to be made after the order had been countermanded by J. Foster & Co. J. P. Matthews & Co. knew the facts. Freker & Co. did not know the facts, but acted on the directions of J. P. Matthews & Co. altogether, and in so doing lost their potatoes. On the morning of the 26th of February, J. Foster & Co. had countermanded the order by telegram direct to Freker & Co., and so informed J. P. Matthews & Co. Evidently plaintiffs were under the impression that Foster's reason for countermanding the order was that the shipment was delayed too long, and with this idea plaintiffs at once telegraphed J. P. Matthews, as follows: "Mena car nearly loaded. Goes forward to-day. We are not at fault [that is, We have not delayed.] Convince Foster." In response to this telegram of plaintiffs, J. P. Matthews & Co., telegraphed him later in the day, "Rush both cars. Send papers of Mena car to ourselves." On receipt of this, plaintiff was naturally led to believe that Matthews had satisfactorily explained matters to Foster, and that all was clear. Hence the message to "rush both cars" meant that they would be received if *rushed* as directed. This was complied with. Nothing more seems to have been heard from the matter by plaintiff, and on the 11th March he drew a draft for the price of the potatoes on J. P. Matthews

& Co. This draft was returned to plaintiff indorsed, "Payment refused," on the 18th or 19th March, for the indorsement bore date March 17th. Plaintiff drew another draft on the 24th March, and this draft also came back indorsed on the back, "Not correct. Insist on Foster & Co. paying the draft. Draw on them again."

In his testimony Matthews says: "I at once, and about noon of said 27th day of February, 1897, returned said invoice and bill of lading to Freker. I mailed said bill of lading and invoice about noon, and placed thereon the necessary postage stamps, and addressed the same to L. A. Freker & Co., 1139 North Third street, St. Louis, Missouri. In due course of mail said letter containing said invoice and bill of lading would reach St. Louis, Mo., on the next morning, February 28th, 1897, and before the said car of potatoes could possibly have reached its destination at Mena, Arkansas." The object of this statement evidently was to show that plaintiff had time to receive the car at Mena after he received back the bill of lading. But Freker says he never heard of the bill of lading after he sent the same to J. P. Matthews & Co., by their direction. Besides, the latter wrote a letter to plaintiff dated March 17, 1897, from Fort Smith, in which this language is used:

"L. A. Freker & Co. Gentlemen: We were surprised to find that you had drawn for the Mena car at so late a date (March 11th.) Why did you not send the draft and bill of lading when you shipped the car, as you did the other (car), and we would have gotten Mr. Foster to pay the draft." This means, if it means anything, that the invoice and bill of lading was not sent with the car. How, then, could these papers have been returned on the 27th February to Freker, as stated by Matthews in his testimony? The necessary inference from the letter is that the invoice and bill of lading had never been sent to J. P. Matthews before the first draft was drawn, if at all. The jury could fairly conclude that plaintiff had never received back the invoice and bill of lading he had sent to J. P. Matthews & Co.

If J. P. Matthews & Co. were liable at all, they were liable for the full value of the potatoes, for it was a total loss.

They might have been sued in tort, but the plaintiff had a right to waive the tort, and sue them for the value of the potatoes, and this he did. They had brought about an anomalous condition of things, without the knowledge or consent of Freker; and, in order, apparently, to protect him at all events, had voluntarily taken the place of the nominal consignees and purchasers, by inducing Freker to transmit to them the evidence of title to the goods, and never made an attempt to protect their principal's interest afterwards, and now defend by saying that they are tort feasors, if anything, and not purchasers, for an agent is not a purchaser. The difficulty is that, when they assumed to act as the consignees, they then ceased to be the agents of the plaintiff, but assumed an independent attitude. But because he had been kept in ignorance of J. Foster & Co's true status by the conduct of his brokers, plaintiff sued both. The jury found the brokers liable, and that liability to be that of purchasers. At all events, that is the effect of it, and the instructions of the court were on that theory, and I think the trial court was correct in its view, and that the judgment should be affirmed.

LYONS v. GREEN.

Opinion delivered May 12, 1900.

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1. CERTIORARI—LACHES.—Delay of thirteen months before asking to have an erroneous judgment set aside on certiorari is not such laches as will defeat the relief sought if no efforts have been made in the meanwhile to enforce the judgment. (Page 208.)

2. SAME—WHEN PROPER REMEDY.—Where judgment was rendered against a defendant in an action which had been previously dismissed as to him, certiorari, and not appeal, is his proper remedy. (Page 209.)

3. INJUNCTION—DISSOLUTION.—An injunction granted at the instance of plaintiffs and one of the defendants against another of the defendants will be dissolved by dismissal of the suit as to both such defendants. (Page 209.)

4. ACTION—DISMISSAL IN VACATION.—Under Sand. & H. Dig., § 5792, providing that "the plaintiff may dismiss any action in vacation, in the

office of the clerk," it is proper for the clerk, as custodian of the record, to enter up an order of dismissal at the request of the plaintiff's attorney. (Page 210.)

5. APPEAL—AMENDMENT OF RECORD.—A misprision of the circuit clerk in entering a judgment of dismissal in vacation cannot be corrected on appeal. (Page 210.)

Certiorari to Hempstead Circuit Court in Chancery.

RUFUS D. HEARN, Judge.

D. B. Sain, for petitioner.

The case was regularly and unconditionally dismissed by plaintiffs, through their attorney, before the clerk in vacation; and petitioner was no longer a party after that. Sand. & H. Dig., § 5792. If the record of dismissal was a misprision of the clerk, it should have been corrected before the judgment by default was rendered. Sand. & H. Dig., § 4198. Judgments rendered without notice are void. Mansf. Dig. § 5201. The proper remedy when such judgments are rendered is by certiorari with temporary restraining order. 48 Ark. 333. The office of the common law writ of certiorari is confined to bringing up the record alone, and not matters *dehors* the record. 25 Wend. 169; 17 Ark. 440; 18 Ark. 449; 23 Ark. 107; 21 Ark. 475; 30 Ark. 17; 43 Ark. 341. Extrinsic evidence is not admissible to support the record or sustain the judgment of the inferior tribunal. 59 Wis. 425; 155 Mass. 467; 34 N. H. 163; 17 N. J. L. 25. Sand. & H. Dig., § 1126, provides for the reading of affidavits and evidence *dehors* the record in certiorari proceedings in the circuit court (see 43 Ark. 341); but that provision does not apply to this court. Where the record shows a want of jurisdiction, certiorari is the proper remedy. 61 Ark. 607; 29 Ark. 172; 38 Ark. 159; 39 Ark. 349; 52 Ark. 231; 25 Ark. 420; 28 Ark. 87; 44 Ark. 509. In such a case judgment will be rendered here, quashing the judgment below. 35 Ark. 95; 17 Ark. 440; 96 Ala. 461; 29 Ark. 173; 101 Cal. 594; 35 Cal. 269; 47 Mich 375; 73 Mich. 40; 37 Mich. 388; 1 Mo. 545; 8 Nev. 84; 25 Mich. 483. Extraneous evidence will not be heard to contradict the record. 52 Wis. 379; 5 Binn. (Pa.) 29; 2 Dall. (Pa.) 114; 5 Allen, 13; 2 Law Repos. (N. C.) 78; 109 Mass. 270. The enquiry is, whether the inferior court

kept within its jurisdiction and proceeded regularly. 113 Ill. 154; 129 U. S. 336; 33 Wis. 678; 24 W. Va. 517. When the record discloses errors, no presumptions are indulged in favor of regularity. 18 Ark. 53; 27 Ark. 292; 31 Ark. 567; 33 Ark. 828; 61 Ark. 464. The judgment against petitioner was void for want of notice. 39 Ark. 347; 13 Ark. 355; 15 Ark. 43; 16 Ark. 646; 67 Ia. 175; 2 Freeman, Judg. § 495; 49 Ark. 411; 44 Ala. 478; 30 Ark. 148; 30 N. J. L. 80; 64 Mo. 294. The judgment was a fraud upon petitioner, because it was a violation of the compromise made by the parties. 2 Freeman, Judg. § 492; 11 Ark. 442; 9 Ark. 535: 59 Ark. 8.

W. S. Eakin, for respondents.

Petitioner is barred by laches. 54 Ark. 375; 47 Ark. 514; 12 Am. Dec. 537; 37 Cal. 222; 85 Ill. 290; 15 N. Y. Sup. Ct. 56; 10 Chicago Leg. News, 292; 42 Cal. 253; 9 Mich. 324; S. C. 80 Am. Dec. 85; 56 Ark. 85; 43 Ark. 243; 38 Ark. 81. Petitioner should have proceeded by appeal. 37 Ark. 318; 25 Ark. 518; 35 Ark. 96; 29 Ark. 173; 2 Mass. 445; 17 Mass. 352; 52 N. Y. 445; 46 Vt. 617; 28 Ark. 87; 47 Cal. 222; 51 Ark. 284; 43 Ark. 33; *ib.* 262; 11 Ark. 519, 538. Chancery, having once taken jurisdiction of a cause, retains it for the purpose of doing complete justice on all points. 14 Ark. 50; 30 Ark. 89; *ib.* 228; 34 Ark. 410; 37 Ark. 164; *ib.* 286; 46 Ark. 96; 48 Ark. 312; 52 Ark. 541.

WOOD, J. This is a petition to quash, on certiorari, a decree of the Hempstead chancery court in the case of David and Harriett Green against D. M. Goodlet, administrator of the estate of H. K. Lyons, deceased, *et al.* The petitioner, after alleging that he was one of the defendants in that case, sets forth, as grounds for setting aside the decree, that on the 28th day of August, 1897, W. S. Eakin, as attorney for Green and wife, the plaintiffs in the suit, did on August 28, 1897, dismiss the suit before the clerk of the Hempstead court, in vacation, as to W. T. Lyons, petitioner, and that afterwards, on October 14, 1897, the plaintiffs in the suit obtained judgment against petitioner, and had a lien declared upon his land; that the court had no jurisdiction of the person or property of petitioner, as he was not served with notice after the action had

been dismissed, nor did he appear in person, nor authorize any one to appear for him in the action. The return to the writ of certiorari shows that on August 26, 1897, the following entry was made in the case of David Green and Harriett Green, plaintiffs, against D. M. Goodlet, administrator of estate of H. K. Lyons, deceased, *et al.*, to-wit: "Comes W. S. Eakin, attorney for plaintiffs, and on his motion this cause is dismissed as to D. M. Goodlet, administrator of W. W. Goodlet, Rebecca Brown and J. C. Brown. *Teste:* Geo. W. Sandefur, Clerk, by L. F. Monroe, D. C." Also the following: "Before the clerk in vacation, August 28, 1897. David Green and Harriett Green, plaintiffs, against D. M. Goodlet, administrator of the estate of H. K. Lyons, deceased, * * * W. T. Lyons," *et al.* Comes W.S. Eakin, attorney for plaintiffs, and on his motion this case is dismissed as to W. T. Lyons. *Teste:* Geo. W. Sandefur, Clerk, by L. F. Monroe, D. C."

After this the decree was rendered against the petitioner, W. T. Lyons, on the 14th day of October, 1897, which he here seeks to annul. It is not denied that petitioner had no other or further notice after these entries. In other words, the only service upon him was that had when the suit was begun. The respondents insist that the petitioner is not entitled to the relief sought for three reasons, viz.: "(1) He was guilty of laches in not applying sooner for relief by this proceeding; (2) his proper remedy is by appeal from the judgment of which he complains; (3) the court of equity rendering the judgment had complete jurisdiction of his person and property at the time the judgment was rendered." Considering these in the order presented by counsel, we are of the opinion:

First, that the petitioner is not barred by laches. Even if petitioner had knowledge of the judgment from the date of its rendition, a delay of about thirteen months before seeking to have same set aside would not subject him to the charge of laches, when it appears that no efforts had been made in the meanwhile to enforce the judgment. The petitioner, we observe, gave notice that he would apply to have the judgment quashed some fourteen days before the owners of the judgment advertised the land for sale under execution. Petitioner could

hardly be said to have shown any sort of acquiescence in a judgment which he sought to avoid even before any effort was made by the owners thereof for its enforcement. "What delay must be regarded as so unreasonable as to preclude the complainant from resorting to this writ" is not settled by the authorities. Each case must depend upon its own peculiar facts Respondent cites us to *Keyes* v. *Marion County*, 42 Cal. 252, where a delay of one year was held, under the circumstances of that case, to be fatal. But the facts of that case were so different from those at bar as to render it valueless as an authority for respondent's contention. The rule, as stated by this court, "is to refuse the writ when the party seeking it fails to show that he has proceeded with expedition after discovering that it was necessary to resort to it." *Black* v. *Brinkley*, 54 Ark. 375. The application of the rule to the facts of this case does not call for a denial of the relief sought.

Second. The remedy of petitioner was not by appeal; for, if his contention be correct, he was not a party to the record when the judgment was entered, and had no notice of the proceedings subsequent to the dismissal of the case as to him, and hence no opportunity to be made a party, and therefore no right to appeal.

Third. Counsel insist that the court had jurisdiction of the person and property of petitioner at the time of the rendition of the decree, for the reason (1) that "the petitioner was a party to an injunction proceeding, growing out of, and a part of, the suit decided by the chancellor at the time of the rendition of the decree." The facts concerning this are substantially as follows: Respondents (plaintiffs in the suit in which the judgment here in question was rendered) prayed an injunction against defendant D. M. Goodlet, administrator, to restrain him from collecting rents from their lands to satisfy a judgment of the probate court against the estate of H. K. Lyons, deceased. The prayer for injunction was predicated upon a recital of facts setting up their equities. Defendant Lyons, the petitioner, in his answer to the original complaint, "reiterates that part of the plaintiffs' complaint wherein they pray an injunction against D. M. Goodlet, as the administra-

tor of suid estate, restraining said administrator from collecting rent on said land, and prays that the land now held by him be included in said injunction." Petitioner joined in the execution of the injunction bond, and his land and property were included in the writ of injunction issued in the case. The order granting the injunction was that D. M. Goodlet, administrator, etc., be estopped and enjoined "until the further order of the court." This order for injunction was made October 9, 1896. The next entry of record in the case was that before the clerk in vacation August 26, 1897, *supra*, where W. S. Eakin, attorney for plaintiffs, dismissed as to D. M. Goodlet, administrator, W. W. Goodlet, Rebecca Brown and J. C. Brown, and the next was that before the clerk in vacation August 28, 1897, *supra*, dismissing as to W. T. Lyons. If these dismissals were valid, at the time the judgment was rendered there were no parties to the suit except the plaintiffs and Mitchell and Hyatt All the other parties had been eliminated by these dismissals in vacation. So that, when the final decree was rendered, the party against whom the injunction had been granted, and the petitioner, Lyons, who had joined in asking the injunction, were both out of the case. The dismissal of the case as to them *ipso facto* dissolved the injunction. The chancellor seems to have recognized that fact in the final decree, for that contains no reference to the injunction. (2) It is urged, as a further reason why the court had jurisdiction of the person and property of petitioner, that the record does not import absolute verity, and that the deputy clerk had no power to enter up the order and sign same in vacation, so as to make it valid and binding on the parties. And, again, that the order as entered did not reflect the facts, and that proof may be considered here to show what the plaintiff actually did and intended to do before the clerk. A dismissal by the plaintiff in vacation is expressly authorized by the statute (section 5792 of Sandels & Hill's Digest), and what the plaintiff did through his attorney he did himself. It was proper for the clerk, as the custodian of the record, to enter up the order of dismissal at the request of the plaintiff. If, by any misprision of the clerk, the actual order desired by

the plaintiff as to the dismissal was not entered, that could and should have been corrected in the circuit court before the final decree was taken by proper notice and proceedings. It is too late to do so here. We have to do in this proceeding only with the record as it is. Oral proof is not authorized before us to change it.

It follows that the judgment, in so far as it affected the petitioner, was *coram non judice* and void. The same, therefore, as to him, is hereby quashed, set aside, and held for naught.

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PORTER v. TALLMAN.

Opinion delivered May 12, 1900.

1—CONFIRMATION OF TAX TITLE—PROOF OF PUBLICATION.—Where a decree of confirmation of a tax title recites that due and legal notice of the proceeding was given, it will not be set aside on a bill of review because the affidavit of publication of notice purported to have been made by the publisher, instead of by the editor or proprietor, as required by statute, as the publication may have been proved in some other way. (Page 213.)

2. SAME—CONSTRUCTION OF STATUTE.—Under Sand. & H. Dig., § 630, providing that there shall be no confirmation of the sale of any lands "unless the petitioner or his grantor or those under whom he claims title has paid the taxes on the lands for at least two years after the expiration of the right of redemption, said payment of taxes to be three consecutive years immediately prior to the application to confirm," the three consecutive annual payments of taxes may consist of one payment made before and two after the expiration of the right of redemption. (Page 213.)

Appeal from Arkansas Chancery Court.

JAMES F. ROBINSON, Chancellor.

STATEMENT BY THE COURT.

Elliott Tallman brought this action in equity to review and set aside a decree confirming a tax title for error apparent upon the record. He alleged that he was the owner of the land embraced in the tax deed, that the sale upon which the deed was

based was irregular, and the deed void, and that the decree of confirmation was erroneous for the following reasons apparent upon the record: (1) Because there was no sufficient affidavit of the publication of the notice of proceedings to confirm. (2) Because Porter had not, at the time of confirmation, paid taxes for two full years after the expiration of redemption, and did not exhibit to the court tax receipts showing three consecutive payments of taxes on the land after the period of redemption had passed.

The defendant, Porter, appeared and filed his answer. Upon the hearing the court found in favor of plaintiff, and set aside the decree of confirmation, and declared void the tax title claimed by Porter, and he appealed.

Gibson & Pack and *Rose, Hemingway & Rose*, for appellant:

All inquiry as to the tax sale was cut off by the decree of confirmation. 66 Ark. 1; 52 Ark. 400; Sand. & H. Dig., § 638. A defect in the affidavit showing a regular publication of a notice of confirmation does not invalidate the decree of confirmation. 21 Ark. 365; 47 Ark. 131, 144; 55 Ark. 30, 35; 66 Ark. 1. The presumption is that all showing as to facts, necessary to the decree, was made. 63 Ark. 513; 64 Ark. 611; 49 Ark. 413; 57 Ark. 49, 54; 57 Ark. 628; 66 Ark. 1. The facts set out in the complaint constituted a compliance with sections 630 and 633, Sand. & H. Dig., requiring that the one seeking confirmation shall exhibit tax receipts for three years. The jurisdiction of the court in no wise depends upon the sufficiency of the facts to warrant its verdict. 1 Freeman, Judg. § 118; 8 Ia. 114; S. C. 66 Am. Dec. 52, 61; 57 Ark. 49, 54, 55; 1 Pet. 328.

Geo. C. Lewis, for appellee.

A bill to procure a review and reversal of a decree is always maintainable, where the errors are apparent on the record. 59 Ark. 444. If the bill contains the essential averments, it will be given the same effect as a petition for rehearing. 20 S. E. 899; 25 S. E. 998; *ib.* 1004. If the decree is contrary to some statutory enactment or to some principle or rule of

law or equity, this is error apparent. 59 Ark. 444; Beach, Eq. Jur. § 575; 3 Am. & Eng. Dec. in Eq. 10; 3 Enc. Pl. & Pr. 575. A "publisher" is not authorized to make the affidavit of publication. Sand. & H. Dig., § 4685.

RIDDICK, J., (after stating the facts.) There are only two questions presented by this appeal. The first relates to the sufficiency of the affidavit showing the publication of the notice of the proceeding to confirm the tax title of Porter. It is said that this affidavit purports to have been made by the publisher of the paper, instead of by the editor or proprietor, as required by the statute. But the publication may have been proved in some other way than by the affidavit mentioned. The decree of confirmation recites a finding by the court that the petitioner had given due and legal notice of such proceeding, and, in the absence of any showing to the contrary in the record, we must presume that this finding was correct. *Porter* v. *Dooley*, 66 Ark. 1; Sand. & H. Dig., § 4685.

The other question is whether one seeking to confirm a tax title must show that he has made three regular payments of taxes after the period of redemption has expired. Porter purchased the land in controversy at a sale of land for delinquent taxes on the 9th day of June, 1890. The time for redemption expired on the 9th June, 1892. At the hearing of his petition for confirmation he exhibited tax receipts showing that he had paid taxes on the land for 1891, 1892 and 1893. These payments were made at the regular time of paying taxes for said years; that is to say, the taxes for 1891 were paid in 1892, the taxes for 1892 in 1893, and those for 1893 in 1894. It is contended that these payments were not sufficient to meet the requirements of the law. The statute provides that there shall be no "confirmation of the sale of lands unless the petitioner or his grantor or those under whom he claims title has paid the taxes on the lands for at least two years after the expiration of the right of redemption, said payment of taxes to be three consecutive years immediately prior to the application to confirm. * * * Copies of the tax receipt showing payment of the taxes for the three years next preceding the publication of the notice to confirm shall be filed with the petition."

Section 2, Act March 27, 1893 (Sand. & H. Dig., §§ 630, 632.) Now, an examination of sections 2 and 3 of the statute will disclose that it three times refers to the matter of these three consecutive payments which must be made before the filing of the application to confirm. The statute not only requires such payments to be made, but directs that copies of the tax receipts showing them shall be filed with the petition to confirm, and emphasizes this matter by expressly requiring that the tax receipts be exhibited to the court on the trial of the cause. It thus appears that this was considered to be a very important feature of the act, and it would seem that, if the legislature intended that these three payments should be made after the expiration of the time of redemption, it would have expressly said so; but there is no such statement in the statute. The only requirement as to the number of payments to be made after that time is that the petitioner, or those under whom he holds, must have paid the taxes for at least two years after the expiration of the right of redemption. We take this to mean that there must be two regular annual payments of taxes made after the right of redemption has expired.

The words immediately following—"said payment of taxes to be three consecutive years immediately prior to the application to confirm"—tend, we admit, to support the contention of appellee, and cause some doubt in our minds as to the meaning of the act. But, after consideration of the whole statute, a majority of the court are of the opinion that the act requires only two regular payments of taxes to be made after the expiration of the right of redemption, and that the three consecutive payments mentioned may consist of one before and two after the right to redeem has expired.

We are of the opinion that there is no error apparent upon the record, and the court erred in so holding. Judgment reversed, and cause remanded, with an order to dismiss the complaint for want of equity.

McGowan v. Smith.

Opinion delivered May 19, 1900.

SALE OF LAND—DEFENSE.—The answer of a vendee of land, resisting the payment of the purchase money, to the effect that the vendor's tax title is defective because there is a right of redemption in another, whose interest the vendee has purchased, is insufficient if it fails to state facts showing such right of redemption. (Page 217.)

Appeal from Craighead Chancery Court.

EDWARD D. ROBERTSON, Chancellor.

Ed. L. Westbrooke, for appellant.

Appellee should have conveyed appellant at least a marketable title. 13 Ark. 423; 51 S. W. 69; 39 S. W. 842; 120 N. Y. 253; S. C. 24 N. E. 195; Maupin, Marketable Titles, §§ 283, 284. Appellant was entitled to a rescission. 27 Ark. 160; 31 Ark. 151; 60 *id.* 89; 17 *id.* 603; 17 *id.* 228; 20 *id.* 424; 21 *id.* 235; Maupin, Marketable Titles, §§ 219, 254, 256, 279. Upon the refusal of appellee to purchase the outstanding title for the benefit of his vendee, the latter, having abandoned possession, was entitled to purchase. 27 Ark. 61.

J. C. Hawthorne, for appellant.

The facts pleaded do not show the outstanding title purchased to have been superior to plaintiff's tax title. The burden of showing this was on appellant. 23 Ark. 147; 17 Ark. 228. Conceding that appellant purchased a paramount title, he should not be allowed to profit by it. 27 Ark. 61; 27 Ark. 244; 20 Ark. 424; 23 Ark. 590; 31 Ark. 151; 40 Ark. 420; Maupin, Marketable Titles, § 202.

BUNN, C. J. On the 1st of November, 1894, the appellee, Smith, sold to the appellant the land in controversy for the sum of $275, payable in three annual installments, two for $92 each, and the third for $91, for which he took his three several promissory notes, each bearing interest at the rate of six per

centum per annum from date until paid, and put the appellant in immediate possession, which the latter held until some time in August, 1897, making some improvements thereon in the meantime, and then abandoned the same to appellee, never having paid anything towards the satisfaction of said indebtedness.

In September, 1897, appellant purchased the outstanding title from the only heirs at law of Elizabeth Ballew, deceased, who appears to have been the original owner of said lands, having entered the same from the state under an act authorizing the sale of swamp and overflowed lands granted by the United States government to the state under the act of congress of September 28, 1850, and continued to own the same until sometime in the year 1883, when these lands were forfeited and sold to one Bennett for the non-payment of the taxes due thereon for the year 1882, and Elizabeth Ballew died without having redeemed the same from said forfeiture and sale. The appellant purchased from Word and Patterson, the only heirs of Elizabeth Ballew, in September, 1897, and at once took possession again, this time under this last purchase; said heirs in the meantime, to-wit, in June 1897, having, as such heirs, purchased said lands from the state land commissioner in right of the said Elizabeth Ballew, which carried with it the right of redemption from said tax sale, if any such right existed. The appellee, Smith, purchased from Bennett, and held under him at the time of his sale to appellant in 1894, and made his deed to appellant just prior to or at the time of the institution of the suit.

The complaint set up the sale of the lands from appellee to appellant, and the taking of the promissory notes, and the putting of appellant in possession, and his refusal and failure to pay anything on the notes, and prayed judgment for the amount of the notes and for other relief.

The appellant (the defendant in the court below) answered, and subsequently filed an amended answer, which seems to have been a substitute for the original answer, and was so treated by both parties and the court. This amended answer alleged that plaintiff had no title to the lands when he sold to defendant, and never had any title at any time. It, however, sets up

that plaintiff held under said tax sale. And in said amended answer defendant asked that he, as the grantee of said heirs of Elizabeth Ballew, be allowed to redeem the lands from said tax sale of 1883, averring that they had but recently arrived at their majorities, and were not yet barred by statute in such cases made and provided, or language to that effect. Said amended answer, however, did not set up any objections to the regularity of said tax sale, nor did it state the date of the death of said Elizabeth Ballew. A demurrer was orally interposed to said amended answer, and was sustained by the chancellor; and, the defendant failing and refusing to answer over, the chancellor took testimony of the counsel for plaintiff and of the defendant, and decreed for plaintiff for want of an answer, and on said testimony; and defendant appealed.

This suit was instituted in the chancery court for the western district of Craighead county, for the recovery of the purchase money of land, and decree for the amount, and vendor's lien established, and order of sale. The only issue made is one of law raised by the demurrer to the amended answer. From what has been stated, it is evident that the said amended answer was not sufficient to constitute a defense, under the peculiar circumstances of the case. No legal objection was made or offered to be shown to the validity of the tax sale, in said amended answer, and the date of the death of the owner of said land—Elizabeth Ballew—is not shown; and, of course, it does not appear, therefore, that any right of redemption descended to said heirs, or that they had acquired any such right by purchase from the state in right of their said ancestor. It devolved upon defendant to show a superior title in himself to that of plaintiff under an unquestioned tax sale, there being no charge of fraud made against him. *Walker* v. *Towns*, 23 Ark. 147; *Desha* v. *Robinson*, 17 Ark. 228.

The chancellor allowed defendant credit of forty-five dollars, the amount he paid for the title of the heirs of Elizabeth Ballew, and rendered decree for the balance, amounting to the sum of $264.50, and declared the same to be a lien on the land, and ordered their sale by the clerk, as special commissioner, to satisfy the amount of the decree.

For reasons above given, the decree is affirmed.

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

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Opinion delivered May 19, 1900.

1. CARRIER—LIVE STOCK—NEGLIGENCE OF SHIPPER.—A shipper of cattle cannot recover of the carrier for cattle which escaped from the carrier's stock pen, while waiting for shipment, and were lost, if their escape was due to his own carelessness in failing to fasten the gate of the pen. (Page 222.)

2. DAMAGE—EVIDENCE—OPINION.—In an action against a carrier to recover damages to stock caused by the carrier's delay in furnishing cars for shipment, plaintiff's opinion as to the amount of his injury, being based on elements of damage not stated, is inadmissible. (Page 223.)

3. BILL OF LADING—NOTICE OF DAMAGES.—Damages to cattle suffered by reason of the carrier's delay in furnishing cars for shipment are not covered by a stipulation in the bill of lading that, "as a condition precedent to any damages or any loss or injury to stock covered by this contract," the shipper will give notice to the company before the stock is removed. (Page 224.)

Appeal from Drew Circuit Court.

MARCUS L. HAWKINS, Judge.

Dodge & Johnson, for appellant.

A common carrier does not become responsible for the care and custody of property until it is delivered to it, and it has accepted it for shipment. 56 Ark. 288; Hutch. Carr. §§ 82, 94, 95. It was the appellee's duty to see to the safety of the cattle until they were delivered to appellant; and his failure to use proper precautions to that end, and not the failure of appellant to furnish cars, was the proximate cause of the loss. Hence he cannot recover. 56 Ark. 263, 271; 63 Tex. 322; 55 Ark. 521; 139 U. S. 237. Where delay is caused by an unusual and unexpected rush of freight, such as the carrier could not be expected to foresee, if goods be transported within a reasonable time, the carrier has done its duty. Hutch. Carr. § 292; 70 Mo. 296; 51 Mo. 311; 10 Biss. 170; 20 Wis. 594; 102 N. Y. 590; 22 Am. & Eng. R. Cas. 421. The court

erred in the admission of testimony in regard to the repairs upon the gate after the loss. 48 Ark. 473; Ell. Ry. §§ 1177, 1697; 150 Mass. 388; 45 Ia. 627; 123 Ind. 15; 77 Mo. 34; 31 Conn. 524; 144 U. S. 206; 30 Minn. 465; 108 N. Y. 151; 51 Conn. 524; 77 Mo. 34; 75 Tex. 155; 123 Ind. 15; 132 Ill. 53; 86 Mich. 14; 154 Mass. 168; 30 Minn. 465, 468; 21 L. J. (N. S.) 261, 263, The court erred in the admission of evidence on the question of value. 59 Ark. 110; 47 Ark. 497; 51 Ark. 328; 21 S. W. 81; *ib.* 607; 31 S. W. 412; 67 Tex. 241; 85 Tex. 593; 56 N. W. 200; 14 Neb. 463. Appellee's failure to give the notice required by the fifth clause of the bill of lading bars his recovery. 63 Ark. 355; 55 S. W. 215.

R. E. Craig, *W. S. & Farrar L. McCain*, aud *Wells & Williamson*, for appellee.

A railway cattle-pen is a depot of the company. 67 Ark. 498. The 25 head of cattle not being embraced in the special contract of the bill of lading, there was nothing to affect the common-law liability of appellants in respect thereto. 74 N. W. 301. Appellant was liable for loss occasioned by the insecure gate to the cattle-pen. 48 Ark. 491; 37 Ark. 519; 17 S. E. 344; 45 S. W. 41; 90 Tex. 223; 68 Tex. 314; 80 Tex. 270; 37 S. W. 255. Appellant was liable, as a common carrier, for the cattle lost, whether the gate was insecure or not. 52 Ark. 290; 60 Ark. 338; 55 N. E. 296; 139 U. S. 128; 22 S. E. 490. The doctrine of reasonable time has no application to contracts of a railway company where a time is fixed for furnishing cars. 62 Mo. App. 262; Hutch. Carr. § 317. In considering the duty which the law imposes, much depends upon the character of the freight. 58 Ark. 487; 24 S. W. 916; 21 S. W. 56. The clause in the bill of lading does not operate to release appellant. 57 Mo. App. 471; 72 Mo. App. 34; 17 Mich. 296. There was no error in the admission of the testimony as to damage. 44 Ark. 103; 49 Ark. 381; 39 Ark. 167; 51 Ark. 324; Greenleaf, Ev. § 440. As to appellee's right to recover damages to the cattle, see also 50 La. Ann. 619; 61 Ind. 583; 15 So. 807.

BATTLE, J. John C. Law sued the St. Louis, Iron Mount-

ain & Southern Railway Company for damages which were caused by the escape of his cattle from the stock pens of the defendant, in which they had been placed for shipment, and by the failure to ship them within a reasonable time after they were ready and waiting for transportation. He alleged in his complaint that he notified the defendant's agent that he would have 340 head of cattle at Portland, on the line of its railway, in this state, on the 23d of November, 1897, ready for shipment, and that he was informed that the cars would be ready to receive them on the 24th of the same month; that he arrived at Portland with his cattle on the 23d of November, and placed a part of them in the defendant's stock-pen; that on the night following the cattle in the pen broke through a defective gate, and made their escape; that 112 of them were recovered at an expense of $71.10 to him; and that 28 could not be found, and were lost. He further alleged that the cattle were detained at Portland needlessly and negligently from the 23d to the 25th of November, when they were shipped; that while the 112 were in the stock pens they were not fed or watered, but were "starved" by the defendant for a period of 60 hours; that they became emaciated, hungry, and restless, to the plaintiff's damage in the sum of $336; that the 28 which were lost were worth $700; that he was further damaged in the sum of $309 by reason of the defendant's failure to ship the remaining 206 head in a reasonable time, and to water and feed them while awaiting shipment. And he asked for judgment for $1,416.10, the total amount of his damage. The defendant answered, and denied each allegation in the complaint, and set up many defenses. The jury in the case, after hearing the evidence, returned a verdict in favor of the plaintiff for $600. The court rendered judgment accordingly, and the defendant appealed.

The evidence that was adduced in the trial tended to prove, substantially, the following facts: On the 15th or 16th of November, 1897, Law, the plaintiff, applied to the defendant's agent at Portland for ten cars for the purpose of shipping 340 or 350 head of cattle to St. Louis and Little Rock, and the agent promised that he would try to procure the cars for

him. Plaintiff then returned to his home at Hamburg, in this state, where his cattle were. While there he was informed by the agent, through a telegram, that the cars would not be ready until the 23d of November. He drove his cattle to Portland; reaching there on the 23d,—the day designated. On arrival there he placed four car loads of them, which he expected to ship to St. Louis, in Cammack's lot, which adjoined the defendant's stock-pens. The remainder of the cattle (six car loads) he herded in an old field about a mile and a half from town. The next day (the 24th of November) the agent informed him that he would get his cattle off about 3 o'clock in the afternoon. He then took the four car loads of cattle out of Cammack's lot, and put them in the defendant's stock-pens. The gate to the pens was an old one. It sagged down and dragged on the ground. It had settled so, as plaintiff testified, "that you could not fasten it good." It had a sliding latch, which fitted in a notch in a post; and it could be fastened by slipping the latch into the notch, or on the inside of the post. He pushed the gate to, and as it sagged he made no effort to raise it in order to shove the latch into the notch, but slid the latch on the inside of the post. On account of the crowded condition of the pens the latch was subject to be pushed back, and the gate opened, by the cattle rubbing and pressing against it. But he made no effort to prevent this, but slid the latch on the inside of the post, and left it in that condition. On the next succeeding night, about 8 o'clock, the cattle pushed open the gate and escaped. All of the cattle, except 25, were recovered, at a cost of $71.10. Twenty-eight were at first lost, but 3 of them were afterwards found. The 25 which were never recovered were worth $625.

One hundred and thirty-eight head of the cattle were shipped from Portland on the 25th of November, 1897, and 206 were shipped on the 28th of the same month. While they were at Portland, awaiting shipment, the weather was bad, and mud abounded everywhere. They were compelled to stand in the mud. It was difficult to obtain feed for them. A few cotton seed were obtained, but there were no troughs, and no place suitable for feeding; and the seed were thrown in piles

on the ground, and a good part of them were lost in the mud, and they did but little good. The consequence was, the cattle suffered with hunger, and lost much in flesh, and it became necessary to feed them for some time before they were ready for market. The delay in the shipment was caused by the great demand for cars on the defendant's road, which exceeded reasonable anticipation. The defendant was unable to supply the demand of shippers.

The plaintiff claims that he was damaged in the manner aforesaid as follows:

First. He claims he was damaged by reason of loss of twenty-eight head of cattle, caused by their escaping from a defective and insecure pen, $700.

Second. To amount paid out for gathering up the escaped cattle, $71.10.

Third. To damages to 112 head of cattle by exposure and detention at Portland and Little Rock, caused by delay in furnishing cars, $3 per head, $336.

Fourth. To damages for detention of 206 head from Tuesday, November 23d, to November 28th, without food and water, at $1.50 per head, $309.

The jury, in a special verdict, found that he was entitled to damages as follows:

To loss of 25 head	$375.00
To damage to stock and gathering same	225.00
Total	$600.00

Did the evidence sustain the verdict? The evidence shows that the cattle which made their escape from the pen passed through the gate, and that their escape was due entirely to the manner in which the gate was fastened. If there was any defect or insecurity in the manner in which it was fastened, it was the result of plaintiff's negligence. He relieved the defendant of every duty in this respect, and, unaided and alone, except by his own employees, undertook to fasten it. The defendant was not called upon, and did not undertake to assist in any way. The escape of the cattle was due entirely to the negligence of the plaintiff, and he is consequently entitled to recover nothing on that account.

Was the verdict of the jury sustained by the evidence in other respects? The plaintiff undertook to prove the damages that he sustained by the detention of the cattle at Portland by his own testimony, elicited by questions and answers, over the objection of the defendant, as follows:

"Q. You have charged here damage to 112 head of cattle by reason of neglect in furnishing cars, exposure and detention at Portland and Little Rock, $3 per head. Tell the jury what was the damage, and what was the cause?

"A. Why, the damage I considered was at least $3 a head, and I think more than that.

"Q. What was the damage resulting from delay in furnishing cars at Portland per head of cattle?

"A. Three dollars a head is what I said just then. I considered they were damaged that much.

"Q. Tell the jury how they were damaged.

"A. They were starved to death in the mud, and detained there, and then, after they got out of the pens, of course, they got nothing to eat there, you see, and they were detained there three or four days without anything to eat; and, of course, that fixed them so they were not fit to go on the market at all, and I had to put them in my feeding pens, and ship them out in the spring as fed cattle. I would have sold them off the range just as they were the first time.

"Q. The next item is the detention of 206 head of cattle from Tuesday, November 23d, until November 28th, at 3 o'clock. Where did the detention occur?

"A. At Portland.

"Q. What was that worth per head?

"A. One dollar and fifty cents per head."

This was all the evidence adduced to show the damage mentioned, and it was clearly incompetent; for it is not, as a general rule, permissible for a witness to estimate the damages a party has sustained by the doing or omitting to do a particular act. That is not a fact, but a matter of opinion, to be deduced from competent evidence by the court or jury trying the issues of fact. The damage in question was the pecuniary injury the plaintiff suffered on account of the unreasonable de-

tention of his cattle at Portland. We do not know what elements entered into his estimate of the same. He might have estimated it to be the depreciation in the market value of the cattle on account of an unreasonable delay in the shipment, or the cost of restoring the cattle to the condition they were before the delay. In the latter case his measure of damages would have been clearly wrong. This is not one of those cases in which there is no room to estimate damages, except in one way. Hence the greater was the reason for confining witness to a statement of facts, and allowing the jury to estimate the damages under instructions of the court. The jury should have been left to determine the damages according to the facts, uninfluenced by the opinions of interested witnesses.

In the bills of lading executed by the defendant to plaintiff, the following clause was incorporated:

Fifth. "That, as a condition precedent to any damages, or any loss or injury to live stock covered by this contract, the second party will give notice in writing of the claim thereof to some general officer, or to the nearest station agent of the first party, or to the agent at destination, or some general officer of the delivering line, before such stock is removed from the point of shipment, or from the place of destination, and before such stock is mingled with other stock; such written notification to be served within one day after the delivery of the stock at destination, to the end that such claim may be fully and fairly investigated, and that a failure to fully comply with the provisions of this clause shall be a bar to the recovery of any and all such claims." The notice mentioned in this clause was not given, and the defendant insists that it was thereby relieved from liability for the claim sued for. The notice to be given was confined to "any damages," or any loss or injury to live stock covered by the bills of lading. It does not appear to us that the damages sued for were covered by the bills of lading; and we think that the notice was not required by the contract of the parties to be given in this case.

Reversed and remanded for a new trial.

MILWAUKEE HARVESTER COMPANY v. TYMICH.

TYMICH v. MILWAUKEE HARVESTER COMPANY.

Opinion delivered May 19, 1900.

1. EVIDENCE—ADMISSION OF AGENT.—On trial of an attachment, the ground of which was that defendant was about to dispose of his property fraudulently, it was not error to exclude proof of declarations and admissions of defendant's son and agent, made in defendant's absence and without his authority. (Page 227.)

2. ATTACHMENT—EVIDENCE OF FRAUD.—Where an affidavit in attachment alleged that defendant was about to make a fraudulent disposition of his property, it was error to refuse to permit plaintiff to prove that defendant attempted to collect garnished claims, offering to give receipts antedating the garnishment, though such attempt was made subsequent to the attachment. (Page 228.)

3 EVIDENCE—REFRESHING MEMORY.—It was not error to permit a witness to prove the items of an account from a balance sheet admitted to be correct, though not made by him. (Page 228.)

4. CONTRACT—BREACH—SIMILAR VIOLATIONS AS DEFENSE.—Where, in an action against an agent for breach of contract, it was shown that defendant had violated his contract by making sales to irresponsible parties to be paid for at times different from those provided in the concract, it was proper to exclude evidence that under a prior and similar contract defendant had in like manner departed from the contract in in making sales to parties not shown to have been insolvent, and that no complaint was made. (Page 229.)

5. INSTRUCTION—ASSUMPTION OF FACT.—If there was an undisputed liability of the defendant under the contract, it was competent for the court to tell the jury to return a verdict for any amount they might find to be due. (Page 229.)

Appeals from Prairie Circuit Court, Southern District.

JAMES S. THOMAS, Judge.

STATEMENT BY THE COURT.

Plaintiff sued W. A. Tymich and Joseph Hobart, as partners under the firm name of Tymich & Hobart, on November 2, 1896, for $739, and sued out an attachment on the grounds that defendants were about to sell and dispose of their property

with the fraudulent intent to cheat, hinder and delay their creditors.

Defendants answered, denying the debt, and filed an affidavit denying the grounds of the attachment. The issues thus formed were submitted to the jury. After the introduction of the evidence, the jury, under the direction of the court, returned a verdict for the defendant Hobart both upon the debt and the attachment. The issues upon the debt and the attachment as to the defendant W. A. Tymich were submitted to the jury, and the court instructed the jury to find for the plaintiff in whatever sum they may find due. The jury returned a verdict for $743.20, and dissolved the attachment. Judgment was accordingly rendered. Plaintiffs filed their motion for a new trial in this cause as to the verdict dissolving the attachment, which was overruled. Plaintiffs excepted.

The motion for a new trial was on the following grounds, to-wit: (1) Because said verdict was contrary to law. (2) Because said verdict was contrary to the evidence. (3) Because said verdict was contrary to the law and evidence. * * * (5) Because the court erred in refusing to permit W. C. Holmes to testify as to statements made by defendant Tymich's son, while in the store, as to the whereabouts of his father. (6) Because the court erred in refusing to permit Holmes to testify as to the statements made by Tymich's son as to his father wanting to sell out, and that he could get things cheap, etc. (7) Because the court erred in refusing to permit plaintiffs to prove by Svantner, Jas Dvorek and John Peters that the defendant Tymich tried to collect claims garnished, and to discount the same from parties who had been garnished, and to show by the sheriff's return that the same had been garnished. Plaintiffs appealed to the supreme court.

Trimble & Robinson, for Tymich & Hobart.

The court erred in the admission of testimony that was immaterial and concerned facts not set up in the pleadings. 29 Ark. 500; 41 Ark. 393; 30 Ark. 612; 25 Ark. 570; 13 Ark. 88; 7 Ark. 516. It was also error to allow witness Griffith to refer to the balance sheet in testifying. McKelvey, Ev. 319.

The court erred in giving the first, second and fourth instructions asked by appellee. The cause of action, if any was proved, was entirely different from that set up by the pleadings, and a dismissal of the complaint was the only remedy. Pom. Remedies, § 554; 2 Rice, Ev. 661; Newman, Pldg. 723; Green's Pldg. & Pr. § 475; Baylies, Code Pldg. 324; 2 Comst. 506; 88 N. Car. 95. The court erred in in structing the jury to "*return a verdict for the plaintiff in any amount they may find due.*" Const. Ark. art. 8, § 23; 37 Ark. 164; *ib.* 239; 37 Ark. 580; 35 Ark. 146; 33 Ark. 350; 36 Ark. 451; 34 Ark. 369; 34 Ark. 373. It was error to refuse instruction number two asked by defendant. Pom. Remedies, § 553; Baylies, Code Pldg. 324.

W. E. Atkinson, for Milwaukee Harvester Company.

There was no error in the court's rulings upon the testimony of witness Griffith, or upon the instructions noticed in brief of appellant. Appellant Milwaukee Harvester Company, contends that the court erred in its rulings upon evidence and instructions.

Trimble & Robinson and *Sam. W. Williams*, in reply.

Parol evidence is admissible to show a waiver of performance or other matter modifying the contract before breach, and subsequent to the making of it. 52 Ark. 11; 53 Ark. 215; *ib.* 743; Chit. Cont. 105. The court erred in excluding evidence, as to the titles of plaintiff, the previous course of dealing and the good faith of defendants, on the question of whether the agent's deviation from their orders amounted to a conversion of the principal's property. Story, Ag. §§ 85, 118, 141, 193, 237, 333. Conversion must be proved before the tort can be waived. 2 Ark, 512; 10 Ark. 211; Story, Ag. 224; 47 Ark. 533. Appellant was guilty of no negligence. Whart. Neg. § 534. That was a question for the jury. 25 Ark. 74; 35 Ark. 602; 49 Ark. 182; 54 Ark. 159; 52 *ib.* 368; 57 Ark. 429.

HUGHES, J., (after stating the facts.) We are of the opinion that the court committed no error in refusing to per-

mit Holmes to testify, on the trial of the attachment, as to statements made by the son of the defendant Tymich, while in his father's store, as to the whereabouts of his father, and as to his father's wanting to sell out, and that he, Holmes, could get things cheap, etc. The son was keeping his father's store in his father's absence, but was not authorized to bind his father by any admission or any statement he might make. "The declaration or admission of an agent are never competent evidence against his principal, nor anything he may say before or after making the contract or the doing of an authoritative act, unless it forms part of the *res gestæ*, or has some necessary connection with it, and is a part of the contract or act itself." *Byers* v. *Fowler*, 14 Ark. 86. Holmes' testimony as to what the son said his father wanted to do would have been hearsay. The son himself was a competent witness. *State Bank* v. *Woody*, 10 Ark. 638; *Sadler* v. *Sadler*, 16 Ark. 628.

The court committed error in refusing to permit the plaintiff to prove that the defendant Tymich tried to collect claims from persons who had been garnished in the action, and that he offered to give receipts for payment antedating the garnishment. True, this was subsequent to the affidavit for and issuance of the attachment. The affidavit for the attachment stated that the defendants were about to sell and dispose of their property with the fraudulent intent to cheat, hinder and delay their creditors. Trying to collect from persons garnished in the action, with an offer to receipt for payments of a date prior to the date of the garnishment, was a circumstance that should have gone to the jury for what it was worth, and it was error in the court to exclude the proof of it, for which the judgment on the attachment is reversed, and said cause No. 3818 is remanded for a new trial.

In case No. 3737, of Tymich & Hobart *v.* Milwaukee Harvester Company it is contended that the court erred in allowing Griffith, the agent for the appellee, to use a balance sheet to refresh his memory in testifying. This balance sheet had been compared by Griffith and Tymich with the books of Tymich, and had been found by them to agree in all respects, and it was agreed between them to be correct. This was shown in evi-

dence. The balance sheet used was taken from the books of the Milwaukee Harvester Company, and was furnished Griffith, but was not made by him. Under the circumstances, there was no error in the court's allowing Griffith to refer to the balance sheet to refresh his memory in testifying.

The plaintiffs offered to and did prove that the defendant Tymich had violated his contract with them by selling their machinery, etc., to irresponsible parties, to be paid for at times different from the times provided in the contract. The defendant offered to prove that, under a similar but different contract, he had departed from the contract in selling the plaintiff's machinery in 1894 and 1895, and that no complaint had been made of this. The court excluded this testimony, and the defendant excepted, and insists here upon his exceptions. We fail to see that a violation of a contract at one time will justify or excuse the violation of another and different contract at another time. Besides, the notes taken in 1894 and 1895 may have been on solvent parties. To so hold would be neither good logic nor good morals.

The instructions of the court are not set out in the abstract, and we take it therefore they are correct. This we presume where the instructions are not shown in the abstract. But it is urged that the court erred in instructing the jury to return a verdict for the plaintiff in any amount they might find due. There was no error in this. This was what the jury were bound to do. They were not told that anything was due, or that they might so find. The violation of the contract was undisputed, and the court had the right to construe the contract. If the court saw that there was an undisputed liability of the defendant under the contract, it was competent for the court to tell the jury to return a verdict for any amount they might find to be due.

The judgment in this case (No. 3737) is affirmed.

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TRIPLETT v. MANSUR & TEBBETTS IMPLEMENT COMPANY.

Opinion delivered May 19, 1900.

1. CONDITIONAL SALE—RESERVATION OF TITLE—PAYMENT.—Where goods are sold on condition that the title shall remain in the vendor until the purchase notes are paid, the execution of renewal notes for the debt is not a payment, unless by agreement of the parties the notes are taken as such. (Page 233.)

2. SAME—VALIDITY.—An agreement in a sale of goods that if the vendee sells them they are to be sold as property of the vendor, and the proceeds of the sale are to be and remain the property of the vendor, is valid. (Page 234.)

3. SAME—BONA FIDE PURCHASER.—Where a chattel is sold with reservation of title in the vendor until the price is paid, the title remains in him until the condition is performed; and a purchaser from the vendee acquires no title, though he buys in good faith, for a valuable consideration, and without notice of the condition. (Page 234.)

Appeal from Jefferson Circuit Court.

JNO. M. ELLIOTT, Judge.

J. M. & J. G. Taylor, and *M. L. Altheimer*, for appellant.

Where goods are sold on a credit to a merchant *for resale*, the doctrine of conditional sales does not apply in a controversy between the vendee and the assignee and creditors of the vendee. The reservation of title in such case is void, and appellee is remanded to its remedy under the vendor's lien given by Sand. & H. Dig., § 4727. This lien is lost if the goods are assigned. 45 Ark. 136; 52 Ark. 450; *ib.* 458; 6 Daly, 305; 31 Barb. 650. When the notes were taken in payment of the original account, it devolved upon appellee to show that the title was specially reserved. 60 Ark. 133.

W. T. Young, for appellee.

The agreement reserving title was valid. 5 L. R. A. 300; S. C. 57 Conn. 352; 9 L. R. A. 270; S. C. 58 Pac. 384. Taking a note for a debt is not a payment of it, unless it be

so agreed. 36 Ark. 69; 48 Ark. 267; 49 Ark. 508; 50 Ark. 261.

HUGHES, J. This is a suit in replevin, brought in the Jefferson circuit court, by Mansur & Tebbetts Implement Company, of St. Louis, against C. H. Triplett, assignee of H. C. McGaughy, who failed in business in Pine Bluff in February, 1897, making an assignment to C. H. Triplett; the goods, wares and merchandise amounting to $1,339.01. The complaint states that the plaintiff (appellee herein) is a Missouri corporation, engaged in the manufacture and selling of hardware, machinery, tools, plows, grist mills, etc.; that the defendant, C. H. Triplett, assignee (appellant herein), is the assignee of H. C. McGaughy, a hardware merchant of Pine Bluff; that during the years 1896 and 1897 the said McGaughy purchased from this plaintiff the goods, wares and merchandise set out; that no title passed to the said McGaughy in said goods until they were fully paid for, according to the contract and agreemeent entered into between appellant and appellee at the time of said purchase, as follows: "And it is also agreed that the title to and ownership of all goods which may be shipped as herein provided, or during the current season, shall remain in, and their proceeds in case of sale shall be the property of, Mansur & Tebbetts Implement Company, and subject to their order, until full payment shall have been made for same by the said McGaughy; but nothing in this clause will release the undersigned from making payments as herein agreed." Prayer, that judgment be given for possession of said goods and costs. The necessary affidavit and bond in replevin were filed by appellee.

The answer admitted the sale of the goods mentioned by appellee to the said McGaughy, but denied that appellee was the owner and entitled to the possession thereof, or any part thereof, or that appellee retained the title to said goods, or any part thereof, but stated the appellant was the owner and entitled to the possession of said goods.

The case was tried before a jury on December 8, 1897. Judgment in favor of appellee for $1189.19 and costs, and in favor of appellant for $95.18. Motion for new trial filed and overruled, and appeal granted to this court.

W. B. Neff, a witness on behalf of appellee, testified: That he was in the employ of appellee, and worked for it when McGaughy purchased the goods replevied herein; that he knew the goods replevied were the same as were bought of appellee; that he demanded goods from appellant before replevying them. Against the objection of appellant, counsel for appellee introduced the order made by said McGaughy for the goods replevied, upon the back of which was printed the following: "It is also agreed that the title to and ownership of all goods which may be shipped as herein provided, or during the current season, shall remain in, and their proceeds in case of sale shall be the property of, Mansur & Tebbetts Implement Company, and subject to their order, until full payment shall have been made for the same by the undersigned in money; but nothing in this clause will release the undersigned from making payment, as herein agreed." "Q. You have looked over these contracts of sale. Look at these notes, and see if they are given for the goods covered by this contract of sale. Ans. They are." With the changes for dates and amounts, said notes are as follows: $216.10. Pine Bluff, Ark., November 17, 1896. December 15, 1896, after date, the subscriber, H. C. McGaughy, promises to pay to the order of Mansur & Tebbetts Implement Company, or order, $216.10, payable at the Merchants' & Planters' Bank, with exchange on New York or St. Louis. Collection charges and interest at 8 per cent. per annum from November 15, 1896, until paid. Value received. If this note is collected by suit or through an attorney, the subscriber agrees to pay ten per cent. additional for costs of collection. H. C. McGaughy." The said notes were not paid by the said McGaughy at the time of his assignment to appellant herein. Only goods for which the notes were given and unpaid were replevied. Those purchased before and paid for were not taken. The goods sold by appellee to said McGaughy and replevied herein were such goods as were carried for sale in a hardware or implement store.

The evidence shows that there had been a partial payment of two hundred dollars on the one note originally given for the price of the machinery appellant purchased, and for the balance two new notes were executed.

The appellant says that there are two questions of law involved in this case, of far-reaching effect and importance:

First. Where one sells goods, wares and merchandise to a retail merchant, where the purpose of the sale is that the goods may be re-sold, as where a manufacturer or wholesaler sells to a retail dealer personal property on a credit, for the purpose of re-sale, does the doctrine of conditional sales apply or govern such a sale, in a controversy as to such articles between the original vendor and the assignee and creditors of the original vendee?

Second. Where there is a conditional order and sale in the first place, and subsequently, after the delivery of the goods to the vendee, the amounts due for such purposes are closed by notes, which notes do not set out or state that the title to the goods, wares and merchandise for which said notes are given is retained, is not the giving of said notes and their acceptance such a payment, unless the parties entered into another agreement at that time reserving title as will preclude the original vendee from claiming title to said goods when they have passed by assignment into the hands of an assignee for the benefit of creditors? And where one of said notes is paid, partly in money and partly in other notes, would not the title or lien reserved be at an end, unless the parties entered into another agreement at that time reserving title?

In answer to the first proposition of the appellant, we have to say that the question propounded therein is not involved in this case. It will be proper to decide that question, when it is presented for decision. In the case at bar the goods replevied were in the hands of the assignee of the appellant, and had not been resold to customers in the usual course of business.

In answer to the second proposition of appellant, we have to say that the giving of notes for a debt is no payment of the debt, unless by agreement of the parties the notes are taken in payment. *Blunt* v. *Williams*, 27 Ark. 374; *Henry* v. *Conley*, 48 Ark. 267. By agreement of the appellant's assignor with the appellee made, at the time the goods were ordered, he was to execute his notes for the purchase price, and the title to the

goods was to remain in the appellee until the goods were fully paid for. Execution of a renewal note for the debt or part of it was not payment of the debt, unless taken as such. According to the contract of the parties, if the goods were sold by McGaughy, they were to be sold as the property of the appellee, and the proceeds of the sale were to be and remain the property of the appellee. Such an agreement is valid. *New Haven Wire Co. Cases*, 5 L. R. A. 300; S. C. 37 Conn. 332; *F. J. Dewes Brewery Co.* v. *Merrit*, 9 L. R. A. 270; 58 Pac. Rep. 384.

The appellant concedes, and the law is, that when personal property is sold under an agreement that the title to the property shall not pass, but remain in the vendor until fully paid for, no act of the buyer can prevent recovery of the property by the seller, if the same is not paid for. "When a chattel is sold with reservation of title in the vendor until the price is paid, the title remains in him until the condition is performed, and a purchaser from the vendee acquires no title, though he buys in good faith for a valuable consideration and without notice of the condition." *McIntosh* v. *Hill*, 47 Ark. 363; *Simpson* v, *Shackelford*, 49 Ark. 63; *Edgewood Distilling Co.* v. *Shannon*, 60 Ark. 133. Arkansas cases *passim*.

The judgment is affirmed.

SPRINGFIELD WAGON COMPANY *v.* BANK OF BATESVILLE.

Opinion delivered May 19, 1900.

1. CORPORATION—LIEN ON STOCK.—Under Sand. & H. Dig., § 1342, providing that a corporation "shall at all times have a lien upon all stock or property of its members invested therein for all debts due from them to such corporation," the lien which a corporation has on the stock of a member for debts due will not be displaced by the subsequent levy of an execution on such member's stock. (Page 236.)

2. SAME—PRIORITY OF LIENS.—Sand. & H. Dig., § 1356, declaring that the provisions of the statute for the enforcement of a corporation's lien on the stock of its members for debts due shall not "affect any lien or

right acquired by any other party by virtue of any attachment or levy of execution upon the stock of any stockholder in any such corporation," only means that the statutory lien of a corporation on the stock of members for debts due shall not affect prior liens thereon. (Page 237.)

Appeal from Independence Circuit Court,

RICHARD H. POWELL, Judge.

STATEMENT BY THE COURT.

H. H. Hinkle was the owner in 1894 of certain shares of stock in the Bank of Batesville. In that year he pledged this stock to S. R. Hinkle to secure payment of a loan of money. Afterwards he became indebted to the bank. This indebtedness of H. H. Hinkle to S. R. Hinkle and to the Bank of Batesville was still subsisting and unpaid in 1898, at which time the Springfield Wagon Company, the plaintiff in this action, recovered a judgment against H. H. Hinkle. An execution was issued on this judgment, and levied upon the shares of the bank stock which had been pledged to S. R. Hinkle. The levy was not made by an actual seizure of the certificates of stock, but by giving notice to the officers of the bank of the execution and levy, as provided by statute. The stock was sold under the execution, and purchased by the wagon company, but before the sale the wagon company was notified that the stock had been pledged to S. R. Hinkle, and that the certificates of stock were in his possession. It was also notified that H. H. Hinkle was indebted to the bank for a large amount, and that the bank claimed a lien therefor upon his stock. After the sale and purchase, the cashier of the bank refused to transfer the stock of Hinkle to the wagon company upon the books of the bank until the claim of the bank against Hinkle was paid. Thereupon the wagon company brought this action, asking for a writ of mandamus to compel the officers of the bank to transfer the stock on its books.

The bank for answer set up the debt of Hinkle to it, and claimed that by virtue of the statute it had a lien on the stock of Hinkle prior in time and superior to that of the wagon company, but offered to transfer the stock upon the payment of its debt. The wagon company denied the right of the bank to a

lien, but upon that question the circuit court sustained the claim of the bank, and dismissed the petition for mandamus. The wagon company appealed.

Robert Neill and *H. S. Coleman*, for appellant.

The capital stock of a corporation is liable to seizure and sale under execution for a debt of a stockholder in whose name it stands on the books of the corporation. Sand. & H. Dig., §§ 3049, 3056–3059. The lien given to the bank by Sand. & H. Dig., § 1342, cannot affect the rights of appellant. Sand. & H. Dig., § 1356. A corporation may waive its statutory lien on the stock of its shareholders. 15 Otto, 217–224; 23 Am. & Eng. Enc. Law, 647.

J. W. Butler and *J. C. Yancey*, for appellee.

The stock being in pledge, and appellant having notice thereof, it was not subject to levy by appellant. 42 Ark. 236; 58 Ark. 291; 64 Ark. 215; 31 Ark. 35; Cook, Stock, etc. § 487; 23 Am. & Eng. Enc. Law, 635–6; 12 Ark. 158. The levy of the execution and sale thereunder did not confer upon appellant any right, as purchaser at said sale, to compel the bank, by mandamus, to transfer the stock. 93 Fed. 603. The lien of the bank was prior to that acquired by the execution, and the purchaser thereunder takes subject to it. 60 Ark. 198; 134 U. S. 401; Cook, Stock, etc. §§ 527, 530; 10 Pet. 596; Beach, Priv. Corp. §§ 634, 635; 31 Am. & Eng. Corp. Cas. 451; Field, Corp. § 137; Ang. & Ames, Corp. § 589; 2 Freeman, Ex. § 348. The lien is given to the bank by Sand. & H. Dig., § 1342, and §§ 1352–1356 provide only a remedy for enforcing them. The bank may elect to take this statutory remedy, or may proceed in chancery to foreclose. 30 Ark. 574. Or it may refuse, as in this case, to make the transfer. Cook, Stock, etc. §§ 530, 532; 17 Mich. 141; 45 Conn. 22; 77 Va. 445; 23 Am. & Eng. Enc. Law, 697; 41 Conn. 255. There was no waiver of the lien. 23 Am. & Eng. Enc. Law, 697; Cook, Stock, etc. § 531.

RIDDICK, J., (after stating the facts.) We are of the opinion that the ruling of the circuit court was correct. It is

not disputed that H. H. Hinkle was at the time of the issuance of the execution against him, and is yet, indebted to the Bank of Batesville for a sum of money greater than the value of such stock. The bank had a lien upon the stock for its debt, and, if this lien was superior to that of the execution creditor, a transfer of the stock would have availed nothing, for it would have been subject to a lien for a greater sum than the value of the stock. The statute provides that the stock of a corporation shall be transferred only on the books thereof, and that the corporation "shall at all times have a lien upon all the stock or property of its members invested therein for all debts due from them to such corporation." Sand. & H. Dig., § 1342. The wagon company was bound to take notice of this statute. Besides, in this case, it was expressly notified of the bank's claim and lien before it purchased the stock, and its purchase was subject to that lien. This stock had been previously pledged to S. R. Hinkle to secure a loan of money to H. H. Hinkle, but there was no transfer of the stock upon the books of the bank, and there is some controversy as to whether the bank had notice of such pledge before Hinkle became indebted to it. But we regard that as a matter of no importance here; for this is not a controversy between S. R. Hinkle, the pledgee, and the bank, and it is unnecessary to consider whether the lien of the bank was superior in law to that of S. R. Hinkle, or subject to it; for it appears that the liens of both of these parties were prior in point of time and superior to that of the wagon company.

The contention that section 1356, Sand. & H. Dig., gives priority to the execution lien of the wagon company cannot be sustained. That section simply declares that the provisions of the statute for the enforcement of the bank's lien shall not affect "any lien or right acquired by any other party by virtue of any attachment or levy of execution upon the stock of any stockholder in any such corporation." Certainly, the legislature did not by this language intend that the statutory lien of the corporation for the debt of its stockholder should be displaced whenever another creditor levied an execution or an attachment upon the stock. A lien of that kind, subject to be

displaced by the act of the creditors, would be of little value. That section, as we understand it, only declares that the enforcement of the bank's lien by the statutory method shall not affect other liens upon the stock, and leaves the question of the priority of such liens to be determined by proper pleadings to which the holders of such liens are parties, and under rules of law already in force. *Oliphint* v. *Bank of Commerce*, 60 Ark. 198.

We see nothing in the facts of this case to justify a finding that the bank had waived its lien as against the appellant wagon company, and we think the court rightly refused to order a transfer of the stock on the books of the bank.

Judgment affirmed.

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KANSAS CITY, PITTSBURG & GULF RAILWAY COMPANY *v.* LOWTHER.

Opinion delivered June 2, 1900.

NOTICE TO RAILROAD TO CONSTRUCT CATTLE GUARD—HOW PROVED.—Sand & H. Dig., §§ 6238, 6239, provides that railroad companies shall construct and keep in repair safe stock guards on either side of enclosures, on notice from owner to do so, and imposes a penalty for failure to do so. Section 5890 *ib.* provides that notices mentioned in the code shall be in writing, and may be served by a sheriff or constable, whose return shall be proof of the service. *Held*, in an action against a railroad company to recover the penalty for failure to repair cattle guards after notice, that section 5890 does not apply to the notice required by section 6238, the latter section not being in the code, and that the constable's return of service of the notice required by section 6238 was insufficient to prove its service. (Page 240.)

Appeal from Polk Circuit Court.

WILL P. FEAZEL, Judge.

STATEMENT BY THE COURT.

The appellee brought a suit in the Polk county circuit court to recover the penalty provided in sections 6238–9, Sandels & Hill's Digest. The statute referred to provides that if

any railroad company fails to put in and keep in repair safe cattle guards, after due notice given in writing, the party aggrieved may recover a penalty not less than $25 nor more than $200. The plaintiff alleged in his complaint that he was the owner of certain lands, describing them, and that he gave the notice mentioned in the statute, in writing, on the 5th day of January, 1898. The plaintiff does not allege that he is in any manner aggrieved by the failure of the defendant to construct safe cattle guards. The prayer of the plaintiff is for judgment for $200 under the section of the digest above mentioned. A copy of the notice is made an exhibit to the complaint.

The defendant's answer denied each and every allegation of the complaint.

In the trial of the case the court at first refused to permit the plaintiff to prove any damage. Later in the progress of the trial the court, over the objection of the defendant, permitted the plaintiff to prove that he was damaged and aggrieved. Exceptions were saved by the defendant to the action of the court in said rulings. The evidence shows that during the year 1898 cattle were found in the field of the plaintiff. The plaintiff swears that he saw some of them come over the cattle guards. In driving said cattle out of the field, they were driven over the cattle guards. The evidence of the plaintiff, in substance, is that he was the owner of the farm mentioned in the complaint; that the defendant's railroad was constructed through the same, and that the cattle guards were unsafe and insufficient to keep cattle out of his field; and that cattle came into his field by reason of said defective cattle guards, and damaged his premises. The only evidence that the plaintiff introduced to prove the notice in writing, as required by section 6238, above mentioned, was the return of the constable on the back of the notice. The defendant introduced D. J. Cavitt, the agent upon whom the constable's return stated that the notice was served, who testified in substance as follows: That the said notice was never served upon him, and that he had no notice whatever of any service of the same. Judgment for plaintiff, and appeal to this court.

Read & McDonough, for appellant.

The complaint did not allege that the plaintiff was in any way damaged or aggrieved; and it was error to admit evidence upon that point. Notice, such as is required by the statute, is simply a fact, and is provable as such. 16 Am. & Eng. Enc. Law, 857; 35 Mo. 71; 47 Mo. 304; 7 Vt. 152. The "notice" mentioned in § 6238, Sand. & H. Dig., is not one of the *notices* mentioned in that section of the code (Sand. & H. Dig., § 5890) providing for service of notice as by officers. See also Murfree, Sheriffs, § 866.

HUGHES, J., (after stating the facts.) Section 6238 of Sandels & Hill's Digest is 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 enclosure where said railroads enter said enclosure and to keep the same in good repair." Section 6239 provides for a penalty of not less than twenty-five nor more than two hundred dollars for failure to comply with the statute, to be recovered in a civil action by any person aggrieved thereby. There is no evidence of the service of the notice, save the constable's return thereon not sworn to. There is no provision in this statute as to who may serve the notice provided for, nor as to how the service shall be proved. We find no statute making the return of the constable, who served the notice, proof of the fact of service; and we think the fact of service should be proved like any other fact, the proof of which is not provided for by statute. 16 Am. & Eng. Enc. of Law, 827 and cases cited in note 4.

Section 5890, Sandels & Hill's Digest, provides that "notices mentioned in the code shall be in writing, and may be served by a sheriff, constable, coroner or marshal of a town or city, whose return shall be proof of the service." But the notice provided for in section 6238, Sand. & H. Dig., is not mentioned in the code, because section 6238 was passed long

after the adoption of the code. Besides, the code provision quoted relates to notices in proceedings or suits in courts, which the notice provided for in section 6238 cannot be said to be.

Reversed, and remanded for a new trial.

STATE v. WILLIAMS.

Opinion delivered June 9, 1900.

1. CRIMINAL LAW—VARIANCE BETWEEN INDICTMENT AND PROOF.—Under an indictment for unlawful cohabitation with a woman named "May Hite," proof that defendant cohabited with a woman named "May Hyde" is a fatal variance. (Page 242.)

2. NAME—IDEM SONANS.—The names "Hite" and "Hyde" are not *idem sonans*. (Page 243.)

Appeal from Independence Circuit Court.

JAS. W. BUTLER, Special Judge.

Jeff Davis, Attorney General, Chas. Jacobson and *S. D. Campbell, Prosecuting Attorney Third Circuit*, for appellant.

The defect in the instrument was immaterial, since the offense was a joint one. Rap. Cr. Proc. § 83; Clark, Cr. Proc. 341. "*Hyde*" and "*Hite*" are *idems sonans*. Rap. Cr. Proc. § 83; Clark, Cr. Proc. 341; Whart. Cr. Pl. & Pr. § 119. *De minimis lex non curat*. 53 Am. Dec. 137. Whether the names were *idem sonans* was for the jury. Authorities *supra*.

BUNN, C. J. The material part of the indictment charges that "the said Josephus Williams, being a man, and May Hite, being a woman, in the county and state aforesaid, on the 1st day of November, 1898, did unlawfully cohabit together as husband and wife, without being married." Upon a plea of "not guilty," a jury was impaneled to try the issues, and the state offered the following testimony: Monroe Claxton testified that he was acquainted with defendant Williams; that he

did not know a woman by the name of May Hite, but he knew May Hyde; that defendant and the woman Hyde lived together in the same house in the bottom during part of the year 1868. On being questioned by the court, witness said the woman's name was spelled "Hyde." The court then ruled, over the objections of the state, that the two names Hyde and Hite are not *idem sonans*, and refused further testimony on the part of the state, unless it could show that May Hite was in fact the same as May Hyde, the state having offered to prove by two other witnesses the acts of cohabitation, and by one other (the clerk of the county and probate court) that, so far as his records showed, the defendant had never been married to May Hyde or May Hite, all of which testimony the court refused to admit, because witnesses did not identify the woman as May Hite as named in the indictment, but referred to May Hyde only. The defendant objected to all testimony referring to May Hyde, and not to May Hite, for the same reason, and his objections were sustained by the court.

The foregoing being all the testimony in the case, the court gave the following charge to the jury: "Gentlemen of the jury: It is conceded by the state that, under the rulings of the court, the state has failed to make out a case, and your verdict will be 'Not guilty.' The thing falls simply from the ruling of the court that the name of the woman is wrong. The proof shows that the name of the woman is May Hyde, while the indictment charged May Hite, and for that reason defendant is not convicted." All proper exceptions were saved. The jury returned a verdict of not guilty, in obedience to the direction of the court, Motion for new trial was filed and overruled, and state took her bill of exceptions and appealed.

The court directed the verdict because of a variance between the proof and allegation in the indictment as to the name of the woman jointly indicted with the defendant, who, however, was not arrested. It is well to state, also, that the doctrine of *idem sonans* may not necessarily have the same effect in the case against the woman as in this case, as the name of the woman in this case against Williams is merely descriptive of the offense, while in a case against her it would but denominate

the party defendant. The state sought to have the court declare that the two names are *idem sonans*, and therefore the same in law. This declaration the court declined to make, but, on the contrary, declared that the two names are not *idem sonans*. The rule in questions like this is thus stated in the American Encyclopedia of Law, vol. 4, pp. 769 and 770: "Where two names, though spelled differently, necessarily sound alike, the court may, as matter of law, pronounce them to be *idem sonans;* but, if they do not necessarily sound alike, the question is for the jury. A literal variance in the spelling of the word is not alone fatal, when the omission or addition does not make it a different word; and this diversity in the spelling of a name is not material where it is *idem sonans*." This is the rule laid down also in *Commonwealth* v. *Warren*, 143 Mass. 568.

The letter "d" and the letter "t" are both dentals, but have not necessarily the same sound, by any means. The "d" has a broader and (we may say) a more lengthened sound, ordinarily, than "t," which has a sharp, shorter sound, and yet the difference grows less, according to their places in a word or name. Thus Wadkins and Watkins have been held to be *idem sonans*, because in casual pronunciation there is scarcely any difference in the sounds. But this similarity of sound does appear in the words "ride" and "rite," because there is a prominence given to the two letters which brings out their nominal difference in sound. So it is in the names involved in this case. There is not the same sound necessarily in Hyde and Hite, as there is in "Hyde" and "Hide", where the play is upon 'y' and 'i,' two letters which have identically the same sound where used in such a connection.

There are many cases where it is held that, notwithstanding the doctrine of *idem sonans* does not strictly apply, yet the doctrine of interchangeability of names applies, as was applied in *Commonwealth* v. *Warren*, 143 Mass. *supra*, where the controversy arose as to the two names of "Celestia" and "Celeste,"—the name of one of the witnesses in the case,—as the first wife of defendant, in a trial for polygamy. That rule is not sought to be applied in this case, however, and is only applied in

cases to be submitted to the jury to determine the fact of whether or not the person is known by one name as well as the other.

Our conclusion is that Hyde and Hite are not *idem sonans*, and that the trial court did not err in that regard. The judgment is therefore affirmed.

BATTLE, J., absent.

MARIANNA v. VINCENT.

68 244
187 403
188 213

Opinion delivered June 9, 1900.

MAYOR OF TOWN—JURISDICTION—UNLAWFUL SALE OF LIQUORS.—Defendant was charged before the mayor of an incorporated town with selling liquor without license, and convicted of violating a town ordinance prohibiting the sale of liquor without license. On appeal to the circuit court he was discharged on the ground that the ordinance under which he was convicted was void. On appeal to the supreme court, *held* that, whether the ordinance in question was void or not, the mayor, having the same criminal jurisdiction as a justice of the peace (Sand. & H. Dig. § 5256), had jurisdiction to try him for a violation of Sand. & H. Dig. § 4862, making it a misdemeanor to sell liquor without a license. (Page 247.)

Appeal from Lee Circuit Court.

HANCE N. HUTTON, Judge.

McCulloch & McCulloch, for appellant.

The only test of the power of cities and towns to pass penal ordinances is whether or not such ordinances are "inconsistent with the laws of the state." Sand. & H. Dig., § 5146; 53 Ark. 368. The ordinance in question was not. 37 Ark. 382.

Fletcher Roleson, for appellee.

The appellant had no power to prohibit single or occasional sales of liquor, under Sand. & H. Dig., § 5132. 31 Ark. 462; 46 Ark. 362; 34 Ark. 557; 27 Ark. 557; 45 Ark 455.

BUNN, C. J. On the 16th March, 1899, B. F. Latta, the marshal of the town of Marianna, Lee county, Arkansas, made affidavit for a warrant of arrest against the defendant, in these words, to-wit: "To the best of my knowledge and belief, I hereby state that Louis Vincent did, in the town of Marianna on the 16th day of March, 1899, sell to King Crawford a bottle of whiskey, and pray a warrant for his arrest." On this affidavit the mayor of said city issued the following warrant, to-wit: "To B. F. Latta, Marshal: 'It appearing that there are reasonable grounds for believing that Louis Vincent has committed the offense of selling whiskey in the town of Marianna without license, you are therefore commanded to arrest Louis Vincent and bring him forthwith before me, to be dealt with according to law.'" In obedience to this warrant, the marshal arrested and brought the defendant before the mayor for trial, and the following recital appears as part of the proceedings of the mayor's court, to-wit: "On this the 16th day of March, 1899, comes B. F. Latta, marshal of the town, having in his custody the defendant, Louis Vincent, who having been arrested on a warrant of arrest charging him with the offense of unlawfully selling whiskey in the town of Marianna on the 16th day of March, 1899, in violation of a town ordinance. And the defendant announces ready for trial, and pleads not guilty as charged. And the court, after hearing the evidence, finds the defendant guilty, and fixes his punishment at a fine of one hundred dollars. It is therefore ordered and adjudged that the incorporated town of Marianna have and recover of the defendant, Louis Vincent, said sum of one hundred dollars, and all costs of this prosecution." Then follows the alternative judgment of punishment rendered in such cases.

The defendant appealed to the circuit court, where, after one or two new trials, on motion of defendant, the cause was dismissed for want of jurisdiction, in this, that "the mayor's court of the town of Marianna had no jurisdiction of the offense of selling whiskey without license, as charged in the affidavit and warrant, and that this court had no jurisdiction on appeal." Upon this motion the circuit court rendered the following judgment, to-wit: "And said motion being presented, and it

appearing to the court that the town of Marianna had no lawful power or authority to adopt or enforce the ordinances upon which this prosecution is based, said motion is by the court sustained. It is therefore by the court considered, ordered and adjudged that the defendant be discharged, and go hence without day." The town of Marianna at the time, by its attorney, excepted, and appealed to this court.

Much of the discussion is devoted to the inquiry as to whether the town council by ordinance could do more than "license, regulate, tax or suppress tippling houses and dramshops," as provided in section 5152, Sand. & H. Dig.; the defendant contending that a town council, under the rule laid down by this court in construing that section of the digest, in *Tuck* v. *Town of Waldron*, 31 Ark. 462, *Town of Magnolia* v. *Sharman*, 46 Ark. 358, and other cases, has no authority to pass an ordinance to deal with the liquor question, further than to license, regulate, tax and suppress tippling houses and dramshops as provided in said section, which is section 12 of the act of municipal incorporation, passed March 9, 1875. In the case of *Tuck* v. *Town of Waldron*, this court said: "Under this rule [stated by Judge Dillon], the council of Waldron had no power to pass the ordinance for the violation of which appellant was convicted." The ordinance prohibited one from selling ardent or vinous liquors without first procuring a license. The rule as stated by Judge Dillon is: "When there are both special and general provisions, the power to pass by-laws under the special or express grant can only be exercised in the cases, and to the extent, as respects those matters, allowed by the charter or incorporating act; and the power to pass by-laws under the general clause does not enlarge or annul the power conferred by the special provision in relation to their various subject matters, but gives authority to pass by-laws, reasonable in their character, upon all other matters within the scope of their municipal authority, and not repugnant to the constitution and general laws of the state." The conclusion of this court on the subject was thus expressed in that case. "It (the town council of Waldron) undertook to prohibit the sale of ardent or vinous liquors in any quantities, and by any person, without

corporation license; when the act under which the town was incorporated only authorizes the council to license, regulate, tax, or suppress tippling houses and dramshops, and to regulate or to prohibit ale and porter shops or houses and public places of habitual resort for tippling and intemperance. If the legislature intended to authorize municipal corporations to require all persons who wish to engage in selling wine and liquors, in any quantities, within their corporate limits to obtain corporation license, the intention should, and probably would, have been expressed in the act, and not left to inference. Municipal corporations must confine their legislation within the scope of the powers conferred upon them by their charters."

This was the doctrine of *Town of Magnolia* v. *Sharman* also, and it apparently sustains the contention of the defendant in this case, with this explanation, however: The alleged ordinance is not found in this record, and is not mentioned, except by way of recital in the judgment of the mayor's court and in the judgment of dismissal of the circuit court; and we therefore are not at liberty to say what is its purport, and can only speak of it in general terms, for the purposes of this discussion. On the other hand, it is contended by the prosecution that the decisions of this court cited above do not preclude the adoption of an ordinance on the subject, under the provisions of section 5146 of Sand. & H. Digest. Be this as it may, the question in this case is, did the mayor of Marianna have juirisdiction to hear and determine the case? The affidavit for the warrant and the warrant itself, taken together, determined the jurisdiction of the mayor, not what he or the circuit court said in the rendition of these respective judgments. There is no mention of an ordinance, nor reference to one, in the affidavit nor warrant. The crime alleged in them was, at all events, a violation of the state law; that is, a violation of section 4862 of Sandels & Hill's Digest. The mayor of a town has the same jurisdiction to hear and determine cases under the criminal laws of the state as has a justice of the peace. See section 5256 of Sandels & Hill's Digest.

The mayor having once obtained jurisdiction, the case should not have been subsequently dismissed for want of jurisdiction by the circuit court, merely on mistakes of law made by the mayor, or for any other irregularity; but it should have proceeded to try the case *de novo*, and render such judgment as was proper therein. The judgment of dismissal is therefore reversed, and the cause is remanded for further proceedings not inconsistent herewith.

BATTLE, J., absent.

LOGAN *v.* EASTERN ARKANSAS LAND COMPANY.

Opinion delivered June 9, 1900.

68 248
70 328

68 248
74 584

68 248
84 320

68 248
80 35
80 585
81 301

68 248
87 363

1. TAX SALE—PUBLICATION OF NOTICE—PROOF.—The certificate which the law requires the county clerk to make and record, showing in what newspaper the list of delinquent lands and the notice of sale were published, and the date of publication, and for what length of time (Mansf. Dig. § 5763), cannot, if insufficient, be aided by the testimony of the publisher of the list and notice, showing that due publication thereof was made. (Page 250.)
2. SAME—MERITORIOUS DEFENSE.—The failure of the county clerk to append to the recorded list of delinquent lands the certificate required by Mansf. Dig., § 5763, is a "meritorious defense," of which the original owner of land sold for taxes cannot be deprived by the execution of a deed from the county clerk to the purchaser at tax sale. *Cooper* v. *Freeman Lumber Co.*, 61 Ark. 36, followed. (Page 250.)

Appeal from Independence Circuit Court in Chancery.

RICHARD H. POWELL, Judge.

H. S. Coleman, for appellant.

The manifest intention of the legislature in enacting the law governing tax sales (Sand. & H. Dig., § 6623 *et seq.*) is clearly to uphold tax sales by every reasonable intendment; and the courts should endeavor to effectuate this intent. Appellee failed to support, by any evidence, his allegation that the lands were not legally advertised. The sale was not invalidated by the failure of the clerk to make the certificate required in

Sand. & H. Dig., § 6606, *before* the day of sale. *Cf.* 34 Fed. 701; 140 U. S. 634; 55 Ark. 218; 65 Ark. 595. Appellee's complaint was fatally defective in that it failed to allege that he, or those under whom he claimed title, had paid all the taxes due on the land before the bringing of the suit. Sand. & H. Dig., § 6625.

John B. Jones, for appellee.

The sale was void because the record did not show the facts prescribed by the statute; and evidence *aliunde* was not competent to supply the defect. 55 Ark. 218; 140 U. S. 634; S. C. 34 Fed. 701; 32 Wis. 394. The proof of publication must show that the paper had a *bona fide* circulation in the county, and that it was published a month before the first insertion. 65 Ark. 90; 52 Ark. 312; 51 Ark. 34.

BATTLE, J. This action was brought by the Eastern Arkansas Land Company against H. G. Logan to quiet title to certain lands described in its complaint. The claim to the lands against which it seeks to quiet its title is based upon a sale of the lands to the defendant in 1895 for the taxes of 1894. It claims that the sale was void, because the clerk of the county court failed to record the list of lands returned delinquent on account of the non-payment of the taxes of 1894, of which the lands in question were a part, and a notice that the same would be sold by the county collector, in a book kept for that purpose, before the day of sale, with a certificate, made by himself, at the foot of such record, stating in what newspaper said list was published, what length of time published, the date of publication, and the length of time the same was published before the second Monday in June then next ensuing. It is conceded that the certificate which the county clerk was required to make at the foot of such record was not made until after the day fixed for the sale. On account of the failure of the clerk to make such certificate in the manner and within the time stated, the circuit court held that the sale of the land in controversy to the defendant for the taxes of 1894 was void, and quieted the title of the plaintiff against the same; and the defendant appealed.

The only question for our consideration in this case was decided in *Martin* v. *Allard*, 55 Ark. 218. In that case the question was, can the certificate which the law requires the clerk to make be superseded by the testimony of the publishers of the list of delinquent lands, showing that the notice of sale was published in the manner required by law. The court said: "The statute prescribes that the list of lands delinquent for non-payment of taxes shall be published for two weeks between certain specified dates, with a notice of the intent to sell them. Mansf. Dig. §5762. It requires the clerk of the county court to record the list and notice of sale in a book to be kept in his office for that purpose, with a certificate showing in what newspaper it was published, for what length of time, and the date of publication. *Ib.* § 5763. The statute denominates this entry a record; *it requires that it shall be made by the clerk before the sale*, and provides that it shall be evidence of the facts it recites. *Ib.* § 5763. And the court further said: "But, conceding that the publisher's testimony goes to the extent of proving that the notice of sale was published as the law requires, the question is whether it is competent to establish the fact in that way. * * * The identical question here presented arose in the circuit court of the United States for the eastern district of Arkansas in a suit by the appellant in this case to confirm a tax title depending upon the forfeiture now under consideration, where the same effort was made to supply the defect in the tax record by the testimony of the publishers of the newspapers. The circuit court rejected the testimony, and the ruling was affirmed on appeal to the Supreme Court of the United States, where it was said: 'The provision (section 5763, Mansfield's Digest) is a peremptory one, and it cannot be dispensed with, without invalidating the proceeding;' that is, the tax sale. *Martin* v. *Barbour*, 140 U.S. 634; S. C. 34 Fed. Rep. 701. That conclusion follows from the authorities before cited. The appellant's title therefore fails." See also *Taylor* v. *State*, 65 Ark. 595.

The court, in effect, held in *Martin* v. *Allard* that the provision of the statute requiring the clerk to record the certificate before the day of sale was mandatory. If this ruling be cor-

rect, it must have been made upon the theory that the provision subserved some useful purpose. Can it do so? Under the statutes of this state, the least quantity of each tract of land delinquent is sold to the person who will pay the taxes, penalty and costs charged against the tract. If the certificate is made before the sale, persons desiring to purchase can ascertain whether the land has been advertised according to law; and, finding that the law has been complied with, would be encouraged to bid and purchase by paying the taxes, penalty and costs for less land than they would if there was no record evidence of a compliance with the statute. In this way it serves as a protection to the original owner of the land; and the failure to comply with it becomes a defense to him against the sale, of which he cannot be deprived by any deed of the county clerk to the purchaser at the tax sale, as held in *Cooper* v. *Freeman Lumber Company*, 61 Ark. 36.

While the rule established in *Cooper* v. *Freeman Lumber Company*, 61 Ark. 36, does not accord with the views of the writer of this opinion, it is binding upon him as a precedent until it shall be overruled. "Judges are not expected or required to overturn principles which have been considered and acted upon as correct, thereby disturbing contracts and property, and involving everything in inextricable confusion, simply because some abstract" rule of law has been incorrectly established in the outset.

Decree affirmed.

ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY *v.* STATE.

68 251
75 282

Opinion delivered June 9, 1900.

1. RAILROADS—FURNISHING WAITING ROOMS—INDICTMENT.—An indictment of a railway company for failure to provide separate waiting rooms for the two races at a certain depot is defective if it fails to allege that defendant was carrying passengers, and that the alleged depot was a passenger depot. (Page 254.)

2. INDICTMENT—SUFFICIENCY.—While it is sufficient, as a general rule, to

charge a statutory offense in the words of the statute, an indictment of a railway company, carrying passengers, for failure to provide separate waiting rooms at a passenger depot should allege a more particular description of the offense, as there are many ways in which it may be committed. (Page 254.)

3. SAME—MISJOINDER OF OFFENSES.—An indictment of a railway company carrying passengers for failure to provide separate waiting rooms for the two races at a passenger depot is improperly joined with an indictment of a station agent for failure to assign passengers to these waiting rooms according to race. (Page 255.)

4. SAME—ADMISSIBILITY OF EVIDENCE.—In a prosecution of a railway company for failure to provide separate waiting rooms for the two races at a passenger depot, defendant should have been allowed to show that it did not own or operate the road. (Page 255.)

Appeal from Sebastian Circuit Court.

STYLES T. ROWE, Judge.

STATEMENT BY THE COURT.

Appellant was convicted under the following indictment:

"The grand jury of said court accuses said parties defendant of said crime, committed as follows, to-wit: Said parties defendant, in said county and district, on 30th May, 1899, said St. Louis & San Francisco Railway Company, being a corporation organized under the state laws of Missouri, and owning and operating a line of railway in Arkansas, and by Huntington, in the Greenwood district of Sebastian county, where a depot is owned and operated by said railway company, and said F. M. Richardson being the agent and employee of said railway company, at said Huntington depot, unlawfully did refuse to provide separate waiting rooms at said depot, of equal and sufficient accommodation for the white and African races of people, against the peace and dignity of the state of Arkansas. Jo Johnson, Prosecuting Attorney Twelfth Circuit."

A demurrer was filed to the indictment as follows: "First. That the St, Louis & San Francisco Railway Company is improperly joined with the defendant, F. M. Richardson. Second. The facts set forth in the indictment do not constitute a public offense. Third. The indictment attempts to include a charge against the railway company for failure to provide sufficient and separate accommodations for the white and African races,

and joins such charge with a charge against the alleged agent of the railway company for failure to assign passengers to the rooms used for the races to which such passengers belong, which is an improper joinder of offenses. Fourth. It does not appear from the indictment whether it intended to charge the defendant railway company with entirely failing to furnish waiting rooms for the white and African races, or whether a waiting room of sufficient capacity was furnished for the whites and an insufficient one for the African race, or whether a sufficient one was furnished for the African and an insufficient one was furnished for the white race, or whether an insufficient one was furnished for both races, or in what respect the railway company has failed or neglected to discharge its duty. Sixth. It does not appear from said indictment that defendant railway company was carrying passengers in the state of Arkansas at the time of the alleged violation of law. Seventh. It is not alleged in said indictment that the defendant railway company had a passenger depot in the town of Huntington, Arkansas. Eighth. It is not shown by the indictment that the defendant railway company is not a street railway company."

The court overruled the demurrer. The defendant was tried and convicted, and appealed to this court.

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

The indictment was not sufficient under Sand. & H. Dig., §§ 6219, 6220, and the motion in arrest should have been sustained; because: (a) There is no allegation that defendant railway company was carrying passengers in the state; (b) nor that it had a passenger depot at Huntington (61 Ark. 9); (c) the indictment fails to negative that defendant is a street railway (*cf.* Acts 1893, 290; 31 Ark. 408–411); (d) the indictment does not specify what crime defendant is charged with. Since there are numerous ways in which the statute could be violated, an indictment, simply charging the offense in the language of the statute, is not sufficient. 11 Ark. 169; 47 Ark. 488–492; 62 Ark. 513; 37 Ark. 415; 38 Ark. 519; 27 Ark. 493; 37 Ark. 408. Ownership of the premises, etc., by defendant being charged in the indictment, the state had it

to prove. 10 Ark. 259; 22 Ark. 251; 30 Ark. 131. The court erred in refusing the tenth instruction asked by appellant. Hutch. Carr. §§ 114, 292, 610; 4 Elliott, Railroads, p. 2297 1497; *ib.* §§ 1470, 1575; 35 S. W. 626; 5 Ill. App. 201; 31 Ill. App. 36.

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

The indictment charges the offense with sufficient particularity, and the evidence sustains the verdict.

HUGHES, J., (after stating the facts.) The court is of the opinion that the demurrer to the indictment should have been sustained. First, because it does not allege that the defendant railway company was carrying passengers in the state. Second, the indictment does not charge that the defendant had a passenger depot at Huntington.

The statute under which this indictment was found provides that all railway companies carrying passengers in this state shall "provide separate waiting rooms of equal and sufficient accommodations for the two races at all their passenger depots in this state. The foregoing section shall not apply to street railroads." Sand. & H. Dig., §§ 6219, 6220. It is not clear from the indictment what criminal act the defendant is charged with. We think there should have been a more particular description of the offense, as there are so many ways in which the statute may be violated, and to charge simply in the language of the statute in such cases would not be sufficient, as in ordinary cases. It is sufficient, as a general rule, to charge a statutory offense in the words of the statute; but when a more particular statement of the facts is necessary to set it forth with requisite certainty, they must be averred. *Moffatt* v. *State*, 11 Ark. 169; *State* v. *Graham*, 38 Ark. 519.

Then it seems there is a misjoinder of parties by including the agent Richardson in the indictment. It is made the duty of railway companies to provide separate waiting rooms, and for failure to do so the company is subject to indictment. Sand. & H. Dig., § 6219. It is made the duty of the agent at the station to assign passengers, according to race, to these

waiting rooms, and for a failure to do so he is subject to indictment. Sand. & H. Dig., §§ 6224, 6227, 6228. These seem to be separate offenses.

Again, we think the defendant ought to have been allowed to show by evidence offered in the case, and excluded by the court, that it did not own and did not operate the road.

Reversed and remanded, with directions to sustain the demurrer to the indictment.

BATTLE, J., absent.

SMITH v. YOUNGBLOOD.

Opinion delivered June 9, 1900.

GIFT INTER VIVOS—DELIVERY TO TRUSTEE.—Where money is delivered to a trustee to hold during the life of the donor, and to invest and pay over the interest to the donor for the support and maintenance of herself and the donees during her life, and on her death to pay the same to the donees, the delivery is sufficient to complete the gift. (Page 256.)

Appeal from Pope Circuit Court in Chancery.

JEREMIAH G. WALLACE, Judge.

Dan B. Granger and *J. F. Bullock*, for appellants.

There was never any sufficient delivery. 59 Ark. 195; 43 Ark. 319; 2 Kent's Com. *430; 1 Benj. Sales, 5; 17 Am. St. 524; 107 U. S. 602; 1 Am. & Eng. Dec. in Eq. 564–7. "A gift to take effect in the future is void. 8 Am. & Eng. Enc. Law, 1315; 45 Oh. St. 108; 80 N. Y. 422.

R. B. Wilson, for appellees.

Delivery to a bailee for the benefit of the donee constitutes a perfect gift. 36 Ind. 78; 63 Me. 364; 4 Conn. 512; 11 R. I. 266; 43 Ark. 319; 10 Johns. 293; 128 Mass. 159; 2 N. Y. Ch. 333.

WOOD, J. The court below found "that on or about the 1st day of May, 1882, Amanda Youngblood * * gave to

defendant, F. F. Youngblood, the fund sued for, to-wit, $1,600, for the plaintiffs, to be held by him for them for and during the term of her natural life, and to be paid over to plaintiffs in equal proportions at her death, she reserving the interest for her life for the support and maintenance of herself and plaintiffs; the said F. F. Youngblood to loan and invest the same to best advantage, and pay the interest over to her annually." After a careful consideration of the evidence set forth in the transcript, we have reached the conclusion that the chancellor's findings on the facts are correct. Certainly, it cannot be said that they are clearly against the preponderance of the evidence. This being true, the following principle of law is applicable: "The delivery of property to a third person as trustee for the donee, and not as the agent of the donor, where the latter relinquishes all dominion of the property to the trustee for the purposes of the trust, is a sufficient delivery to complete the gift, which in such case is not revoked by the subsequent death of the donor before the property has been actually delivered to the donee. And the validity of the gift is not affected by the fact that the trustee is not to deliver the property to the donee until after the donor's death." 14 Am. & Eng. Enc. Law (2d Ed.), 1026, and authorities cited in note,—especially *Green* v. *Tulane*, 52 N. J. Eq. 169. The doctrine announced in *Nolen* v. *Harden*, 43 Ark. 307, applies here. The transaction here shown by the proof constitutes a gift *inter vivos*. See 1 Crawf. Dig., title, "Gift," p. 887, for cases showing prerequisites for such gifts.

Affirm.

HOYE *v.* BURFORD.

Opinion delivered June 9, 1900.

1. MORTGAGE—DESCRIPTION OF INDEBTEDNESS.—The recital in a mortgage that it is given to secure all indebtedness that the mortgagor owes the mortgagee is a sufficient description of the debt intended to be secured. (Page 258.)

2. SAME—LIMITATION OF ACTION.—Under Sand. & H. Dig., § 5094, providing that a partial payment on a debt secured by mortgage shall not operate to revive said debt unless the mortgagee shall, prior to expiration of the period of limitation, indorse a memorandum of such payment on the record, such indorsement of partial payments is not necessary where the record of the mortgage does not show that the mortgage is barred, although the debt secured would in fact be barred but for partial payments made upon the note secured. (Page 259.)

Appeal from Conway Circuit Court.

JEREMIAH G. WALLACE, Judge.

STATEMENT BY THE COURT.

This was an action of replevin by H. L. Burford against John Hoye to recover the possession of two cows. Burford claimed the property by virtue of a mortgage executed to him by R. W. Butler, dated March 11, 1895. This mortgage says, "In consideration of the sum of $1.50, the receipt of which is hereby acknowledged, the party of the first part has bargained," etc., with other property described, two cows, describing them as "two calves belonging to above cows," and recites that Butler is indebted to Burford in the sum of $1.50 evidenced by "my promissory note of even date" with the mortgage, "and to further secure all indebtedness that I owe said H. L. Burford." By special verdict the jury found that the cows in controversy were the calves mentioned in the mortgage. The court, on motion, rendered judgment on this verdict in favor of the plaintiff for the cows, or their value, $12.50 each. It was conceded at the hearing that the $1.50 mentioned in the mortgage was not a *bona fide* indebtedness, and that the real purpose of the mortgage was to secure a balance of $250 due on a note for $351.15, dated March 14, 1891, payable October 15, 1891, on which *bona fide* payments had been made as late as 1897, and on that account it was not barred. It was also conceded that Hoye was an innocent purchaser of the property from Butler about one year before the suit was commenced, and that no credits were entered on the margin of the record of the mortgage. Suit was commenced February 22, 1898. The defendant objected to the introduction of the note and mortgage, on the ground that it did not

describe the indebtedness, and because the mortgage was barred by the statute of limitations.

Ratcliffe & Fletcher and *A. F. Vandeventer*, for appellant.

The mortgage was not void for want of sufficient mention of the indebtedness. 14 Conn. 17; 12 Bush, 209; 47 Ark. 712; 1 Jones, Mort. § 70.

J. F. Sellers, for appellees.

The statute of limitation is waived if not pleaded. 31 Ark. 684; 49 *ib.* 253. No exception being saved to the court's rulings on the validity of the mortgage, they are deemed waived. Sand. & H. Dig., § 5844; 41 Ark. 535; 44 Ark. 103; 50 Ark. 348; 51 Ark. 324. Exceptions not embodied in the motion for new trial are waived. 43 Ark. 391; 45 Ark. 524; 55 Ark. 376.

WOOD, J., (after stating the facts.) Passing over the objection of appellee that the exceptions of appellant to the rulings of the trial court were not embodied in his motion for new trial, and therefore were waived, and conceding that exceptions were properly saved, and that the errors of which appellant here complains are properly before this court for consideration, still we find nothing for which to reverse the judgment. Taking the grounds of the motion as appellant states them, the court did not err: "First, in refusing to declare the mortgage of March 11, 1895, void." The mortgage recites: "Whereas, the said party of the first part is indebted to the said party of the second part in the sum of $1.50, evidenced by my promissory note of even date herewith, and to further secure all indebtedness that I owe said H. L. Burford," party of the second part. It is conceded that the $1.50 expressly mentioned was not *bona fide*. But the proof showed that at the time the mortgage was executed there was a *bona fide* indebtedness of some $250 from the mortgagor to the mortgagee. The clause above set forth was all-sufficient to take that in. This point is ruled by *Curtis* v. *Flinn*, 46 Ark. 70, where the court, through Judge Cockrill, said: "If the mortgage contains a general description, sufficient to embrace the liability intended to be secured, and to put a person examining the records upon

inquiry, and to direct him to the proper source for more minute and particular information of the amount of the incumbrance, it is all that fair dealing and the authorities demand."

Second. The mortgage was not barred by the statute of limitations. It is true, the note which the mortgage was given to secure had only been saved from the statute bar by reason of payments made thereon. But these kept it alive, and as the mortgage of record was not barred, and did not show the debt to be barred, it was not necessary that the partial payments made on the note should be indorsed on the margin of the record of the mortgage. Section 5094 of Sand. & H. Dig. does not require it in such a case, but only in cases where the mortgage of record shows the debt to be barred. Then, in order that third parties be not misled, if, notwithstanding the mortgage of record shows the debt to be barred, the debt is not in fact barred by reason of partial payments, these must be entered on the margin of the record of the mortgage. Such we understand to be the object and the proper construction of the proviso to section 5094 of Sandels & Hill's Digest.

Affirm the judgment.

BATTLE, J., absent.

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81 134

O'LEARY BROTHERSS v. ABELES.

Opinion delivered June 9, 1900.

1. BANK CHECK—PAYMENT.—Where the payee of a check delivered same to a bank for collection, and the bank sent the check by mail to the drawee bank, and the latter, having funds to the drawer's credit, on receiving the check, indorsed it "Paid," sent a draft to the collection bank for the amount, and surrendered the check to the drawer, as between the payee and the drawer the check is paid, though the draft was unpaid, and the drawee failed. (Page 262.)

2. CUSTOM OF BANKS—NEGLIGENCE.—Proof of a custom among banks of sending checks for collection to the banks on which they are drawn is inadmissible, as custom will not excuse negligence. (Page 262.)

3. BANK'S INSOLVENCY—LIABILITY OF DIRECTOR.—A director in a bank,

having funds on deposit therein, in good faith mailed a check on such bank to a creditor. The payee placed the check in another bank for collection, and the latter bank sent it to the drawee for collection. The drawee marked the check "Paid," and delivered it to the drawer, and sent to the collection bank a worthless draft on a third bank, and subsequently failed. *Held*, that the fact that that the drawer was a director in the drawee bank will not make him liable for the resulting loss. (Page 262.)

Appeal from Pulaski Circuit Court, Second Division.

JOSEPH W. MARTIN, Judge.

O'Leary Brothers & Co., of Pittsburg, Pa., sued Charles T. Abeles, doing business as Charles T. Abeles & Co., on an account for $1,216.65. Defendant admitted the correctness of the account, but pleaded payment in full.

The evidence showed that on January 27, 1893, defendant mailed to plaintiffs his check on the First National Bank, of Little Rock, for $1,192.32, in payment of the amount herein sued on. The check was received by plaintiffs, and on January 30, 1893, was by them indorsed to and deposited with the Iron City National Bank, of Pittsburg, Pa., for collection. On the same day the latter bank sent the check to the drawee by mail for collection. On February 3, 1893, the Iron City National Bank received from the drawee in payment of the check a draft on the Southern National Bank, of New York, which it on the same day indorsed to the Chemical National Bank, of New York. This draft was returned to the Iron City National Bank protested and unpaid on February 6, 1893. Plaintiffs offered testimony to the effect that, in sending the check to the drawee bank for collection, the Iron City National Bank followed the usual and ordinary customs of banks in transacting business. On defendant's objection this testimony was excluded by the court. Defendant testified as follows: "I sent my check on January 27th. I got acknowledgment of receipt of the check in a few days. I have hunted for the letter acknowledging receipt of the check, and cannot find it. I had about $1,600 to my credit in the First National Bank when I drew the check. The check was charged up to me. I got it back from the First National Bank. It is marked "Paid, Little Rock, February 1." * * * I was a director of the First National Bank at the

time my check was sent to plaintiffs, and at the time of the bank's failure. I was familiar with the business of the bank. The bank did not open after February 1, 1893. I got some money back from the bank (from Armstrong, the receiver) after it was closed. I made a deposit on the morning of February 1. Believed the bank solvent, or I would not have made the deposit."

Verdict and judgment were rendered for the defendants. Motion for a new trial was overruled, and an appeal taken.

C. B. Moore, for appellants.

The court erred in refusing to give the first instruction asked by appellants. 28 Ark. 66; 8 Ark. 213; 6 Cranch, 253; Story, Const. 979; 48 Ark. 267. It was also error to refuse the second instruction asked by appellants. 115 Ill. 427; 43 Ill. 497; 2 Pars. Cont. 135. It was also an error to refuse the third instruction. Abeles, being a director in the First National Bank, was chargeable with seeing that appellants were paid in cash or valid exchange. 110 U. S. 7; 141 U. S. 132; 38 Ark. 17. The check was not payment, since the amount was never realized on it. 38 N. Y. 289; 42 N. Y. 538; 115 N. Y. 47.

Eben W. Kimball, for appellees.

It was negligence to send a check in payment. Abeles was not guilty of any neglect of his duties as director, and was not chargeable with any such duty as appellants seek to impose on him. 141 U. S. 132. By sending the check to the drawee bank for collection and return, the holder makes the drawee its agent, and must bear any loss arising after the time when the check could have been presented by express or other usual method. 2 Dan. Neg. Inst, § 1599. The holder was guilty of negligence in sending the check to the drawee bank, and is liable for any loss ensuing from such course. 102 N. Y. 477; S. C. 7 N. E. 413; 1 Dan. Neg. Inst. 328a; 3 Am. & Eng. Enc. Law (2d Ed.) 80; 117 Ill. 100; 99 Mass. 311; 109 Pa. St. 422; 12 Colo. 539; 53 Kans. 542; 167 Pa. St. 259; 44 L. R. A. 504.

WOOD, J. When the holder of a check delivers same to a bank as his bailee for collection, and the bank sends the check by mail to the drawee, who lives at a distance, and the drawee, upon receipt of the check, having money on deposit to the credit of the drawer, indorses the check "Paid," and afterwards delivers same to the drawer, as between the payee or holder and the drawer, the check is paid; for, if the holder chooses this method of collection, and the bailee bank, instead of receiving the cash, takes, for the amount of the check, exchange which turns out to be worthless, the loss which the holder thereby sustains is regarded as the result of his own negligence, or that of the bank holding same for collection. This doctrine applies here. *Anderson* v. *Rodgers*, 27 L. R. A. 248, and authorities there cited; also, note to same; 1 Dan. Neg. Inst. 328a; 3 Am. & Eng. Enc. Law, (2d Ed.) 804; Bolles on Banks & Bankers, § 295; *Anheuser Busch Brewing Assn.* v. *Clayton*, 13 U. S. A. 295; *Wagner* v. *Crook*, 167 Pa. St. 259; Zane on Banks & Banking, § 171 *et seq.*, 188; *Minneapolis Sash & Door Co.* v. *Metropolitan Bank*, 44 L. R. A. 504. See, also, *Loth* v. *Mothner*, 53 Ark. 116. See, *contra*, *McIntosh* v. *Tyler*, 47 Hun, 99; *Indig* v. *Bank*, 80 N. Y. 100; *Briggs* v. *Bank*, 89 N. Y. 182. The rule, it seems, is not affected by any usage or custom where such methods of collection obtain. *Minneapolis Sash & Door Co.* v. *Bank*, 44 L. R. A. 504, and authorities cited.

2. There is no rule of law that would make Abeles liable for the loss resulting from the transaction in proof because of his being a director in the drawee bank. He is not shown to have been negligent in the discharge of any of his duties as director, whereby the loss was occasioned. He is not charged with fraud, but the proof shows affirmatively that he acted in good faith with his creditor. He believed the bank solvent, as shown by his depositing money therein on the very day his check was presented for payment. The bank was open and doing business on that day. Certainly, there was nothing in his duties as director that would charge him with the knowledge that a check drawn by him on funds in the bank to his credit would not be properly presented for collection, and collected in

money, instead of worthless exchange. Good faith only is required of him in matters of this kind. *Hayes* v. *Beardsley*, 136 N. Y. 299. See, also, *Briggs* v. *Spaulding*, 141 U. S. 132.

Affirm.

BATTLE, J., did not participate.

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68 263
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AMERICAN FREEHOLD LAND MORTGAGE COMPANY *v.* MCMANUS.

Opinion delivered June 9, 1900.

1. PLEADING—EXHIBITS.—A deed made an exhibit, and referred to in a complaint in equity, and thereby made a part of the record, will control the averments of the complaint. (Page 265.)
2. LIMITATION OF ACTIONS—MORTGAGE.—Where a mortgage under seal contains an express covenant to pay the debt secured, the period of limitation to a suit to foreclose it is ten years, though the notes which witness the debt are barred in five years. (Page 265.)
3. APPEAL—DECREE PRO CONFESSO.—A decree *pro confesso* based on a complaint which failed to allege a good cause of action will be set aside on appeal. (Page 266.)

Appeal from Monroe Circuit Court in Chancery.

JAS. F. THOMAS, Judge.

STATEMENT BY THE COURT.

This is an appeal from the chancery side of the Monroe circuit court. The appellee, Mary E. McManus, alleges in her complaint that she is the owner and in possession of the northeast quarter of section 23, township 1 south, range 2 west, situated in Monroe county, Ark., and containing 160 acres; that she bought the above described land from Thomas L. Matthews and wife, Laura M. Matthews, January 1, 1891, and paid therefor a valuable consideration; that she went into immediate possession of said land, and has held peaceable and uninterrupted possession since January 1, 1891. She further alleges that on the 20th day of September, 1883, the said Matthews and wife, by a deed of trust, conveyed said land to the

defendants, to secure the payment of certain promissory notes and coupon interest notes, which notes were all due and payable on the 15th day of September, 1888; that more than five years had elapsed since the maturity of said notes and deed of trust, and that no suit had been brought by the defend ants to foreclose the same, nor had any payment been made to prevent the statute of limitations from barring the defendant's claim. She further alleges that said trust deed is barred by the statute of limitations, and that said deed of trust is a cloud upon plaintiff's title. A copy of said trust deed was filed as "Exhibit A," and made a part of the complaint. The plaintiff's prayer was that said trust deed be canceled as a cloud upon her title. The trust deed shows that the notes secured by the trust deed were payable to the American Freehold Land Mortgage Company, of London, Limited, and that the defendant, J. K. O. Sherwood, was the trustee. On the 22d day of October, 1897, summons issued for both of the defendants, directed to the sheriff of Pulaski county, and on the 23d day of October, 1897, it was returned duly served upon "the within named, the American Freehold Land Mortgage Company, by handing a copy of the same to John M. Rose, the authorized agent, upon whom service is to be had in said county, as commanded."

At the November term, 1897, a decree by default was entered in said cause, finding that the said notes and trust deed were barred by the statute of limitations, and annulling and cancelling the same, as a cloud upon the plaintiff's title. From this decree the defendants have appealed.

Watson & Fitzhugh, for appellants.

The process not appearing to have been served on defendant Sherwood, the recital thereof in the decree is not sufficient showing of it. 29 Miss. 139. Therefore the judgment by default is not good against any of the defendants. 4 Ark. 427; *ib.* 431. Sherwood was a necessary party. 1 Beach, Eq. Pract. § 70; 144 U. S. 451; Sand. & H. Dig., § 5626. Since the promise to pay the indebtedness is in the trust deed itself, the period required to bar the suit on the promise is ten years. 65 Ark. 491. The allegation in the complaint that the trust deed

was barred by the five-year statute of limitation was only a conclusion of law, and should have been disregarded. 64 Ark. 46, 47. The trust deed is part of the record, and controls the averments of the complaint. 33 Ark. 722. By default appellant did not admit the correctness of the allegation. 41 Ark. 42; 44 Ark. 56.

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

The recital of notice in the record is sufficient evidence thereof. Sand. & H. Dig. § 4191. It is not necessary that jurisdictional facts should appear of record in a court of general jurisdiction. 49 Ark. 413. The bill, answer and other pleading, together with the decree, constitute the record. 13 Pet. 6; 2 Beach, Eq. Pract. § 806. The mortgage company was the real party in interest (44 Ark. 314), and could sue without joining Sherwood. Sand. & H. Dig., §§ 5623, 5626. The deed of trust was, in legal effect, a mortgage. 53 Ark. 546; 31 Ark. 437, 438; 54 Ark. 179. The debt being barred, the deed of trust is barred. Sand. & H. Dig., § 5094; 65 Ark. 491. The suit in the lower court was upon the note, not upon the covenant in the mortgage; and appellant cannot shift it here. 64 Ark. 307. The only question presented is, whether the allegations of the bill are sufficient to authorize the decree. 18 Wall. 99; 44 Ark. 60.

WOOD, J., (after stating the facts.) The object of plaintiff's complaint was to cancel a deed of trust, which she claims was a cloud upon her title. She makes the deed of trust an exhibit to her complaint. A deed made an exhibit and referred to in a complaint in equity, and thereby made part of the record, would control the averments of the complaint. *Buckner* v. *Davis*, 29 Ark. 444; *Beavers* v. *Baucum*, 33 Ark. 722. Here the deed of trust exhibited with plaintiff's complaint contains an express covenant to pay the debt of appellants, exactly similar to that contained in the deed of trust passed on by this court in *New England Mortgage Security Co.* v. *Reding*, 65 Ark. 489, where we held that, the mortgage being under seal, and containing a promise to pay the debt, the right of action upon it was ten years. The averment in plaintiff's bill that "said trust

deed is barred by the statute of limitations" was controlled by the stipulations and recitals in the trust deed itself, which showed such averment to be untrue. The court therefore erred in rendering a decree *pro confesso* cancelling the deed of trust. The decree was not based upon a complaint which showed a good cause of action. It was therefore erroneous. *Chaffin* v. *McFadden*, 41 Ark, 42; *Benton* v. *Holliday*, 44 Ark. 16.

The judgment is reversed, and the complaint is dismissed for want of equity.

GLASS v. STATE.

Opinion delivered June 9, 1900.

LIQUORS—SALE—DELIVERY.—Defendant, an agent employed to take orders for liquors, sent an order to his principal in an adjoining county, and the principal filled the order and delivered the liquor to a common carrier to be carried to the purchaser, but the carrier took it to defendant's place of business, where the purchaser received and paid for it. *Held*, that the court, at defendant's request, should have instructed the jury that if the principal delivered the liquor to the carrier to be delivered to the purchaser, and the carrier left it for him at defendant's house, and defendant, for accommodation merely, permitted it to be left and delivered it to the purchaser, defendant was not guilty of selling liquor without license. (Page 268.)

Appeal from Logan Circuit Court.

JEPHTHA H. EVANS, Judge.

Robt. J. White, for appellant.

The second instruction was abstract and misleading. The sale was completed when the goods were set apart, addressed to Rawlings, and delivered to the carrier. 43 Ark. 356; 1 Benj. Sales, 130–514; 71 Ala. 358, 360, 368. Appellant was entitled to instructions fairly presenting his defenses to the jury. 3 S. W. 717; 20 Tex. App. 13; 4 S. W. 22.

WOOD, J. The appellant was indicted and convicted in the Logan circuit court for selling liquor without license, and appeals to this court.

The proof showed that one Rawlings ordered a jug of liquor from one Odom, a liquor dealer at Huntington, in Sebastian county. Rawlings lived at Booneville in Logan county. He ordered the liquor through Glass, the appellant, who lived at Booneville, and who was the agent of Odom to solicit orders for the sale of liquor, receiving a regular salary for such services. Glass sent in the order to Odom at Huntington. Odom put a jug of liquor, sealed, tagged and addressed to Rawlings, at Booneville, into the hands of the mail carrier at Huntington. The carrier left the jug at Glass' place of business, and in a day or so thereafter Rawlings called there and got the whiskey, and afterwards paid Glass for it at Booneville. Glass testified that there was no understanding between him and the house that the liquor was to be delivered to him and by him to the customer. There was testimony that the house at Huntington had nothing further to do with the liquor after it was delivered to the mail carrier at Huntington for the customer, and that Glass had nothing to do with it except to send in the order and to remit what money he collected; that the carrier had no instruction to deliver the liquor to Glass, but for convenience he sometimes left the liquor at Glass' place, sometimes at the post office, and sometimes with the customer; that neither Glass nor the house had any control of the liquor after it was delivered to the carrier.

The court on its own motion instructed the jury as follows:

"1. If the defendant was in the employ of a licensed liquor dealer at Huntington, Arkansas, soliciting orders for whiskey to his house, and in this county received the order of J. O. Rawlings therefor, transmitted the same to his house, where it was filled, and the liquor for Rawlings was sent by the house to defendant in this county, was there received by defendant, and by him there delivered to the witness, Rawlings, and money therefor there collected, then the sale was in this county and by defendant, and you will convict defendant. If you fail to find the above supposed state of facts to be true beyond a reasonable doubt, you will acquit the defendant."

"2. If the defendant was the agent of a liquor house, and in this county took Rawlings' order for whiskey, deliver-

ing in this county the whiskey to Rawlings pursuant to such order, and in this county collected the pay therefor from Rawlings, defendant is guilty, and you will convict."

Defendant asked the following instruction, which was refused: "If you find from the evidence that the liquor was placed in a jug at Huntington, Sebastian county, Arkansas, sealed and addressed to J. O. Rawlings, at Booneville, Arkansas, and delivered to the mail carrier, a common carrier, to be by him delivered to Rawlings, and that the carrier left the liquor at defendant's house for Rawlings, and that defendant, for accommodation only, permitted it to be left there, and afterwards delivered it to Rawlings, then defendant is not guilty, and you should acquit."

The attorney general confesses that the refusal of the court to give the instruction asked by appellant was reversible error. The attorney general is correct. The instruction was warranted by the evidence, and the defendant was fairly entitled to an instruction which would give the jury the right to find that the liquor was appropriated to the order for same, and delivered to the carrier for the purchaser at Huntington in Sebastian county, and that Glass had no control over the liquor after it was delivered to the carrier in Sebastian county. If Glass had no control over the liquor after he sent in the order for same to his house at Huntington, then he would not be guilty of selling liquor in Logan county, because in such a case there would be no setting apart or delivery of the liquor, under the contract of purchase, by Glass in Logan county. On the other hand, if Glass received the order for the liquor in Logan, and sent same to his house, and the house filled the order and returned same to Glass, who delivered same to the purchaser in Logan county, then the jury might find him guilty. Both views should have been presented to the jury. The court ,following *Berger* v. *State*, 50 Ark. 25, *Blackwell* v. *State*, 42 Ark. 275, and *Yowell* v. *State*, 41 Ark. 355, presented the latter view in its charge, but failed to present the former. The doctrine announced and authorities cited by this court in *State* v. *Carl*, 43 Ark. 353, shows clearly that this was error. See also *Berger* v. *State*, *supra*, on this point.

The judgment is reversed, and cause remanded for a new trial.

BATTLE, J., absent.

JACKSON *v.* BEATTY.

Opinion delivered June 9, 1900.

WARNING ORDER—SUFFICIENCY OF PROOF OF PUBLICATION.—An order calling in county warrants for cancellation and reissue is void where neither the proof of publication, nor the sheriff's return, nor the record of the court, shows that the newspapers in which such order was advertised were regularly published in the county for the period of one month next before the date of the first publication of said advertisement, as required by Mansf. Dig. § 4356. (Page 272.)

Appeal from Carroll Circuit Court, Eastern District.

JAS. M. PITTMAN, Judge.

STATEMENT BY THE COURT.

Beatty sought by mandamus to compel Jackson, collector of Carroll county, to accept for county taxes the county warrant No. 267 for $75.35, issued by the county court of Carroll county in 1894.

Jackson admitted that the taxes tendered by Beatty were correct; that he was collector; that Beatty offered to pay him his county tax with warrant No. 267, and to remit the excess of the warrant above his taxes; that the warrant was legally issued to pay a debt allowed by the county court against the county, and alleged that he refused to accept the warrant in payment of taxes by Beatty for the reason that on the 10th day of April, 1890, the county court of Carroll county, being in regular session, had made an order calling in for reissue and cancellation all the warrants outstanding, and that the holder of this warrant had failed to present the same for cancellation and reissue, and that same was therefore barred. The order of the county court was as follows:

"In the matter of calling in for reissue, cancellation and classification the outstanding indebtedness of Carroll county. On this day the court took into consideration the calling in of the various warrants of said county, and the other floating indebtedness of said county, for the purpose of classifying, cancelling and reissuing the same; and, the court being fully advised in the premises, it is therefore by the court ordered, considered and adjudged that all persons holding any county warrants of the said county of either the Eastern or Western districts of said county, issued prior to the 15th day of April, 1890, shall present the same to the court on or before the 12th day of July, 1890, for the purpose of having the same canceled, classified and reissued according to law; and all warrants and other indebtedness not so presented shall be null and void, and the same shall be forever barred. It is therefore ordered that within ten days after the adjournment of this court the clerk of the court furnish to the sheriff of this county a true copy of this order, and that said sheriff proceed to notify the holders of said warrants and other indebtedness to present the same to this court as aforesaid in the manner prescribed by law."

A copy of this order was attached to the sheriff's return, which is as follows:

"I, Spencer J. Morris, sheriff of Carroll county, do hereby certify that I served the notice calling in the county warrants of Carroll county, Ark. (a copy of which order of said court is attached hereto), by posting up at each election precinct in each township in said county and at the court house door in said county a true copy of said order of said county court, each one of which I put up more than thirty days before the 12th day of July, 1890, the time fixed in said order for calling in said warrants by the court, and I further certify that I caused a true copy of said order to be published in the Carroll County Progress and in the Daily Echo, two newspapers published in Carroll county, Ark., and each at the time before and since said publication of said order, had a *bona fide* circulation in said county, all of which will fully appear from the affidavits of E. W. Carleton, editor of the Echo, and J. D. Hailey, editor of the Progress, attached hereto as part of my return herein.

Witness my hand as such sheriff of Carroll county, Ark., this the 7th day of July, 1890. Spencer J. Morris, Sheriff Carroll County, Ark."

Editors' affidavits of publication:

"I, E. W. Carleton, do solemnly swear that I am editor of the *Echo*, a weekly and daily newspaper published in Eureka Springs, Carroll county, Ark., and that said newspaper has a *bona fide* circulation in Carroll county, Ark., and that said paper did have a *bona fide* circulation in said Carroll county for more than thirty days prior to the first publication of the notice hereto fixed, and that said paper had a *bona fide* circulation during the time of the publication of the notice hereto annexed, and that the notice hereto annexed was published in said daily *Echo* for two weeks in succession, the last insertion of which was more than thirty days before the 12th day of July, 1890; the first of said publication being on the 10th day of May, 1890, and the last of which was on the 5th day of July, 1890. E. W. Carleton, Editor Echo. Subscribed and sworn to before me this 5th day of July, 1890. John H. Childs, Notary Public, Carroll county, Ark."

"I, J. D. Hailey, do solemnly swear that I am the editor of the *Carroll Progress*, a weekly newspaper published in Berryville, Carroll county, Ark., and that said newspaper had a *bona fide* circulation in Carroll county, Ark., and that said paper did have a *bona fide* circulation in Carroll county for more than thirty days prior to the first publication of the notice hereto annexed, and that said paper had a *bona fide* circulation during the time of the publication of the notice hereto annexed, and that the notice hereto annexed was published in said weekly *Progress* for two weeks in succession, the last insertion of which was more than thirty days before the 12th day of July, 1890, the first of said publication being on the 23d day of April, 1890, and the last of which was on the 5th day of July, 1890. J. D. Hailey. Subscribed and sworn to before me this 7th day of July, 1890. Len Nunnally, Clerk."

G. J. Crump and *Watkins & Walker*, for appellant.

The proof of publication is sufficient. Gould's Dig. § 59; *Cf.* Mansf. Dig. § 1148; Sand. & H. Dig., § 1104. See also

Sand. & H. Dig., § 4356. The latter section does not repeal the former. 60 Ark. 61. Section 1104, *supra*, governs this case. 48 Ark. 246; 37 Ark. 659. The county courts have no exclusive jurisdiction to audit, settle and order payment of all demands against the county. Sand. & H. Dig., § 1173; 44 Ark. 225; 37 Ark. 649; 3 McCrary, 447.

McDaniel & Tillman, for appellee.

The provisions of the statute governing the calling in of county warrants are to be strictly complied with. 65 Ark. 142; 51 Ark. 34. The failure of the sheriff's return to show that the newspapers had been regularly published in the county for the required time, prior to the first publication, renders the whole proceeding void. 51 Ark. 34; 61 Ark. 259; 16 S. W. 197. "Published" and "printed," as used in the statute, are not identical in meaning. 77 Me. 433. *Cf.* Sand. & H. Dig., § 1104. The affidavits of the publishers constitute mere recitals. 65 Ark. 142. The plea of *res judicata* does not apply. 4 Wall. 232; 1 Greenleaf, Ev. § 530; 14 Pet. 156; 2 Bl. Judg. § 693; Freeman, Judg. § 263; 17 Ark. 365; 33 Ark. 522.

WOOD, J., (after stating the facts.) Was the order of the county court void by reason of a failure to give notice as required by law? It is contended by the appellee that the order is a nullity because the sheriff's return shows a failure to comply with section 4356 of Manfield's Digest, which was in force when the order was made. That statute prescribes that "when a legal publication of *any character* is required by existing or future laws * * * to be made by advertisement in a newspaper printed in this state, it shall be published in some daily or weekly newspaper printed in the county where the suit or proceeding is pending, or where the * * * subject of the proceeding or publication is situated. *Provided*, there be any newspaper printed in the county having a *bona fide* circulation therein, which shall have been regularly published in said county for the period of one month next before the date of the first publication of said advertisement."

It will be observed that the affidavits of the editors attached to the sheriff's return each fail to show that the re-

spective newspapers had been regularly published in Carroll county for the period of one month next before the date of the first publication of said advertisement. Neither the return itself nor the recitals of the record of the county court of July 12, 1890, when the order of cancellation was made, show the newspapers had been regularly published in the county for the required time prior to the first publication. On this point the present case is ruled by the decisions of this court in *Gibney* v. *Crawford*, 51 Ark. 34, and *Thompson* v. *Scanlan*, 16 S. W. Rep. 197. But it is contended that, as the affidavits of the two editors show that each paper had a circulation in the county thirty days prior to the date of the first publication, and that the notice was published in the *Progress* beginning April 23, and ending July 5, and in the *Echo*, beginning May 10 and ending July 5, the return, construed with reference to the different parts of it, shows each paper was published more than thirty days prior to the first day of publication. *Non sequitur.* The statute requires the notice to be published in a newspaper printed in the county, if there be one, "having a *bona fide* circulation therein, which shall have been regularly published in said county for one month next before the date of the first publication." Obviously, something more is required than that the paper shall have had a circulation in the county for one month prior to the date of the first publication. It must have been printed or published in the county for that length of time before the first publication of the notice. Now, a newspaper may have a *bona fide* circulation in a county, and yet not be published therein at all. For we think the word "published," as used in the statute, is synonymous with the word "printed." Therefore we cannot see that, because it may have been shown that these papers had a *bona fide* circulation in the county for thirty days before the date of the first publication, it necessarily follows that they were published or printed in the county for that length of time before the date of the first publication. Nor will we, in this special statutory and summary proceeding, indulge in any astute refinements of construction in order to show that the statute in regard to jurisdiction has been complied with. We

must adhere to the rule in such cases that "everything will be presumed to be without the jurisdiction which does not distinctly appear to be within it," and insist upon a strict construction and compliance with the terms, of the statute.

We deem it unnecessary to discuss the pleas of *res judicata* and the statute of limitations. We have carefully considered same, and are of the opinion that they are not well taken. It follows that the judgment of the county court cancelling the warrant in controversy was void, and the judgment of the circuit court in this case ordering a peremptory mandamus on the collector to receive the warrant was correct, and it is affirmed.

LOFLAND v. COWGER.

Opinion delivered June 9, 1900.

ADMINISTRATION—APPORTIONMENT OF ASSETS—SECURED CREDITOR.—Where the probate court has ordered an apportionment of funds to claims of the fourth class, it cannot subsequently compel a secured creditor of that class to foreclose his mortgage and credit the proceeds on his debt, in order to reduce his claim and lessen the amount of the apportionment due thereon. (Page 275.)

Appeal from Yell Circuit Court, Dardanelle District.

JEREMIAH G. WALLACE, Judge.

STATEMENT BY THE COURT.

One L. B. Reynolds owed J. C. Lofland a debt, which he secured by executing to Lofland a mortgage on real estate. Reynolds died. Lofland probated his claim against his estate, and it was classed in the fourth class of claims. Afterwards the probate court ordered the administrator to pay out of the money of the estate in his hands fifty cents on the dollar on all fourth class claims. Some months after this order of apportionment was made the administrator and certain unsecured creditors of the estate brought this action in equity in the circuit court, asking that Lofland be compelled to foreclose his

mortgage, and that he be allowed a *pro rata* only on the balance due him after crediting the proceeds of the mortgage on his claim. Lofland demurred to the complaint, and, his demurrer being overruled, he stated in his answer that the property mortgaged was less in value than the amount of his debt, and that, if he was compelled to foreclose his mortgage, and accept a *pro rata* on only the balance due after crediting proceeds, a portion of his debt would remain unpaid.

The court found in favor of plaintiff, and ordered that Lofland foreclose his mortgage, and that he be allowed a *pro rata* of fifty cents on the dollar on the balance found due after crediting proceeds of the mortgage. Lofland appealed.

John M. Parker, for appellant.

It was the duty of the administrator to file his account current one year after appointment (Sand. & H. Dig., § 133), and of the probate court to ascertain the amounts on hand and order payment of same to creditors. *Ib.* § 154. The probate court having done that, by this order the rights of appellant became vested, and, if wrong so far as related to appellant's claim, the administrator's remedy was by appeal. 59 Ark. 548; 12 Am. & Eng. Enc. Law, 1470. Appellant was entitled to fifty per cent. of his claim. 59 Ark. 548. The rule as to marshaling of securities has no application here. 14 Am. & Eng. Enc. Law, 685, 686, 696, 697–8, 725–7; 31 Ark. 203.

John B. Crownover, for appellees.

There was no error in requiring appellant to foreclose his mortgage and liens and credit the proceeds as the debt, and then allowing him fifty per cent. on said amount. 59 Ark. 548; 13 Ia. 575; 31 Pac. 755; 32 S. C. 473; 16 Mass. 308; 76 Mo. 200; 1 Sneed, 351; 3 Head, 361.

RIDDICK, J., (after stating the facts.) The question raised by this appeal has already been considered by the court. In the recent case of *Jamison* v. *Adler-Goldman Com. Co.* 59 Ark., 548, we held that the assets of an insolvent decedent's estate are to be apportioned among creditors of the same class in proportion to the amounts severally due them at the time of the apportionment, and that, in ascertaining the amounts due to

secured creditors, any sums realized by them on their securities since obtaining their judgments in the probate court should be deducted. Now, at the time the order of apportionment was made in this case nothing had been paid on the claim of Lofland. The fact that it was secured by a mortgage on real estate was a matter of no moment, so far as the apportionment was concerned; for, as we stated in the Jamison case, "secured and unsecured claims are classed and paid on the same basis." The mortgage given to secure the debt did not constitute a payment, either in whole or part, and, as no part of his judgment is paid, Lofland is entitled to a *pro rata* on the whole amount thereof, in accordance with the order of the probate court.

Whenever the debt is paid in full, the mortgage will of course be discharged, and the property, relieved of the lien, will belong to the estate; but the court cannot, after the apportionment has been ordered, compel the creditor to foreclose his mortgage, and credit the proceeds on his debt, in order to reduce his claim, and lessen the amount of the apportionment due theron. *Jamison* v. *Adler-Goldman Com. Co.* 59 Ark. 548; *Erle* v. *Lane*, 22 Col. 273; *Philadelphia Warehouse Co.* v. *Anniston Pipe Works*, 106 Ala. 357.

Whether this could have been done before the order of apportionment was made is a question we need not consider in this case. For the reasons stated the judgment of the circuit court will be reversed, and the cause dismissed for want of equity.

DUNCAN *v.* SCOTT COUNTY.

Opinion delivered June 16, 1900.

CONTRACT—CONSIDERATION—MUTUALITY.—An agreement between a county judge and a county clerk, entered into before an order calling in county warrants was made, that the clerk would make no charges against the county for the fees allowed by law for his services in connection with such order is without consideration or mutuality, and not binding. (Page 278.)

Appeal from Scott Circuit Court.

STYLES T. ROWE, Judge.

Mechem & Bryant and *Leming & Hon*, for appellants.

There was no contract by appellant to give his fees. Yelv. 11; Ch. Cont. (11 Am. Ed.) 12; 11 Ark. 689; 47 Ark. 519; 64 Ark. 648. There was never a meeting of minds. Cases *supra*. Even if there had been, the county judge, except *as a court, duly sitting*, had no authority to make an agreement of the kind. 38 Ark. 213; 49 Ark. 145; 47 Ark. 234; 9 Ark. 320; 55 Ark. 437. There was no consideration moving to appellant. While his *motive* may have been to save the county expense, that did not constitute a *consideration*. 14 Wall. 570–6. There was no mutuality to the contract. No consideration is valuable upon which no action will lie for enforcement or breach. 64 Ark. 648; 93 Cal. 169; 4 Ark. 251; 1 Ch. Cont. 35, 52, 58, 68; 4 M. & G. 860, 896; 8 Pick. 392; 2 B. & P. 73; Caine's Cas. 104; 1 Met. 278; 1 Vt. 420; 4 Johns. 84; 1 Murph. 181; 2 Term R. 763; 7 Dowl. 781, 786; 2 Lev. 161; 3 Term R. 17, 22, 23; 9 Am.-& Eng. Enc. Law, 914; 72 Ia. 130. Appellant was not estopped. 1 Big. Fraud. (1st Ed.) 438–9; Big. Est. 485, 486; 31 Ark. 701.

H. N. Smith, intervener, pro se.

There was sufficient consideration for the promise and appellant is estopped. 1 Pars. Cont. 444; 27 Ark. 407; 31 Ark. 631; 32 Ark. 468; 37 Ark. 53.

BUNN, C. J. This is a suit by appellant, F. M. Duncan, as county clerk of Scott county, for certain fees alleged to be due him for official services in the matter of calling in the county scrip of said county for examination, cancellation or reissuance, under the statute. The claim was allowed in the county court, and H. N. Smith, a citizen and taxpayer of said county, for himself and all other taxpayers of the county, took an appeal from the allowance and judgment of the county court to the circuit court, where the claim was disallowed, and Duncan appealed to this court in due form.

The defense was that the appellant had agreed with the

county judge, before the order calling in the scrip was made, that he would make no charges for his fees. This agreement was also made by the sheriff, and the saving of these fees to the county seems to have been one of the inducements which led the county judge to call in the scrip. The sheriff made no charges for his services, but the appellant, as clerk, claiming that he had made no definite agreement on the subject, filed his claim in due form, and that was the beginning of this suit.

The circuit court made the following declaration of law on the subject: "The court declares the law to be that F. M. Duncan is estopped from claiming anything for services rendered touching the order for and the reissuing the county scrip of Scott county; that the county judge relied on his promise not to charge anything for his services, and, if he was permitted to charge for such services, it would result in an injury to Scott county, which would not have resulted but for the promise of gratis services on the part of Mr. Duncan. He, with a full knowledge of all the facts touching a matter, cannot mislead another to his injury, and then recover on a claim based on and growing out of his own wrong. The law allows a county judge to make an order calling in county scrip and reissuing the same. Hence it may be well assumed that the legislators, when enacting the law, supposed it would be beneficial. The presumption is, such an order is beneficial to the county. This being true, it enures to the benefit of each citizen alike. Hence it enured to the benefit of F. M. Duncan, as a citizen of Scott county."

While it may be a presumption that the calling in the scrip was a benefit to all the citizens of Scott county, that presumption does not arise from any concession Duncan may have made as to his fees, nor from any bargain the county judge may have made with him in relation thereto, but rather from the fact that the county court, exercising a sound discretion as to whether or not the occasion demanded the calling in of the scrip, made the order for that purpose. Whether or not the question before the county court was such as to call for the saving of the fees of the clerk and sheriff as a proper consideration in the matter, we will not stop here to discuss. All

we wish to say in this connection, and all that is necessary for us to say, is that the alleged agreement was without consideration, and certainly without mutuality. Duncan could not have compelled a specific performance of the agreement on the part of the county judge, had he refused to perform his part of it. If there was any consideration accruing to the appellant, it was an illegal one, and therefore no consideration. Otherwise, it was a mere voluntary agreement on the part of the appellant, having no binding force in law. He was by law entitled to the fees allowed by the county court, and he is estopped by no antecedent agreement to waive them.

The judgment is reversed, and the cause remanded, with directions to be proceeded with not inconsistently herewith.

WOOD and RIDDICK, JJ., did not participate.

HAGERMAN v. MOON.

Opinion delivered June 16, 1900.

1. LIMITATION OF ACTIONS—POSSESSION UNDER DONATION DEED.—Sand. & H. Dig., § 4819, provides that no action for the recovery of lands against any person who may hold such lands under a donation deed shall be maintained "unless it appear that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the lands in question within two years next before the commencement of such suit or action." *Held*, that adverse possession under a donation certificate does not set the statute in motion, and cannot be tacked to subsequent possession under a donation deed to complete the statutory bar. (Page 282.)

2. APPEAL—RECORD—AMENDMENT.—The record of the circuit court is amendable there, and not in the supreme court. (Page 283.)

Appeal from Little River Circuit Court.

WILL P. FEAZEL, Judge.

STATEMENT BY THE COURT.

On the 20th of March, 1896, Frank Hagerman and others brought an action against Mrs. Mattie Moon to recover a cer-

tain tract of land. They stated that they were the owners of the land and entitled to the possession of the same, and the manner in which they acquired title. During the pendency of the action they filed an amendment to their complaint, which is as follows:

"Comes the plaintiffs herein, and, for supplement to their original complaint herein filed, state that the defendant claims title to the lands therein described by virtue of a donation deed to her executed by the commissioner of state lands, on the 13th day of February, 1896; that said donation deed by the state to defendant is based upon a forfeiture of said lands to the state of Arkansas in the year 1884 for the payment of the taxes for the years 1881–2–3; that there were no lawful taxes due on said lands for said years, the same having been previously paid, and the tax collector was not authorized to sell the same; that the levy of taxes made by the county court for each of said years is illegal and void; that no list of the delinquent lands for said years was published as required by law; that no notice of sale of the delinquent lands for said years was given and published by the revenue collector of Little River county, as required by law; that said sale and forfeiture of said land for said years to the state was without power and authority to sell the same, and is therefore a nullity and void, and also the said donation deed to said defendant based thereon, the taxes on said lands having been paid before and prior to said forfeiture."

The defendant did not deny the allegations in the complaint, except by so much of her answer as is as follows:

"But she says the truth is that Jacob T. Moon, the late husband of defendant, on the 13th day of February, 1893, applied for and obtained a donation certificate for said lands aforesaid from the land commissioner of the state of Arkansas, and immediately entered into the peaceable, quiet, uninterrupted, exclusive, and adverse possession of the aforesaid lands, and continued to hold the possession thereof peaceably, quietly, and adversely to all the world to the time of his death, and that since the death of the said Jacob T. Moon, her late husband, she has continued to peaceably, quietly, uninterruptedly,

exclusively, and adversely hold said lands against the claim of plaintiffs and all other persons whatever to the time of the bringing of this suit, and that the defendant and the said Jacob T. Moon, under whom she holds, have continuously, peaceably, uninterruptedly held adverse possession of said lands for more than two years before the bringing of this suit, and she claims the benefit of the statute of limitations of two years, made in case of donation claims in this state.

"For further answer, she says that the plaintiffs, nor those under whom they hold, nor their ancestors, have not been in possession of the aforesaid lands, or any part thereof, within two years before the bringing of plaintiffs' action herein, and that she claims the benefit of the two-years statute of limitation in case of donation deeds from the land commissioner of the state of Arkansas, and says that plaintiffs are barred from bringing or maintaining their aforesaid action.

"Defendant, for further answer, says that she is the owner of the aforesaid lands by virtue of a donation deed executed to her by the commissioner of state lands, dated on the 13th day of February, 1896, under the seal of his office, a copy of which is herewith filed, and made a part hereof."

The following is a copy of the judgment rendered in the case:

"This cause coming on for trial, the parties waived a jury, and by consent the case was submitted to the court as a jury, on the complaint and supplemental complaint, the answer and motion of defendant, and the admission of plaintiffs that the defendant donated the land in controversy, to-wit: The S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 32, township 12 south, range 28, west, and that the said defendant entered into the actual possession of said land under a donation certificate, dated the 13th day of February, 1893, in favor of Jacob T. Moon, deceased, husband of defendant, and thereafter held actual possession of the same from that date until the 13th day of February, 1896, at which time she received a donation deed from the commissioner of state lands, and that she continued to hold possession under said certificate and donation deed till the institution of this suit on the —— day of —— 1896. The

court, upon the pleadings and admissions of the plaintiffs as aforesaid, finds that the defendant has been in the uninterrupted, adverse and actual possession of said land under her certificate and donation deed for more than two years prior to the bringing of this suit, and that plaintiffs were not in actual possession during that time. The court therefore holds that plaintiffs' action for the recovery of said lands is barred by the statute of limitations, and that plaintiffs' action for the recovery of same cannot be maintained. It is therefore considered, ordered and adjudged by the court that the plaintiffs take nothing by their suit, and that the defendant retain possession of the said land, of which she is adjudged to be the owner in fee simple, and that she recover all her cost in this behalf expended, and have execution therefor."

F. H. Taylor and *E. B. Kinsworthy*, for appellants.

It being admitted and confessed that there were no taxes due on the land when forfeited, that all taxes had been paid by appellants before the forfeiture, and that appellee had paid no taxes on the land, no affidavit of the tender of taxes, penalty, costs, etc., as required by Sand. & H. Dig., § 2595, was necessary. 51 Ark. 399. The court erred in holding that appellant was barred. 65 Ark. 305, 308; Sand. & H. Dig., § 4575. Possession should follow title. 60 Ark. 168.

J. C. Head, for appellee.

The cause should have been dismissed for want of affidavit of tender of taxes, etc. Sand. & H. Dig., § 2995; 21 Ark. 319; 41 Ark, 149; 23 Ark. 644; 31 Ark. 314; 64 Ark. 550.

BATTLE, J., (after stating the facts.) The defendant relied upon what is known as the two years' statute of limitations for her defense against this action. The statute, so far as it relates to this case, is as follows: "No action for the recovery of any lands, or for the possession thereof, against any person or persons, their heirs or assigns, * * * who may hold such lands under a donation deed, shall be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the lands in question within

two years next before the commencement of such suit or action." Sand. & H. Digest, § 4819.

This statute does not protect a party holding land under a certificate of donation by the state against actions for possession. Adverse possession for two consecutive years under the certificate is no bar to an action against him, because he is not named in the statute. As such possession does not set the statute in motion, it is obvious that it cannot be of any avail to the owner of the certificate, under the two-years statute, after the deed of donation has been executed to him by the state. That possession only which sets the statute in motion can be tacked to other possession for the purpose of completing the statutory bar to the maintenance of actions for the recovery of land. *McCann* v. *Smith*, 65 Ark. 305; *Gates* v. *Kelsey*, 57 Ark. 523.

This action was not barred. It was commenced within less than two months after the deed of donation was executed.

The defendant says that this action was not submitted upon the amendment of the complaint, but upon the complaint and exhibits and the answer and exhibits. The record, however, shows that the defendant is in error, and that it was submitted upon the amendment; and we are governed by the record. Parties aggrieved by errors in the record of the circuit court, and desiring to have them corrected, should apply to that tribunal for correction, and not to this court. This is not the proper forum in which to institute such proceedings.

The judgment of the circuit court is set aside, and this cause is remanded for a new trial.

BUNN, C. J., and RIDDICK, J., did not sit in this case.

JAMES v. ORRELL.

Opinion delivered June 16, 1900.

BAILMENT—NEGLIGENCE—BURDEN OF PROOF.—In an action against a cotton ginner to recover damages for cotton lost while in his possession, it was error to instruct the jury that, "the loss of the cotton being admitted, the burden is upon the defendant to show that such loss was not caused by the negligence of him or his servants." (Page 287.)

Appeal from Conway Circuit Court.

JEREMIAH G. WALLACE, Judge.

STATEMENT BY THE COURT.

This suit was brought in the Conway circuit court by appellees against appellant for the value of a bale of cotton claimed by them to have been stolen from his gin through his negligence, and for the value of seven other bales claimed to have been burned and destroyed by reason of his negligently permitting his gin to be destroyed by fire. In response to a motion to make the complaint more definite and certain, an amended complaint was filed. In the amended complaint it is charged that in the year 1897 appellee Gray made a crop of cotton on which appellee Orrell had a mortgage for an unpaid supply account; that Gray hauled eight bales of his cotton to James' gin for the purpose of having it ginned; that the cotton was delivered into the gin on the 1st day of November, 1897; that on the 2d day of November James negligently permitted one bale of the cotton to be stolen; that on the 10th day of November the gin house was destroyed by fire, and the other seven bales of cotton thereby burnt up and destroyed; that the gin house and cotton therein was destroyed by reason of the negligence of James in "permitting loose cotton and other combustibles to accumulate on the floors of said gin house, thereby rendering it hazardous and liable to fire to an unusual degree;" and that he "negligently permitted his gin machinery to become out of repair, and negligently permitted the

same to be operated by inexperienced and incompetent operators." And that "he negligently refused to gin said cotton for the plaintiffs, although requested to do so, but kept the same in said ginhouse, and ginned other cotton that had been received after the cotton of plaintiffs had been delivered into said gin, and negligently permitted the same to remain in said ginhouse, and said cotton was destroyed."

The answer admitted everything but the allegations of negligence. It was alleged that only seven bales were delivered to the gin, and that James had a landlord's lien on the cotton that would reduce the amount of the recovery; but, as the amount of the recovery is not in question now, it is not deemed necessary to further refer to any issue but the one of negligence, raising the question of appellees' right to recover any sum whatever. The answer expressly denied the allegation of negligence, and further alleged that defendant was ready and willing to gin the cotton, and began ginning it about a week before the theft of the bale, and that Gray stopped the ginners, and ordered them to hold the cotton in the ginhouse without ginning till further orders from him, and that while so holding the cotton it was lost and destroyed; and that, but for such delay caused by Gray's orders, the cotton would all have been ginned and ready for delivery long before the loss.

The case was tried before a jury. Finding and judgment for plaintiffs for $168.11. The principal issues on the trial, and the only ones here, arise out of the allegations of negligence. The evidence to sustain and disprove the negligence charged in the complaint was conflicting. The plaintiffs and several witnesses testified on behalf of plaintiffs, and their testimony tended to establish the negligence charged in the complaint. The defendant and several witnesses testified on his behalf, and their testimony tended to disprove the negligence charged, the testimony on that point being conflicting.

Appellant on the trial offered to prove the allegation in his answer that at the time of the loss he had for several days been holding the cotton for the accommodation of Gray, and obeying his orders by postponing the ginning; counsel at the time stating to the court that the evidence was not offered to prove

or disprove negligence, but to show the nature of the bailment, etc. The court refused to allow the evidence, and appellant at the time excepted.

The court's charge on points other than the burden of proof were not objected to. On the burden of proof, over appellant's objection, the court instructed the jury as follows: "The loss of the cotton being admitted, the burden is upon the defendant to show that such loss was not caused by the negligence of him or his servants; and, unless you find by a preponderance of the evidence the loss was not caused by such negligence, your verdict will be for the plaintiff,"—and to the giving of which appellant at the time excepted.

Appellant asked the court to give to the jury the following instruction: "Defendant is sued in this case for negligence in permitting certain cotton to be destroyed by fire while in his cotton gin for the purpose of being ginned. He denies negligence, and, unless the evidence by a preponderance has satisfied you that such loss occurred by reason of the negligence of defendant or his servants, he would not be liable therefor." The instruction was refused by the court, and appellant at the time excepted. Appellant also asked the court to instruct the jury that the burden was upon appellees to show the loss by theft was through his or his servants' negligence, and the court refused, and he at the time excepted.

Appellant filed a motion for new trial on the grounds: (1) That the court erred in refusing to allow him to prove that, at the time the cotton was stolen and destroyed, he was withholding the ginning at instance and request of Sam Gray. (2) The court erred in instructing the jury upon the burden of proof. (3) The court erred in refusing to instruct the jury upon the burden of proof upon motion of defendant. The motion for new trial was filed, and overruled, and duly excepted to, and time given to file bill of exceptions, and appeal granted. Bill of exceptions duly signed and filed within the time allowed.

J. F. Sellers, for appellant.

The burden was on the appellees to show, not simply the loss, but that it was occasioned by appellant's negligence. 12

Am. & Eng. Enc. Law, 59; 16 *ib.* 453; Cooley, Torts, 809; 24 S. W. 1053; 12 Lea, 232; 62 N. Y. 448; 12 N. Y. 236; 7 Gray, 92; 61 Fed. 764; 42 S. W. 679; 170 Mass. 166; 49 N. Y. Supp. 949; 99 Mo. 653; 17 Ga. 136; 46 N. Y. Supp. 576; 4 Biss. 137; 21 N. E. 864; 71 Ala. 509; 23 Atl. 367; 76 Pa. St. 62; 15 Atl. 326; Edw. Bail. 399; Hale, Bail. 31; 127 N. Y. 506; 26 S. W. 706; 63 Ark. 709; 56 Am. St. Rep. 684; 49 Cent. L. J. 61; 7 Humph. 133; 31 Ark. 286; 40 Ark. 375; 44 Ark. 208; 52 Ark. 26; 63 Ark. 344.

Chas. C. Reid, for appellees.

The mere fact that the ginning of the cotton was postponed at appellees' request did not change the relation of the parties on the character of the bailment. 54 S. W. 872. Appellees made out a *prima facie* case of negligence, and the burden of rebutting it devolved upon appellant. 2 Thompson, Tr. §§ 1831, 1839; 14 Ill. 279; 74 Ill. 249; 16 Am. & Eng. Enc. Law, 455. The facts and circumstances may be such as to raise a presumption of negligence. 32 Atl. 44; 16 Am. & Eng. Enc. Law, 449; Shearman & Redf. Neg. §§ 59–68; Thompson Neg. 1227, 1235; 26 Ark. 653; 54 Ark. 159.

HUGHES, J., (after stating the facts.) The defendant offered to prove on the trial that the cotton was being withheld by him from being ginned at the instance and request of Gray, one of the appellees, at the time it was stolen, and at the time of the burning of the gin; and this was not allowed by the court, to which he excepted, and made this the first ground of his motion for a new trial. Appellant contends this should have been allowed, because the appellees requested that the ginning should be delayed until they could gather a certain field of cotton, that it might all be ginned at the same time; that, having withheld the ginning thus at the request and for the accommodation of appellees, a less degree of care was required of him to keep the cotton safely. While we would not reverse the case for failure to allow this testimony, we think it should have been allowed, that the jury might be in possession of all the facts that might bear upon the case.

There was prejudicial error in the court's instruction to

the jury as to the burden of proof. It told the jury that, "the loss of the cotton being admitted, the burden is upon the defendant to show that such loss was not caused by the negligence of him or his servants; and, unless you find by a preponderance of the evidence that the loss was not caused by such negligence, your verdict will be for the plaintiff." This is error, for which the judgment must be reversed. Judge Story in his work on Bailments (8th Ed.), § 410, says: 'With certain exceptions, which will thereafter be taken notice of, as to innkeepers and common carriers, it would seem that the burden of the proof of negligence is on the bailor, and proof merely of the loss is not sufficient to put the bailee on his defence. This has been ruled in a case against a depositary for hire, where the goods bailed were stolen by his servant." "Properly understood, it seems to be clear that the burden of proof must always be upon the plaintiff to make out all the facts upon which his case rests; and, as negligence is the foundation of the action between bailor and bailee, that the duty of proving such negligence is on the former, rather than that of disproving it on the latter. That the burden is on the plaintiff in other cases founded on negligence is now quite generally agreed. * * * Negligence is no more to be presumed in such cases than in any other." There is some discrepancy in the cases, but "the best considered modern authorities, in which the question has been most directly discussed and decided, support the views above expressed." *Id.* §§ 410a, 213, 278, 339, 454 and authorities, note 3 and 4.

"All bailees, with or without a special contract, are *prima facie* excused when they show loss or injury by act of God, or of public enemies; and ordinary bailees in a variety of lesser instances, such as fire, loss by mobs or robbery." *Wilson* v. *Southern Pacific R. Co.* 62 Cal. 164, as to loss by fire. 3 Am. & Eng. Enc. Law, pp. 750, 751 and cases.

Negligence is an affirmative fact, to be established by proof. *Rutledge* v. *Ry. Co.* 24 S. W. 1053. The burden of sustaining the affirmative of an issue involved in an action is upon the party alleging the facts constituting the issue. *Heinemann* v. *Heard*, 62 N. Y. 448.

The appellant asked the court to instruct the jury that the burden as to negligence was on the plaintiff, which he refused to do. This was error. For the errors indicated the judgment is reversed, and the cause remanded for a new trial.

BUNN, C. J., and BATTLE, J., not participating.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY *v.* MAGNESS. 68 289 / 190 599

Opinion delivered June 16, 1900.

JUDICIAL NOTICE—LOCATION OF TOWN.—The courts will take judicial notice that a town of several hundred inhabitants on a railroad, having express and post offices, is located in a certain county. (Page 290.)

Appeal from Independence Circuit Court.

RICHARD H. POWELL, Judge.

Dodge & Johnson, for appellant.

The complaint was defective in that it did not show that the injury occurred in the county where the suit was brought. Sand. & H. Dig., § 6352; 38 Ark. 206; 55 Ark. 282. The facts do not justify the verdict. The court erred in its instructions to the jury. The statutory requirement as to lookout extends only to the *track*, and does not embrace the whole right of way. Sand & H. Dig., § 6207; 56 Ark. 599; 48 Ark. 366; 52 Ark. 162; 62 Ark. 182. The instruction as to "reasonable care" in keeping the "lookout" was erroneous. 62 Ark. 237; 62 Ark. 253; 64 Ark. 662; 62 Ark. 170.

Robert Neill, for appellee.

Jurisdiction is presumed in circuit courts after judgment. 18 Wall. 350; 19 Wall. 54; Freeman, Judg. §§ 122, 124, 125; 12 Am. & Eng. Enc. Law, 271–2; 6 Cal. 685; 26 Ark. 52; 31 Ark. 190. Sufficient showing was made of when the injury occurred, to dispense with the allegation. 19 Ind. 395; 47 Ind. 326. Courts take judicial notice of the location of towns, etc. 48 Ind. 119; 28 Ind. 429; 2 Harr. (Del.) 451; 52 Tex.

562; 59 Tex. 500; 38 Ia. 22. The railway company is held to the duty of keeping a lookout for, and using proper diligence to discover, animals *approaching* the track. 64 Ark. 239.

RIDDICK, J. This is an appeal from a judgment against the railway company for damages caused by its train striking two mules belonging to plaintiff. The first contention is that the circuit court had no jurisdiction, for the reason that the complaint does not allege that the injury occurred in the county where the action was brought. But the complaint alleges that the injury occurred on the White River branch of the defendant's road near the town of Newark. The evidence shows that the train at the time of the accident was going from Batesville to Newport, and the accident took place west of Newark, as the train was approaching that place from Batesville, and so close to the town that persons at the station saw the mules at the time they were struck by the train. Now, it is a matter of general information that Newark, a town of several hundred inhabitants, with express and post offices, is located in Independence county, on the line of defendant's road between Batesville and Newport. The courts will take judicial notice of the fact that it is located in Independence county, and that the circuit court of that county has jurisdiction to try an action for damages for injuries occurring there. *Central Railroad & Banking Co.* v. *Gamble*, 77 Ga. 584.

The contention that the court erred in instructing the jury as to the lookout to be kept by employees in charge of a train must be overruled. The engineer, according to his own testimony, saw the mules when they were five hundred yards away from the approaching train. They were at that time within fifty feet of the track, and, having discovered them, the engineer was bound to use ordinary care to avoid injuring them. The question was not whether he kept a proper lookout, but whether he used due care after he discovered the mules near the track. While the instruction as to the duty of the employee to keep a lookout may be abstract, we cannot see that it could in any way prejudice the rights of appellants.

On the facts the case is somewhat doubtful, but our conclusion is that the judgment should be affirmed.

LITTLE ROCK TRACTION & ELECTRIC COMPANY v. DUNLAP.

Opinion delivered June 16, 1900.

NEGLIGENCE—UNGUARDED BRIDGE.—A street-car company built a narrow bridge over a cut in a street for its own convenience, by permission of the city, but according to plans furnished by the city engineer. The city did not require it to place railings along the sides of the bridge. The situation was such that it was impossible to guard the cut unless bridge was railed. Plaintiff's horse, being frightened while on the bridge, fell from an unguarded side and was killed. *Held*, that whether the company was guilty of negligence in leaving the bridge with unguarded sides was a question for the jury. (Page 292.)

Appeal from Pulaski Circuit Court, Second Division.

JOS. W. MARTIN, Judge.

STATEMENT BY THE COURT.

The Little Rock Traction & Electric Company operates a street railway in the city of Little Rock. A line of this railway passes along Eleventh street where that street crosses West Spring street. At that point there is a cut along West Spring street some ten or fifteen feet below the grade of Eleventh street, and the railway is carried on a bridge or trestle above West Spring street. The trestle is planked making a passageway for pedestrians along the center of Eleventh street, but is not used for passage of vehicles. This bridge was constructed by the street-car company for its own convenience, but in accordance with plans furnished by the city engineer. The plaintiff, Geo. W. Dunlap, who lived two or three blocks away from this bridge, was the owner of a horse "blind in one eye and moon-eyed in the other." The horse was not blind, but his vision was so defective that he could not see the ground at his feet, but could see objects some feet away with one eye. The bridge was beyond the stock limits of the city, and on the day of the accident Dunlap turned his horse out to graze. The horse, passing along the street, walked partly across the bridge, became frightened, and then attempted to turn, but in

doing so he fell from the bridge, and was killed. Thereupon Dunlap brought this action against the company to recover damages. On the trial there was a verdict in favor of plaintiff for $25, and judgment accordingly, from which the company appealed.

Rose, Hemingway & Rose, for appellant.

At common law, the owner of cattle or horses could take them on the highway for no other purpose than mere passage. Elliott, Roads & Streets, § 316. In this state the owner of cattle is not liable in trespass when they stray on the highway or another's enclosed land. 48 Ark. 369; 37 Ark. 562. But the landowner is under no obligation to expend money or labor in preparing the land for a convenient or safe enjoyment of it. 47 Ill. 333; 66 Mo. 325; 74 Ill. 435; 6 Pa. St. 472; 46 Ark. 207; 55 Mo. 580; 71 N. Car. 222; 57 Ark. 21. For whatever defect there was in the plans of construction, the city is responsible. 54 Conn. 574; 87 Mo. 673; 4 Oh. St. 95; 98 Fed. 694.

Fulk, Fulk & Fulk, for appellee.

The verdict is supported by evidence, and will not be reversed. 40 Ark. 168; 57 Ark. 577. Appellant was chargeable with knowledge that the bridge was dangerous, and was guilty of negligence. 60 Ark. 545; 46 Ark. 207. Appellee was not negligent. 46 Ark. 207; 57 Ark. 569; Thompson, Neg. 497–8; 46 Ill. 495.

RIDDICK, J., (after stating the facts.) The plaintiff contends that the company was guilty of negligence in failing to put railings along the side of the bridge constructed by it across the cut in the street, and that this negligence occasioned the injury. While the company was not required by any order of the city or its engineer to put railings along the sides of the bridge, still there is nothing in the evidence to show that it was forbidden to do so, and the question presented is whether the jury were justified in finding that the company was guilty of negligence in failing to put up railings.

If one should, with the permission of the city, for his own advantage cut a ditch across a public street, and leave it

unguarded and in a condition liable to injure those passing along the street, he would be guilty of negligence, and liable for injury occasioned thereby. It is also clear that if the city should dig the ditch, and if one should alter or enlarge the ditch so as to make it still more dangerous, he might become liable for injury caused by such change in the character of the opening. 1 Shearman & Redfield on Neg. (5th Ed.) § 359, and cases cited.

The deep cut across the street, into which plaintiff's horse fell from the bridge constructed by defendant, was, if left unguarded, more or less likely to cause injury; and, although the company did not make the ditch, and is not responsible for it, still it was bound to exercise due care not to increase the danger. If the bridge had not been erected, the city could have closed the ends of the street abutting on the cut, so as to prevent persons or animals from falling into it, but after the erection of the bridge the ends of the street could not be entirely closed, as a passage was necessary for the cars of defendant. In other words, the bridge constructed by the company for its own convenience made it impossible to guard the cut, except by flooring the bridge and then placing railings along its sides. The bridge was in a suburb of the city, where the owners of stock were permitted to let them run at large upon the streets. In passing this street, stock would be apt at times to attempt to pass over this narrow bridge, and, if frightened while upon it, were in danger of falling from its unguarded sides into the cut below, as plaintiff's horse fell. This bridge, in effect, extended the sides of the cut from which the animals could fall, and, on account of its narrowness and unguarded sides, was more or less dangerous. Under these circumstances, we think it was a question for the jury to say whether this narrow unguarded bridge connecting the ends of the street severed by the cut did not add to the danger of the cut, and whether the company was not guilty of negligence in leaving it with unguarded sides. Though the case is not free from doubt, we are of the opinion that the questions of negligence and contributory negligence were properly submitted to the jury.

Judgment affirmed.

BINGHAMPTON TRUST COMPANY v. AUTEN.

68 294
68 306

Opinion delivered June 16, 1900.

TRUST COMPANY—POWER TO PURCHASE OR DISCOUNT NOTES is conferred on trust companies by the New York banking law of 1892, art. 4, providing that a trust company shall have authority "to purchase, invest in and sell stocks, bills of exchange, bonds and mortgages and other securities," and to invest moneys received by it in trust "in such real or personal securities as it may deem proper." (Page 296.)

Appeal from Pulaski Circuit Court, Second Division.

JOS. W. MARTIN, Judge.

STATEMENT BY THE COURT.

This is an action at law by the Binghampton Trust Company, a corporation organized under the laws of New York and doing business in that state, against the receiver of the First National Bank of Little Rock, on the following note:

"$5,000. Little Rock, Ark., Aug. 20, 1892.

"On January 15, 1893, after date, we or either of us promise to pay to the order of the First National Bank five thousand dollars for value received, negotiable and payable without defalcation or discount at the First National Bank of Little Rock, Ark., with interest from maturity at the rate of 10 per cent. per annum until paid. [Signed] McCarthy-Joyce Co., by Geo. Mandlebaum, Sec. and Treas." Indorsed: "James Joyce. Geo. Mandelbaum. First National Bank, Little Rock, Ark."

The trust company received this note during August, 1892, in a letter from H. G. Allis, president of the bank, in which he stated: "We offer this as rediscounted by the bank, and the bank, of course, will pay at maturity, regardless of whether the parties desire renewals or not. If you can use paper, kindly remit proceeds to First National Bank, New York, for our credit, and advise us. H. G. Allis, President." The note was purchased or discounted by the trust company, and a dis-

count of seven per cent. per annum deducted from the face of the note, and the balance remitted to the First National Bank of New York, to be placed to the credit of the First National Bank of Little Rock. The complaint alleged that the makers and other indorsers were insolvent, and that payment could not be enforced against them.

The defense set up by the receiver was that, by the laws of New York, the trust company was forbidden to discount notes, and that the note sued on was discounted by the trust company in violation of the law, and was therefore void. On a trial before the circuit court this defense was sustained, and judgment rendered in favor of the defendant. Plaintiff appealed.

Blackwood & Williams, for appellant.

Under the laws of New York, as introduced in evidence, appellant was not prohibited from discounting notes. Under art. 4, c. 689, of the Laws of New York for 1892, appellant is a "banking corporation;" and under par. 4, § 21, c. 546, Laws (N. Y.) of 1887, it had power to make the transaction in question. The power given therein to *invest in* or *purchase* notes or to *loan money on personal securities*, includes power to "*discount*" or *purchase notes at a discount*. 10 Oh. St. 372; 82 N. Y. 291; 18 Barb. 456; 74 N. Y. 329; 82 N. Y. 291; 38 Mich. 430; 19 N. Y. 369; 38 Mich. 430; 14 Ala. 677; 8 Wheat. 338, 350; 13 Ala. 583; 37 Ind. 127; 92 Pa. St. 226; 23 N. Y. 244; And. Law Dict., "*Invest;*" Rap. & Law. Dict.; 79 Fed. 296. Defendant cannot plead that the act was *ultra vires*. That plea could be made by the sovereign only. 98 U. S. 627, 628, 629; Sedg. Stat. Const. 73; 47 Ark. 280–284.

Hill & Auten, for appellees.

For the laws of New York, introduced into evidence, see: Laws 1887, c. 546, p. 705, §§ 11, 20, 21, 27; see also 4 Rev. St. 1899, p. 2512; 2 *id.* p. 1578, § 296; Laws 1887. c. 546, p. 705, § 301; 2 Rev. St., c. 11, § 297; *id.* p. 1522, § 29; 3 *id.* p. 1723, § 4; Laws 1892, vol. 2, p. 1888, § 87. This is the law, as put in proof in the lower court, and it is all that can be noticed on appeal. 20 Ark. 136. Under the above

cited laws, the appellant had no authority to make the transaction in issue. 19 Johns. 1; 15 *id.* 358; S. C. 8 Am. Dec. 243; 2 Cow. 678; 7 N. Y. 364; *id.* 328; 8 Cow. 20; 21 N. Y. 490.

Blackwood & Williams, for appellant, in reply.

That the trust company had power to "discount" notes, see 52 N. Y. Supp. 941. It is not the policy of the legislature and courts of New York to restrain trust companies from discounting notes. 79 N. Y. 448; 139 N. Y. 185, 189. The cases in 77 N. Y. 64 and 79 N. Y. 437 are not opposed to appellant's position.

RIDDICK, J., (after stating the facts.) The question in this case is controlled by the laws of the state of New York. The plaintiff is a New York corporation, and the purchase or discount of the note sued on took place in that state, and the question presented is whether the transaction by which the trust company obtained possession of the note, and under which it claims the ownership thereof and the right to recover therefor, was lawful under the statutes of that state. We naturally feel some hesitation in interpreting the statutes of a distant state with the purpose and history of whose laws we are not very familiar; and this feeling is increased when, as in this case, only detached portions and sections of different statutes have been introduced in evidence for consideration by the court.

Among the laws of New York introduced in evidence is article four of the "banking law" (Laws of N. Y., 1892, c. 689), which article seems to be a general law covering the subject of trust companies in that state. It does not expressly state that it applies to all trust companies previously organized, but from the general scope of this law we think that it was intended to define the powers and duties of trust companies in that state generally, and is not confined to those only which were organized after the passage of the statute. This, as before stated, does not very clearly appear from article four itself, but we must remember that this article is only one chapter in a general statute known as the "Banking Law." If the whole of this banking law was before

us, it is probable that its scope and extent would more fully appear. In fact, the supreme court of New York, in a recent case in which this same trust company was a party, held that this act of 1892 applied to such company, though it was organized under the statute of 1887. *Binghampton Trust Co.* v. *Clark*, 52 N. Y. Sup. 941. This law was passed in the spring of 1892, and was in force at the time the trust company purchased or discounted the note in controversy, and we think it defines the powers that the company had in matters of that kind. Under this law it had authority to receive deposits and "to loan money on real or personal securities," to "purchase, invest in and sell stocks, bills of exchange, bonds and mortgages and other securities." And, again, the statute authorizes it to invest the moneys received by it in trust "in the stocks or bonds of any state of the United States, or in such real or personal securities as it may deem proper." We are of the opinion that these provisions of the statute gave it the power to discount or purchase the note sued on. The note was a personal security, and under the statute the company had power to purchase, invest in, or loan money on such securities. It seems to us that this would include the transaction by which the trust company became the owner of this note, whether that be called a purchase or a discount of the note. In either event it amounted to nothing more than an investment of money in a personal security, which the company was expressly authorized to do. We think that the company had substantially the same power under the law of 1887, for the terms of that law are very much the same as those of the act of 1892 above quoted; but we need not refer to that law, for it was superseded by the statute of 1892.

Counsel for appellee has called our attention to certain restrictive statutes of New York which forbid corporations not formed under, or subject to, the banking laws, and corporations not authorized by law, from "receiving deposits, making discounts, or issuing notes or evidences of debt to be loaned or put into circulation as money." Now, we think it is very clear that all of these restrictions do not apply to trust companies. For instance, there is in this law, as just stated, a restriction which forbids certain corporations from receiving

deposits; but this does not apply to trust companies, for they are expressly authorized to receive deposits, and one of the objects of the statute which permits their formation is to furnish a safe place of deposit for trust funds.

We are also of the opinion that these restrictive laws, so far as they forbid certain corporations from discounting notes, do not apply to trust companies, for the powers expressly granted to these companies to purchase, invest in, and loan money on personal securities include, as we think, the power to discount and purchase notes; and to hold that a trust company could not discount—in other words, purchase at a discount—a note owned by the bank would be to hold that the legislature forbade in one section what it had expressly authorized in another section of the same law.

The cases of *N. Y. Trust Co.* v. *Helmer*, 77 N. Y. 64, and *Pratt* v. *Short*, 79 N. Y. 437, cited by counsel for the bank, have no reference to trust companies organized or governed by statutes like those of 1887 and 1892, and we think those cases should not control our judgment here. On the other hand, the case of *Binghampton Trust Co.* v. *Clark*, 52 N. Y. Sup. 941, a case in which this same company was a party, seems to us to be a decision which fully supports our conclusion that the trust company had authority to purchase or discount notes. As this is a case recently decided, it is propable that the learned circuit judge did not have the benefit of it in his consideration of the case.

While, as before stated, we do not feel altogether sure about the law of New York, we nevertheless entertain no doubt as to what is right and just in this case. The bank disposed of the note to the trust company, secured by the bank's indorsement, and under a promise from its president that the bank would "pay at maturity, regardless of whether the parties desired renewals or not"; and the bank should have kept its promise. As the bank failed to perform any portion of its contract, we think that the trust company is entitled to the judgment asked. The judgment of the circuit court will be reversed, and judgment entered here for amount of the note and interest.

BATTLE, J., not participating.

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BINGHAMPTON TRUST COMPANY *v.* AUTEN.

Opinion delivered June 16, 1900.

1. DECEIT—RESCISSION.—Where a trust company was induced to buy worthless notes by fraudulent representations of the seller as to the maker's solvency, it may sue for damages occasioned by the deceit without offering to return the notes. (Page 304.)

2. PRINCIPAL AND AGENT—LIABILITY OF BANK FOR PRESIDENT'S FRAUD.—Where the president of a bank committed a fraud in the course of his employment, the bank will be liable therefor, though the directors of the bank did not know of nor authorize the fraud. (Page 305.)

3. USURY—CORPORATIONS.—There can be no usury in a contract between corporations entered into with reference to the laws either of New York or of Arkansas, where corporations are forbidden by the laws of the former state to interpose the defense of usury, and by the laws of the latter state the interest charged was not excessive. (Page 306.)

Appeal from Pulaski Circuit Court, Second Division.

JOS. W. MARTIN, Judge.

STATEMENT BY THE COURT.

The McCarthy-Joyce Company, an Arkansas corporation, was on 7th of December, 1892, indebted to the First National Bank of Little Rock in the sum of thirty thousand dollars; its account with the bank being overdrawn to that amount. For the purpose of raising money to pay off a portion of this debt, the company on that day executed to James Joyce two notes for five thousand dollars each, one due in four and the other in five months. We copy one of them: "Little Rock, Ark., December 7, 1892. $5,000. Four months after date we or either of us promise to pay to the order of James Joyce $5,000, for value received, negotiable and payable without defalcation or discount at the First National Bank of Little Rock, Ark., with interest from maturity at the rate of 10 per cent. per annum until paid. McCarthy-Joyce Company, Geo. Mandlebaum, Secretary and Treasurer."

The notes were indorsed by James Joyce, the payee, in

blank, and were delivered by the company to H. G. Allis, president of the bank, to be negotiated by him, the proceeds thereof to be applied on the debt of the company to the bank. Allis indorsed the notes, and then transmitted them to the Binghampton Trust Company, of Binghampton, N. Y., in the following letter:

"Capital and surplus, $600,000. H. G. Allis, President. W. C. Denny, Cashier. First National Bank of Little Rock, Ark. December 10, 1892. Binghampton Trust Company: Gentlemen—I enclose you two notes of the McCarthy-Joyce Company, one at four months, the other at five months, from the 7th inst., for $5,000 each. This company now has on hand 1,500 bales of cotton, worth in the neighborhood of $70,000. It is probable they will have to hold this cotton for sixty or ninety days. I indorse the paper myself, in order that it may be subjected to any collateral of mine in your hands. The paper is absolutely good, as we hold insurance and warehouse receipts on all this cotton. If you can handle it, kindly remit the amount of the notes to the United States National Bank of New York for our credit, and advise me proceeds by wire; otherwise, return. Yours very truly,

"H. G. ALLIS, President."

The statements in the letter were false. The McCarthy-Joyce Company was insolvent. It did not have on hand the cotton mentioned, nor did Allis or the bank have warehouse receipts for the cotton. The trust company, being misled by these false statements, accepted the note, and remitted in payment for the same $9,710 to the United States Bank of New York, which was placed to the credit of the First National Bank, and by that bank credited on the account of the McCarthy-Joyce Company. One of the notes was taken by the trust company for itself, and the other for the Deposit Bank of New York.

The trust company afterwards brought this action against the First National Bank to recover damages for deceit on account of the false statements of its president, Allis. The circuit court found in favor of the defendant, and the trust company appealed.

Blackwood & Williams, for appellant.

The Little Rock bank was bound by the representations of Allis, its president. 4 Thomp. Corp. § 4627; 1 Morawetz, Corp. § 538; 137 U. S. 107; 39 Me. 317; 72 Me. 170; 7 Metc. 274; 104 U. S. 194; 110 U. S. 7; 62 Ark. 19, 20; 44 Hun, 136; 5 N. Y. 291, 293; 106 N. Y. 195, S. C. 12 N. E. 433; 6 Am. & Eng. Corp. Cas. 245, S. C. 46 N. J. Law, 237; 61 N. W. 904; 25 Am. St. Rep. 134, S. C. 86 Mich. 134; 4 Bosw. 630; 1 Head, 164; 54 Pa. St. 380; 71 N. W. 652; 17 S. W. 644, 646, S. C. 107 Mo. 133; 34 N. E. 201, S. C. 138 N. Y. 480; 87 N. Y. 628; 45 Fed. 671; 16 W. Va. 555; 30 Vt. 170; 76 Fed. 339; 26 Am. St. Rep. 352. S. C. 104 Mo. 531; 10 Wall. 604, 645; 1 Salk. 289; 5 Pet. 566; 1 Dan. Neg. Inst. 389; 4 Th. Corp. §§ 4930–4933; 62 Ark. 40; 1 Am. & Eng. Corp. Cas. 235; 83 Fed. 556; 58 N. W. 943. The presumption is in favor of the authority of the president to make the contract. 73 Fed. 50; 12 Wheat. 70; 8 *id.* 356–7; 101 U. S. 181–3; 104 U. S. 192–5; 61 Fed. 804; 116 N. Y. 193; 143 N. Y. 430, 436; 37 S. W. 339; 34 Pa. St. 148; 4 Thompson, Corp. §§ 4789, 4781, 4815, 4741; Morawetz, Corp. §§ 336, 538, 593. An action for deceit will lie for fraudulent misrepresentations of the credit of a third person. 3 Term R. 51; 6 Johns. 181. Corporations are liable therefor to the same extent as are persons. 64 Ark. 613; 34 N. Y. 30; 42 Ark. 542. Corporations are liable in actions for deceit, where that deceit was committed by its agent in the performance of acts within the scope of his employment and for their benefit. 4 Am. & Eng. Enc. Law, 255; 5 H. L. C. 72; 106 Pa. St. 125; 77 N. C. 233; 37 N. J. Eq. 175; Benj. Sales, § 466; L. R. 8 Q. B. 244. 54 Ga. 635; 40 N. Y. 454; 2 Beach, Priv. Corp. § 448; 80 N. Y. 167; 2 Exch. 259; L. R. 5 P. C. 394; 10 Ch. D. 514; 5 App. Cas. 317, 326; Poll. Torts, *82; 3 App. Cas. 106. The bank, by receiving the benefits of Allis' deceit, estopped itself to allege his want of authority. 2 Hill. Torts, 434; 4 Inst. 317; 9 Johns. 118; 14 Johns. 247; 8 Barb. 357; Ames, Corp. 311; 83 Fed. 565; 1 Laws, Rights, Remedies & Pr. §§ 29, 1041; Evans, Ag. 49; 30 N. Y 211; 51 Md. 290; 43 Conn. 434; 79 Fed. 296; 64 *ib.* 985; 1 Pars. Cont. 47n.; 2 Am.

Dec. 285; Story, Ag. §§ 455, 242, 244; Year Book, 7 Henry 4, p. 35; 1 Am. & Eng. Enc. Law, 437; 7 N. E. 85; Mech. Ag. § 113; Cooley, Torts, § 146; 4 Am. & Eng. Enc. Law, 252; 64 Ark. 208. Allis' knowledge of the deceit was the knowledge of the bank. Mech. Ag. § 72; 11 Wall. 356; 38 Vt. 402; 33 Vt. 252; 52 Mo. 181; 70 Mo. 290; 13 N. H. 145; 40 N. H. 375; 58 Vt. 113; 29 Minn. 322; 14 R. I. 293; 68 N. Y. 434; 10 N. Y. 178; 66 Ill. 438; 29 Ind. 553; 27 Ala. 336: 32 Ill. 517; 10 Rich. (S. C.) 293; 9 Heisk. 479; 72 Me. 226; 7 Biss. 260; 17 C. B. (N. S.) 466; 6 Ch. App. 678; 12 Cal. 377; 31 Cal. 160; 34 Ga. 304; 33 Ind. 147; 14 La. Ann. 711; 4 Humph. 396; 39 Mich. 362; 43 Vt. 403; 56 *id.* 77; 113 Mass. 391; 53 Wis. 361; 36 Minn. 112; 35 Barb. 330; 2 Hill, 451; 4 Pa. 127; 29 N. Y. Supp. 77; 82 Fed. 277. Estoppel applies as well to corporations as to individuals. 10 Wall. 604; 73 Fed. 951; 56 Fed. 967; 147 Mass. 268, S. C. 17 N. E. 496; 4 Thompson, Corp. § 4608, 5210, 5224; 50 N. H. 571; 57 Fed. 821; 38 Ark. 71; 9 Heisk. 437. There was no usury in the contract as to interest. An accidental overcharge does not constitute usury. 62 Ark. 380; 25 Ark. 260. Where an instrument is susceptible of two constructions, the one rendering it lawful and the other unlawful, the former construction should be adopted. 13 Ark. 363; 54 *ib.* 471; 46 *ib.* 129; 35 Ark. 55. The transaction was not a loan, but a sale of the notes for a discount, and hence not usurious. 1 Cranch, C. C. 556; 1 Barb. 462; 1 Bouv. Dict. "*Discount*;" 79 Fed. 296, 299. The burden was on appellee to show usury, and he has failed, since he has shown no corrupt agreement and no illegal charges. 59 Ark. 368; 25 *ib.* 191; 47 N. J. Eq. 8; 103 Ill. 362; 8 Atl. 555; 85 Ala. 394. The presumption is against usury, and it must be clearly proved. 81 N. Y. 363; 8 *ib.* 276; 40 *ib.* 248; 96 *ib.* 100; 25 N. J. Eq. 422; 47 N. J. Eq. 8. The laws of Arkansas govern as to usury. The contract was not usurious thereunder. 33 Ark. 648; 39 Am. Dec. 205; 55 *ib.* 387; 94 *ib.* 546; 31 *ib.* 264; 27 Am. & Eng. Enc. Law, 972. Allis' proposition was, presumably, that the notes be discounted at a legal rate, and the appellant had no power to bind him by an acceptance on

any other terms. 23 N. J. Eq. 512; 103 Mass. 356; 2 Sandf. 133; 14 Pet. 77; 103 U. S. 155; 4 Wheat. 225; 1 Pars. Cont. *477, *478; Poll. Cont. (4th Ed.) *2; Bish. Cont. § 313; 4 Minor's Inst. (2d Ed.) 17; 132 Mass. 129; 25 Ark. 545; 101 N. Y. 45; 94 U. S. 47; 34 N. H. 303; 35 Me. 388; 26 Ark. 382; 41 Wis. 504; 34 N. H. 304; Benj. Sales (4th Ed.) § 87. The proposition must be clear and definite, or its acceptance will not close a contract. 1 M. & S. 290; 2 B. & Ad. 232, S. C. 22 Eng. C. Law, 63; L. R. 20 Eq. 492, S. C. 44 L. J. Ch. 492; 59 Wis. 316; 8 Allen, 566; 4 Whart. 369; 142 Mass. 442. The law of the place where an offer is accepted by mail or telegram governs the contract. 4 Cliff. 598, S. C. 21 Fed. Cas. (No. 12, 715); 4 Ga. 1; 40 N. J. Law, 476; 15 R. I. 380, S. C. 2 Am. St. Rep, 902; 20 Q. B. Div. 640; 1 C. P. Div. 87; 2 Kent's Comm. 477; 6 Wend. 103; 32 Md. 196; 48 N. H. 14; 47 Ark. 525; 1 B. & Ald. 681; 1 H.L. Cas. 381; 23 Wall. 85; 61 Ark. 1; 60 Fed. 693. *Lex loci contractus* governs as to validity and interpretation of contract. 7 Ark. 231; 20 *ib.* 356; 25 *ib.* 261; 40 *ib.* 423.

Hill & Auten, for appellee.

Allis did not represent the bank, so as to bind it. Nor was there ever any ratification of his acts. Mechem, Ag. §§ 129, 132. Appellants should have tendered back the notes. 17 N. H. 573; 43 Am. Dec. 614; 4 Mass. 502, S. C. 3 Am. Dec. 230; 105 Mass. 558; 15 Mass. 319; 98 Mass. 205; 104 Mass. 494; 8 Am. Dec. 104–5; 1 Den. 69. The bank is not estopped to dispute Allis' authority. 10 Wall. 604; 73 Fed. 951; 56 Fed. 967; 75 Fed. 769. The transaction was usurious. For New York statutes put in evidence on the question of usury, see Tit. 3, Rev. St. (N. Y.) §§ 1, 2 and 5. That the contract was usurious, see 41 Ark. 331; 7 Cow. 678; 4 Scam. 29; 1 Porter, 96. Payment and receipt of excessive interest is *prima facie* evidence of usury. 10 Johns. 140; 2 Cow. 712; 8 Cow. 398; 3 Cow. 284.

Blackwood & Williams, for appellants, in reply.

Whether considered as an Arkansas or a New York contract, the transaction was not usurious. The law of New

York forbidding corporations to plead usury applies to a foreign corporation maker of a usurious note, *executed and payable in New York*, and sued on in another state. 51 N. J. L. 186; 12 Wall. 226; 25 Gratt. 1. The transaction was a *purchase* of the paper. 2 Pars. Cont. *421, *424; 1 J. J. Marsh. 497; Clarke, Cont. 309; Dan. Neg. Int. § 768; 8 Wheat. 338; 8 Pa. 548; 7 Wend. 569; 7 Pet. 107; 8 Cow. 685; 65 N. Y. 522; Hill & Den. 252; 91 N. Y. 327; 29 Hun, 129; 130 N. Y. 6; 72 Hun, 373; 90 N. Y. 303; 2 Conn. 175; 15 Me. 163; 16 Me. 456; 9 Barb. 647; 14 Ill. App. 566; 7 Pet. *424; 8 Cow. 685, 689; 19 Wis. (N. Y.) 433; 10 N. Y. 200; 9 Barb. 647; 79 Fed. 298; 35 Pa. St. 230; 15 Leg. Int. 132. Also compare: 82 N. Y. 302; Boone, Bnkg. § 28; 18 Barb. 456; 26 Oh. St. 141; 20 Kas. 440; 74 N. Y. 329; 14 Ill. App. 556; 68 N. Y. 396.

Hill & Auten, for appellee, in reply:

That the bank can plead usury, notwithstanding the statute of New York, see 1 Otto, 29 (91 U. S.); S. C. Bk. 23 L. C. P. Ed. p. 196.

RIDDICK, J., (after stating the facts.) This is an action by the Binghampton Trust Company against the First National Bank of Little Rock to recover damages for deceit.

The company does not ask for a rescission of its contract with the president of the bank by which it became the owner of the note of McCarthy-Joyce Company. It asks for damages for deceit and fraud practiced upon it by which it was induced to pay out a large sum of money for the worthless note of an insolvent company. A party who is induced to purchase property by deceit and fraud has an election of remedies. He may rescind the contract, and to do this he must return or offer to return what he has received under it. On the other hand, he may affirm the contract, and sue for damages occasioned by the deceit and fraud, and in that event he is not required to return or offer to return what he has received under the contract. These rules are well settled, and the contention of the bank that plaintiff should have returned or offered to return the notes must be overruled. *Goodwin* v. *Robinson*, 30 Ark. 535; *Mat-*

lock v. *Reppy*, 47 Ark. 148; 14 Am. & Eng. Enc. Law (2d Ed.) 168, and cases cited.

The next contention is that Allis was not acting for the bank, but for the McCarthy-Joyce Company, and that he had no authority to bind the bank by his false representation. Allis was president of the bank to which the McCarthy-Joyce Company was indebted in a large amount. This company was financially embarrassed, and in fact insolvent. As president of the bank, Allis was endeavoring to collect this debt. For this purpose these notes were executed and delivered to him, and for this purpose he negotiated them to the trust company. His letter to the trust company by which he effected the sale of the notes is written on paper upon which is the bank's letter head. He assumes in the letter to be acting for the bank, and directs the company to remit the proceeds to "our credit" (meaning the bank), and signs the letter, "H. G. Allis, President." As president of the bank, it was his duty to endeavor to collect the debt which McCarthy-Joyce Company owed it. While he may have been trying to befriend the McCarthy-Joyce Company as well as to protect the bank, the evidence leaves no doubt in our minds that in this matter he was acting for the bank, and endeavoring to protect its interests. It is a matter of no moment that the directors of the bank did not know or authorize the false representations of Allis. We must, to quote the language of Mr. Benjamin, "distinguish between authority to commit a fraudulent act and authority to transact the business in the course of which the fraudulent act was committed." The bank, of course, did not authorize Allis to commit a fraud, "but it entrusted him with the conduct of this class of business, and he conducted it unfairly, and committed the fraud in the course of his employment." Benjamin, Q. C., in *Mackay* v. *Commercial Bank*, Law Rep. 5 P. C. 402. If a conductor having charge of a railway train in the course of his business commits an assault upon a passenger, the company may be liable for the damages, though it neither authorized or desired its agent to commit such an assault; for the principal is liable for the wrong of the agent committed in the course of his duties as agent. On the

same principle, a bank is liable for the fraud of its agent committed in the course of the bank's business. This rule is often applied, and hardly needs citation of cases to support it. In this case, as before stated, the fraud was committed by Allis as a means of collecting a debt due the bank from another party. It was done in the interest of the bank, and the bank received the money obtained by his fraud. Under these circumstances, the bank cannot at the same time retain the benefit and avoid the liability. That the bank is liable for the damages occasioned by this fraud of its agent, at least to the extent of the benefit received by it from the fraud, follows from settled rules of law, as well as from the plainest principles of justice. *Mackay* v. *Commercial Bank*, Law Rep. 5 P. C. 394; *Barwick* v. *English Joint Stock Bank*, Law Rep. 2 Exch. 259; *Swire* v. *Francis*, Law Rep. 3 App. Cases, 106; *Fishkill Savings Inst.* v. *National Bank*, 80 N. Y. 162. The question of the authority of the company to discount notes is also involved in this case, but we have already determined that the bank had such authority, in another case between the same parties, and refer to our opinion in that case for our reasons for this conclusion. *Binghampton Trust Co.* v. *Auten*, *ante*, p. 294.

The only remaining question arises on the contention by the bank that the discount of the notes by the trust company at the rate of seven per cent. per annum was, under the laws of New York, illegal and usurious. Now, conceding that this was a loan, and not a mere purchase of the note, the trust company could, under the New York statute of 1892, charge six per cent. interest and reasonable collection charges. In the absence of any proof as to what the collection charges were, we are not sure that we could hold the seven per cent. to be usurious under New York law, and it certainly would not be under the law of this state. But we need not discuss that question further; for, in order to show usury in this transaction, the defendant corporation relies upon a law of New York, but under another statute of that state a corporation cannot interpose the defense of usury. The statute, as construed by the courts of that state, operates to make lawful the contract of a corporation for the loan of money to itself which would

otherwise be usurious and void. *Rosa* v. *Butterfield*, 33 N. Y. 665; *Lane* v. *Watson*, 51 N. J. L. 188; *Junction Railroad Co.* v *Bank of Ashland*, 12 Wall. (U. S.) 226. This statute applies to all corporations borrowing money in New York, and we know of no reason why it should not apply to a national bank. If there is any class of corporations which should not be permitted to plead usury, certainly banks should not be allowed to do so. All parties to this contract were corporations, and the contract was valid under the law of New York; and, if valid in the state where made, it is valid everywhere. If it was an Arkansas contract, it was valid, because it is not unlawful to charge seven per cent. in this state. So there is no usury, whether it is a New York or an Arkansas contract.

The note which the trust company was led to purchase through the fraud of the bank's president was shown to be worthless, and we think the trust company has made out a clear case to recover damages to the amount it paid to the bank on the note purchased. The judgment of the circuit court will be reversed, and a judgment entered here for that amount in favor of the trust company, with interest from date of payment.

BATTLE, J., did not participate.

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ANDERSON-TULLY COMPANY *v.* ROZELLE.

Opinion delivered June 23, 1900.

SALE—DELIVERY.—Where a bill of sale of a large quantity of lumber lying in the vendor's yard was executed, and the lumber delivered and accepted, the title passed, though it was agreed that the vendor should subsequently load the lumber on barges in the river at his own expense, and in the meantime protect and take care of the lumber in his yard, and though it was agreed that if the lumber contained more than the estimated number of feet the vendee should pay for the excess at the agreed price. (Page 310.)

Appeal from Mississippi Circuit Court.

FELIX G. TAYLOR, Judge.

S. S. Semmes and *Rose, Hemingway & Rose*, for appellants.

The levy on "all the lumber belonging to said E. D. Matthews" was void for uncertainty, and a sale under it would convey no title. Sand. & H. Dig., §§ 335, 336; 14 Ark. 41; 4 Ark. 198; 7 Ark. 415; 28 S. E. 219; 2 Caines, 61. As the plaintiff acquired no lien by the levy, he had no right to contest the claim of the interpleader. 19 Cal. 41; 43 Cal. 206. The interpleader could not have moved to quash the return on the attachment. Only the defendant could have done that. 23 S. W. 450; 47 Ark. 31; *id.* 19. But the intervener may always show that there is no lien. 53 Ark. 140; 57 *id.* 540. The intervention in this case is a separate suit (33 Ark. 613); and appellee should have filed an answer. 58 Ark. 446; 65 Ark. 469. Appellee could not defend against the intervention unless he had some kind of claim against the property. Drake, Attach. § 459; 74 Ala. 328. The court below had no jurisdiction to render the judgment appealed from because of defective service of the attachment. 17 Ark. 149; *id.* 482; 139 U. S. 216; 1 Rose's Notes, U. S. Rep. 213; 33 Ark. 31. The evidence does not support the verdict. The sale was complete, and the title in appellant. 19 Ark, 567; 23 Ark. 245; 39 Ark. 575; 37 Ark. 490; 7 Ark. 269; 60 Ark. 612; 31 Ark. 163; 14 Ark. 345; 31 Ark. 163; 35 Ark. 197; *id.* 304; 54 Ark. 305; 62 Ark. 592.

W. J. Driver, for appellee.

The evidence supports the verdict. The assignments in the motion for new trial are too general. 44 Ark. 213. The question of the validity of the levy was not raised below, and is not before the court. 2 Ark. 415. The levy was sufficient. Sand. & H. Dig., § 346. The interpleader can not contest the rights of the parties, or question the proceedings between them. 47 Ark. 31. The bill of sale was in reality but a mortgage. 13 Ark. 112; 31 Ark. 62; 2 Sumn. 486.

BATTLE, J. On the 11th day of July, 1898, L. D. Rozelle commenced (not filed) an action against E. D. Matthews in the Mississippi circuit court on an account for $495.70. On the same day he sued out an order of attachment, which was

served on the 12th day of July, 1898, by attaching certain lumber as the property of Matthews. On the 7th of December following, Anderson-Tully Company filed a complaint in the action instituted by Rozelle, claiming the lumber attached. A jury was impaneled to inquire into the facts. In the trial which followed, the following facts, substantially, were shown by the undisputed evidence: On the 24th of November, 1897, Anderson-Tully Company contracted with Matthews for one million feet of cottonwood lumber, and agreed to pay for the same at the rate of eight dollars a thousand feet. The company agreed to send an inspector to the mill of Matthews to make an estimate of the lumber sawed, as often as once in every thirty days, and agreed to advance to Matthews five dollars for every thousand feet of the lumber contained in the estimate, and to pay the remainder of the price when the lumber was delivered by Matthews on barges at Luxora, Arkansas. About the first day of July, 1898, the company sent its inspector to Luxora to receive lumber from Matthews. 220,000 feet of lumber were found loaded on a barge, and were received. The company then made a statement of Matthews' account with it, and found, after crediting him for the lumber delivered, he was still indebted to it in the sum of $1,995 for advances upon their contract. There was then in the mill yard of Matthews one hundred and fifteen piles of lumber, estimated to contain 373,625 feet. To collect the amount due it, the company caused Matthews to execute to it a bill of sale for the 115 piles of lumber, and to deliver the possession of the same to it in the yard where it was placed. The lumber was delivered to and received by the company as its own property, and the purchase money was paid, except sixty-five dollars, which was garnished in the hands of the company. This was done on the 5th of July, 1898. Matthews agreed to load the lumber on barges in the Mississippi river, convenient to his mill, at his own expense, and, in the meantime and until this was done, to protect and take care of the same. When the lumber was loaded, it was agreed that, if it contained more feet than was estimated, the company would pay for the excess at the price agreed upon. The reason given for the last transaction was

the protection of the company, but there was no agreement that the lumber should, upon any condition, ever become the property of Matthews.

Upon this evidence, the jury returned a verdict in favor of the plaintiff, Rozelle. The company filed a motion for a new trial, which the court denied, and the company appealed.

According to the evidence, the lumber in controversy was the property of the company. All that was to be done to complete the sale according to the agreement of the parties was performed. The lumber was delivered. The fact that Matthews was to haul it to the barge did not affect the transfer of title. That was no condition upon the performance of which the sale was to become complete. *Lynch* v. *Daggett*, 62 Ark. 592.

The judgment of the circuit court is reversed, and the cause is remanded, with direction to the court to enter a judgment in favor of the company for the lumber.

BRUCE v. STATE.

Opinion delivered June 23, 1900.

HOMICIDE — SELF-DEFENSE — INSTRUCTIONS.— Defendant killed a United States deputy marshal, who was attempting to arrest him for illicit distilling. The state's evidence tended to prove that the deputy had approached within twenty-five steps of defendant, and, presenting his gun, commanded defendant to surrender, and that the latter immediately fired and killed the deputy. Defendant's evidence tended to prove that deceased and those with him approached defendant in a fast run and commenced firing their guns before he had made any resistance, and that defendant did not know that deceased was an officer when he fired. The court, at defendant's instance, instructed the jury that if Bruce had no notice of the fact, or reasonable grounds to know, that deceased was an officer, and the killing was apparently necessary to save his own life, or prevent his receiving great bodily injury, the killing of deceased was homicide in self-defense. *Held*, that it was not prejudicial error to refuse a further instruction to the effect that if the killing appeared to defendant to be necessary, he was justified in taking the life of deceased to protect his own. (Page 313.)

Appeal from Pope Circuit Court.

WM. L. MOOSE, Judge.

G. W. Bruce, for appellant.

The attempted arrest was not made in the manner required by law. Sand. & H. Dig., §§ 1971–3; 49 Ark. 449. The court erred in giving the ninth, thirteenth and fourteenth instructions asked by the state. Sand. & H. Dig., §§ 1971–2. The court erred in its refusal of instructions asked by appellant upon the law of self-defense.

Chas. C. Waters and *J. T. Bullock*, for appellee.

No warrant was required for deceased to make an arrest for a crime against the United States. U. S. Rev. St. § 788; *Cf.* Sand. & H. Dig., § 1968. Instructions Nos. 13 and 14 were properly given. 2 Bish. Cr. Law, § 652; Clark, Cr. Law, 161; McClain, Cr. Law, § 328; 1 Whart. Cr. Law, § 413; 27 Cal. 572; 71 Miss. 179; 58 Ark. 47.

BATTLE, J. Harve Bruce, Alva Church, Dave Milsaps and Turner Skidmore were jointly indicted by the grand jury of the Pope circuit court for murder in the first degree, which was alleged to have been committed on the 29th day of August, 1897, in Pope county, in this state, by killing B. F. Taylor. The defendants severed their trials, and Harve Bruce was tried and convicted of involuntary manslaughter, and his punishment was assessed at six months' imprisonment in the penitentiary, and he appealed.

The appellant killed B. F. Taylor at the time and place and by the means alleged in the indictment. Taylor was a deputy marshal of the United States at the time he was killed. At this time he and others under his command were attempting to arrest Bruce, the appellant, and others, for illicitly distilling whiskey, and to capture an illicit distillery. The killing occurred at the distillery. Alva Church and the appellant were there at that time. The appellant had committed an offense by distilling liquor contrary to the statutes of the United States, and was carrying arms, sleeping in the woods, and avoiding arrest by the United States marshal. At the time Taylor was killed he and his *posse comitatus* had approached within twenty-five or thirty steps of Bruce, without his knowledge. The evidence adduced by the state in the trial tended to prove that

Taylor commanded Church and Bruce to surrender, he and those assisting him at the same time presenting arms and advancing, and that Bruce immediately fired his gun several times at them, and killed Taylor, before they had made any attempt to do him violence. On the other hand, the evidence adduced by the appellant tended to prove that Taylor and those with him approached Bruce in a fast trot or run, and commenced firing their guns at him before he had made any resistance.

As Bruce was convicted of involuntary manslaughter, it is unnecessary for us to notice any of the errors complained of, except those which relate to self-defense. If Taylor was attempting to arrest Bruce unlawfully, Bruce had no right to kill him to avoid arrest. If in doing so he did not necessarily act in self-defense, in the protection of his own life or to prevent great bodily harm, he was at least guilty of manslaughter. Mr. Bishop, in his work on Criminal Law, says: "If one, even an officer, undertakes to arrest another unlawfully, the latter may resist him. He has no protection from his office, or from the fact that the other is an offender. But the doctrine already stated that nothing short of an endeavor to destroy life or inflict great bodily harm will justify the taking of life, prevails in this case, so that, if the person thus being unlawfully arrested kills the aggressor in resisting, he commits thereby the lower degree of felonious homicide called 'manslaughter.' Still, in principle, life and liberty stand substantially on one foundation; life being valueless without liberty. And the reason why a man may not oppose an attempt on his liberty by the same extreme measures permissible in an attempt on his life appears to be because liberty can be secured by a resort to the laws." 1 Bishop's New Criminal Law, § 868, and cases cited.

Upon self-defense the court instructed the jury, at the request of the appellant, as follows: "If the jury, from the evidence, believes that the defendant was placed in the position, at the time of the killing, in which his life was imperiled by the deceased, and he slew him without having any notice of his official character, and the killing was apparently necessary to save his own life, or to prevent his receiving a great bodily

injury, then the killing of deceased was homicide in self-defense; nor does it matter that deceased was legally seeking to arrest the defendant, if the defendant had no notice of the fact, or reasonable grounds to know that he was an officer."

And the court refused to instruct the jury, at the request of the appellant, as follows: "The defendant claims that the killing was justifiable, because done in necessary self-defense; and you are instructed that, in determining whether the killing was necessary, the defendant had the right to be governed by the situation as it appeared to him at the time; so that, under the law, if from the appearance the defendant honestly believed, without fault on his part, that he was in danger of losing his life or receiving great bodily harm from his assailants, he was as much justified as if the danger had been actual or real."

The appellant insists that the court erred in refusing to instruct the jury as requested. His contention is that he had the right to act upon his situation as it appeared to him at the time he did the killing. As to how it did appear, the evidence was conflicting. The evidence adduced by the state tended to prove that Taylor was a deputy marshal of the United States, as he was; that he approached within twenty-five or thirty steps of the appellant, and, presenting his gun, commanded him to surrender, and, instead of obeying, he immediately fired his gun at Taylor, and killed him. On the other hand, the evidence on the part of appellant tended to prove that Bruce was ignorant of the fact that Taylor was a deputy marshal; that Taylor and those with him, without any warning, approached him in a run, and commenced firing their guns at him before he had made any resistance or shown that he would; and that Bruce then killed Taylor. Upon this evidence the court instructed the jury, at the request of the appellant, that if Bruce "had no notice of the fact, or reasonable grounds to know, that he was an officer," "and the killing was apparently necessary to save his own life, or prevent his receiving a great bodily injury, that the killing of the deceased was homicide in self-defense;" and he sought to have this instruction amended by an additional one to the effect that, if the killing appeared

to Bruce to be necessary, he was justified in taking the life of Taylor to protect his own. But it seems to us that he was not prejudiced by the refusal to give that instruction; for, if the evidence adduced by him was true, then it must have so appeared to the jury and to him; and, if the evidence adduced by the state was true, it could not have so appeared to the jury or Bruce, and he at least acted recklessly and carelessly, without due circumspection, and was guilty of manslaughter; so that, according to any view the jury could have taken of the evidence, he was not prejudiced by the refusal to instruct as he requested.

The verdict of the jury is remarkable. There was no evidence to sustain it as to the degree of homicide of which they found the defendant guilty. They found that he was not justified or excusable, and found him guilty of the least offense they could. They were unreasonably lenient to him, and he has no right to complain. Sand. & H. Dig., § 2260; *Pratt* v. *State*, 51 Ark. 167; *Fagg* v. *State*, 50 Ark. 506, 508.

Judgment affirmed.

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MOONEY v. TYLER.

Opinion delivered June 23, 1900.

1. FINDING OF CHANCELLOR—CONCLUSIVENESS.—A chancellor's finding of facts will not be set aside on appeal unless against the clear preponderance of the evidence. (Page 315.)

2. PLEADING—AMENDMENT—DISCRETION.—The refusal of a court to permit an amendment to the answer to be filed setting up the defense of usury, after the proof is in and the case is ready for trial, will not be ground for reversal if no abuse of discretion appears. (Page 316.)

Appeal from Garland Chancery Court.

LELAND LEATHERMAN, Chancellor.

STATEMENT BY THE COTRT

This suit was brought to foreclose a mortgage for $500 on lot 6, block 1, and lot 1, block 9, in the city of Hot Springs.

A note was given by appellants for the $500, in which it was stipulated that, if default was made in payment of interest or insurance upon the property, the principal and interest should at once become due and payable. The appellants defaulted in the payment of the insurance in $8.40 for 1895, and $8.40 for 1896, whereupon appellee brought this suit to foreclose.

Appellants answered that the debt was not due, and that lot 1, block 9, was inadvertently or fraudulently incorporated in the deed of trust. After all the proof was in, and the case was ready for trial, the appellants offered to file an amendment setting up in defense usury in the debt. This was disallowed by the court, to which appellants excepted. The cause was tried, decree for appellee, and appellants excepted brought the case here.

Vaughan & Rutherford, for appellants.

It was error to refuse to allow the amendment asked by appellants. Anderson's Law Dict. 363; 9 Am. & Eng. Enc. Law (2d Ed.) 473; 6 Enc. Pl. & Pr. 819. The deed was avoided by the alteration made in it. 2 Am. & Eng. Enc. Law (2d Ed.) 188. The burden of justifying the alteration was upon the holder. *Ib.* 272–274.

Morris M. Cohn, for appellee.

The court, in the exercise of its discretion, had a right to refuse the proffered amendment. 54 Ark. 444; 23 Ark. 459; 19 Wis. 249; 6 Cow. 606; 6 Hill, 223; 2 Cal. 409. The court was correct in the denial of are hearing. 1 Dan. Ch. Pract. 1479; 26 Ark. 496; *ib.* 225; 2 Ark. 33; 60 Ark. 481; 37 Ark. 333; 55 Ark. 312; 17 Ark. 104; 2 Ark. 133; 40 Ark. 445; 47 Ark. 196; 55 Ark. 324.

HUGHES, J., (after stating the facts.) We find no reversible error in the decree of the court. The debt became due and payable upon default in payment of the insurance. There was evidence tending to show that lot 1, block 9, was not incorporated in the deed of trust by mistake or fraud; at least, it is not clear that the chancellor was not right as to this. Unless the findings of the chancellor was against the clear pre-

ponderance of the evidence, we should not reverse. *Gaty* v. *Holcomb*, 44 Ark. 216.

There was no issue as to usury in the case. Under the circumstances of this case, it seems to us that it was within the sound judicial discretion of the chancellor to permit or refuse to permit the amendment setting up usury at the time it was offered, as it, if admitted, would probably have caused delay in the trial of the cause. There does not appear to be an abuse of judicial discretion in this, and we do not feel warranted in interfering with the chancellor's discretion in the matter. *Thompson* v. *McHenry*, 18 Ark, 537; *Mandel* v. *Peet*, 18 Ark. 236; *Ford* v. *Ward*, 26 Ark. 360; *Clayton* v. *State*, 24 Ark. 16; *Mohr* v. *Sherman*, 25 Ark. 7; *Campbell* v. *Garven*, 5 Ark. 485.

Decree affirmed.

BUNN, C. J., and BATTLE, J., not participating.

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BRINKLEY CAR WORKS & MANUFACTURING COMPANY *v.* LEWIS.

Opinion delivered June 23, 1900.

MASTER AND SERVANT—RISKS OF EMPLOYMENT.—A servant who knowingly consented to work in a place of danger will be held to have assumed the attendant risk. (Page 319.)

Appeal from Monroe Circuit Court.

JAS. S. THOMAS, Judge.

STATEMENT BY THE COURT.

This is an action to recover damages for personal injuries sustained by appellee while in employ of appellant. It is alleged in the complaint that, for about five years prior to time of injury (November 27, 1897), plaintiff (appellee) had been working around the mill and lumber yard of defendant (appellant), which is a corporation engaged in the manufacture of lumber on an extensive scale; that it was plaintiff's duty to

push loaded cars from the mill, on tracks, to various parts of the yard; that defendant had carelessly piled green lumber too near the track on which plaintiff's car was operated, which green lumber, on said 27th day of November, 1897, fell on plaintiff and greatly injured him; that defendant had failed to furnish plaintiff a safe place in which to labor, or safe appliances to work with; that plaintiff was damaged by the injury, in the sum of $10,000, for which sum he brought suit.

Defendant denied the material allegations of the complaint, and alleged that, if plaintiff was injured at the time mentioned, the injury resulted from the negligence of plaintiff and his fellow workmen.

On May 3, 1898, the case was tried, and plaintiff recovered judgment for $125. Motion for new trial was filed May 4th. Motion was overruled, and defendant excepted. In due time defendant filed its bill of exceptions, and appealed to this court. The evidence, in full, on the part of the plaintiff, is as follows:

Isom Humphrey testified as follows: "I know the plaintiff. I was working at the mill of defendant, at the time plaintiff received the injury. I was distributing lumber, and plaintiff was running the push car. My place of working was about seventy-five or one hundred yards from where plaintiff was hurt, but I could see the pile that fell from where I was working. When a car was hard to push, myself and others would be called upon to assist in pushing it out. When the lumber fell, I was right in front of plaintiff,—about ten feet from him. The lumber struck me and Lewis [plaintiff], and Lewis laid there until we got the lumber off of him. The pile of lumber was green, and was 1 inch thick, 12 inches wide, and 16 feet long. It was near the track, and the lumber on the car struck it, which caused it to fall. The lumber which fell was piled by Toney James and Tom Thornton, and a part of it was piled the day before it fell. The duty of James and Thornton was to load lumber on the flat cars for shipping, but they would sometimes *help plaintiff to push out the car.*"

Tom Hicks: "I have been working for defendant for four or five years. I loaded the lumber from the saw to the car,

which was then taken by the plaintiff, Lewis, and others out into the yard. Sometimes Toney James and Tom Thornton would assist in pushing out the car. They piled most of the lumber which fell and caused plaintiff's injury. *The plaintiff would often assist in piling the lumber.* Do not know whether he assisted in piling the lumber which fell or not. Aquella Polk worked with plaintiff. I piled a part of the lumber which fell, and if I had piled all of it, I do not think it would have fallen. When there was no lumber to take from the saw to the car, I would be required to do any other work to be done."

G. R. Lewis, the plaintiff: "I am the plaintiff in this case. I am 40 years old, and am married. I had been in the employ of defendant, prior to November 27, 1887, about four or five years. On November 27, 1897, while myself and Aquella Polk and some others were pushing a loaded car along the track to the yard, a large pile of green lumber, 16 feet long, fell on me and broke my leg. Dr. Sumpter was called in to attend to me, and I saw a bone about four inches long which he took out of my leg. I was confined to my bed for about four months, and am not now able to work or to get around without the aid of crutches, and my leg pains me greatly. *I have worked in lumber business a great deal, and know the difference between piling and stacking it.* To pile it means to lay it down, one plank on another, with no sticks between the layers, and lumber piled in this way is liable to tumble down. To stack lumber is to put sticks between the layers, and to turn the end of the lumber toward the track on which the car runs. The piled lumber is generally put off lengthways along the side of the track. The lumber which fell on me was piled several days before it fell, and was piled lengthways by the side of the track, by Toney James and Thomas Thornton. It was not taken from the push car, but was taken from the rollers, and piled there to go through the planer. At least, it was in the place that lumber is put for the planer. It was very near the track, not more than twelve or eighteen inches from it, and about five feet high. I had passed by it every time I pushed out a car. I never assisted in piling it, and do not think my partner, Aquella Polk, did. It was not my duty to pile or

stack lumber. It was piled too near the track, and piled so close to the track that the lumber on the car struck it, and it fell and hurt me, as stated.

C. F. Greenlee, for appellant.

The plaintiff assumed the ordinary risks of his employment, and cannot recover. 57 Ark. 76, 78.

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

Appellant's negligence caused the injury, and it is liable therefor. 58 Ark. 76. It is the duty of the master to keep a safe place for his servants to work in. 48 Ark, 333; 54 Ark. 289, 297. The doctrine of fellow servants has no application, nor can it be said that plaintiff was intentionally injured. 18 S. W. 178; 66 Pa. St. 199; 57 Pa. St. 380; 78 Mo. 212.

HUGHES, J., (after stating the facts.) In the opinion of a majority of the court, the appellee assumed the risks incident to his employment, and was not entitled to a recovery in this case. We think this case comes within the principles heretofore announced by this court in similar cases.

In *Emma Cottonseed Oil Co.* v. *Hale*, 56 Ark. 237, it is said by Judge Battle, in delivering the opinion of the court, that "it is well settled that when one enters the service of another he takes upon himself the ordinary risks of the employment in which he engages. On the other hand, the employer takes upon himself an implied obligation to provide the person employed with suitable instruments and means with which to do his work, and to provide a suitable place in which such person, when exercising due care himself, can perform his duty safely, and without exposure to dangers that do not come within the obvious scope of his employment. But the servant can dispense with this obligation. If, having sufficient intelligence and knowledge to enable him to see and appreciate the dangers to which he will be exposed, he knowingly assents to occupy a place set apart to him by the master, and does so, he thereby assumes the risks incident thereto, and dispenses with the obligation of the master to furnish him with a better place. It is then no longer a question whether such place could not with reasonable care and diligence be made safe. Having vol-

untarily accepted the place occupied by him, he cannot hold the master liable for injuries received by him because the place was not safe." *Little Rock, M. R. & T. Ry.* v. *Leverett*, 48 Ark. 346; *Davis* v. *Ry.* 53 Ark. 117; *Fones* v. *Phillips*, 39 Ark, 17; *Coombs* v. *New Bedford Cordage Co.* 102 Mass. 572; *Sullivan* v. *India Mfg. Co.* 113 Mass. 396. This doctrine seems to accord with sound reason and principle, as well as with the weight of the adjudications on this question, and we see no reason to justify a departure from it.

It is shown by the evidence of the plaintiff (the appellee) that he was perfectly familiar with the employment he engaged in; that he had much experience in it, and knew the dangers incident to it; that he was a man 40 years old; and that he voluntarily entered the employment without complaint, and without any promise by the master that the place in which he was to work would be made safer. If the master was under obligation to furnish him a safer place in which to exercise his employment, he waived this obligation by accepting the employment to be exercised in the place assigned, and was not entitled to recover for injury caused by reason of the fact that the place was not as safe as reasonable care and diligence of the master could have made it.

Reversed and remanded for a new trial.

RIDDICK and WOOD, JJ., dissent.

GLENN *v.* PORTER.

Opinion delivered June 23, 1900.

1. REPLEVIN—JUDGMENT AGAINST SURETY—JURISDICTION.—One who signs a replevin bond as surety in the sheriff's presence, as provided by section 6387, Sand. & H. Dig., thereby becomes a party to the action, and a judgment rendered against him is not without jurisdiction, though the bond was never returned by the sheriff, as required by section 6393. (Page 323.)

2. SAME—NON-SUIT—EFFECT.—A judgment in replevin, reciting that plaintiff asked to take a non-suit, which was granted, and that there-

upon defendant asked for judgment against plaintiff and surety for return of the property replevied, or its value, which was rendered, is not void on its face for want of jurisdiction in the court to render judgment against the plaintiff and his surety after granting a non-suit to plaintiff. (Page 324.)

Certiorari to Independence Circuit Court.

FREDERICK D. FULKERSON, Judge.

STATEMENT BY THE COURT.

Petitioner asked for certiorari to quash the following judgment: "In the Independence Circuit Court, spring term, 1899. On Monday April 17, 1897, a regular day of said term of court, among other things the following proceedings were had, to-wit: P. A. Olson *v.* Jeff Porter. On this day, this cause coming on to be heard, and both parties being present in person and by attorneys, the defendant announced ready for trial, whereupon the plaintiff asked to take a non-suit, which was by the court granted; and thereupon the defendant asked for judgment in his favor. And, the court being fully advised in the premises, and it appearing from the proceedings that this is an action of replevin in which the plaintiff had obtained possession of the property mentioned herein, and that the plaintiff had executed a replevin bond, with John W. Glenn as his surety, the court is therefore of the opinion that the defendant should recover the possession of the property or its value. It is therefore considered, ordered and adjudged by the court that the defendant, Jeff Porter, have and recover of and from the plaintiff, P. A. Olson, and John W. Glenn, surety on the replevin bond, one dark brown mare mule, about eleven years old, branded 'HW' on left shoulder, or the sum of twenty-five dollars, the value of said mule; one bay mare mule, five years old, 14½ hands high, or twenty-five dollars; one 2¾ Tennessee wagon, or the value, fifteen dollars; one double set of harness, or ten dollars, the value of said harness; and one lot of household and kitchen furniture, or twenty-four dollars. And it is further considered, ordered and adjudged by the court that the defendant have and recover of and from the plaintiff all his costs had, laid out, and expended in this action; that if said property be not restored to the defendant within ten days from the

rendition of this judgment, that execution issue against the plaintiff and John W. Glenn, for the value of said property; and it appearing that this judgment had not been entered of record on the 19th day of this term of court, it is ordered that same be entered now for then."

The grounds alleged for quashing the judgment are:

"First. That there was no bond executed by him [Glenn, the petitioner] filed in said action, so as to give the court jurisdiction of his person, and that said judgment was rendered against him without notice. Second. That the forthcoming bond which your petitioner signed as security for said Olson is so fatally defective in form and substance that it can not be construed to be a good statutory bond in an action of replevin; and, even if it had been filed in court and introduced as evidence, the court could not have rendered a lawful judgment thereon in said action against your petitioner. Third. That when the plaintiff, Olson, by permission of the court, took a non-suit, he was then out of court, and all subsequent proceedings in that action were purely *ex parte*, and no lawful judgment could be rendered against him for the return of the property or its value. Fourth. That, notwithstanding the aforesaid judgment against your petitioner is absolutely void, yet the said Jeff Porter, by his attorney, caused an execution to issue, etc., and is threatening to levy same, etc." By an amendment to the original petition it is asked that Olson also be made a party plaintiff, and that the judgment against him also be quashed—"*first*, because, having taken a non-suit, he was out of court, and no longer within its jurisdiction; *second*, the defendants having failed to file a plea to the merits, there was no law entitling them to a judgment."

There was a demurrer to the petition for certiorari, as follows: (1) That the matters set up in said petition are properly presentable on appeal to this court. (2) That the levy of an execution as set forth by the petitioner could have been prevented by the filing in due time of a supersedeas bond. (3) That the matters set forth in said petition do not constitute a cause of error or complaint upon the part of petitioner, and were entirely within the jurisdiction of the court, and were

proper." The writ was issued, and the record of the proceedings of the circuit court brought up.

H. S. Coleman, for petitioners.

The plaintiff had the right to dismiss. Sand. & H. Dig., § 5792. Defendant can ask for a trial, after plaintiff dismisses, only in cases when a plea of counterclaim or setoff has been filed by him. *Ib.* § 5854. Olson having taken a non-suit, no appeal would lie. 14 Ark. 625; 24 Ark. 601–2. Defendant, not having pleaded to the merits or denied plaintiff's allegations of title, was not entitled to a judgment for the property. Sand. & H. Dig., § 5761; 6 Ark. 206; 7 Ark. 28; 11 Ark. 9, 12; 24 Ark. 275. The judgment against Olson was void. There could have been no judgment against the surety, except in the alternative. Sand. & H. Dig., § 6400; 29 Ark. 282–3; 50 Ark. 291. The bond taken by the sheriff was so defective that no judgment could be legally rendered thereupon. 54 Ark. 13; 56 Ark. 291; Sand. & H. Dig., §§ 6387, 6393.

J. C. Yancey, for respondent.

The application for certiorari is improper, because, *first*, the matters complained of are reversible on appeal; and, *second*, because the judgment was correct. It was proper to include the surety in the judgment, Sand. & H. Dig., § 6400. The complaint showed the value of the property, and that was sufficient to sustain the judgment. 19 Ark. 319; 32 Ark. 470. The surety was a party to the suit. 37 Ark. 206. He was not entitled to notice before judgment could be rendered against him. 31 Ark. 194. He can not set up that there was any defect in the bond. 10 Ark. 89; 22 Ark. 528; 21 Ark. 447; 23 Ark. 235; 60 Ark. 212. Certiorari is not permissible where appeal lies. 43 Ark. 33; 39 Ark. 347; 39 Ark. 399; 43 Ark. 341; 44 Ark. 511; 52 Ark. 213; 61 Ark. 605. The recitals of the judgment are unimpeachable. 50 Ark. 188; *ib.* 338; 61 Ark. 464; 28 Ark. 146.

WOOD, J., (after stating the facts.) 1. The recital of the judgment is: "And the court being fully advised in the premises, and it appearing from the proceedings that this is an action of replevin in which the plaintiff had obtained possession

of the property herein, and that the plaintiff had executed a replevin bond with John W. Glenn as his surety." This recital shows that Glenn, petitioner, was a party to the replevin suit. Although the bond may not have been returned by the sheriff with the order of delivery, as required by § 6393 of Sandels & Hill's Digest, this is not a matter of which the surety can complain, or take advantage of to show that he was not a party to the proceedings. The bond is given for the benefit of the defendant in the action. When it has been executed in the presence of the sheriff, as required by section 6387, *id.*, and the property has been taken away from the defendant, and delivered to the plaintiff, it has performed its office, and the surety, by the act of executing the bond, has made himself a party to the suit, and thereafter shall be so considered, and no further notice is required.

Non est factum is not pleaded. It appears that the bond was taken by the sheriff, executed by petitioner, and the property taken from the defendants, and delivered to the plaintiff, in the replevin suit. The judgment shows the execution of the bond by petitioner, and, even if it were proper to consider the affidavit of the sheriff that the bond was "never filed in the clerk's office" (which we do not decide), that does not contradict the recitals of the judgment. The sheriff, on motion of defendant, could have been made to bring the bond into court before any judgment was rendered upon it. For aught that appears to the contrary, the bond was before the court when he rendered judgment. Suffice it to say, we must accept the recitals of the judgment as true, although the bond may not have been filed in the clerk's office, and although the sheriff at the time he made his affidavit might have still had the bond in his possession. Glenn, then, being a party to the record, if the court had jurisdiction to render judgment against Olson, his principal, all other matters of which he here complains could and should have been corrected on appeal.

2. Did the court have jurisdiction to render the judgment complained of against Olson? It is urged that it did not have, for two reasons: (a) Because, having taken a non-suit, he (Olson) was out of court, and no longer within its jurisdiction;

(b) the defendants having failed to file a plea to the merits, there was no law entitling them to judgment.

The judgment must be looked to as a whole. The judgment of non-suit, and for a return of the property to the defendants or its value, is all in one entry. All doubtless took place simultaneously, and was intended to embrace, and did embrace, one order. The parties were all before the court. Section 5792 of Sand. & H. Dig. provides that the plaintiff may dismiss any action in vacation in the office of the clerk, on the payment of all costs that may have accrued therein, except an action to recover the possession of specific personal property, when the property has been delivered to the plaintiff. This shows the policy of the law. True, "there is nothing in this statute that prohibits a plaintiff in replevin from dismissing his action in term time with the consent of the court." But it would be monstrous for any court to yield its consent to such a proceeding, leaving the plaintiff in the possession of the property which the processes of law had enabled him to acquire. It was unnecessary to make such a prohibition, for it will always be assumed that courts will not consent for, or permit, one to profit by his own wrong. The defendant asked for judgment in his favor, just as soon as the plaintiff moved for a non-suit. This was tantamount to denying the plaintiff's right to the property, and was, to all intents, setting up a claim to the property. Before the judgment of non-suit was entered, the defendant interposed his claim to the property, which, although verbal, was equivalent to an objection to the verbal motion to non-suit, unless the property was returned to the defendant. It was in answer to plaintiff's verbal motion to dismiss. There is nothing in the case like those cases where, instead of urging some claim to the property, the defendant interposes a plea in abatement or in bar of the proceedings. Here it appears from the judgment that defendant announced, "Ready for trial." It does not appear from this that he was seeking to avoid a determination of the matters in controversy on the merits. The effort to avoid the trial was by plaintiff.

We find nothing in the record for which to quash the judgment of the circuit court in the case of P. A. Olson v. Jeff

Porter. The petition for a writ of certiorari is therefore dismissed.

BATTLE, J., not participating.

WOLFF v. ELLIOTT.

Opinion delivered June 23, 1900.

PAROL EVIDENCE—IDENTIFICATION OF GRANTEE.—Where a deed conveyed land to "John Elliott and Amanda Elliott, his wife," parol evidence is admissible to show that, although John Elliott had a lawful wife living named "Amanda Elliott," the deed was intended to convey title to another woman whom he had unlawfully married, and who was known as "Amanda Elliott." (Page 328.)

Appeal from Jackson Circuit Court.

RICHARD H. POWELL, Judge.

STATEMENT BY THE COURT.

John Elliott and Amanda Ross, two negroes, were married on the 18th of January, 1877, in the state of Alabama. They resided in that state, but Elliott afterwards abandoned his wife, and came to Jackson county, Arkansas. Without procuring a divorce from his wife in Alabama, he, in 1884, married Amanda Moore of Jackson county. They lived together as husband and wife until his death, and she was known in Jackson county as Amanda Elliott, wife of John Elliott. While they were thus living together, John Elliott purchased of G. B. Chastain a lot in the town of Newport. The payment for the land was made in monthly installments. John Elliott and the woman he called his wife, and whom he had married in Jackson county, would, to quote the testimony of Chastain, the vendor, "come up on Monday night when the money was paid. They would be there together, and I would give them a receipt." After money was paid, Chastain directed Elliott to have such a deed as he desired drawn up, and he (Chastain) would sign it. Thereupon Elliott and the woman whom he had married in

Jackson county went together to an attorney, and directed him to prepare a deed from Chastain conveying the lot to them jointly. Not knowing that Elliott had a wife in Alabama, the attorney prepared a deed describing the vendees therein as "John Elliott and Amanda Elliott, his wife;" and Chastain, who knew nothing of the other Amanda Elliott, executed the deed as prepared by the attorney. Elliott took possession of the lot, and after his death Amanda Elliott, the woman he had married in Jackson county, sold and conveyed it to Ann Smith; and defendants, Wolff & Goldman, hold under this deed. Amanda Elliott, the wife of John Elliott living in Alabama, after his death sold and conveyed an undivided one-half interest in the land to W. H. Holliday and Gustave Jones, and afterwards she and her vendees brought this action of ejectment to recover the land.

On the trial the circuit judge excluded the testimony of the attorney who prepared the deed from Chastain, and who testified that John Elliott and the woman known as his wife in Jackson county came to him and directed him to draw a deed from Chastain to them jointly. The court, among other instructions to the same effect, gave the following to the jury:

"1. The jury are instructed that in the deed of W. B. Chastain to John Elliott and Amanda Elliott, his wife, that the words 'his wife' are descriptive of and particularize the person or grantee to whom the deed was made; and if the jury find that, at the time of the execution of said deed, John Elliott had a wife living of the name of Amanda Elliott, then she is the person referred to in said deed as one of the grantees, and no other person of the name of Amanda Elliott, who was not in law the wife of said John Elliott, can be substituted in the place of said Amanda Elliott, the wife of said John Elliott."

There was a verdict for plaintiffs, and defendants appealed.

J. W. Phillips and *S. D. Campbell*, for appellants.

The evidence fails to show that Elliott was ever legally married in Alabama; and the court will not presume it. In conflicting presumptions, that which assumes innocence of a criminal offense will be adopted. 22 Ark. 90; 34 Ark. 511; 58 Ark. 556; 59 Ark. 431; 52 Am. St. Rep. 183; 22 Am.

Rep. 24. The courts will not take judicial notice of the statute laws of another state. 16 Ark. 87; 17 Ark. 154; 50 Ark. 237; 52 Ark. 388. It was incumbent upon the plaintiff to prove the *validity* of the first marriage. 60 Ark. 308; 46 Am. Dec. 121; 6 How. 550; 66 Am. St. 79. The presumption is that there was no valid marriage, even by the rules of common law, in Alabama. 47 Am. St. Rep. 226; 127 Ill. 379. Even if the marriage in Alabama was valid, the evidence shows that she was not the person to whom the deed was made. Even if the second marriage is void, Elliott and the second wife would have been tenants in common; hence the first wife would have only a dower right, and could not maintain ejectment. 21 Ark. 62; 31 Ark. 334; 62 Ark. 51. The court erred in the giving and refusing of instructions. Parol testimony was admissible to explain the ambiguity and identify the grantee. 84 Cal. 1; 99 Am. Dec. 351n., citing: 7 Neb. 1; 12 Wis. 235; 10 Gray, 45; 19 Ala. 659; 28 Ark. 75; 68 Am. Dec. 529; 19 Am. St. 803; 42 N. E. 174; 16 Atl. 405; 12 S. W. 659; 40 Ark. 237. There was never any delivery to the first wife or to any one for her. Hopk. Real Prop. 435; 1 Am. & Eng. Dec. Eq. 387; 58 Am. 288; 67 Am. St. 860.

Gustave Jones, for appellees.

It was competent for appellee to testify as to her marriage. 30 N. C. 1016; 28 Ark. 19. There is no *latent* ambiguity in the deed. 40 Ark. 237. Parol evidence was not admissible to show which wife was the grantee. 28 Ark. 282; 12 Johns. 77; 10 Johns. 23.

RIDDICK, J., (after stating the facts.) The facts in this case are somewhat peculiar, but we do not think there is much doubt about the law. When the name of a grantee, as written in a deed, is capable of being applied to two or more persons, parol evidence is admissible to identify the grantee named. In such case a latent ambiguity exists, which may be removed by extrinsic evidence. Following this rule, it is the common and well-established practice to admit parol testimony to identify persons or property named in a deed or record. *Jay* v. *East Livermore*, 56 Me. 120; *Cole* v. *Mette*, 65 Ark. 506; *Andrews* v. *Dyer*, 81 Me. 104; 1 Jones, Law of Real Prop. § 226.

This does not in any way contravene the rule that parol evidence will not be received to contradict or vary the terms of a deed or other written contract; for the object of this evidence is not to contradict the deed, but, by showing the circumstances under which it was made, to enable the court or jury trying the case to ascertain the person or property referred to, so as to carry into effect the intention of the parties to the instrument.

"It may," says Mr. Taylor, "be laid down as a broad and distinct rule of law that extrinsic evidence of every material fact which will enable the court to ascertain the nature and qualities of the subject-matter of the instrument; or, in other words, to identify the persons and things to which the instrument refers, must of necessity be received." 2 Taylor on Evidence, § 1194.

Now, the learned circuit judge was no doubt familiar with these rules of law; but in this case, as the grantees in the deed were described as "John Elliott and Amanda Elliott, his wife," and as John Elliott could have had at that time only one lawful wife, the circuit judge was of the opinion that it must be conclusively presumed that the Amanda Elliott named was his lawful wife, and that it was not proper to show to the contrary. But we are unable to agree that this view of the law was correct. Both of these women had been married to John Elliott. Each of them was known by the name of Amanda Elliott, and as the wife of John Elliott. The question to be determined by the jury was not which one of them was in law the wife of John Elliott, but which was the grantee in the deed from Chastain. Now, it has been held that a conveyance to a person under an assumed name is valid, and passes the title intended to be conveyed. *Wilson* v. *White*, 84 Cal. 239. And certainly a conveyance to this woman, who was married to Elliott in Jackson county, describing her by the name under which she was generally known in that county, would pass title to her. If the law was otherwise, injustice might often result. In this case there is nothing to show that the Amanda Elliott of Jackson county knew that Elliott had another wife living. She may have been altogether ignorant of that, and may have

honestly believed that she was his lawful wife and entitled to his name; yet, under the law as given by the circuit judge, if she had purchased and paid for this land, a conveyance to her as "Amanda Elliott, wife of John Elliott," the name by which she was known, would have vested the title, not in her, but in another woman, of whom perhaps neither she nor her grantor had ever heard. This would result, not in carrying out, but in defeating, the intention of the parties to the deed.

For these reasons, we think the presiding judge erred in instructing the jury, and also erred in excluding evidence tending to identify the grantee named in the deed. Judgment reversed, and new trial ordered.

HUGHES, J., dissented.

RILEY v. STATE.

Opinion delivered June 30, 1900.

CRIMINAL LAW—VARIANCE BETWEEN INDICTMENT AND PROOF.—An indictment for killing "one Sullivan, whose christian name is unknown to the grand jury," is not sustained by proof of having killed Durbyn Griggs. (Page 331.)

Appeal from Sebastian Circuit Court.

STYLES T. ROWE, Judge.

A. C. Brewster, for appellant.

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

BUNN, C. J. The indictment in this case in part reads: "The grand jury of said court accuse said defendant of said crime committed as follows, viz.: Said defendant, in said county on 24th July, 1899, unlawfully, wilfully, deliberately, maliciously, premeditatedly, and feloniously with a pistol did assault, shoot, and kill one Sullivan, a human being, whose christian name is unknown to the grand jury." On the trial the deceased was shown to have been named Durbyn Griggs

by the testimony in the case. The indictment being for killing Sullivan, whose christian name only was unknown, proof that Durbyn Griggs was killed does not identify the person of deceased, nor sustain the allegations of the indictment.

Reversed and remanded.

STATE v. REED.

Opinion delivered June 30, 1900.

DENTISTRY—PRACTICING WITHOUT LICENSE.—Under Sand. & H. Dig., § 4973, making it unlawful to practice dentistry without a certificate from the board of dental examiners, provided that the act should not be construed to prevent any person from extracting teeth when no charge is made therefor, a student of dentistry who without such certificate performed dental work under the direction of a licensed dentist, and charged and received pay therefor, is guilty of practicing dentistry without a certificate. (Page 332.)

Appeal from Clark Circuit Court.

JOEL D. CONWAY, Judge.

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

J. H. Crawford, for appellant.

BUNN, C. J. This is an indictment for practicing dentistry without first obtaining a certificate from the board of dental examiners. The evidence showed that defendant was, at the time of the commission of the alleged offense, a student under Dr. Milam, a regular practicing dentist of the city of Arkadelphia. The evidence also showed two instances in which defendant while so engaged had performed dental work, and both apparently under the advice of Dr. Milam, defendant performing the mechanical work—one in extracting teeth, and the other in filling teeth—and that for the first work nothing was charged or received by him, but that for the latter work he charged and received the sum and fee of $10.

The court instructed the jury as follows, to-wit: (1) If you believe from the evidence that this man practiced dentistry without obtaining license, as the law directs, within twelve months before the finding of this indictment, you should find the defendant guilty, and assess his punishment at not less than $10 nor more than $100. (2) If, upon the other hand, you believe the defendant was in there learning dentistry, and was working under Dr. Milam's direction and advice, it will be your duty to say, 'We, the jury, find the defendant not guilty.' (3) If the defendant had set up as a regular practicing dentist, he would be guilty; but if he were there learning the business under Dr. Milam, practicing under his directions and his advice, he is not guilty."

These instructions, it will be observed, leave out the charging and receiving pay for the work as an element of the crime. The statute (Sand. & H. Dig.) defining the crime is in these words: "Section 4973. It shall be unlawful for any person to practice or attempt to practice dentistry, or dental surgery, in the state of Arkansas, without first having received a certificate from the board of dental examiners; *provided*, this shall not be construed as preventing any regular licensed physician from extracting teeth, nor to prevent any other person from extracting teeth when no charge is made therefor by such persons."

From the language of the act under which this indictment was found, it is impossible to escape the conclusion that the performance of dental work, and charging and receiving pay therefor, is practicing dentistry. The theory of the trial court seems to have been that, notwithstanding this, yet, as the defendant was, when he did this work, a mere student, and doing his work under the direction of Dr. Milam, a licensed dentist, he was not answerable to the law on the subject. It must be noted, however, (if this is any defense at all), that while this relation existed between the defendant and Dr. Milam at the time, so far as the dental work was concerned, yet the charge for the same was not made in the name of Dr. Milam, nor was the pay received for him. The charge was made by the defendant for himself, independent of Dr. Milam, and so was the pay

received by him. The second and third instructions given by the court were therefore erroneous, and, being excepted to by the prosecuting attorney, a new trial should have been granted for that reason.

The refusal of the court to give an instruction in the language of the statute at the instance of the state was not error, for two reasons: *First*, the first instruction given was substantially the same as if it had been expressed in the language of the statute. *Secondly*, an instruction merely in the language of the statute, under the circumstances, would not have been any assistance to the jury, for the object was to instruct them as to the legal meaning of certain words in the act,—that is, to inform them what constituted a practicing of dentistry under the act.

But for the error named in the outset the judgment is reversed, and the cause remanded for a new trial.

BEAVERS v. MYAR.

Opinion delivered June 30, 1900.

VESTED RIGHTS—EFFECT OF SUBSEQUENT LEGISLATION.—Rights vested under act of April 13, 1893, curing execution or acknowledgment of conveyances of homesteads by married men which were defective under act of March 18, 1887, were not divested by act of April 19, 1899, repealing the act of 1893. (Page 335.)

Appeal from Ouachita Circuit Court in Chancery.

CHAS. W. SMITH, Judge.

STATEMENT BY THE COURT.

Plaintiff, Henry W. Myar, filed his complaint in the Ouachita circuit court, wherein he alleged "that on the 22d day of January, 1890, the defendant executed and delivered to Henry Berg, as trustee, his certain deed of trust, conditioned for the payment of a certain note on the first day of November, 1890, and for securing the said Henry Myar for any advances he

might make to the said W. C. Beavers. Said deed of trust was given on the following lands, to-wit: East half southwest quarter, southwest quarter northwest quarter, and west half southeast quarter northwest quarter, section 27, township 11 south, of range 18 west. The plaintiff sold and delivered to the defendant goods, wares, and merchandise to the value of $56.78. That no part of said indebtedness has been paid, and the same is now past due. That plaintiff has demanded payment, which has been refused." A copy of the deed of trust was attached as an exhibit, and there was a prayer for payment of $56.78, and the appointment of a special commissioner to sell the land and apply the proceeds to the payment of plaintiff's debt.

To this complaint defendant filed an answer, in which he says: "That it is true he gave the mortgage to Henry Berg as trustee to secure H. W. Myar in the sum of $56.78, on January 22, 1890, on the east half southwest quarter, southwest quarter northwest quarter, and west half southeast quarter of northwest quarter, in section 27, township 11 south, range 18 west, in Ouachita county, Arkansas, but he further states that at said time he was a married man and the head of a family, and lived and resided on said land as a homestead; that he still resides on said land, and that it was at the time said mortgage was given his homestead, and still is, and that his wife never joined in the execution of said mortgage, and that the same is void."

The plaintiff demurred to this answer alleging as grounds that the facts set up therein were not sufficient to constitute a valid defense to his complaint. The court sustained the demurrer, and, the defendant electing to stand on it, and refusing to further plead, there was a decree for plaintiff for his debt, and an order of sale of the land.

On January 14, 1899, the defendant prayed an appeal, which was granted by the clerk of this court.

Thos. W. Hardy, for appellant.

The deed of trust was invalid, by reason of the failure of the wife of the mortgagor to join in its execution. Sand. & H. Dig., § 3713; 57 Ark. 242. The deed of trust was not cured

by the act of 1893 (Sand. & H. Dig., § 743). *Cf.* 44 Ark. 372. This act is repealed, so far as it applies to mortgages and deeds of trust. Acts 1899, p. 214. Hence the validity of the deed of trust here is governed by Sand. & H. Dig., § 3713. 43 Ark. 420; 44 Ark. 365; 48 Ark. 183; Cooley, Const. Lim. §§ 468–9.

Thornton & Thornton, for appellee.

The act of 1899 is prospective only. 6 Ark. 484; 63 Ark. 573; Cooley, Const. Lim. 411; 112 U. S. 539; Wade, Ret. Laws, § 34; Endlich. Int. St. § 271; Black, Int. Laws, 257. The legislature cannot impair existing contracts. 27 Ark. 26; Cooley, Const. Lim. 354–5, 450; 10 Ark. 195; 49 Ark. 192; 63 Ark. 563; 5 Ark. 217; 7 Johns. 477; Smith's Comm. 903; 24 Ark. 483; 44 Ark. 280; *ib.* 350; 63 Ark. 157; 1 How. 143; 41 Ia. 48; 11 Wis. 440; 29 S. W. 450; Suth. Stat. Const. 48, 480; 62 Miss. 510. There can be no vested right to do wrong. Cooley. Const. Lim. 471; 43 Ark. 425.

HUGHES, J., (after stating the facts.) Section 1 of the act of March 18, 1887, provided that "no conveyance, mortgage or instrument affecting the homestead of any married man shall be of any validity unless his wife joins in the execution of such instrument and acknowledges the same." The mortgage or deed of trust involved in this case was void under this act, and this is conceded by appellant. But the act of the 13th of April, 1893, provides "that all deeds, conveyances, instruments of writing affecting, or purporting to affect, the title to real estate, which have been executed since the 18th day of March, 1887, and which are defective or ineffectual by reason of section 1 of an an act entitled 'An act to render more effectual the constitutional exemption of homesteads,' approved March 18, 1887, be, and the same, and the records thereof, are hereby declared as valid and as effectual as though said act had never been passed." Section 743, Sand. & H. Dig. This cured and made valid and effectual the deed of trust under consideration, it having been made prior to the act of April 13, 1893, and subsequent to the act of March 18, 1887. Under the act of April 13, 1893, the appellee's rights under the trust deed vested, and could not be

divested by subsequent legislation. Therefore the act of April 19, 1899, repealing the act of April 13, 1893, did not have the effect to divest the rights of the appellee, which vested under the said act of April 13, 1893. An act of the legislature will not be construed to have a retroactive effect, if susceptible of any other construction. *Couch* v. *McKee*, 6 Ark. 484; *Fayetteville B. & L. Assn.* v. *Bowlin*, 63 Ark. 573; Cooley, Constitutional Lim. (4th Ed.) 411, and cases cited. "Rights conferred by statutes are determined according to the law which was in force when the right accrued, and are not in any manner affected by subsequent legislation." *Porter* v. *Hanley*, 10 Ark. 195; *St. L. I. M. & S. Ry. Co.* v. *Alexander*, 49 Ark. 192; Wade, Retroactive Laws, § 34. The legislature possesses no power to divest legal or equitable rights previously vested. *Brown* v. *Morison*, 5 Ark. 217; *Dash* v. *Van Kleeck*, 7 Johns. 477.

Affirmed.

BLOOM *v.* STATE.

Opinion delivered June 30, 1900.

68 336
672 438

1. VENUE—CIRCUMSTANTIAL EVIDENCE.—Proof that the cattle alleged to have been stolen ranged in the county of the venue late in September, and that early in October defendant sold them in another county, is sufficient proof of the venue to support a conviction. (Page 337.)

2. INSTRUCTION—CREDIBILITY OF WITNESS.—An instruction to the jury that "if you believe that any witness has sworn falsely as to any material fact, you are at liberty to disregard his entire testimony, or you may receive that portion you may believe to be true, and reject that you may believe to be false," is erroneous, as it is only where the jury believe that a witness has wilfully sworn falsely that they are at liberty to disregard his entire testimony. (Page 337.)

Appeal from Lonoke Circuit Court.

J. E. GATEWOOD, Special Judge.

Jas. A. Gibson and *John F. Park*, for appellant.

The evidence fails to prove the venue as laid in the indictment. This allegation was material, and the state is required

to prove it. 8 Ark. 406; *ib.* 455; 13 Ark. 110; 16 Ark, 505; 25 Ark. 435; 30 Ark. 41; 35 Ark. 389; 56 Ark. 244; 58 Ark. 396; 20 Ark. 174; 62 Ark. 499; 55 S. W. 15; 17 S. W. 5. The court erred in giving the fourth instruction asked by the state, upon the weight to be given to the evidence of a witness guilty of false swearing. 56 Ark. 244. The false swearing must be *wilful.*

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

The venue was proved. Venue may be proved by circumstantial evidence. 118 Mass. 1, 2, 6; 42 Ark. 73–77; 10 Mass. 154; 11 Vt. 650; 29 Ark. 293. The omission of the word "wilfully" in the fourth instruction did not prejudice appellant.

HUGHES, J., The appellant was indicted in Arkansas county for the larceny in that county of four steers.

Appellant contends that there is no proof of the venue as laid in the indictment. There is no direct proof that the steers were stolen in Arkansas county, but there is circumstantial evidence that they were stolen in that county. The testimony tends to show that they ranged thirteen miles southeast of Stuttgart, in Arkansas county, and were in charge of P. W. Turley; that they were missed from their range the latter part of September, and were sold in Lonoke county 2d of October following. Venue may be proved, like any other fact, by circumstantial evidence, as well as by direct testimony, by a preponderance of the evidence. 3 Rice on Evidence, 345; *Com.* v. *Harmon*, 4 Pa. St. 269; *Wilder* v. *State*, 29 Ark. 293; *Wilson* v. *State*, 62 Ark. 497.

The question as to the identity of the person who sold the cattle in Lonoke county with the defendant was raised in the evidence, and this was a question for the jury. While there seems to be some conflict as to this, we could not disturb the verdict in any respect upon the evidence, which tended to support the verdict.

In declaring the law in the case, the court said to the jury: "If you believe that any witness has sworn falsely as to any material fact, you are at liberty to disregard his entire

testimony, or you may receive that portion you may believe to be true, and reject that you may believe to be false." This was excepted to by defendant, and is insisted on as error in his motion for a new trial. The instruction is erroneous and prejudicial, according to the decision in the case of *Frazier* v. *State*, 56 Ark. 244, which holds that, before you can disregard the testimony of a witness for false swearing, the false swearing must be wilfully done. In the case of *Frazier* v. *State*, 56 Ark. 244, in passing on an instruction similar to the one under consideration, this court said: "False swearing as to a particular fact warrants a jury in discrediting the entire testimony of a witness only when it is wilful, and the instruction is incomplete in omitting this. Moreover, the instruction might be construed as warranting a jury in disregarding testimony which it believed to be true, if it emanated from a witness who had sworn falsely to some other fact. Thus construed, it does not reflect the law; for, although a witness is found to have wilfully testified falsely to a material fact, the jury will not be warranted in disregarding other parts of his testimony which appear to be true."

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

RITTMAN *v.* PAYNE.

Opinion delivered July 21, 1900.

MUNICIPAL CORPORATION—VACANCY IN OFFICE—SPECIAL ELECTION.—A special election to fill the office of city marshal of a city of the second class, held on notice of the mayor without authority of the city council, is invalid. (Page 339.)

Appeal from Arkansas Circuit Court.

GEO. M. CHAPLINE, Judge.

Geo. C. Lewis, for appellant.

Where special findings of fact are made by a court, they must state all the facts necessary to support the verdict. 33 Ark. 534; 8 Enc. Pl. & Pr. 933, 949. There can be no "*implied authority*" to hold an election. 10 Am. & Eng. Enc. Law (2d Ed.) 563; 32 Fla. 545; 148 Ind. 38. The city council, and not the mayor, was authorized to set the time and place of the special election. Sand. & H. Dig., § 5127. Hence the election is void. 10 Am. & Eng. Enc. Law (2d Ed.) 562, 624, 630; Dill. Mun. Corp. 194; 50 Ark. 279; 3 S. W. 622; 89 Ill. 337; 27 Ill. 310; 38 Ill. 44; 61 Ill. 99; 104 Ill. 339; 54 Ill. 123; 21 L. R. A. 202, S. C. 108 N. C. 106; Dill. Mun. Corp. §§ 208, 270; Ell. Mun. Corp. § 193; Beach, Pub. Corp. §§ 163, 381; Tied. Mun. Corp. § 65

Parker & Parker, for appellee.

The statute does not require the special election to be called by the *town council*. If the people know of a special election, and participate therein, even though the proper notice be not given, unless it appears that upon proper notice it would have resulted differently, the election will stand. 7 Neb. 381; 13 Neb. 466; 46 Neb. 514; 14 Bush, 161; 57 Md. 327; 10 How. 212; 8 Pa. Co. & Ct. Ref. 568; 132 Mass. 289; 84 Mich. 420; 31 Neb. 82; 17 R. I. 594; 50 Ark. 277.

BUNN, C. J. This cause, in some of its aspects, was once before on appeal in this court. Our decision on that appeal is reported in 66 Ark. 201, the case being styled "E. Payne, Appellant, against W. H. Rittman, Appellee." The questions before us then were: First, whether or not the governor's appointment of E. Payne, the appellant, to fill the vacancy in the office of marshal of Stuttgart, a city of the second class, was valid; and, secondly, had the circuit court jurisdiction to hear and determine a contested election for that office? We held, in effect, that the governor's appointment was invalid, and that the power to fill such vacancy rests in the city council, the language of the decision being as follows, to-wit: "It will be observed that, while authority is conferred by statute upon a city of the second class to order special elections to fill vacancies in the office of city alderman, nothing

is said in that connection as to the office of city marshal. But a majority of this court holds that the authority to fill vacancies belongs to municipalities generally, and that these general powers are expressly conferred by statute in this state upon all its municipal corporations." "Municipalities," as here used, means the city or town councils, through which municipal action is expressed and had. This cause was remanded with directions to the circuit court to overrule the demurrer as to its jurisdiction of the contested election, and to proceed to try the same. The defendant, on the case being remanded, filed his answer, in which he not only answered the notice of contest, but also set up the fact that the election had been held on the notice of the mayor only, without any authority of the city council on the subject. The city council having the sole right to fill the vacancy, that should have been done by previous ordinance or resolution. The mayor had no power in the matter, and any acceptance of the mere result of the election cannot be regarded as giving any validity to the election itself. The trial court found that the election was held by direction and notice of the mayor. There was, therefore, no legal election, and it is unnecessary to go into the inquiry as to who was elected.

Judgment reversed, and cause dismissed.

HILLIARD v. BUNKER.

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Opinion delivered July 21, 1900.

1. LEVYING COURT—APPROPRIATIONS—SUFFICIENCY OF RECORD OF VOTE.—Where the record of the levying court shows that a majority of the justices were present, naming them, and that each and every item of the appropriations for the current year were taken up and voted on, and that each item was adopted by a unanimous vote, without naming those voting for each item, the record shows a sufficient compliance with Sand. & H. Dig., § 1275, providing that "the names of those members of the court voting in the affirmative and of those voting in the negative on all propositions or motions to levy a tax or appropriate any money shall be entered at large on said record." (Page 344.)

2. SAME—TERMS.—Sand. & H. Dig., § 1163, which provides that "whenever it shall happen that the time for holding the county court and the circuit court in any county shall be on the same day, the county judge shall not commence his court until two weeks thereafter," has reference only to the terms of the county court proper, and not to the terms of the levying court, which are fixed by section 6417, *id.* (Page 345.)

3. COURT HOUSE—CONTRACT—APPROPRIATION.—An appropriation by the the levying court for the purpose of building a county court house is not a prerequisite to the letting of a contract for the same by the county court. Following *Durrett* v. *Buxton*, 63 Ark. 397. (Page 347.)

4. LEVYING COURT—VALIDITY OF PROCEEDINGS.—The proceedings of the levying court are not invalid because the record was not signed by the members of the court present and participating. (Page 347.)

Appeal from Chicot Circuit Court in Chancery.

MARCUS L. HAWKINS, Judge.

Robinson & Merritt, for appellants.

The appropriation was made by the county court at a time when the law did not provide for the holding of said court, and hence is *coram non judice* and void. 2 Ark. 229; 20 Ark. 77; 27 Ark. 414; 32 Ark. 687; Sand. & H. Dig., § 1163. The court will take judicial notice that October 2, 1899, was the first Monday in October. 38 Ark. 548. The court for levying taxes and making appropriations is a county court, within § 1163, Sand. & H. Dig. 32 Ark. 687. The chancery court has jurisdiction, and injunction is the proper and only remedy. Const. Ark. art. 16, § 13; 46 Ark. 471; 58 Ark. 187; 54 Ark. 645.

Baldy Vinson, for appellees and cross-appellants.

The levying court that met on October 2, 1899, was held on the proper day. Section 6417, Sand. & H. Dig., is not repealed or modified by § 1163, *id.* The county court is one of superior jurisdiction, and recording is not necessary to the validity of its acts. 59 Ark. 588; 40 Ark. 224. Courts have authority to adjourn from day to day. 2 Ark. 229; 48 Ark. 227; 55 Ark. 213. Even if the appropriation made by the quorum court is void, the contract sought to be enjoined is valid. No appropriation was required, it being the duty of the county court to enter into a contract for a good and sufficient

court house and jail. 63 Ark. 402; act March 18, 1879; 36 Ark. 641; Sand. & H. Dig., § 841. The county court had exclusive jurisdiction of the matter originally. Const. Ark. art. 7, § 28; 43 Ark. 67; 5 Ark. 21. Chancery court has no power to issue the injunction asked. 33 Ark. 192; 34 Ark. 356; Const. Ark. art. 7, § 15; *id.* art. 7, § 30; *id.* art. 7, § 35; Sand. & H. Dig., §§ 6423–6425.

BUNN, C. J. This is a bill in chancery to enjoin the court house and jail commissioners of Chicot county from letting a contract to build a court house and jail at Lake Village, as ordered by the county court. The bill sets up various objections to the proceedings of the county court, both as a tax levying and appropriation court, and while sitting as the ordinary county court; to all of which objections the defendants interposed a demurrer, assigning sundry grounds therefor. Most of the allegations to which the several specific demurrers are interposed are mere averments of objections to the manner in which the county court had assumed to exercise its undoubted jurisdiction. To all of these allegations, except as to the character of the notice for bidders given by the commissioners, the demurrer was sustained by the chancellor, and properly so. The chancellor also sustained the demurrer on the four general grounds, and in this also he was correct, in our view of the law in relation thereto, as will appear from what follows in considering the several questions necessary to be discussed as they arise in their order.

The history of the proceedings of the county court, both as an ordinary court and a levying court, and of the county commissioners, complained of in the complaint, is as follows, viz.: On the 11th day of July, 1889, it being a day of the regular July term of the Chicot county court, that court, among other things, appointed John C. Connerly, O. C. Stearns, Walter Davis, N. W. Bunker and Baldy Vinson, as commissioners of the court, to examine into the condition of the court house and jail of said county, "with special reference to building a fire-proof vault for the records of the county, and with directions to report at the following October term." On the first Monday in October, 1899, it being the 2d day of

that month, the county court, with the justices of the peace of the county, met to make appropriations and levy taxes for the year, and to this court said county court commissioners reported; and in their report they showed that the court house and jail were both in such bad condition as to be incapable of being repaired so as to make them serviceable for their purposes, and they therefore earnestly recommended the building of a new court house and jail, presenting to the court, at the same time, such information on the subject as they had obtained upon diligent inquiry and investigation as they thought would be of benefit to the court in the premises. Upon consideration the levying court approved the report and the recommendation therein contained, and appropriated the sum of fifteen thousand dollars for the building of a court house, and ten thousand dollars for the building of a jail, and made an order directing the regular county court to appoint commissioners for that purpose, the judge thereof to be one of them, and the record shows that court then adjourned for two weeks—that is, until the 16th October, 1899. There is no further record of the convening or adjournment of that court for that year. This much appears, however: that at its meeting on the 2d of October it made, succinctly and separately in their order, what appears to be the appropriations for the current and ordinary expenses of the county for the year, in addition to the court house and jail appropriations aforesaid. The opening order of the levying court, which convened on the first Monday in October aforesaid, is as follows, to-wit: "Be it remembered that on this the 2d day of October, 1899, the same being the day fixed by law for the meeting of the Chicot county court, were presiding Hon. Charles F. Wells, Judge, and a majority of the justices of the peace for said county, met at the court house in the town of Lake Village, Chicot county, Arkansas, for the purpose of making appropriations and levying taxes for the year 1899, and Frank Strong, sheriff, and Johnson Chapman, clerk, also being present, and the opening of same being proclaimed in due form of law by the sheriff, the following proceedings were had, to-wit: It is ordered by the court that the clerk call the roll of justices of the peace, which was accordingly done,

when the following-named justices answered to their names, to-wit: [here follow the names of eleven justices of the peace], and, there being a majority of the qualified justices of the peace present, the court proceeded with its business in the following order, to-wit." Then from page 31 to page 36, inclusive, of the transcript filed by defendants herein appear the minutes of the court making appropriations, except as to the court house and jail, of which the minutes appear on pages 23 and 24. The following is the adjourning order: "The court now sitting for the purpose of making appropriations and levying taxes for the year 1899, having completed its duties, stands adjourned by operation of law for two weeks, or until October 16, 1899." Then follow blank places for names of justices, but none appear to have been given.

The first question raised by the allegations of the complaint and demurrer thereto is, does the record show that a majority of the justices of the peace were present on the 2d of October, 1899? The roll was called, and eleven answered to their names, and these names appear in the record of the call, and these were declared to be a majority of the justices of the peace of the county; and the minutes of the proceedings of that day further show that each and every item of the general appropriations for the current year were taken up one by one, and voted upon, and that each item was adopted by a unanimous vote; and that this was also true of the items of building the court house and jail and the appropriations therefor. The object of the minute record in such cases is to show that each item of appropriation received a majority vote of the members of the court present and participating, when these constitute a majority of the justices of the county. The record of the proceedings in this case show a substantial compliance with the statute. The rule which requires the yeas and nays to be called and taken down is applicable solely to legislative bodies. Thus the constitution contains such a provision as to the legislature, and the statute requires the observance of it by town and city councils in voting upon certain classes of propositions, but there is no rule of the kind applicable to judicial bodies in this state.

The next and more serious question to be considered is, was the first Monday in October, 1899, fixed by law for the convening of the levying court? It is undoubtedly true that section 6417 of Sand. & H. Digest, which is a part of our revenue statute, fixed the 1st Monday in October as the day for the annual meetings of the levying courts of all the counties in the state; but it is contended in argument (although the issue is not clearly made in the complaint and demurrer thereto) that section 1163, *id.*, changes the time for convening of the levying court in counties where the holding of the circuit court is fixed for the same time, and where there is but one clerk. This section reads as follows, to-wit: "Whenever it shall happen that the time for holding the county court and the circuit court in any county shall be on the same day, the county judge shall not commence his court until two weeks thereafter. Provided, this section shall not apply to counties having separate county clerks, as provided for in section 19, article 7 of the constitution." This section, with some subsequent amendments, unimportant in this inquiry, was first enacted February 5, 1875, as part of an act fixing the time for holding the ordinary county courts in the state, and has always been referred to by the legislature under that head, and digested in that connection by the digesters. The time for holding the levying courts, as we have said, is and has always been a part of our revenue statute, and in each of the changes that have been made since 1875 there has been no express nor direct reference to the other. So, if section 1163 of the digest has any effect, as a repealing or amendatory statute, upon section 6417, it can only be by the vaguest implication. Our revenue act of March 28, 1883, from which the law is taken, was a general and comprehensive act on the subject, expressly repealing all laws in conflict therewith. If this postponing section (1163), which was then in force, had any reference to the revenue law at all, or to the time of holding the levying court, it was in direct conflict with section 9 of the act of 1883, and was repealed thereby; for the revenue statute was on a special subject, and took up the whole of that special subject, to which said section 9 was strictly germane, and the postponing section,

as subsequently amended, makes no reference to this section of the revenue statute, and, indeed, contains no repealing clause whatever. The language of section 1163 is significant in this, that the county judge is required not "to commence his court until two weeks afterwards." This language is more appropriately applied to the county court held by the judge (for such is his court) than when applied to a court composed of many persons, who are authorized to organize and proceed to business in his absence; thus impliedly denying him the effectual power to permit that court to lapse by his mere non-action. It will be observed that the section fixing the time for holding the annual levying court is uniform throughout the state, although in some counties the county courts proper do not hold on that day. It will be observed, also, that the section does not provide for the levying court to meet at the fall term of the regular county court, but on the 1st Monday in October of each year, indicating an independency of the terms of the county court proper; and if the times for holding the county courts proper were changed, and no reference be made to the section of the revenue statute fixing the time for holding the levying court, the latter would not be affected by the former, for, there being no conflict, there would be no repeal by implication or by general terms. We conclude, for these and other reasons that might be assigned, that the postponing section had reference only to the terms of the county court proper, and not to the terms of the levying court.

The question is not altogether free from doubt in the minds of some of us, and it would not be strange to find that the county courts throughout the state, which have been affected, have entertained and acted upon divergent views of the subject; for the enactments, it must be confessed, are confusing, although more in their arrangement than in their substance. It must be borne in mind that nothing here said must be considered as denying to the levying courts the power inherent in all superior courts of record to adjourn from time to time, as necessity or convenience may demand, provided no statute is violated, nor any interference is made with the uniform, systematic and orderly administration of our revenue laws.

In *Durrett* v. *Buxton*, 63 Ark. 397, this court held that sections 839, 841 of Sand. & H. Dig. are special statutes, and are not repealed by the subsequent statute, digested as section 1279, which forbids county courts or their agents from making contracts until appropriations have been made therefor. Section 841 leaves the whole question of building a court house and jail to the county court proper.

The objection that the record of the day's proceedings were not signed by the members of the court present and participating does not go to the validity of the proceedings so noted by the clerk as shown in the record. In the first place, the authorized officer having written up the minutes upon the record, and their verity not having been called in question, the county court having general jurisdiction of the subject-matter, and being a superior court, the truth of the minutes could be established by parol. *Lowenstein* v. *Caruth*, 59 Ark. 588; *Bobo* v. *State*, 40 Ark. 225.

The objection that the county court appointed three (only two were appointed), instead of one, is abstractly correct, but it only goes to the compensation to be allowed the commissioners for services. This bill is to restrain the letting of a contract on the notice given at first by the commissioners for informality, and the chancellor sustained the plaintiff in that regard. As we understand it, the commissioners then advertised in proper form for bidders, and the temporary restraining order granted by us was to restrain them from letting the contract on this last notice. In the case at bar the levying court made the appropriation required by section 1279, and so, in either event, whether a previous appropriation by the levying court was necessary, as provided in section 1279, for the erection of county buildings generally, or the order for the building of the court house and jail could be made by the county proper without such previous appropriation, as seems to be the effect of the rule of *Durrett* v. *Buxton*, *supra*, the order of the county court proper was valid, and binding upon the county.

In such an expensive matter as the building of a court house and jail, it is not of course expected, under ordinary cir-

cumstances, to cover the whole amount by the levy for one year, and in fact this cannot be done, since, together with the ordinary expenses of the county, the levy for erecting these buildings must not exceed in one year the rate of 5 mills. The amount and number of the annual installments necessary to cover the whole cost of the structure must be and is left to the discretion of the levying court, to be exercised so as to accomplish the result intended in a reasonable time.

Having thus disposed of all the questions that properly arise under the allegations of the bill and demurrer thereto, our conclusion is that the decree of the chancellor should be affirmed, and the temporary injunction granted by us should be dissolved, and it is so ordered.

AUSTIN v. STEELE.

Opinion delivered July 21, 1900.

MORTGAGE—LIMITATION.—The statute providing that payments on a mortgage debt shall not operate to revive the debt, so far as the rights of third parties are affected, unless the mortgagee "shall, prior to the expiration of the period of the statute of limitation, indorse a memorandum of such payment with date thereof on the margin of the record where such instrument is recorded" (Sand. & H. Dig., § 5094) does not apply where the mortgage debt is kept alive by subsequent written agreement. (Page 353.)

Appeal from Benton Circuit Court in Chancery.

EDWARD S. MCDANIEL, Judge.

STATEMENT BY THE COURT.

On the 6th day of January, 1897, appellee brought this suit on the chancery side of the Benton county circuit court against appellant, W. H. Austin, and others.

The material allegations of the complaint are that on the 18th day of July, 1882, Baker Phoenix, being the owner of the following-described real estate situated in Benton county, Arkansas, to-wit, the southeast quarter of southeast quarter

of section 21, and southwest quarter of southwest quarter of section 22, and the northwest quarter of the northwest quarter of section 27, and the northeast quarter of the northeast quarter of section 28, all in township 20 north, range 33 west (160 acres), by deed of trust conveyed the same to Henry C. Wilson, in trust to secure the payment to W. F. Leonard of the sum of $300 borrowed from him by Baker Phoenix, and due and payable on the 1st day of August, 1887, or five years after date. That the trust deed was properly executed, and recorded in the office of the recorder of Benton county, Arkansas, on the 26th day of July, 1882. That on a blank date Leonard, for a valuable consideration, sold and assigned the $300 note and unpaid interest coupons to appellee, Stelle, without recourse, and that he was the owner of the note and unpaid interest coupons. That on the 20th day of October, 1883, Baker Phoenix, joined by his wife, sold and conveyed to D. B. Eichinger 80 acres of said real estate, described as follows: The southeast quarter of southeast quarter of section 21, and the northeast quarter of northeast quarter of section 28, in township 20 north, range 33 west; and Eichinger's deed therefor was duly recorded in the office of the recorder of Benton county, Arkansas, on the —— day of ———, 1883. That through a succession of conveyances from Eichinger the last described 80 acres had been conveyed to appellant. That the remaining 80 acres, described as the southwest quarter of southwest quarter, section 22, and the northwest quarter of northwest quarter, section 27, township 20 north, range 33 west, was on the 8th day of June, 1890, by Baker Phoenix, joined by his wife, sold and conveyed to Emily Halpin, and her deed was properly executed and recorded in the office of the recorder of Benton county, Arkansas, on the 31st day of January, 1896. That on the 29th day of January, 1896, Emily Halpin sold and conveyed the 80-acre tract of said land owned by her to appellant, W. H. Austin, and the deed therefor was duly recorded in the office of the recorder of Benton county, Arkansas, on the 31st day of January, 1896, and appellant entered into possession of the land, and was so at the institution of this suit. On the 11th day of July, 1887, said indebtedness remaining

unpaid, by an agreement entered into between Baker Phoenix and W. F. Leonard (payee and owner of the note) the time of the payment of same was extended five years, or until August 1, 1892. That thereafter, and on the 1st day of August, 1892, said note still remaining unpaid, by an agreement entered into between W. F. Leonard (as payee and owner of the note) and one W. T. McAnally, the time for the payment of said note was extended from August 1, 1892, to August 1, 1897. That by the terms of said note, if default was made in the payment of any of the installments of interest when due, the said mortgagee should have the right to declare the principle and all unpaid installments of interest due, and that such default had been made in the payment of the installment of interest due August 1, 1896, and that appellee, Steele, had elected to declare the whole amount due. That Baker Phoenix, on a blank day, in Benton county, Arkansas, died intestate, and no administration on his estate had been had, and none was necessary, and that J. B. Phoenix and M. J. Halpin were his sole heirs at law. In consideration of the foregoing allegations, plaintiff prays judgment on note for amount due and foreclosure of defendant's equity of redemption, and other proper relief.

On the 18th day of March, 1897, appellant demurred to the complaint for the following causes: (1) Because of the laches of appellee and his assignor. (2) Because of the failure of the appellee and his assignor to comply with the act of the general assembly prescribing the manner of continuing in force mortgages and deeds of trust, approved March 25, 1889. (3) Because the extension agreements mentioned in the complaint were not made by any one having an interest in the property affected by such agreements. (4) Because of failure to set forth facts sufficient to entitle the appellee to the relief prayed for.

On the 8th day of April, 1897, appellant filed his answer and cross bill, admitting Baker Phoenix owned the lands mentioned in the complaint in 1882, and that he executed the note and trust deed for the purposes mentioned in the complaint, and disclaimed sufficient knowledge of the ownership of the note to

form or authorize a belief. It is also admitted that in 1883 Baker Phoenix sold and conveyed 80 acres of the land, and in 1890 he sold and conveyed the remaining 80 acres of the tract, and that through his successive grantees appellant acquired his title to the entire tract of 160 acres; and before the complaint herein was filed, and by way of new and affirmative matter, appellant alleges that he purchased the lands for a valuable consideration and in good faith; that prior to purchasing the same he examined the records affecting the titles to the lands, and no credits or payments on the note and trust deed have been entered on the margin of the record thereof, as required by the act of the general assembly, approved March 25, 1889, or otherwise. Said act is specially pleaded in bar of the appellee's right to a foreclosure of the trust deed. That the original transaction was usurious. That the note and trust deed were void and a cloud on appellant's title. That the extension agreement made by Baker Phoenix in 1887 was neither acknowledged nor recorded, and at that time he had conveyed the southeast quarter of southeast quarter of section 21, and the northeast quarter of northeast quarter of section 28, township 20 north, range 30 west, and mentioned in the complaint, and had no rights *in re* or *ad rem*, and the agreement was of no binding force as to any of the lands. That McAnally was not a party to either the note or trust deed, and that the extension agreement made by him in 1892 was neither acknowledged nor recorded, and that he was a stranger to the title of the southwest quarter of southwest quarter, section 22, and northwest quarter of northwest quarter, section 27, township 20 north, range 33 west, described in the trust deed, and the agreement executed by him was of no binding force. That appellee's alleged cause of action was stale, and outlawed by the general law of limitation; and prays for cancellation of the trust deed.

Appellee demurred upon the grounds that the facts set forth in the answer, if true, were insufficient to constitute a defense to the complaint, and also answered denying usury and the assumption of the debt by McAnally.

The hearing of the case in the court below resulted in a decree of foreclosure, for the reversal of which this appeal is prosecuted.

J. A. Rice and *C. M. Rice*, for appellant.

Under the act of 1889 (Sand. & H. Dig., §§ 5094–5), the debt and the right to foreclose, as against third parties at least, was barred at the end of five years. There is no agreement legally sufficient, under the above act, to extend the time, so as to affect the rights of third parties. An agreement to extend the time of payment, not executed and recorded as required by law, is at most a personal obligation between the parties, and does not bind the property or subsequent purchasers. 1 Jones, Mort. §§ 564, 578; 42 Cal. 493; 36 Cal. 11; 26 Cal. 361; 56 Cal. 342. McAnally's agreement was void as to the eighty in sections 21 and 28. The bar was complete before he made his extension, and his agreement could not revive the mortgage against the mortgagor's grantees. 18 Kas. 104; 2 Jones, Mort. §§ 1195, 1198; 18 Cal. 482, 490; 83 Mo. 35; 34 Ia. 380; 13 Am. & Eng. Enc. Law, 760; 18 Cal. 342; 56 Cal. 342. Appellant had a right to rely upon the record required to be kept by the act of 1889, and he is, to all intents and purposes, an innocent purchaser. Pingrey, Mort. §§ 1575, 1753. The beneficiary of a trust can not maintain a suit such as this about the trust property. The demurrer should have been sustained. 2 Jones, Mort. § 1384; Sand. & H. Dig., § 5626; 17 Am. & Eng. Enc. Law, 505; Bliss, Code Pl. §§ 54, 55, 58; Story, Eq. § 75; 3 Ark. 364; 27 Ark. 235; 32 Ark. 297, 302.

E. P. Watson, for appellee.

The act of 1889 applies only to those cases wherein the plaintiff seeks to revive the debt by showing payments. The act is not retrospective, and so does not apply to the agreement of 1887. Nor does the second section of the act apply to this case. 63 Ark. 573. The mortgage was a lien on the land as long as the debt was a valid and subsisting one. Sand. & H. Dig., § 5094. The question as to the trustee being a party was not raised below, and cannot now be raised. 30 Ark. 399; 54 Ark. 525; 3 Met. 137; 33 Ark. 497. The deed was in reality a mortgage. 31 Ark. 429; 53 Ark. 545; 54 Ark. 179; Jones, Mort. §§ 62, 1769. Hence the transfer of the debt

carries with it the mortgage. Jones, Mort. §§ 817, 820, 1146; Pom. Eq. Jur. § 2310.

HUGHES, J., (after stating the facts.) Prior to the passage of the act of March 15, 1889 (Sandels & Hill's Digest, §§ 5094, 5095), the limitation of actions to foreclose mortgages or deeds in trust upon real estate was seven years, the period allowed by the statute within which to bring ejectment for the possession of the land. Section 4815, Sandels & Hill's Digest, as to limitation of right to bring ejectment (act of January, 1851). "Seven years continuous adverse possession against the mortgagee will bar his action for the recovery of the mortgaged premises, or for foreclosure of the mortgage; but to constitute adverse possession against a mortgagee it is not sufficient that the mortgagor, or those holding under him, occupy, use, improve and pay taxes on the premises as their own absolute property, but the possession must be in open denial of the mortgagee's title, and accompanied with such acts or declarations of the holders as are sufficient to put the mortgagee on notice that they claim and hold in hostility to his rights, and adversely to him. Until then the possession is consistent with his rights, and not adverse, and the statute does not begin to run." *Ringo* v. *Woodruff*, 43 Ark. 469; *Whittington* v. *Flint*, 43 Ark. 504. This statute as to the question of limitation of the right to bring this action controlled until the passage of the act of March 15, 1889, which provided that "in suits to foreclose or enforce mortgages or deeds of trust it shall be sufficient that they have not been brought within the period of limitation prescribed by law for a suit on the debt or liability for the security of which they were given, etc." Actions on promissory notes not under seal are barred if not brought within five years after the cause of action shall accrue. Section 4827, Sandels & Hill's Digest.

The debt in this case was evidenced by a promissory note due on the 1st of August, 1887, secured by a trust deed upon the lands in controversy, and bearing date 13th of July, 1882, in which deed of trust there was an express covenant to pay said debt. This trust deed was properly acknowledged and recorded on the 26th day of July, 1882, in the office of the

clerk and recorder of Benton county, in which county said lands are situate. The note was assigned by Leonard, the payee, to the appellee, Steele, without recourse. On 20th October, 1883, Phoenix and wife conveyed of said real estate to Eichinger the southeast quarter of the southeast quarter of section 21, and the northeast quarter of the northeast quarter of section 28, in the aggregate 80 acres, in township 20 north, range 33 west. This piece was afterwards conveyed to the appellant, Austin.

The other 80 acres, the southwest quarter of the southwest quarter of section 22, and the northwest quarter of the northwest quarter of section 27, township 20 north, range 33 west, was, on the 8th of June, 1890, conveyed by Baker Phoenix and wife to Emily Halpin, to whom a properly executed and acknowledged deed was made on the 8th day of June, 1890, which was duly recorded in the office of the recorder of Benton county on the 31st of January, 1896. On the 29th of January, 1896, Emily Halpin conveyed the same tract to appellant, Austin, and on 31st January, 1896, the deed to him therefor was recorded in the office of the recorder of Benton county, and the appellant entered into possession of the land, and was in possession thereof when this suit was commenced. This possession was, however, not adverse.

On the 11th day of July, 1887, before the debt secured was due, and before the statute had begun to run, and the debt being unpaid, by an agreement in writing between Baker Phoenix and W. F. Leonard, the payee and owner of the note, the time for the payment of the same was extended five years, or until the 1st of August, 1892. This made the date at which the right of action would have been barred after the 1st of August, 1897, and this suit was brought on the 6th of January, 1897, nearly seven months before the right of action to foreclose the mortgage was barred.

We need not, therefore, notice the extension of the time of payment, made by Leonard at the instance of McAnally. It is true the extension of the time of payment made by agreement between Phoenix and Leonard was made after Phoenix had sold one 80 acres of the land, but Phoenix was liable to pay the

note at the time of the extension of payment, and the purchasers from Phoenix had constructive notice of the mortgage on record, and in contemplation of law bought subject to it; in other words, bought only the equity of redemption. *Barrett* v. *Prentiss*, 57 Vt. 300; *Hughes* v. *Edwards*, 9 Wheaton (U. S.) 489, 498. His grantees could stand in no better condition than Phoenix himself. *Hughes* v. *Edwards*, 9 Wheaton, 489.

The statute requiring indorsement of payment on the record to prevent the bar of the statute does not apply. The mortgage was kept alive by written agreement, and in fact the covenant in the mortgage was not barred until 1897, the period of limitation on that covenant being ten years, it being a covenant in the mortgage under seal to pay the debt.

The decree is in all things affirmed.

NEWBERRY *v.* STATE.

68 355
85 184

68 355
188 582

Opinion delivered July 21, 1900.

1. EVIDENCE—DYING DECLARATION.—While decedent was lying on the ground mortally wounded and gasping for breath, his grandfather requested the bystanders to "listen to him while he tells how it happened, before he dies." In response to these words decedent made a statement implicating defendant, and died within a few hours. *Held*, that such statement was admissible as a dying declaration. (Page 357.)

2. SAME—REFUSAL OF INSTRUCTION—WHEN CURED.—The court's refusal to charge that the jury in determining the weight to be given to de cedent's dying declaration might take into consideration his mental condition and the fact that defendant had no opportunity to cross-examine was not prejudicial where the court told the jury that it was for them to determine the weight to be given to such statement, and that they could, with other circumstances, consider whether such state ment was voluntarily made, and whether it covered all the circumstances of the killing. (Page 359.)

Appeal from Faulkner Circuit Court.

GEO. M. CHAPLINE, Judge.

STATEMENT BY THE COURT.

Z. T. Newberry was indicted for murder of John Bass. Bass was a tenant. He and his wife occupied one room of a house belonging to Newberry. In the other room Newberry had stored wheat. Newberry had two keys to the house, and gave one of them to Bass, retaining the other. Bass, while occupying the house, lost his key. During Newberry's absence, he obtained the other key from Newberry's wife. When Newberry returned home the night before the killing, and found that Bass had got possession of the key, he became excited, took his Winchester rifle, and went to Bass' house, and demanded the key. Bass surrendered the key, but claimed that Newberry had promised to let him have another key if his key was lost, so that the house could be kept locked, and the wheat protected during any absence of Bass and his wife from home. Newberry denied that he had made such a promise, and seemed to be much excited. When Bass told him he could not be responsible for the wheat without a key to lock the house, he replied: "Let the wheat go to hell! If they would take it while you are gone, they would take it while you are there." The next day Bass sent a note to Newberry ordering him to remove his wheat in ten days, or he would prosecute him for disturbing his family. On the afternoon after this note was delivered, Bass and Newberry met in the public road. Newberry was riding a mule, and had his Winchester rifle. Bass was riding a pony, and was unarmed. They each bowed and spoke, but, after they had passed each other and were about forty feet apart, Newberry called to Bass and said, "John what did you mean by sending me that note this morning?" Bass replied that he meant what he said. They thereupon got into an altercation about whether Newberry had promised to let Bass have another key or not, and the end of it was that Newberry shot Bass with his Winchester rifle. The pony upon which Bass was riding turned and ran, and carried Bass about half a mile, when he fell to the ground, and died about five hours afterwards.

Upon trial of the charge Newberry was convicted of voluntary manslaughter, and his punishment assessed at five years in the penitentiary. From the judgment of conviction he appealed.

E. A. Bolton, *John T. Young* and *J. H. Harrod*, for appellant.

Dying declarations must be admitted in evidence with the utmost caution, and never unless it clearly appears that they were made while the deceased realized that death was impending; and the burden of showing this is on the state. 2 Ark. 247; 146 U. S. 140; 17 Ill. 21; 126 Ill. 81. Dying declarations relating to former and distinct transactions are not admissible. Whart. Cr. Ev. (8th Ed.) § 278. The court erred in commenting upon the evidence. 38 Ark. 509; 89 Ill. 90; 51 Mo. 160.

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

The fear of impending death may be inferred from circumstances. Underhill, Cr. Ev. § 104. Sending for a physician is no indication of a hope for life. 1 Den. C. C. 1; 103 Ala. 12; 15 So. 824. There is no error in the court's instructions.

RIDDICK, J., (after stating the facts.) The first question raised by the appeal in this case has reference to the action of the circuit judge in permitting declarations made by Bass after the shooting to be introduced as evidence on the part of the state. Appellant contends that it was not shown that these declarations were made under a sense of impending death. The law bearing on the admissibility of dying declarations is very clearly stated in Greenleaf on Evidence as follows: "It is essential to the admissibility of these declarations, and is a preliminary fact to be proved by the party offering them in evidence, that they were made under a sense of impending death. But it is not necessary they should be stated at the time to be so made. It is enough if it satisfactorily appears in any mode that they were made under that sanction, whether it be directly proved by the express language of the declarant, or be inferred from his evident danger, or the opinions of the medical or other attendants stated to him, or from his conduct or other circumstances of the case, all of which are resorted to in order to ascertain the state of the declarant's mind." 1 Greenleaf, Evidence (16th Ed.) § 158; *Dunn* v. *State*, 2 Ark. 229; *Mattox* v. *United States*, 146 U. S.

140, 151; 3 Russell on Crimes (International Ed.) 391; *People* v. *Simpson*, 48 Mich. 474.

Now, in this case Bass was shot in front on the right side of the chest. The bullet passed through him, and came out at his back at a point some lower than where it entered. The effect of this wound was such that Bass reeled in the saddle, and, after being carried by his horse about half a mile from the place of the shooting, fell to the ground, and lay with his face downward, unable to move. A man, who lived near, seeing him fall, came to him, and turned him over. Finding his condition was such that he could not easily be moved, he brought a quilt, and laid Bass upon that while he summoned a physician and the neighbors. The physician testified that the wound made by the bullet in front was as large as his middle finger, and that in the back where it came out it was as large as his thumb. Bass was very weak, and was suffering greatly. The physician saw that the wound was mortal, though he expressed no opinion to Bass. Bass did not ask the doctor for his opinion, nor say anything to show whether or not he had hopes of recovery, but only asked for something to relieve his pain. Among those who came to see Bass was his grandfather. He leaned over Bass where he lay on the quilt, and said, "John, what is the matter?" Bass answered, "I am shot." "Who did it?" asked his grandfather. "Newberry," replied Bass. His grandfather, then still leaning over him, and in the same tone of voice, said: "Now, boys, listen to him while he tells how it happened before he dies." In response to these words of his grandfather, Bass made the statement admitted in evidence as his dying declaration. The statement that he made is not long, but the witnesses say that he was so weak that it took him an hour to make it. He was gasping for breath, and to those who saw him it was evident that death was only a short distance ahead. The probability is that Bass realized his situation, for when his grandfather intimated to him that death was near, and that he should make a statement, he at once commenced to do so, thus showing that he assented to the opinion expressed by his grandfather. He died in five hours after being shot, and about three hours after making the statement.

The admission of dying declarations as evidence in prosecutions for homicide to show the circumstances of the death of the declarant is justified on the ground of necessity. The slayer and the slain may have been the only persons present at the tragedy, and, if the dying declarations of the circumstances of his death made by the deceased could not be shown, it would at times be impossible to punish the guilty. Even when there are other witnesses, they may be unfriendly to the deceased, or may be ignorant of essential facts. For these reasons it is important that the circumstances as they appear to the deceased should also be shown. Especially is this true now, since under modern statutes the defendant is allowed to testify and give his view of the facts. The law therefore admits such declarations when made under a sense of impending death. Whether they were so made being a preliminary question of fact for the trial judge, his finding to that effect will not be overturned when there is evidence supporting it. The circumstances in proof here support the finding of the judge on that point, and such finding must stand.

Such declarations can be admitted only to prove the circumstances attending or leading up to the homicide, and some of the declarations of Bass relating to the controversy about the key were not properly admitted, but we do not see that they were prejudicial. Whether Bass or Newberry was right in the controversy about the key did not justify Newberry in killing Bass. The instruction asked by defendant that the jury in determining the weight to be given the statement of Bass might take into consideration his mental condition at the time, and the fact that defendant had no opportunity to cross-examine, might well have been given, but the court did tell the jury that it was for them to determine the weight to be given to such statements, and that they could, with other circumstances, consider whether such statements were voluntarily made, and whether they covered all the circumstances of the shooting. Taking the whole charge together, we think the case was fairly presented to the jury, and that no prejudice resulted from the refusal to give the instruction asked.

The evidence as presented in the transcript makes out a

strong case of unlawful killing. It is undisputed that when the controversy about the key commenced Bass was sitting on his pony, about forty feet from Newberry, who was seated on a mule. Bass was unarmed. Newberry had a Winchester rifle. Bass stated that he refused to retract a statement to the effect that Newberry had promised him another key, and that thereupon Newberry got off his mule, and shot him. Newberry testified that Bass was riding toward him with his hand in his pocket, threatening to kill him, and that he got off his mule and shot Bass while Bass was ten or twelve feet away on his pony. He admits that at this time he saw no weapons, and Bass had none except a small pocket knife. There was other testimony that the tracks of a pony and a mule were seen in the road at the place where the shooting occurred. The tracks of Newberry where he stood beside his mule at the time he fired, and the tracks of the pony when it whirled in the road after the shot, were seen, and showed that Bass did not advance upon Newberry. A careful consideration of the evidence leaves no doubt in our minds that the killing of Bass was not done in self-defense. The verdict of the jury was as favorable to the defendant as the evidence warranted, and, finding no error, the judgment is affirmed.

STEERS v. KINSEY.

Opinion delivered October 20, 1900.

1. DEED—ACKNOWLEDGMENT.—A notary's certificate attached to a deed purporting to be executed by a corporation, which recites that the president of the corporation appeared before the notary and stated under oath that the seal of the corporation had been affixed to the deed by virtue of a resolution of the board of directors, and that he and the secretary had each signed the deed by virtue of such resolution, shows an acknowledgment, though a defective one. (Page 366.)

2. CURATIVE ACT — CONSTRUCTION.—Act of March 11, 1891, curing defective acknowledgments, contains a proviso "that this act shall not apply to any conveyance or other instrument of writing when the same is brought in question in any suit now pending in any court in this

state." *Held*, that a defect in the acknowledgment of a realty mortgage was not brought in question by an attachment suit against the mortgagor pending at the time of passage of the act, as the property was subject to attachment for the mortgagor's debt, whether the acknowledgment of the mortgage was good or bad. (Page 367.)

3. SAME—VESTED ESTATE.—By procuring the levy of an attachment on mortgaged land a creditor of the mortgagor acquires no such vested estate in the land as would debar the operation of an act curing a defect in the acknowledgment of the mortgage. (Page 368.)

Appeal from Desha Chancery Court.

JAS. F. ROBINSON, Chancellor.

STATEMENT BY THE COURT.

This action was brought against the Arkansas City Improvement Company by S. F. Steers, a liquidator, under the law of Louisiana, of the firm of S. B. Steers & Co., of New Orleans, to quiet the title of said firm to certain land in Desha county of this state. The defendant, Arkansas City Improvement Company, filed an answer, and claimed title to the land. The land was also claimed by Oliver Kinsey, who appeared and filed an answer and cross-complaint. These lands at one time belonged to the Kentucky & Arkansas Land & Industrial Company, a corporation organized under the laws of Kentucky. This company mortgaged the land to the Farmers' Loan & Trust Company of New York. The mortgage was executed and recorded in October, 1889. The attestation clause of the deed, with signatures attached, was as follows: "In witness whereof the president and secretary of the party of the first part have, by virtue of a resolution of the stockholders and board of directors of the said party of the first part, hereunto signed their names, and caused the corporate seal of said party of the first part to be hereunto affixed; and the party of the second part, in evidence of its acceptance of the trust hereby created, has caused its corporate seal to be affixed to these presents, and the same to be attested by the signatures of its president and secretary the day and year first above written. The Kentucky & Arkansas Land & Industrial Co. W. R. Bergholz, President. Attest: Leo Bergholz, Secretary. [L. S.] The Farmers' Loan & Trust Company. R. G. Rolston, President. Attest: Luepp, Secretary. [L. S.]"

The deed had attached to it the following certificate:

"State of New York, City and County of New York. On this 24th day of October, in the year of our Lord one thousand eight hundred and eighty-nine, before me, the undersigned, a notary public for the state of New York, and for the city and county of New York, duly commissioned and acting, personally came William R. Bergholz, to me well known, who, being duly sworn, did depose and say that he resides at New Rochelle, New York, and is the president of the Kentucky & Arkansas Land & Industrial Company, and knows the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal, and was thereto affixed by virtue of a resolution of the board of directors of said company, and that he signed his name thereto likewise by virtue of the same resolution, as president of said company. And the said William R. Bergholz did further say that he also knows Leo Bergholz, the secretary of the said company; that the signature of the said Leo Bergholz subscribed to the said instrument is the genuine handwriting of the said Leo Bergholz, and was so affixed by virtue of the same resolution of said board of directors. Julius M. Ferguson, Notary Public, New York County. [L. S.]"

There is also a further certificate that the president of the Farmers' Loan & Trust Company appeared and acknowledged the execution of the mortgage.

Default having been made in the payment of the mortgage debt, the trust company, in September, 1891, sold the land, under the power contained in the mortgage, to Leo Bergholz for $51,233.33, and the Arkansas City Improvement Company claims title under him. On the 10th day of December, 1890, after the execution and recording of above mortgage, Steers & Co. commenced suit in the United States court at Little Rock against the Kentucky & Arkansas Land & Industrial Company to recover a debt due them for the company, and had an attachment levied upon the lands mortgaged as above stated. On March 29, 1892, Steers & Co. recovered judgment in said action against the land and industrial company for $18,096.30, and the attachment was sustained. Under this judgment the lands were sold on the 14th day of May, 1892, and purchased

by Steers & Co., who now claim the lands under such purchase. The Kentucky & Arkansas Land & Industrial Company was also indebted to Post & Company, and they, on the 18th of December, 1891, commenced suit against the land and industrial company in the Desha circuit court, and had an attachment levied on the lands of the company, including those mortgaged and attached as above stated. On the 29th day of July, 1891, Post & Company recovered judgment in said action for $6,656.66. The attachment was sustained, and on the 26th of March, 1892, the property was sold and purchased by Post & Company. The appellee, Oliver Kinsey, claims under this sale and purchase.

On the hearing of this action brought by Steers to quiet title, the chancellor found against Steers & Co., on the ground that the United States court had no jurisdiction to render the judgment upon which their title was based, but ordered that they have a lien for money paid out in redeeming and paying taxes on land. The chancellor found in favor of Oliver Kinsey, and declared that his title to the lands was superior to that of the Arkansas City Improvement Company by reason of the fact that the mortgage from the Kentucky & Arkansas Land & Industrial Company to the Farmers' Loan & Trust Company, under which mortgage the Arkansas City Improvement Company claimed, was not acknowledged as required by law. From this decree Steers and the Arkansas Improvement Company appealed.

J. W. Dickinson and *Rose, Hemingway & Rose*, for appellent Steers.

The Kentucky corporation, having an agent for purpose of service of process in this state, had such a residence here as authorized suit against it in the federal courts in this state. 43 Ark. 547. Those courts have power to pass upon the question of their own jurisdiction, and their judgments are not open to collateral attack. 11 Ark. 519; 21 Ark. 364; 12 Ark. 218; 49 Ark. 398; 50 Ark. 339; 5 Cranch, 185; 10 Wheat. 379; 3 Pet. 193; 10 Pet. 449, 473; 123 U. S. 559; 152 U. S. 337; 158 U. S. 423; 8 Wheat. 700; 12 Pet. 330; 96 U. S. 378; 145 U. S. 603; 146 U. S. 206; 151 *id.* 109. 160 U. S. 219; 51 Fed. 667; 56 Fed. 105; 62 Fed. 111; 8 C. C. A. 241; S. C.

59 Fed. 742; 8 C. C. A. 635; S. C. 60 Fed. 316; 7 C. C. A. 354; S. C. 58 Fed. 536. The attachment being a proceeding *in rem*, the court acquired jurisdiction of the *res* by the levy. 10 Wall. 309; 34 Ark. 391. To present any ground for equitable relief against a judgment, the attaching party must show that he has a meritorious case or defense. 50 Ark. 458; 51 Ark. 341; 52 Ark. 80; 54 Ark. 3; 56 Ark. 546; 57 Ark. 354; 57 Ark. 602; 61 Ark. 347; 35 Ark. 123. The act of February 27, 1893, did not cure the acknowledgment to the mortgage from the attachment defendant, because: (1) The act applies only to acknowledgments, and there is no acknowledgment to this mortgage, for the reason that there has been no compliance with the statute prescribing the form of acknowledgments. 35 Ark. 62; 37 *id.* 91; 42 *id.* 141. (2) At the time of the passage of the act, Steers & Co. had acquired vested rights under the marshal's sale, and the act could not impair these. 43 Ark. 156; 60 Ark. 269; 64 Ark. 492, 494; 163 U. S. 118; 60 Ark. 269; 52 Kas. 424; Cooley, Const. Lim. 495. Appellant's lien was fixed, and was a vested right. 138 Mass. 244; 87 Ala. 582; 58 N. H. 198; 8 Conn. 549. (3) The statute has no application to pending suits.

F. M. Rogers and *John McClure*, for appellant, the Arkansas City Improvement Company.

The judgment and the sale thereunder, rendered in the circuit court for the eastern district of Arkansas, are void, because the defendant was not sued in the district of its residence. Act Congress March 3, 1887, as corrected by act August 13, 1888; 145 U. S. 444, 453; 141 U. S. 127; 146 U. S. 203; 151 U. S. 497. Said judgment was subject to collateral attack. VanVleet, Coll. Att. 14; 1 Black, Judg. 194; 144 U. S. 640; 61 Ark. 470. The deed executed to Post & Co. by the sheriff is void, and cannot be received as proof of their title, for the reason that it was executed before the year allowed for redemption had expired. 27 Cal. 247; 52 Ark. 296. The deed of Cox, as receiver, could not convey title to the Arkansas lands. 7 C. E. Gr. (N. J. Eq.) 117; 50 N. J. L. 641; 82 Va. 901. The circuit court for the district of Kentucky had no jurisdiction of Post & Co., and no power to appoint a receiver. Gluck & Becker, Rec. 32; 17

How. 338. The deed of assignment from Post & Co. to Cox cannot be used as evidence of title because: (1) The acknowledgment is defective in that it used the words "*uses* and purposes," instead of "*consideration* and purposes." 35 Ark. 67; 20 Ark. 190; 32 Ark. 450. (2) The deed has never been recorded in Desha county, where the land is situated, and hence the defect is not cured by any of the curative acts. 38 Ark. 190. The curative act of March 11, 1891, operated to cure defects in the deed from the day it was recorded. 50 Ark. 299; *Cf.* 62 Ark. 82; 51 Ark. 242; 56 Pa. St. 61. No rights were *vested* at the time of the passage of the curative act. The commencement of a suit for the enforcement of a right predicated upon a statute does not create a vested right. 2 Freeman, Ex. § 315; 15 N. Y. 9; 87 Ill. 140; 43 Ark. 424; 44 Ark. 365; 45 Ark. 41; 42 Ark. 147; 58 Ark. 123; Cooley, Const. Lim. 469; 6 Conn. 58; 50 Ark. 299; 64 Ark. 494. If the act validates the conveyance from the date of recording, the rights acquired at the execution sale were inferior to the conveyance so validated. 43 Ark. 422. The laws governing executions and rights thereunder are within the control of the legislature, and no one has a vested right to any particular mode of procedure therein. 50 Ark. 299; 58 Ark. 269; 21 Mich. 390; 1 Hill, 335; 4 Minn. 547; 43 Ark. 425; 12 Ia. 393; 17 Ia. 552. The title of the Farmers' Loan & Trust Company is superior to that of Steers or Kinsey, if the curative act of 1891 had never been passed. 33 Ark. 329; 30 Ark. 112; 16 Ark. 543; 30 Ark. 112.

W. S. & F. L. McCain and *Wells & Williamson*, for appellee.

A conveyance of land is good without either acknowledgment or record, where the execution is proved or admitted. Our special statute in regard to filing mortgages has no application to such a deed. 41 Ark. 421; 47 Ark. 235; 44 Ark. 517. The judgment of the federal court, being rendered without any jurisdiction, is void. 1 Blatchf. 480; Black, Judg. 278; 5 Ark. 424.

RIDDICK, J., (after stating the facts.) This is a controversy concerning the title to certain lots and tracts of land formerly

owned by the Kentucky & Arkansas Land & Industrial Company. The company mortgaged the lands, and, failing to pay its debt thus secured, the lands were sold under the power contained in the mortgage, and purchased by one Bergholz. He in turn sold to the Arkansas City Improvement Company, one of the parties to this action. It is admitted that this mortgage, upon which the claim of the Arkansas City Improvement Company to these lands is based, was executed and recorded before the commencement of either of the attachment suits upon which, and the judgments and orders rendered therein, the other claimants rest their several claims to the ownership of the land. If the lien given by this mortgage upon the land was superior to that acquired by the attachment suits, then the title of the party holding under the mortgage sale is superior to that acquired by those purchasing under sales had in the attachment proceedings.

It is not claimed that there was any defect in the execution of the mortgage itself, but it is asserted that it was never acknowledged as required by statute, and that for this reason, under our law, it was not a lien upon the land as against the attaching creditors. Counsel for Steers contend that the certificate of the notary public attached to the mortgage shows that there was in fact no acknowledgment to the mortgage, but only an affidavit, and that for this reason the statute curing defective acknowledgments does not apply. Now, the acknowledgment of a deed is a declaration or admission made by the party executing the deed to a public officer having authority to take such acknowledgments that it is his deed and executed by him. Bouvier's Law Dict. (Rawle's Ed.) Our statute prescribes a particular form, with which a substantial compliance is necessary. The certificate of the notary attached to the mortgage shows that the statute was not followed, but still we think that this certificate shows an acknowledgment, though a defective one. A corporation acts by its agents, and the deed in this case was executed by the president of the corporation, and attested by the secretary. The certificate of the notary public shows that the president appeared before him, and stated under oath that the seal of the corporation had been affixed to the

deed by virtue of a resolution of the board of directors, and that he and the secretary had each signed the deed by virtue of such resolution. This was in effect an acknowledgment that he had executed the deed, and the fact that this declaration or admission was made under oath cannot change its nature. *Chouteau* v. *Allen*, 70 Mo. 290.

While the acknowledgment was defective, it was cured by the act of March 11, 1891, curing defective acknowledgments. The statute in question provides that it shall not apply "to any conveyance or other instrument in writing when the same is brought in question in any suit now pending in any court in this state." The attachment suits brought by Steers & Co. and by Kinsey were pending at that time, but we are unable to agree with the contention that these suits brought in question the mortgage under which the Arkansas City Improvement Company claims the land; for, whether the mortgage was good or bad, the lands were subject to attachment. The fact that one mortgages his land to secure the claim of a creditor does not prevent his other creditors from levying an attachment upon the land, though, if the mortgage be valid, and has been properly recorded prior to the attachment suits, the attachment lien will be subject to the mortgage. In such an action the mortgagee is not required to be made a party. The recovery of judgment and sale of the land in the attachment suit does not affect his rights, the validity of his mortgage not being questioned by such action. The lien or title acquired by the attaching creditor may furnish a basis for another suit or proceeding by which the validity of the mortgage may be questioned, but the action of attachment itself does not question it, for the right to maintain such action does not depend upon the invalidity of the mortgage. After the land had been sold in the attachment proceeding, the purchasers thereof, or those holding under them, brought this action, which does question the validity of the mortgage given by the Kentucky & Arkansas Land & Industrial Company; but these actions were commenced after the passage of the statute referred to above. And if the statute made the mortgage valid as to the attaching creditors, the rights of those holding under the mortgage could

not be affected by the present suit. The statute cured defects in the acknowledgment to the mortgage, and gave it, except as to persons having acquired vested rights in the land before the passage of the acts, the same force and effect it would have had, had it been properly acknowledged in the first instance.

The only question that remains, then, is whether the parties who brought the attachment suits acquired vested rights in the land by the bringing of the suits and the levy upon the lands. Now, a vested right "must be something more than a mere expectation based upon the anticipated continuance of existing laws. It must have become a title, legal or equitable, to the present or future enjoyment of property," in some way or another. Black, Const. Law, 430; Sutherland, Stat. Const. § 164. But parties have no vested rights in remedies or matters of procedure, and we see nothing in these attachment proceedings that constituted a vested right on the part of the plaintiffs therein to the property attached. The attachments were levied upon the land after the mortgage under which the Arkansas City Improvement Company holds had been executed and recorded, and we think that it was within the power of the legislature to give to such mortgage the effect intended by the parties thereto, by curing the formal defect in the acknowledgment. *Rosenthal* v. *Wehe*, 58 Wis. 621; 6 Am. & Eng. Enc. Law (2d Ed.) 947; *Stephenson* v. *Doe*, 8 Blackford, 508, S. C. 46 Am. Dec. 489; *Butler* v. *Palmer*, 1 Hill (N. Y.) 324.

We are therefore of the opinion that the mortgage under which the improvement company claims the land was, after the passage of the act of 1891, superior to the liens acquired by the attachments. The attachments were subject to the mortgage, and the title acquired by the improvement company under the mortgage sale to the lands conveyed by the mortgage is superior to that acquired by those who purchased these same lands at the sale ordered to satisfy the judgments obtained in the attachment suits.

It is stated in the argument of counsel for Kinsey that certain of the lands attached and purchased by Post & Co., and which are now claimed by Kinsey, were not included in the mortgage above referred to. As to such lands, and as to the

lien declared in favor of Steers & Company for sums expended in paying taxes upon the lands and redeeming them from tax sales, the judgment of the chancellor is affirmed, but as to the title of the lands described in the mortgage, the decree is reversed, and the cause remanded, with an order to enter a decree in favor of the Arkansas City Improvement Company, as suggested in this opinion.

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WYMAN v. JOHNSON.

Opinion delivered October 27, 1900.

1. WILL—CONSTRUCTION.—A testator made a devise as follows: "I want half of all the property that I now own or may own at my death to be set apart for the benefit of the heirs of my son, Samuel H. Johnson. My son, Samuel H. Johnson, can have and control said property during his natural life, but said property shall not be subject to the debts of Samuel H. Johnson. * * * I want the remaining half of my property at my death set apart for the benefit of the heirs of Edna Gibson. I want S. A. Gibson, the husband of my daughter, Edna Gibson, to hold and control said property as long as he remains her husband, but said property shall not be subject to or be taken for his debts. Now, if my daughter should die, and her husband, S. A. Gibson, should marry again, then said property shall be taken charge of by the executors of this will, and used for the benefit of the heirs of Edna Gibson." *Held*, that the estate vested at the testator's death in his grandchildren, and that the will conferred upon the son and son-in-law, respectively, only the control and management of the property until the grandchildren should be old enough to assume the same. (Page 374.)

2. SUBROGATION—PRIOR VALID MORTGAGE.—Where trustees appointed by will to control and manage the testator's property until the devisees should come of age undertook to mortgage the fee in the same, the mortgage is ineffectual to convey the interest of the devisees, but the mortgagee therein will be subrogated to the lien of a prior mortgage executed by the testator and discharged by the trustees out of funds provided by means of the second mortgage. (Page 375.)

3. WILL—EXCLUSION OF AFTER-BORN CHILDREN.—A devise of the testator's estate to the heirs of his son and daughter, without express provision for their after-born children, will be held to exclude the latter. (Page 375.)

Appeal from Lee Chancery Court.

EDWARD D. ROBERTSON, Chancellor.

McCulloch & McCulloch, for appellants.

The heir is not held to be disinherited, unless the intent to do so is clear in the will. 1 Redfield, Wills, p. 434; Schouler, Wills, § 545. The rule in Shelley's case is in force in Arkansas. 51 Ark. 61; 58 Ark. 303. This rule is applicable in the construction of deeds as well as wills. 64 Pa. St. 9; 101 N. C. 162; 62 Ill. 88; 127 Ind. 42; 109 Ind. 476; 80 Ga. 367; 9 Yerg. 400; 13 Pa. St. 344; 53 Pa. St. 211. The word "heirs" has a fixed legal meaning. 53 Ark. 255. This rule applies to the construction of wills as well as other writings. 3 Ark. 147; 13 Ark. 88; 23 *id.* 179; 49 *id.* 125; 58 *id.* 303. The rule established in 3 Ark. 117 is sustained by text writers and cases outside of this state. 1 Redfield, Wills, 433; 2 Washb. Real Prop. 603; 1 Jones, Conv. § 232; 5 Barn & A. 621; 2 Bligh, 56; 101 N. C. 162; 62 Ill. 88; 127 *id.* 42; 11 L. R. A. 670 and notes; 8 Humph. 624; 102 N. Y. 128; 99 Ind. 190; 109 Ind. 506; 79 Pa. St. 333; 64 *id.* 9; 30 N. E. 1077; 37 *id.* 569; 86 Va. 550; 44 S. W. 399; 3 L. R. A. 209; 45 L. R. A. 95; 2 Redfield, Wills, p. 67–385; 36 L. R. A. 186; 23 S. W. 72. The construction of the word "heirs" applies with equal force to the validity of the device. 99 Ind. 190; 37 N. E. 569; 2 Washb. Real. Prop. p. 165; 1 Pick. 27; 46 Pa. St. 200. The devises cannot be held as trusts created in Johnson and Mrs. Gibson, or her husband, for the benefit of their heirs. 1 Perry, Trusts, § 83; Schouler, Wills, § 591–2–3; 2 Redfield, Wills, p. 400–1–2; 72 N. W. 631; 92 Tenn. 559; 130 N. Y. 29; 42 Ark. 51; 2 Washb. Real. Prop. p. 699; 98 Tenn. 353. The shares of the children ascend to the father in fee. Sand. & Hill's Dig., 2479; 15 Ark. 555; 19 Ark. 396. Section 699, Sand. & H. Dig., applies to all voluntary conveyances of real estate and to mortgages and deeds of trust. 43 Ark. 504; 65 Ark. 129. In a devise the rule is, unless the contrary intention is clearly apparent, that the gift is presumed to be intended for only those of the class who are in being at the death of the testator. Schouler, Wills, § 563;

1 Dembitz, Land Tit. pp. 129, 661, 662; 2 Powell, Devises, p. 302; 11 Allen, 36; 47 Md. 513; 4 Paige, 52; 7 Ohio Dec. 105; 40 Ark. 11; 173 Ill. 529. The doctrine of subrogation is peculiarly a creation of equity, and should be applied in this case. 39 Ark. 531; 45 Ark. 149; 47 *id.* 421; 50 Ark. 361; 13 S. W. 12; 40 *id.* 541.

Norton & Prewitt and *Fletcher Rolleson*, for appellees.

The word "heirs" is to be taken as a mere description of a class of persons who are to take the estate. 5 N. E. 652. When heirs are not to take by descent, but under the will, the rule in Shelley's case does not apply. 1 N. E. 202; Jones, Real Prop. § 610; 26 N. E. 895. The word "heirs" was not used in its technical sense. 19 N. E. 868, 24 N. E. 63. The word "heirs" is frequently construed as a word of purchase. 10 L. R. A. 165; 3 Edw. Ch. 270; Schouler, Wills, § 548; 49 Ark. 125; 4 N. E. 167; 127 Ill. 42; 109 Ind. 159; *id.* 476; 26 N. E. 56. The devise is to the "heirs" as first takers, and not to a person "and his heirs." 2 Vent. 311; 1 P. Wms. 229; 99 Ind. 192; 51 Barb. 137; 86 Penn. St. 386. An immediate gift to the heirs of "A," who is recognized in the will as living, is presumed to be a gift to those persons who would be his heirs if he were dead. Schouler, Wills, p. 611, note 4; Hawkins, Wills, p. 92; 3 Sandf. Ch. 65. In construing a will the primary intention of the testator should be ascertained and followed. 1 Dembitz, Land Titles, § 89; 22 N. E. 933. There being no devise of a freehold estate, the rule in Shelley's case does not apply. 4 Kent, § 221; 1 Jones, Real Prop. § 610. In construing the words of a devise, the whole should be taken together. 49 Ark. 128. That an intent may be reached, which implies a trust, a trust will be implied. 31 Ark. 588; Perry, Trusts §§ 112–117; Schouler, Wills, §§ 595–6. Where right of possession accrues, the gift is said to rest in possession. 9 N. E. 214; 26 N. E. 56. A gift to testator's heirs vests at testator's death; if to the heirs of A, at A's death. Schouler, Wills, § 563; 44 Ark. 476. Rate of interest allowed was erroneous. 39 Ark. 547–8.

BUNN, C. J. Joseph M. Johnson, a citizen of Lee county,

died on the 28th day of July, 1887, the owner of a plantation in said county and a small amount of personal property, all of which last was absorbed in the course of the administration of his estate. He made his last will and testament on the 27th day of September, 1886, and after his death this was duly probated. This suit was brought by the grandchildren of the testator, who are named as beneficiaries in the will, to have the same construed, and to set aside as invalid a certain deed of trust made by their parents, wherein the plantation was conveyed, and for general relief.

The parts of the will involved in this discussion are as follows, viz.: "(2) I want M. J. Johnson, my faithful friend and sister-in-law, to have and be supported out of my effects so long as she shall live, should she not otherwise have a sufficient support. (3) I want half of all the property that I now own or may own at my death to be set apart for the benefit of the heirs of my son, Samuel H. Johnson. My son, Samuel H. Johnson, can have and control said property during his natural life, but said property shall not be subject to the debts of Samuel H. Johnson. If at his death his wife shall be living, she can control the property as long as she remains the widow of Samuel H. Johnson. (4) I want the remaining half of my property at my death to be set apart for the benefit of the heirs of Edna Gibson. I want S. A. Gibson, the husband of my daughter, Edna Gibson, to hold and control said property as long as he remains her husband, but said property shall not be subject to or be taken for his debts. Now, if my daughter should die, and her husband, S. A. Gibson, should marry again, then said property shall be taken charge of by the executors of this will, and used for the benefit of the heirs of Edna Gibson. (5) I want the executors of this will (before my estate is divided) to pay John M. Johnson, B. F. Johnson and Nannie J. Sapp the sum of one hundred dollars each. (6) I leave my dutiful son, Samuel H. Johnson, and my beloved nephew, John M. Johnson, and my son-in-law, S. A. Gibson, executors of my will."

It is suggested in argument that the very language of this will shows that its author was an ignorant or unlearned person,

and this is true, but it bears no internal evidence of a want of common sense. It is, at all events, sufficiently explicit, we think, as an expression of his will, to show the real intention and wishes of the testator. After the death of the testator the property remained undivided, both as between the two sets of grandchildren, *per stirpes*, and also as between these grandchildren individually, in respect to each half, and remained in the control and management of Samuel H. Johnson and S. A. Gibson, until taken possession of by the receiver appointed by the court in this case.

Samuel H. Johnson had six children, viz.: Virginia V., born January 31, 1881, died November 20, 1896; Nannie, born September 29, 1882, died June 18, 1896; Joseph L., born April 1, 1879; George W., born May 30, 1884; Ada Belle, born March 26, 1889; and Edward, born October 19, 1893. The last four still live. The first two died without issue, unmarried and intestate, and after the death of the testator, leaving their father, the said Samuel H. Johnson, surviving them as their sole heir at law. Ada Belle and Edward were born after the death of the testator. Joseph L. and George W. are therefore the only ones of the children of said Samuel H. Johnson, who were born prior to the death of the testator and still survive.

Mrs. Edna Gibson, sometimes called Curmiller Gibson, had two children only, both still living when this cause was determined in the lower court, and both born prior to the death of the testator, by name Joseph and Fannie Gibson. Acting, apparently, upon the belief that they held the fee in the respective halves set apart to their children by the will, Samuel H. Johnson and Mrs. Edna Gibson (the wife of the former and the husband of the latter joining with them) borrowed the sum of $3,000 of the Globe Investment Company, and to secure the same gave a deed of trust on said plantation, and this debt and deed of trust subsequently became the property of the appellants, Wyman *et al.*, the Globe Investment Company claiming to have had no notice of any defect in the title of said grantors in the deed of trust, and Samuel H. Johnson and S. A. Gibson continuing in possession. These, as mortgagors, paid the in-

terest on said secured debt, as it accrued, until the institution of this suit.

There was a mortgage debt on the plantation, made by the testator in his lifetime, which amounted to the sum of $431, when this $3,000 was borrowed, and by agreement of the parties this mortgage debt was settled out of the $3,000 by the Globe Investment Company at the time of making the loan. Nothing was ever paid on this $3,000 by the debtors, or any one for them, either to the Globe Investment Company, or its assigns, except the interest aforesaid. This is a bill filed in behalf of the said children of Samuel H. Johnson and Edna Gibson, then surviving, on March 18, 1896, by their next friend, John M. Johnson, who was the active executor of the will, and nephew of the testator; the administration, however, having been closed, as we infer.

The main question involved is as to the estate of these grandchildren and their parents, given by the third and fourth clauses or paragraphs of the will of Joseph M. Johnson, which are set forth above. For several reasons we are of opinion that the rule in Shelley's case does not apply in the construction of these clauses of the will.

In the first place, we must assume, from the context and surroundings, that the testator did not intend to make any distinction between his own children, and, that being the case, the language of the fourth clause itself does not in any sense give an estate to Mrs. Edna Gibson, the daughter. Consequently the testator did not intend to confer any estate upon the son, Samuel H. Johnson, notwithstanding the language used in his case was somewhat different from that used in the case of the daughter. It is manifest that only a control and management was conferred upon Samuel H. Johnson, the son, as was conferred upon his wife in case of her death, and upon S. A. Gibson, the son-in-law, and, in case of his death or marriage to another after the death of Edna, then upon the executors.

Secondly, these bequests are in terms made directly to the grandchildren of the testator, no intermediate estate being created; and the management and control were the subject of clauses following these direct bequests, showing that the

management and control of the two halves until the grandchildren should be old enough to assume the same, although not expressed in words, was all that was intended to be conferred upon the son and daughter. The whole was devised for the benefit of the grandchildren in express terms, and no others are referred to as beneficiaries.

The estate of these grandchildren is therefore an independent estate, not resting or based upon any estate in their parents, Samuel H. Johnson and Edna Gibson, and, that being so, the rule in Shelley's case is not applicable. It follows that no estate was conveyed in the deed of trust, except as to the interest of the two children of Samuel H. Johnson, who were living at the death of the testator, but who died without issue before the institution of this suit. Their shares were vested on the death of the testator, and at their deaths respectively fell to their father, the said Samuel H. Johnson, who therefore could lawfully convey the same in his said deed of trust. This interest constitutes one-half of the one-half, or one-fourth of the whole property devised by Joseph M. Johnson, subject to the payment of his debts and special legacies.

This interest of Samuel H. Johnson is therefore bound under his deed of trust for said mortgage debt. The interest paid on said $3,000 debt by Samuel H. Johnson and Edna Gibson is a valid payment as against them, and stands good, as there is no proof here that the interest payment was out of the fund belonging to the estate. The appellants are entitled to be subrogated to the rights of the mortgagee in the mortgage made by the testator, to the extent of the $431 paid to satisfy the same out of the $3,000 loan, and the interest therein specified in said first mortgage.

There is no direct or express provision in the will for the after-born children of Samuel H. Johnson and Edna Gibson, and, as the estates of the other grandchildren vest immediately on the death of the testator, it is to the exclusion of all others than those provided for expressly, or in terms that admit of no reasonable doubt on the subject. In this respect, the principle of the decision in *Kilgore* v. *Kilgore*, 26 N. E. Rep. 56, is not applicable; for enough was said in the will involved in that case to show the intention of the testator to be to provide for his grandchildren born

after his death. No words of the kind are employed in the will now under consideration. Hence the rule announced in *Shotts* v. *Poe*, 47 Md. 513, pertains, in which the court said: "The only other question is, whether the term 'children' used in the declaration of trust includes children of the son that may be born after the death of the testator? And upon this question there can be no doubt whatever. If there be any question that may be regarded as incontrovertibly settled, in the construction of wills or testamentary papers, it is that an immediate gift to children, *simpliciter*, without additional description, means a gift to the children in existence at the death of the testator, provided there be children then in existence to take."

In construing the will to get at the real intention of the testator, we have concluded that the testator used the word "heirs" as descriptive of a class of beneficiaries, and in the sense of the word "children," the two being used synonymously by those unlearned in the law, for the most part. This being true, the case of *Shotts* v. *Poe*, *supra*, seems to be exactly in point, and, as there were others at the death of the testator capable of taking, and no provision was made for after-born children, these are excluded. The testator may have intended otherwise, but we are construing the will and endeavoring to arrive at his intention by its language, and cannot assume to make a will for him to express his merely probable intentions.

Except as herein indicated, the decree of the chancellor is affirmed, and, since the subject-matter of the suit is real estate, the cause is remanded, with directions to enter a decree not inconsistent with, but in conformity to, this opinion.

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KANSAS CITY, PITTSBURG & GULF RAILWAY COMPANY *v.* WATERWORKS IMPROVEMENT DISTRICT NO. 1 OF SILOAM SPRINGS.

Opinion delivered October 27, 1900.

1. LOCAL IMPROVEMENT DISTRICTS—BURDEN OF PROOF.—In a suit to enforce a lien for an assessment made by a local improvement district, the burden is on the defendant to show that the ordinance creating the district and that which fixed the assessment were not duly passed and published as the law directs. (Page 378.)

2. RAILROAD—LOCAL IMPROVEMENT.—The right of way and depot grounds of a railroad company are assessable for local improvements that benefit such property. (Page 380.)

3. SAME—ENFORCEMENT OF LOCAL ASSESSMENT.—A lien against a railroad for an assessment for local improvement can be enforced by sale of the road as a unit, but not by sale of so much of the road as lies within the improvement district. (Page 381.)

Appeal from Benton Circuit Court in Chancery.

EDWARD S. MCDANIEL, Judge.

Read & McDonough and *Dodge & Johnson*, for appellant.

The burden of proving publication of the ordinance was on appellee. 53 Ark. 368; 56 Ark. 372. The failure to prove it is an absolute defense to this action. Beach, Pub. Corp. §§ 503, 1253; 76 Ill. 317; Dill. Mun. Corp. §§ 310, 334, 422; Tied. Mun. Corp. § 148; 57 N. Y. 526; 60 N. Y. 16; 46 N. Y. 42; 38 N. J. L. 110; 22 Minn. 218; Ell. Mun. Corp. § 218, p. 191; 40 Ill. App. 19. Failure to make publication in a newspaper of the city is also a defense to the action. Sand. & H. Dig., § 5338. There is no authority under the law for taxing railroads for local improvements. The statute (Sand. & H. Dig., §§ 5321, 5338) granting to municipalities the right to tax for such improvements extends it only to *real estate*, and requires that it be assessed upon the valuation as "made by the *county assessor* previous thereto;" and railroad property is not assessed by county assessors. Sand. & H. Dig., §§ 6464, 6465, 6471, 6473. *Cf.* 64 Ark. 432; 51 S. W. 568. Grants of power of taxation to municipalities are to be strictly construed. Cooley, Taxat. 209. Judgment *in rem* against a particular section of a railroad constructed and operated as an entity can not be enforced as herein attempted. 52 Ark. 529; 31 Ark. 494; 57 S. W. 471; 60 N. W. 767; 63 N. W. 1007.

E. P. Watson, *W. V. Tompkins*, and *M. W. Greeson*, for appellee.

The plaintiff was not required to prove the passage and publication of the ordinance. Sand. & H. Dig., § 5341. Such objections should appear, by way of defense, in the answer. 53 Ark. 368; 56 Ark. 372. Railroad tracks are real property.

46 Ark. 330; Sand. & H. Dig., §§ 6466, 6470, 6471. After railroads are *valued* by the state board of railroad commissioners, the values of land in the respective counties are turned over to the respective assessors, and they *assess* it. Sand. & H. Dig., § 6473. The railway company's real property, situated in the district, can not be exempted from local assessment. Const. Ark. (1874), art. 19, § 27; *ib.* art. 16, § 5; 46 Ark. 327, 331. The court has jurisdiction and power to enforce the collection of the tax. *Cf.* Sand. & H. Dig., §§ 5349, 5350 and 6726, 6727, 6728, 6729.

BUNN, C. J. This is a bill to foreclose a lien on defendant's right of way extending through said improvement district, and the depot buildings and depot grounds situated therein, and to collect the amount of the district assessment made against said property? The answer puts in issue the passage of the ordinance organizing said district, and authorizing and making said assessment.

The defendant first contends that the plaintiff has the burden of proof to show that said ordinances were duly passed, and were published as the law directs.

Section 5341, Sand. & H. Dig., reads thus: "The board [on refusal of any property owner to pay his assessment] shall straightway cause a complaint in equity to be filed in the court having jurisdiction of suits for the enforcement of liens upon real property, for the condemnation and sale of such delinquent property, for payment of said assessment, penalty and costs of suits, in which complaint it shall not be necessary to state more than the fact of the assessment and the non-payment thereof within the time required by law, without any further statement or any steps required to be taken by the council, or the board, or any other officer whatever, concluding with a prayer that the delinquent property be charged with the amount of such assessment, penalty and costs, and be condemned and sold for the payment thereof." Section 5342: "It shall not be necessary to exhibit with the complaint any copy of any ordinance or other document or paper connected with the assessment and collection of the moneys assessed under this act." Then follow the provisions for the enforcement of the assessment, all showing the in-

tention of the legislature to make the procedure the simplest and most expeditious, consistent with the rights of the parties involved, and it is manifest that its intention was to make the few allegations of the complaint a *prima facie* case, that is, if not controverted in the pleading and by proof, to be sufficient to authorize the decree of condemnation and foreclosure.

But the defendant contends that the proceeding is under section 5336 of Sand. & H. Dig., and not under the general statute, as expressed in sections 5155 and 5157. Section 5336 has no reference to proof of publication, nor upon which party is the burden to show that the ordinance has been duly published. It only defines the duty of the clerk and of the one aggrieved by the assessment. Section 5157 provides for the recording and publication of all by-laws and ordinances of the council, imposing any fine, forfeiture or penalty, and makes no exception. It is a general ordinance on the subject. Section 5155 reads: "The printed copies of the by-laws and ordinances of any municipal corporation, published under its authority, and transcripts of any by-law, ordinance, or of any act or proceeding of any municipal corporation, recorded in any book or entered on any minutes or journal, kept under the direction of such municipal corporation, and certified by the clerk, shall be received in evidence for any purpose for which the original ordinances, books, minutes or journal would be received [and] with as much effect." In construing these sections this court, in *Van Buren* v. *Wells*, 53 Ark. 377, after discussing other questions in the case, said: "The only remaining question is, was the burden on plaintiff to prove that the ordinances were published in the manner prescribed by the statutes? We think not. The statute makes printed copies of the ordinances of any city or incorporated towns, published by the authority of such city or town [and duly certified copies are in evidence in this case], and manuscript copies of the same, copied by the proper officer and having the seal of the city or town attached, evidence of the existence of the ordinances and their contents, and makes a failure to publish a sufficient defense to any suit or prosecution for the fines or penalties imposed by the ordinances." These sections furnish

the rule in this case, and the question of burden of proof is settled in the case cited, and rests upon the defendant.

The next contention of defendant is that the city of Siloam Springs and its officers were without power or authority of law to assess its said property for the purpose of local improvements, or to pass the ordinance attempting to create said improvement district, and that they were without power or authority to make said improvements, or levy said taxes against this defendant railroad company, chartered and organized for that purpose." This particular objection is not specifically made in the answer, and seems to involve two propositions: First, the power of the city to organize improvement district including all its territory, and second, whether or not the right of way of a railroad is the subject of an assessment for local improvements.

The first of this proposition has been answered by the opinion of this court in *Crane* v. *Siloam Springs*, 67 Ark. 34. As to whether or not the right of way of a railroad extended through or into an improvement district was intended by the lawmakers to be subject to these assessments is a question not altogether free from doubt, owing to the peculiar right a railroad has in the property and the peculiar use to which it is exclusively devoted. As to the manner of assessing rights of way, and, incidentally, as to the propriety of including rights of way in the list of property to be assessed, see Welty, Assessment, § 142, and extensive notes thereunder. The statute (and so does the constitution, art. 19, § 27) makes all real estate the subject of these assessments, and another statute makes all real estate, subject to general tax, to be also real estate, subject to these assessments (Sand. & H. Dig., § 5330), and the general revenue laws of the state (Sand. & H. Dig., § 6471) make rights of way, depot grounds, and so forth, real estate, and to be assessed as such.

Prima facie, then, this class of property is subject to assessment; but, since all burdens of the kind are imposed only on the theory that the improvements for which they are laid are of corresponding benefit to the property itself, if it can be shown that no benefit can accrue, then the property is not subject; but,

as the assessment itself by proper authority is *prima facie* valid, it necessarily devolves on one desiring relief from the burden to show that no benefits will accrue. This leads us to an understanding of the statement of Elliott, where he says in his work on Railroads (§ 782): "It has been held that if the property against which an assessment has been levied has not been benefited [or may not be] by the improvement, the collection of the assessment may be enjoined, but this doctrine is to be taken with careful qualification, for it is only in very clear cases that courts can interfere." Such also is the theory of all the decisions we have been able to find on the subject. Even those which deny that a right of way is in general subject to local assessment, all in one way and another, and to one extent and another, qualify the doctrine maintained by them by saying, or indicating, at least, that when improvements do not benefit the property that fact is the real defense. *Detroit, G. H. & M. R. Co.* v. *Grand Rapids*, 28 L. R. A. 793, and citations in the dissenting opinion: *Matter of Commissioner of Public Parks*, 47 Hun (N. Y.) 302; *Chicago, M. & S. P. R. Co.* v. *Milwaukee*, 89 Wis. 506. And these are the strongest cases we are able to cite just now. In the case at bar, it would be assuming too much for us to say that the property assessed is not or will not be benefited naturally by the improvements made, in the absence of a stronger showing to that effect.

The procedure to assess and appraise the property seems to have been in substantial compliance with the statute. Under our revenue laws, railroad rights of way are valued as units, or by the entire lines, by the state board appointed for that purpose, and these appraisements are certified to the county assessors, through the auditor of state and county clerk, and he is required to make his assessment upon such valuation, and certify the same back on the record, from which local assessments are made.

The decree, so far, is affirmed. But there is no authority to sell a section of the right of way of a railroad, although a lien is declared thereon for the assessment. Elliot says (§ 791) that it is the general rule "that where the statute specially provides a remedy for the enforcement of the assessment, that

remedy must be pursued, but if a right be given, and no remedy prescribed, the courts will usually provide the appropriate remedy." Whether we term this assessment a debt against the railroad *in personam*, or only *in rem* against the particular property, it can only be collected against the railroad as a unit; that is, against the whole road within the state. In ordering otherwise, the chancellor was in error. The cause is therefore reversed and remanded, to proceed against the railroad company, as such, to enforce the assessment in equity.

HALE v. PHILLIPS.

Opinion delivered October 27, 1900.

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1. BUILDING AND LOAN ASSOCIATION—INSOLVENCY—MATURITY OF LOANS.—Upon the insolvency of a building and loan association loans made to members as advancements upon their shares, with interest, immediately become due and collectible. (Page 387.)

2. SAME—BORROWER'S ACCOUNT.—On foreclosure of a mortgage given by a borrowing member of an insolvent building and loan association, the member should be credited with interest and premiums paid by him, but not with dues, for as to the latter he must await the period of final distribution. (Page 389.)

3. SAME—OFFSET.—In a suit by a foreign receiver of an insolvent building and loan association to foreclose a mortgage given by a borrowing member, the latter is not entitled to offset the present value of his stock, as such value cannot be ascertained until the final account of the receiver is filed in the action in which he was appointed. (Page 391.)

Appeal from Sebastian Circuit Court in Chancery.

STYLES W. ROWE, Judge.

STATEMENT BY THE COURT.

The facts in this case are correctly stated in appellant's brief as follows:

"The American Building & Loan Association was a Minnesota corporation, duly organized under the laws of the state of Minnesota to do a building and loan business. Its name was

afterwards duly changed to the American Savings & Loan Association.

"The laws of Minnesota provide that premiums taken for loans by a building and loan corporation should not be treated as interest, nor render such association amenable to the laws relating to usury. The laws of Minnesota further gave building and loan associations authority to provide by by-laws in what manner applications and bids for loans should be received, and who should be entitled to loans. It is also provided by the laws of that state that the note given to evidence a loan to a building and loan association should be accompanied by a transfer and pledge of the shares of the borrower in the association, and that such shares should be held by the association as collateral security for the performance of the conditions of the note and mortgage.

"The general nature and business of this association was to assist its members in saving and investing money, and in buying and improving real estate, and in procuring money for other purposes and loaning and advancing, under the mutual building society plan, to such of them as may desire to anticipate the ultimate value of their shares from the funds accumulated by the monthly contributions of its stockholders, and also from such other funds as may from time to time come into its hands.

"On the 5th of April, 1889, James L. Phillips, of Fort Smith, made written application to become owner of thirty shares of the capital stock, of the par value of one hundred dollars per share, in said association, and on the 10th of April, 1889, the association issued to the said Phillips its certificate for thirty shares of its stock. By the terms of said certificate and the provisions of the by-laws of the association, the said Phillips agreed, and was obligated, to pay to the association, at his home office in Minneapolis, Minnesota, on or before the 10th day of each month, the sum of sixty cents per share as and for the monthly dues upon said stock, until the same should become matured and of the value of one hundred dollars per share. On the 6th of June, 1889, the said Phillips made an application to the association, in writing, for a loan or an ad-

vancement of $1,500, by way of anticipation of the value of thirty shares of stock at their maturity, and, in accordance with the laws of the state of Minnesota and the by-laws of said association, did make his bid for the privilege of securing said loan or advancement, and did bid the sum of $50 per share, or $1,500 as and for a premium for the privilege of obtaining such advancement. His proposition was accepted by the board of directors of the association.

"On the 19th day of July, 1889, in order to secure the payment of said advancement, and the continued monthly payment of interest on the payment of the same at the rate of six per cent. per annum, and the monthly dues on thirty shares of stock until the said stock should be matured and of the face value of $100 per share, and the surrender of said stock at its maturity, the said Phillips and his wife executed their bond to the association. The terms of that bond bind the said Phillips to pay to the association, at the home office at Minneapolis, Minnesota, on or before nine years from the date thereof, the sum of $3,000, together with interest on $1,500 at the rate of six per cent. per annum from the 19th of July, 1889, until paid, payable monthly; or to pay to the association at its home office the sum of eighteen dollars on the 10th day of each and every month as and for monthly dues on said thirty shares of the capital stock, which were assigned to the association as collateral security, and shall also pay all installments of interest aforesaid, and all fines, etc., until the stock becomes matured and of the face value of one hundred dollars per share, and then surrender the stock to the association. In either of which events the bond was to be void; otherwise, to remain in full force. The bond contained the other usual clauses in regard to the payment of fines, when in default; also for the payment of taxes and insurance upon the property secured." It was also stipulated in the bond in words as follows: "If at any time default shall be made in the payment of said interest, or the said monthly dues on said stock, for the space of six months after the same, or any part thereof, shall have become due, or if the taxes or assessments on the property mortgaged to secure the faithful performance of this bond be not paid when due, or if

the insurance policy or policies on said mortgaged property be allowed to expire without renewal, then, and in either such case, the whole principal sum aforesaid shall, at the election of said association, its successors and assigns, immediately thereupon become due and payable, and the sum of nineteen hundred and forty-four ($1,944) dollars, less whatever sum has been paid said association as and for monthly dues on said thirty (30) shares of said capital stock, at the time of said default, may be enforced and recovered at once as liquidated damages." At the same time Phillips and wife executed a mortgage to the association to secure the due performance of the bond. The mortgage is in the usual form.

After this the association became insolvent. "On the 14th of January, 1896, at the suit of the attorney general of the state of Minnesota, the assets of the association were placed in the hands of a receiver. The case was taken by appeal to the supreme court of that state, and the decision of the lower court was affirmed, and it was adjudged that the association was insolvent. On the 18th of June, 1896, William D. Hale was appointed permanent receiver of the association."

Until the insolvency of the association Phillips promptly paid the interest and dues he was owing. Up to the time of the appointment of the receiver he had paid $1,440 as dues, and the sum of $557.50 as interest.

By leave and under the direction of the district court of Hennepin county, Minnesota, from which court the receiver derived his authority, and in which court the receivership is pending, William D. Hale, in his capacity of receiver, brought this action, in the Sebastian circuit court for the Fort Smith district, against James L. Phillips and his wife, Gussie B. Phillips, to recover the $1,500 and interest thereon at the rate of seven per cent. per annum from the 19th day of July, 1889, less the $577.50, with the said rate of interest upon the several payments of interest, and to foreclose the mortgage.

At the time of the appointment of the receiver and the institution of this suit, the association had no creditors, and owed no debts, in the state of Arkansas.

The circuit court found that this case is governed by the

rule announced in *Roberts* v. *American Building & Loan Association*, 62 Ark. 572, and found that, according to this rule, the defendants were indebted to the plaintiff in the sum of $613.20, and rendered judgment in his favor against them for that amount, and ordered the mortgage foreclosed to pay the same; and the plaintiff appealed.

Hill & Brizzolara, for appellants.

Hay & Van Campen, of Minneapolis, Minn., of counsel.

The trial court erred in applying to this case the rule in 62 Ark. 572. That case announces the rule where the association is a going concern, and a stockholder makes default. But in this case the association is insolvent, and a different rule must be applied. 77 N. W. 1010; 115 Pa. St. 273; 38 Atl. 643. The contract is terminated by the insolvency of the association, and it and its members became equally in default. Hence the rules for determining the amount due under contract are inapplicable. 36 S. W. 810; 38 S. W. 483; Thomp. Bldg. Assns. §§ 171, 297; 4 Am. & Eng. Enc. Law (2d Ed.) 1081; Endl. Bldg. Assns. § 523. The payments of dues by a borrowing stockholder are made as payments on his stock, and not as partial payments of the loan to him. *Cf.* 56 Ark. 335. Three rules exist for determining how to apply payments of a borrowing stockholder, after insolvency of the association: (1) It is the rule of the federal courts that the borrower is to be allowed credit for unearned premiums up to the estimated maturity of stock, but otherwise to be treated as any other stockholder. 86 Fed. 491; 61 Fed. 491. (2) In a minority of the states the rule is "that the relation between the association and the borrowing member has been changed by circumstances to the one subsisting between the ordinary debtor and creditor; and that the borrowing member is to be charged with the amount actually received by him, with interest at the legal rate to date, and credited with all payments made, whether by way of dues, interest, or premium, according to the rules governing partial payments." 4 Am. & Eng. Enc. Law (2d Ed.), 1081; 64 Med. 338; S.C. 14 Am. & Eng. Corp. Cas. 649; Thomp. Bldg. Assn. (2d Ed.) p. 344, n. 3; 48 Ga. 445. (3) In a majority of the

states the rule is to credit the borrower with all of the interest and none of the dues, leaving him to receive from the insolvent corporation the dividend upon his stock on account of his payment of dues. 115 Pa. St. 273; 20 S. W. (Tenn.) 430; 38 S. W. (Ky.) 483; 36 S. W. (Tex.) 810; 38 Atl. (N. J.) 643; 40 N. W. (Ind.) 694; 41 N. E. (Ohio) 139; 80 N. W. 120. For cases approving the action of the receiver in applying the "majority rule," see: 77 N. W. 1010; *ib.* 1006; 80 N. W. 120; *ib.* 148. The contract is a Minnesota contract; and should be construed under the laws thereof. 33 Ark. 645; 35 Ark. 52; 46 Ark. 50; 60 Ark. 269; 54 Ark. 556.

Winchester & Martin, for appellee.

The contract, if enforced at all, must be enforced according to its terms, and foreclosure can not be had for sums already paid. 20 Am. & Eng. Enc. Law, 242, 243 and 244. The relation of debtor and creditor does not exist. 1 Am. & Eng. Enc. Law, 643. The decree could not go further than to hold the borrowers for the difference between what they have paid and the sum named in each bond as liquidated damages. 35 Me. 535; 186 Pa. St. 150; 83 Ala. 420; 30 Ark. 396; 18 Am. & Eng. Enc. Law, 237. Appellees should be charged with the amount of money received and interest thereon at six per cent. from the time it was received, and credited with interest and dues paid on stock, including premium. 29 L. R. A. 127; 48 Ga. 448; 64 Md. 338; 105 Mass. 254; 40 Md. 172; 58 Md. 279; 48 Md. 452; 51 Md. 198; 29 L. R. A. 133; 78 N. C. 188; 26 N. J. Eq. 351; 8 App. Cas. 235. Appellees are entitled to credit for the dues paid on the shares of stock which represent the premiums. 20 S. W. 430; 37 S. W. 216; 46 S. W. 452.

BATTLE, J., (after stating the facts.) "Mutuality," it has been said, "is the essential principle of a building association." Its principal object is to raise a fund to advance to those of its members who may desire to borrow money. For this purpose each member subscribes for the number of shares in its stock he desires, and at stated times and short intervals pays upon the same small sums of money, called dues. He continues

these payments until they, with the profits derived from other sources, after the deduction of expenses and losses, equal the face value of the stock, when the stock is matured. The shares are then called in, and the owner receives the face value thereof in cash, unless he has received an advance on his shares, and in that event his obligation based upon such advance is cancelled. Before the maturity of the stock the dues paid are usually advanced to the member who will relinquish to the association the prospective dividend to be paid upon his shares at their maturity in exchange for the lowest present cash payments per share, he agreeing to pay the dues on the shares and interest on the sum advanced "until the association is able to divide, to each share of the stock held by the members, the par value of those shares as fixed in the charter." In other words, he agrees to pay the dues and interest until his shares reach their par value, in consideration of the amount advanced to him before that time. The dues and interest so paid contribute to create the common fund with which the stock of the association is matured and paid.

The member, who has received the advance on his stock still holds his interest in the common fund and in the management and success of the association. He is as much interested as the members who have received no advance. All are bound in proportion to the amount of their shares for the payment of the expenses and losses of the association. The latter class of members is interested in the increase of the common fund because upon it depends the payment of its shares; and the former is interested because upon it depends his discharge from the obligation to pay dues and interest until the maturity of his shares. *Eversmann* v. *Schmitt*, (Ohio) 41 N. E. Rep. 139.

The duty of all the members of both classes to pay dues until the maturity of their shares depends, however, upon the solvency of the association. The insolvency of the company subjects it to being wound up by judicial proceedings at the instance of any of its members; and when insolvency occurs, and such proceedings are instituted, the association becomes unable to carry out its contracts with its shareholders; its stock

can never be matured; its members are relieved of the further payment of dues on their shares; and the further performance of its executory contracts is placed beyond its power. In such a state of affairs nothing remains but liquidation; and so much of the amount advanced to a member, and interest thereon, as has not been paid immediately becomes due and collectible. This is a result of the necessity of the situation. How shall this amount be ascertained? See *Weir* v. *Granite State Provident Association*, 38 Atl. 643; *Knutson* v. *Northwestern Loan & Building Association*, 67 Minn. 201; *Rogers* v. *Raines*, 38 S. W. Rep. (Ky.) 483; *Strohen* v. *Franklin Savings & Loan Association*, 115 Pa. St. 273; *Hale* v. *Cairns*, 77 N. W. Rep. (N. D.) 1010; and Thompson on Building Associations (2d Ed.) §§ 171, 297, and cases cited.

He, of course, should be charged with the amount he actually received, with legal interest thereon. The question is, with what should he be credited? The insolvency of the association and the consequential winding up of its affairs place him in a dual relation to the association, which is that of a borrower whose debt is due, and of a stockholder. The dues paid by him on his shares are a part of its capital stock, and belong to all of its members alike, and should bear their proportionate part of the losses and expenses of the corporation. In this way he is made to bear his part of the burden. Being liable in this manner, it is evident that he is not entitled to receive, or be credited with, anything on account of dues paid until the expenses and losses are ascertained and deducted and his proportion of the assets of the company is determined. Were it otherwise, and he entitled to be credited with dues on the amount of his indebtedness for advances, it is evident that he would receive the value of his shares, so far as that value is the result of dues, while the members who have received nothing would be compelled to bear all the losses. This would be subversive of that mutuality, equality and fairness upon which building associations are supposed to be based. It follows, then, that, as to his proportionate part of the assets of the company, he must await the period of final distribution. See cases above cited, and *Rogers* v. *Hargo*, 20 S. W. Rep.

(Tenn.) 430; *Price* v. *Kendall*, 36 S. W. Rep. (Texas) 810; *Wohlford* v. *Association*, 140 Ind. 662; *Phelps* v. *American Savings & Loan Association*, 80 N. W. Rep. 120.

What we have said of dues does not apply to interest and premiums actually paid. The latter were paid solely on account of the advance. The member who paid the same did so in consideration of the complete execution of his contract with the association. That consideration, by reason of the insolvency of the company and consequent proceedings, has failed, and he, as to the advance, has become a borrower, whose debt therefore is due, and the interest and premium paid should be credited to him on such debt. The members who have received no advances, having paid no premiums and interest, are not entitled to share in those paid by the member who has. See cases cited above.

The rule adopted and followed in *Roberts* v. *American Building & Loan Association*, 62 Ark. 572, does not apply to this case. The object of the rule in that case was to ascertain the amount due when the member who received the advance was in default aud the association was a going concern. In this case the reverse is true, and all the stockholders are in default by reason of the insolvency of the association. *Weir* v. *Granite State Provident Association*, 38 Atl. (N. J.) 643; *Price* v. *Kendall*, 36 S. W. Rep. (Ky.) 810. For the same reason the penalty that the bond sued on authorizes the association to sue for and recover cannot be enforced. The condition upon which the right to it depends has never occurred, and the association has never elected to sue for it.

In the case before us the appellee, James L. Phillips, bid fifty per cent. of the face value of his shares for the advance received by him from the association. The monthly payment of sixty cents upon each share was paid to and received by the association as dues, according to the terms of his bond. When the advance was made, he, in consideration thereof, agreed to pay the monthly dues on his stock until its maturity. In this he undertook to perform what he agreed with the association, and thereby indirectly with its members, to do when he became a fellow stockholder. His duty as to his shares was not changed by the advance. When his stock matured by the performance

of his contract, he was to receive all the benefits accruing. All the sums paid on the stock were dues; the whole of each and every sum so paid was a due as much as any part of any of them. It is, therefore, evident that, in the equitable adjustment of the rights of all parties made necessary by the insolvency of the association, he should be credited with the whole of the sixty cents per share per month on his account as a shareholder, and not as a borrower. *Hale* v. *Cairns*, 77 N. W. Rep. (N. D.) 1010.

Appellant does not seek to recover any premium in this action.

It is said by appellee, James L. Phillips, that he is entitled to offset the present value of his stock against any judgment that may be recovered against him. That cannot be done in this action. The amount due on the stock cannot be ascertained until the final account of the receiver is filed in the action in which he was appointed. This court has not sufficient information to enable it to ascertain the amount. As to it, appellee must await the period of final distribution of the assets. *Rogers* v. *Raines*, 38 S. W. (Ky.) 483; *Weir* v. *Granite State Provident Association*, 38 Atl. (N. J.) 643.

The decree of the circuit court is therefore set aside, and the cause is remanded, with instructions to the court to enter a judgment in accordance with this opinion and to foreclose the mortgage to pay the same, and for other proceedings.

RIDDICK, J., dissents.

MENTE *v.* TOWNSEND.

Opinion delivered October 27, 1900.

1. INSURANCE POLICY—ASSIGNMENT—FRAUD.—A wife's assignment of her interest in a policy on her husband's life is not invalid, though procured by the husband's misrepresentation, if the assignee paid a valuable consideration for the assignment without knowledge of the fraud. (Page 396.)

2. ALTERATION—MEMORANDUM.—The addition to a written assignment of a life insurance policy, after the signatures, of the following words, "This loan of $5,000 is to be repaid upon notice of 30 or 60 days given by Mrs. S. Townsend," does not constitute an alteration of the instrument, being a mere memorandum. (Page 396.)

3. INSURANCE POLICY—MARRIED WOMAN—ASSIGNMENT.—Sand. & H. Dig., § 4944, which provides that it shall be lawful for a married woman to cause the life of her husband to be insured, and that the amount of such insurance shall be free from the claims of her husband's creditors, does not invalidate an assignment by a married woman of her interest in a policy insuring her husband's life as collateral security for a debt of her husband. (Page 396.)

4. SAME—CHANGE OF BENEFICIARY.—Where a policy of insurance is made payable to assured's wife "subject to the right of assured to change the beneficiary," the assured may, without the wife's consent, change the beneficiary *pro tanto* by assigning the policy as security for a loan. (Page 397.)

5. SAME—ASSIGNMENT—NOTICE.—One who takes from a widow an assignment of several policies on her husband's life, payable to her and amounting to $17,000, to secure an indebtedness of the husband amounting to $5,000, and a further advance to assured of $2,000, will be held to be put upon inquiry; and if inquiry from the insurer would have led to the discovery that assured had previously assigned some of the policies to another, the assignee will be held to have had notice of such prior assignment. (Page 398.)

Appeal from Pulaski Chancery Court.

THOS. B. MARTIN, Chancellor.

Morris M. Cohn, for appellants.

There was no loan of $5,000. The signature of Mrs. Goldsmith was obtained by misrepresentations of her husband, appellee's agent, and the assignment is therefore void. 1 Big. Fraud, 353; 38 Ark. 428, 432; 2 Hare's Lead. Cas. Eq. 1213; 14 Ves. 273; 40 Ark. 28, 30, 31; 58 Ind. 493, 498; 18 Md. 305, 320; 78 N. Y. 68; 42 Md. 140, 153; 68 Mich. 116, S. C. 35 N. W. 853; 78 N. Y. 68, S. C. 34 Am. Rep. 50; 42 Md. 140, 152, 153; 59 N. Y. 587, 591; 18 Md. 305, 320; 58 Ind. 493. Transactions between husband and wife are *prima facie* fraudulent, and the burden rests upon the husband of rebutting the presumption. 86 Pa. St. 512; 140 N. Y. 249; 94 Ala. 530; 37 Mich. 319. An assignment of a policy, to be valid, must be made in the mode provided by the com-

pany. 3 Joyce, Ins. § 2309; 50 Me. 96; 1 Biddle, Ins. §§ 280, 281. The assignment was void because of material alterations in the instrument by appellee. 1 Ark. 117; 9 Ark. 122; 30 Ark. 186; 35 Ark. 146; 48 Ark. 426; 49 Ark. 40; 57 Ark. 277. The assignment by the wife of insured, during his life, was inoperative. Her interest was a mere expectancy, as uncertain in ultimate value as that of an heir. 2 Col. C. C. 100; 2 Swanst. 108, 139. An heir's expectancy cannot be conveyed. 9 Mass. 519; 7 Conn. 255; 40 Pa. St. 37. The assignment by the wife was invalid. 2 De G., J. & S. 272; 9 East, 72. *Cf.* 59 Ark. 587; 71 N. Y. 261; 76 N. Y. 585; 86 N. Y. 11; *id.* 614; 100 N. Y. 372, 375; 102 N. Y. 266, S. C. 6 N. E. 667; 102 N. Y. 143, S. C. 6 N. E. 267; 115 N. Y. 152, 157; 122 N. Y. 152, 157; 122 N. Y. 337; 21 N. E. 1025, 1026; 129 N. Y. 566, 574; 140 N. Y. 457, 461; 7 So. 602; 50 La. Ann. 1027, S. C. 24 So. 16; 38 Conn. 294.

Ratcliffe & Fletcher, for appellee.

The wife cannot avoid the assignment merely because she misunderstood it. There would have to be some element of duress present. 41 Atl. 736; 29 Atl. 729; 114 Pa. St. 398; 8 Mo. App. 535; 58 Ark. 281. Appellee can not be held responsible for any misrepresentations of Goldsmith in the procurement of the assignment. 114 Pa. St. 398. Goldsmith had the right to change the beneficiary, by the terms of the policy, and that is the legal effect of the assignment procured by him to her. 99 Fed. 199; 60 Tex. 534; 74 Ga. 669, 670; 126 Ill. 387; 13 Daly, 255, 263; 85 N. Y. 593; 46 N. Y. 456; 12 Abb. N. Cas. 25, S. C. 28 Hun, 119; 23 Wis. 108; 19 Fed. 671; 12 Wis. 223; 9 N. W. 481. Even if there was any defect in the form of the assignment, that was an objection of which the company alone could take advantage; and, by paying the money into court, it has waived such defense. 2 May, Ins. § 396; 53 S. W. 602; 37 N. E. 441; S. C. 161 Mass. 320; 60 N. W. 812; 48 N. E. 1090, S. C. 170 Mass. 218; 6 Pa. Dist. Rep. 468; 43 N. Y. Supp. 649; 150 N. Y. 269. The words claimed to have been added by appellee to the contract were but expressive of the real contract, and not such an alteration as would avoid it. 35 Ark. 235; 5 Ark. 643–4–7; 42 Mo.

454. The burden was on appellants to show a material alteration without consent. 30 Ark. 286, 305–6; 73 Fed. 925; 2 Dan. Neg. Inst. § 1421. The wife had no indefeasible interest in the policy. 7 Daly, 169, 173; 44 N. Y. 159. Sand. & H. Dig., § 4944, does not apply to the case. The wife could assign the policy. 15 R. I. 106. That the husband had the right to assign the transfer, see: 47 Mo. 419; 47 Mo. 453; 8 Mo. App. 535; 56 Mo. App. 27; 50 Mo. 44; 23 Wis. 114; 38 Wis. 542, 546; 35 Ind. 188; 40 Ill. 402; 3 Sneed, 565; 2 Tenn. Ch. 269; 99 Ind. 478; Sand & H. Dig., §§ 489, 4945, 4946.

Morris M. Cohn, for appellants in reply.

Goldsmith did not change the beneficiary, and appellee must rely upon the assignment. 57 Ark. 632. Further, upon the invalidity of such an assignment procured by husband from wife, see: 38 Ark. 428, 432; 58 Ind. 493, 498; 18 Mo. 305, 320; 78 N. Y. 68; 42 Md. 140, 153; 68 Mich. 116; 59 N. Y. 587, 591.

BATTLE, J. On the 17th of May, 1896, The Equitable Life Assurance Society of the United States executed a policy of insurance for $3,000, and on the 13th of August issued another policy for $2,000, both on the life of Solomon Goldsmith, and payable to Eugenia Goldsmith, his wife, in case she survived her husband, "or, in the event of her prior death, to the assured's executors, administrators or assigns, subject to the right of the assured to change the beneficiary." On the 5th of April, 1898, Solomon Goldsmith and his wife, Eugenia, executed an assignment of these two policies to Sarah Townsend as security for a loan of $5,000 by the assignee to the the assured. On the 10th of June, 1898, Solomon Goldsmith died, and on the day following Mrs. Townsend gave notice to the general manager or agent of the insurance company for the state of Arkansas of the assignment to her, and on the 13th of the same month mailed a letter to the company notifying it of the same. On the day last mentioned Mrs. Goldsmith assigned these two policies with other policies on the life of Solomon Goldsmith, amounting to $17,000, to Mente & Co., who on the same day notified the company by telegram of the assignment.

Mrs. Townsend brought this action to enjoin the insurance company from paying the policies assigned to her to Mente & Co. or Mrs. Goldsmith. The company filed an answer in the nature of an interpleader's bill, and paid the amount of the policies into court, and asked that the parties claiming it be required to litigate their rights in court, and that it be relieved from further liability.

1. Mente & Co. and Mrs. Goldsmith denied that Goldsmith was indebted to Mrs. Townsend for $5,000 loaned to him by her.

2. They alleged that Mrs. Goldsmith's signature to the assignment was procured by the misrepresentations of her husband.

3. That if the $5,000 was loaned, it was at a usurious rate of interest.

4. That this assignment was altered after its execution by cutting off words at the end of the paper on which it was written, and by adding words beneath the assignment as follows: "This loan of $5,000 is to be repaid upon notice of 30 or 60 days given by Mrs. S. Townsend."

5. That the assignment by Mrs. Goldsmith was illegal.

6. That the assignment to them was superior to that of Mrs. Townsend.

The court, after hearing the evidence adduced by all the parties, rendered a decree in favor of Mrs. Townsend for the $5,000 which had been paid into court, and Mente & Co. and Eugenia Goldsmith, who were defendants in this action, appealed.

1. After a careful examination and consideration of all the evidence in the case, we find and conclude that the policies in controversy were assigned to appellee, Mrs. Townsend, for the purpose of securing the payment of the sum of $5,000 loaned by her to Solomon Goldsmith, deceased, in his lifetime. The instrument of writing adduced by the appellee at the hearing of this cause as evidence of that fact, the execution of which by Goldsmith and his wife is not denied, supports that conclusion. Other evidence, to repeat which can serve no useful purpose, corroborates that view.

2. But appellants insist that the signature of Mrs. Goldsmith was procured by her husband by means of fraud and misrepresentation. If this be so, there is no evidence that appellee was a party to this fraud, knew or had any notice of it at the time she loaned the $5,000. It was not procured by compulsion. Upon the faith of the assignment appellee loaned a large sum of money. Under these circumstances appellants cannot take advantage of the husband's misrepresentations. While the wife may avoid a fraud upon her as against all who participated therein, it is a rule that a valuable right of a creditor cannot be prejudiced by any fraud of the husband which procured the wife's security, if it was without such creditor's instigation, knowledge or consent. *Kulp* v. *Brant*, (Pa.) 29 Atl. 729; *Johnston* v. *Patterson*, 114 Pa. St. 398; Schouler, Husband & Wife, § 283.

3. Appellants contend that, if the $5,000 were loaned by appellee to Goldsmith, they were loaned at a usurious rate of interest. But we find that this was not shown by clear and satisfactory evidence. The evidence upon this point is conflicting, and the evidence adduced by the appellants was not clear or satisfactory, and therefore is not sufficient to sustain the contention.

4. It is also contended that the assignment was altered after its execution by the cutting off of words at the end of the paper on which it was written, and by adding the words, "This loan of $5,000 is to be repaid upon notice of 30 or 60 days given by Mrs. S. Townsend." There is no evidence that any words were cut off, and the words added below the assignment were no alteration, and were nothing more than a memorandum. *Walker* v. *Walker*, 5 Ark. 643, 647; *American National Bank* v. *Bangs*, 42 Mo. 454.

5. Appellants insist that Mrs. Goldsmith, being a married woman at the time the assignment was made to appellee, could not at that time lawfully assign the policies in controversy to any one. This contention is based in part upon section 4944 of Sandels and Hill's Digest, which provides: "It shall be lawful for any married woman, by herself and in her name, or in the name of any third person, with his assent, as her trustee,

to cause to be insured, for her sole use, the life of her husband for any definite period, or for the term of his natural life; and in case of her surviving her husband the sum or net amount of the insurance becoming due and payable by the terms of the insurance shall be payable to her and for her use; and in case of the death of the wife before the decease of her husband the amount of said insurance may be made payable to his or her children, for their use, and to their guardian, for them, if they shall be under age, as shall be provided in the policy of insurance; and such sum or amount of insurance so payable shall be free from the claims of the representatives of the husband, or of any of his creditors; but such exemption shall not apply where the amount of premium annually paid out of the funds or property of the husband shall exceed the sum of three hundred dollars." But sections 4945 and 4946 of the same digest, which were enacted at the same time the section preceding was, give a married woman the power to "bargain, sell, assign and transfer her separate personal property." We know of no statute prohibiting her from assigning any policy of insurance as a security. We see nothing in the statute relied upon which denies to her this right. But we have a statute which makes "all agreements and contracts in writing for the payment of money or property, or for both money and property, assignable" (Sand. & H. Dig., § 489); and this court has held that a wife can mortgage her separate property to secure her husband's debts. *Collins* v. *Wassell*, 34 Ark. 17; *Petty* v. *Grisard*, 45 Ark. 117. Under these statutes and other laws of this state, which vest her with all the rights of an unmarried woman as to her separate property, and make no exceptions as to policies of insurance upon the life of her husband, we can see no good reason why she cannot assign such policies as a man or single woman can transfer. *Charter Oak Life Ins. Co.* v. *Brant*, 47 Mo. 419; *Baker* v. *Young*, 47 Mo. 453; *Emerick* v. *Coakley*, 35 Md. 188; *Pomeroy* v. *Ins. Co.* 40 Ill. 402; *Kerman* v. *Howard*, 23 Wis. 108; *Rison* v. *Wilkerson*, 3 Sneed, 565; *Williams* v. *Corson*, 2 Tenn. Ch. 269.

The policies in controversy were made "payable to Eugenia Goldsmith, * * * in the event of her prior death, to the

assured's executors, administrators, or assigns, subject to the right of assured to change the beneficiary." The interest of Mrs. Goldsmith in the same, before the assignment to appellee, was an expectancy. Goldsmith, the assured, could have changed the beneficiaries in the policies at any time without her consent. He, in effect, made such change, to the extent of the assignment to appellee. *Hopkins* v. *N. W. Life Ass. Co.* 99 Fed Rep. 199; *Splawn* v. *Chew*, 60 Texas, 534; *Nally* v. *Nally*, 74 Ga. 669, 670; *Martin* v. *Stubbings*, 126 Ill. 387.

6. Appellants, Mente & Co., claim that the assignment of the policies by Mrs. Goldsmith to them is superior to that to appellee, because they had no notice of appellee's claim until after the policies had been transferred to them for a valuable consideration, and because they notified the insurance company, which executed the policies, of their claims before appellee gave notice to it of the assignment to her. The truth is, the assignment to appellee was executed long prior to the time when the policies were transferred to Mente & Co., and notice of the former was given to the general manager or agent of the insurance company for this state prior to the time when Mente & Co. gave notice of their claim. Goldsmith, in his lifetime, gave notice to the insurance company of his intention to transfer the policies to appellee; and Mente & Co. were put on inquiry before the transfer to them, which, if it had been followed up, would have led to the discovery of the assignment to appellees. Goldsmith, the assured, was indebted to Mente & Co. for about $5,000. When he died, he left no property for the support of his widow. She had policies on his life for $12,000, exclusive of the policies in controversy, and, including them, for $17,000. In three or four days after her husband's death, when she was overwhelmed by grief caused by his death, Mrs. Goldsmith, in consideration of $2,000 paid to her by Mente & Co., of which firm her son-in-law was a member, and for the ostensible purpose of paying that firm the $5,000 that her husband owed to it, transferred to Mente & Co. the policies for $17,000. These circumstances were sufficient to put a man of common sagacity upon inquiry to ascertain the reason for such an unreasonable sacrifice, which, if prosecuted with reasonable diligence, would

have led to the discovery that it was made for the fraudulent purpose of defeating the claim of appellee. It would have been natural for such a person to have inquired of the insurance companies if they knew of any reason why the sacrifice should be made. This would have led to the discovery from one that Goldsmith had given notice of an intention to transfer to appellee, and this would have led to an inquiry of appellee, which, if prosecuted, would have led to the discovery of the assignment to her. But it does not appear that any such inquiry was made. Instead of it, a notice of the transfer to Mente & Co. was given by telegram to the insurance company, which showed an effort to be in advance of all others in giving notice. There would not have been any occasion for this hurry if there had not been any fears of adverse claims. The transfer to Mente & Co. was procured by the son-in-law of Mrs. Goldsmith, who was a member of that firm. All these and other accompanying circumstances, which are unnecessary to mention, indicate that the latter transfer was made for a fraudulent purpose, and that Mente & Co. participated. This being true, it was void as to appellee. *Dyer* v. *Taylor*, 50 Ark, 314.

Decree affirmed.

WOOD, J., absent.

68 399
79 397

LESS v. ARNDT.

Opinion delivered November 3, 1900.

LIMITATION OF ACTION—PART PAYMENT.—Part payments credited on a note by the creditor with the debtor's knowledge and consent will stop the running of the statute of limitations. (Page 401.)

Appeal from Lawrence Circuit Court in Chancery.

RICHARD H. POWELL, Judge.

W. E. Beloate, for appellant.

The debt was barred by limitation. Part payment, to re-

vive a debt and toll the statute, must be made under such circumstances as can be treated as an admission of the continued existence of the debt. 65 Ark. 6; 60 Ark. 491; 20 Ark. 189; 18 Ark. 522. The appropriation, being made by the creditor, carried no implication of such acknowledgment. 9 Ark. 459; 14 Ark. 197; 10 Ark. 643; 18 Ark. 521. Appellant is not estopped by any acquiescence.

Chas. Coffin and *H. L. Ponder*, for appellee.

Appellant is estopped by acquiescence. Bouv. Dict. "Acquiescence," p. 61; 65 Ark. 222; 11 Ark. 269; 2 Phill. Ch. 117–125. The creditor had the right to apply the payment, in the absence of direction from the debtor. 1 Wood, Lim. § 110; 38 Ark. 295; 32 Ark. 645; 18 Ark. 525. Appellant's conduct estops him to repudiate the application of the payment made by the creditor. 60 Ark. 498. As to the general effect of part payment, see: 7 Gray, 275; Wood, Lim. § 97; 9 Ark. 455.

BATTLE, J. On the 23d day of February, 1898, H. Arndt brought this action against Ike Less on two promissory notes and an account. One of the notes was executed by Less to Arndt for the sum of $501.61 and ten per cent. per annum interest thereon from the 28th day of March, 1892, the date of the note, until paid; and the other was executed by the defendant to the plaintiff, on the same day, for the sum of $256.99 and ten per cent. per annum interest from date until paid. Both of them were made payable on or before the 15th day of November, 1892. The former was credited, on the 11th of November, 1894, with the proceeds of the sale of seven bales of cotton, amounting to the sum of $139.23; and the latter was credited, on the 9th of November, 1894, with the proceeds of six other bales of cotton, amounting to $149.53. The account was for goods, wares and merchandise sold and delivered, and for cash advanced by the plaintiff to the defendant at divers and sundry times in the years 1893 and 1894, the total indebtedness for which amounted to the sum of $3,089.04, which was reduced by various credits to the sum of $608.88, the last credit being given in October, 1895. The defendant

answered, and alleged that the action was not brought within five years after the right of action accrued upon the notes, and within three years after the account became due and payable, and that plaintiff was barred from maintaining the action by the three and five years' statutes of limitation. The evidence adduced at the trial shows that the defendant sold and delivered to the plaintiff thirteen bales of cotton in the month of November, 1894, and credited the defendant with the proceeds of the sale on the notes as above stated; and that defendant demanded pay for the cotton, and was informed by plaintiff that the notes were credited as stated, and that the defendant made no further objection, but acquiesced in the action of the plaintiff; and also tended to prove that plaintiff, in the month of October, 1895, collected rents which the defendant had authority to collect and use, and credited the account of the defendant with the same as of the day of the collection, and informed defendant what he had done, and that defendant did not object, but acquiesced. The court rendered judgment in favor of the plaintiff against the defendant for the balance due on the notes and account, after deducting the credits on the same. We see no error in the judgment of the court. The action was not barred by the statutes of limitation. *Chase* v. *Carney*, 60 Ark. 491.

Judgment affirmed.

BUNN, C. J., and RIDDICK, J., did not participate.

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68 401
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JOHNSON v. STATE.

Opinion delivered November 3, 1900.

CRIMINAL LAW—SEPARATION OF JURY—FAILURE TO ADMONISH.—Failure of the court in the trial of a felony to admonish the jury, as required by Sand. & H. Dig., § 2237, before permitting them to separate, is reversible error where it is not affirmatively shown that the jurors were exposed to no improper influences. (Page 402.)

Appeal from Lonoke Circuit Court.

GEORGE M. CHAPLINE, Judge.

Ratcliffe & Fletcher, for appellant.

The court erred in denying a continuance and in excluding the evidence of Russell. 21 Ark. 460. The court admitted incompetent evidence, and its mere direction to the jury that they should not consider it did not cure the error. 60 Ark. 89. It was error to allow the jury to disperse during the trial without the admonition required by Sand. & H. Dig., § 2237. 44 Ark. 115; 57 Ark. 1; 1 Bish. Cr. Proc. §§ 991–2–3; 44 Ill. 452; 9 Sm. & M. 465.

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

The defendant was not prejudiced by the failure of the court to admonish the jury.

HUGHES, J. This is an appeal from a conviction of larceny, and one of the grounds of the motion below for a new trial is that, after the trial had been commenced and part of the testimony had been taken, the jury in the case were allowed to disperse and separate as they chose, without being admonished by the court as required by section 2237 of Sandels & Hill's Digest, which is as follows: "The jury, whether permitted to separate or kept in charge of officers, must be admonished by the court that it is their duty not to permit any one to speak to or communicate with them on any subject connected with the trial, and that all attempts to do so should be immediately reported by them to the court, and that they should not converse among themselves on any subject connected with the trial, or form or express an opinion thereon, until the cause is finally submitted to them. This admonition must be given or referred to by the court at each adjournment."

In section 2236 *id.*, it is provided that "the jurors, before the case is submitted to them may, in the discretion of the court, be permitted to separate, or be kept together in charge of proper officers."

It is held in *Johnson* v. *State*, 32 Ark. 309, that it is within the sound discretion of the court to permit the jury to separate either before or after the cause is submitted to them, but such discretion should be exercised, especially in trials for

felony, with the utmost caution. "The officers must be sworn to keep the jury together during the adjournment of the court, and to suffer no person to speak to or communicate with them on any subject connected with the trial, nor do so themselves." Latter clause of § 2236, Sandels & Hill's Digest. In reference to this clause of this section it is held in *Atterberry* v. *State*, 56 Ark. 515, that it is too late to object after verdict that the officer in charge of the jury was not sworn as directed by this section, where the defendant was present when the jury retired, and did not request that the oath be administered, nor object.

"It seems that if a jury in a criminal case, or any portion of it, have been exposed to undue influence, either by the whole jury being under charge of an unsworn officer, or any portion of the jury have separated from the others and had intercourse, or opportunity of intercourse, with third persons, and it does not affirmatively appear that no consequences were effected upon the jury by such exposure, and the possibility of undue influence be not wholly negatived, the verdict of such jury will be set aside. It seems, however, it would be otherwise, if the record showed that no undue influence had been exerted or attempted. *McCann* v. *State*, 9 S. & M. 465; *Lewis* v. *People*, 44 Ill. 452.

In reference to this question see *Maclin* v. *State*, 44 Ark. 115; *Vaughan* v. *State*, 57 Ark. 1. In *Maclin* v. *State*, it is held that "the separation of a juror from his fellows pending the trial casts upon the state the burden of proving that no improper influence was brought to bear upon the juror during his absence. In other words, the mere fact that a juror separates from his fellows without the order of the court is *prima facie* ground for a new trial, unless it affirmatively appears that the separating juror was not subject to any noxious [undue] influence [while absent]."

In this case the jury separated without an order of the court allowing their separation, and without being admonished by the court, as required by section 2237 of Sandels & Hill's Digest, above quoted. The judge was not requested to admonish the jury, nor was there any exception at the time to his failure to do so. They were not placed in the custody of

an officer, but went where they pleased, as the record expressly shows.

Section 235 of the General Statute of Kansas, 857, 858, reads as follows: "When jurors are allowed to separate after being impaneled, and at each adjournment, they *must* be admonished by the court that it is their duty not to converse among themselves, nor suffer others to converse with them on any subject connected with the trial, or to form or express any opinion thereon, until the cause is finally submitted to them." In the case of the *State* v. *Mulkins*, 18 Kas. 16, it is held prejudicial error to fail to admonish a jury, as required by this statute. In discussing the question, the court said: "The statute says that the court 'must' admonish the jury; and therefore no construction should be put upon the statute that would allow it to be wholly disregarded, or even to be lightly considered. By failing to admonish the jury, as required by the statute, the door is opened wide for intervening prejudice to enter during the irregular separation of the jury. By such a failure one of the safeguards to an impartial trial is broken down, one of the securities to an impartial verdict is overthrown, one of the evidences that impartial justice is done is obliterated; and all this without any fault on the part of the defendant. Therefore, where there has been a separation of the jury during an adjournment of the trial, without such admonition, and the defendant afterwards moves for a new trial on the ground of such separation, want of admonition, and intervening prejudice, we think it ought to be presumed, in the absence of everything to the contrary, that prejudice, injurious to the defendant's rights, did intervene during such separation, and did result from the want of such admonition; and therefore we think that in such a case a new trial ought to be granted, and a refusal to grant the same would be substantial error. * * * Of course, the failure of the court to admonish the jury was a mere oversight, which the court would have corrected at the time if either party had at the time called its attention to the same. But as the statute makes it the imperative duty of the court, without any suggestion, to give such admonition to the jury, we do not think that the defendant waived any

rights by failing to call attention of the court to the matter at the time of such failure. If the defendant had failed to move for a new trial because of said failure, then perhaps we might presume that the defendant had waived the error, or at least we might presume that the error did not work any substantial prejudice to his rights," etc.

For the error in failing to admonish the jury in the case at bar, as required by the statute, the judgment herein is reversed, and the cause is remanded for a new trial.

CULBERHOUSE v. CULBERHOUSE.

Opinion delivered November 3, 1900.

68 405
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1. ADVANCEMENT—PRESUMPTION.—In the absence of clear evidence to the contrary, a gift of a horse and of an insurance policy from a father to his daughter will be presumed to be an advancement. (Page 408.)
2. SAME—VALUE OF INSURANCE POLICY.—The value of an advancement of a policy of life insurance payable to a daughter at her father's death should be estimated as of the time when her right of beneficial enjoyment accrued, which was at the death of the insured. (Page 408.)

Appeal from Craighead Chancery Court.

EDWARD D. ROBERTSON, Chancellor.

STATEMENT BY THE COURT.

This action was instituted in 1895 by Pattie W. Culberhouse, as plaintiff, against G. W. Culberhouse, as administrator of the estate of T. D. Culberhouse, deceased, Bank of Jonesboro, Hosmer Kelley, Farmers' Building & Loan Association of Nashville, Sallie Warner, Jennie V. Elder, Kathleen Pace, R. S. Culberhouse, T. D. Culberhouse, Jr., Mignon Culberhouse, and William and Mary Altman. Plaintiff prayed that she be assigned dower in the estate of her deceased husband, T. D. Culberhouse.

Defendant Farmers' Building & Loan Association of Nashville being a mortgagee of T. D. Culberhouse, prayed a foreclosure of its mortgage. The defendants William and Mary

Altman, minors, by their legal and natural guardian, W. D. Altman, and by their guardian *ad litem*, J. C. Hawthorne, filed their answer and cross-complaint. The defendant Mignon Culberhouse, a minor, by her legal guardian, J. H. Kitchens, Jr. filed her separate answer. The defendant T. D. Culberhouse, Jr., by his guardian *ad litem*, E. Parrish, filed his separate answer, and also his answer and cross-complaint. Defendants R. S. Culberhouse, Kathleen Pace, Sallie Warner, Jennie V. Elder and G. W. Culberhouse, as administrator, filed their separate answers and cross-complaints. Defendants in their answers and cross-complaints prayed that dower be assigned, that the advancements made by T. D. Culberhouse, deceased, to his several heirs be ascertained, and that they be charged therewith, and that the estate remaining be partitioned.

T. J. Elder, on behalf of defendants, testified that T. D. Culberhouse died in March, 1895; that in his lifetime he conveyed to defendant Jennie V. Elder 160 acres of land, of the value of $1,600, and to the defendant Sallie Warner 160 acres of land of about the same value as that conveyed to Jennie V. Elder; that he conveyed to the defendant Kathleen Pace a part of block in Cate's Addition to Jonesboro, of the value of $2,000.

G. W. Culberhouse, on behalf of defendants, testified: T. D. Culberhouse died March 29, 1895, leaving surviving him his daughters, Sallie J. Warner, Kathleen Pace, Jennie V. Elder and Mignon Culberhouse, a minor; his sons, R. S. and T. D. Culberhouse, Jr. (last named being a minor); and his grandchildren, William and Mary Altman, children of his daughter, Dora Altman, deceased. At his death T. D. Culberhouse had $15,000 life insurance, $2,000 payable to Kathleen Pace, which she received; $1,000 to Sallie J. Warner, which she received; $1,000 to Jennie V. Elder, which she received; $4,000 to T. D. Culberhouse, which he received; and $4,000 to Mignon Culberhouse, which she received. There was also a $5,000 policy payable to Sallie J. Warner, W. D. and R. S. Culberhouse, Virginia Lee Culberhouse (Jennie V. Elder) and Dora Altman, if living; otherwise, to member's representatives. Dora Altman and W. D. Culberhouse died before T. D. Culberhouse, and the $2,000 which were intended for them originally were paid to

witness as administrator of the estate. T. D. Culberhouse, Jr., got $1,000 from the New York Mutual Reserve, and Mignon Culberhouse $4,000 from the same company. The other amounts were paid by the Hartford Annuity. The different policies in the Hartford Annuity were of the same date. Mignon Culberhouse also got a horse of the value of $125. T. D. Culberhouse, Jr., got three horses. Witness never saw them. T. D. Culberhouse, Jr., sold one of the horses for $50. His father also conveyed him 12 acres of land south of town. The consideration recited in the deed was $250.

The decree rendered at the October term, 1896, recites the appearance of all parties—the adults by their attorneys, and the minors by their guardians; the filing of answers and cross-complaints by all the defendants, including the minors; the submission of the cause upon said answers and cross-complaints, the deeds of conveyance from T. D. Culberhouse, deceased, in his lifetime to his children, the policies of insurance in the Hartford Annuity Life Insurance Company and the Mutual Reserve Fund Life Association, together with a statement from said companies of the amount of premiums paid thereon, and an abstract of title to the lands described in the complaint. The court finds that all parties, including the minors, were duly served with summons. The decree assigns dower and homestead to the widow, as shown by the evidence. The only exception upon which this appeal is based is as follows: "And J. H. Kitchens, Jr., guardian of Mignon Culberhouse, a minor defendant herein, by attorney excepts to so much of the decree of the court as charges said minor with the sum of $4,000, received from a policy of insurance on her father's life, as an advancement, as well as the charge of $125 for a horse. which is by the court decreed to be an advancement to said minor, and asks that his exception be noted of record, which is accordingly done, and said guardian prayed an appeal to the supreme court, which is granted by the court."

Ira D. Oglesby, for appellant.

The evidence does not support the finding as to the advancement of the horse. If the insurance policy be held to be an advancement, appellant should have been charged with the

value of the advancement, at the time it was made. Sand. & H. Dig., § 2486. The only possible charge that could be made, as by way of advancement, against deceased would be the actual amount of premiums paid or the cash value of the policy at the time of the last payment. The mere fact that appellant was named as beneficiary of the policy did not make out a case of advancement to her.

Allen Hughes, *J. C. Hawthorne* and *N. F. Lamb*, for appellees.

The evidence as to the horse clearly sustains the court. Appellant was properly charged with the value of the policy as an advancement. 92 Tenn. 576; 69 N. W. 438; 38 N. E. 199; 24 S. W. 879; 10 S. E. 1076; 17 S. W. 1035. The presumption is that what a parent transfers to a child is an advancement, and not a gift. 41 Ark. 301; 45 Ark. 481; 48 Ark. 17; 51 Ark. 188; 54 Ark. 499. Chancery has jurisdiction over advancements. 20 Ark. 265; 45 Ark. 481; 41 Ark. 301; 51 Ark. 530; 40 Ark. 62; 52 Ark. 188.

HUGHES, J., (after stating the facts.) We are of the opinion that the evidence in the case shows that the appellant Mignon Culberhouse received from her father one horse of the value of $125 and an insurance policy upon his life in the sum of $4,000, upon which she received $4,000; that it does not clearly appear that said horse and said policy of insurance were intended as gifts, and they must be held to be advancements to the said Mignon Culberhouse. *Robinson* v. *Robinson*, 45 Ark. 481; *White* v. *White*, 52 Ark. 188.

The material question in this case is, how shall the value of the advancement be estimated. Shall it be at the date of the insurance policy, at the date of the payment of the last premium, or at the death of insured? Section 2486 of Sandels & Hill's Digest, under the head of Advancements, provides that "the value of any real or personal estate so advanced shall be deemed to be that, if any, which was acknowledged by the person receiving the same by any receipt in writing specifying the value; if no such written evidence exists, then such value shall be estimated according to its value at the time of advancing

such money or property." We are of the opinion that the value of the advancement of the policy of insurance should be estimated as of the time of the right of possession or beneficial interest accrued, which was at the death of the insured, the father of the beneficiary. We think this view of the case is in consonance with equity, and what is presumed from the facts in this case to have been the intention of the father, and that it is supported by the case of *Cazassa* v. *Cazassa*, 92 Tenn. 576. Not until the death of the insured did the beneficial interest in the policy accrue, and the beneficiary thereafter received $4,000 upon the policy. There are only two cases upon this question, it seems,—the one cited here from 92 Tenn. and the other is *Rickenbacker* v. *Zimmerman*, 10 So. Car. 110, in which latter case it is held that the value of the insurance at the time it was taken out, and the first premium paid, together with all premiums subsequently paid, must be treated as an advancement. Reported in 30 Am. Rep. 37, and cited in 1 Am. & Eng. Enc. Law, p. 217.

The decree of the chancellor is affirmed.

HILL v. DADE.

Opinion delivered November 3, 1900.

1. PARTIES — MULTIFARIOUSNESS.— Where an heir seeks to determine whether her ancestor's executrix had authority under the will to convey the fee in the ancestral lands, all persons holding any of such lands through conveyances from the executrix are properly joined as parties, and the bill is not multifarious, as the decision of the question at issue will settle the rights of all the parties. (Page 412.)

2. WILL—CONSTRUCTION—ESTATE CONVEYED.—A will appointed the testator's executrix and sole trustee of his estate, and authorized her to sell the property and reinvest the money arising therefrom, and provided that she might make "use of the proceeds of said property for her own maintenance and the education and support of my children during her natural life, to be equally divided amongst them, share and share alike, at her death." *Held*, (1) that no estate was conferred upon the executrix in her own right, but a mere authority to sell and reinvest, with a

right to be supported out of the income or proceeds of the property; (2) that, at the termination of the trust, the property should be equally divided among the testator's children; the executrix having no power to make preferences among them. (Page 413.)

Appeal from Ashley Chancery Court.

JAS. F. ROBINSON, Chancellor.

STATEMENT BY THE COURT.

Henry C. Dade died in 1865, leaving property both real and personal. In the will which he left he appointed his wife, Elizabeth Dade, executrix and trustee. She took charge of the estate, and during her life sold and disposed of most of the property. After her death, which occurred in 1896, Agnes Hill, a daughter of herself and Henry C. Dade, brought this action to construe the will of her father, H. C. Dade, and for an account and for other purposes. A large number of persons were made defendants, who were children or grandchildren of Henry C. Dade or parties who held property purchased by them from the executrix and trustee, Elizabeth Dade. The plaintiff alleges and contends that the trustee had only power to convey a life estate in the lands, while the defendants assert that under the will she had absolute power of disposal and the right to convey the fee. They also raised the question that the complaint was multifarious. The chancellor, after hearing the evidence, found in favor of the defendants, and dismissed the complaint for want of equity.

From this decree plaintiff appealed.

Geo. W. Norman, for appellant.

All persons materially interested, either legally or beneficially, in the subject-matter are to be made parties, either as plaintiffs or defendants. Story, Eq. Pldg. p. 86; Sand. & H. Dig., §§ 5703–5707. Multifariousness is not ground of demurrer. 34 Ark. 600; 32 Ark. 490; 39 Ark. 158; 42 Ark. 186. Equity has jurisdiction when a tenant in common alleges ouster by his cotenant, and prays an account of rents. 31 Ark. 353; 38 Ark 440–3 *et seq.* The statute of limitations does not run against a remainderman until the death of the life tenant. 42 Ark. 357; 60 Ark. 70. There can be no partition in an action

to settle title to lands, but when chancery has possession on some clear ground of equity jurisdiction, distinct from the matter of partition, the cause may be retained. 38 Ark. 439; 48 Ark. 550; 31 Ark. 345; 47 Ark. 268; 49 Ark. 576. The entire controversy is then settled. 47 Ark. 238. A trustee cannot buy for his own benefit. 61 Ark. 368. Chancery has jurisdiction to construe wills. 38 Ark. 435; 50 N. E. 176; 75 N. W. 413. The executrix had only a life estate with vested remainder to the beneficiary named in the will. 51 Ark. 61; 38 Ark. 439; 104 U. S. 291; 52 Ark. 113. A life tenant and his vendees not entitled to improvements. 44 Ark. 477; 6 Laws. Rights & Remedies, 4431; 38 Ark. 454.

Robt. E. Craig, for appellees.

The will takes effect from the death of the testator, on property both real and personal. 57 Ark. 70. Judicial notice of the date of the war will be taken. 34 Ark. 465. The cases of 51 Ark. 61, 38 Ark. 439, 104 U. S. 291, do not support appellant's contention. If absolute power of disposal be given to the executor with remainder over, the gift over to the remainderman is inconsistent with the power, and therefore void. 19 Am. Rep. 525; 29 Am. Rep. 493; 109 U. S. 725; 45 Am. St. Rep. 493. The will must be construed as a whole, if possible. 53 Ark. 361. The language conveys an estate in fee. 1 Sugd. Powers, 129, 130. The purchaser is not required to look to the application of the purchase money. 19 Am. St. Rep. 282–4; 34 Ark. 463; 44 Ark. 61. The statute of limitations applies only to an express trust, not when the trust is extinguished or repudiated. 46 Ark. 25; 53 Ark. 538. A party holding an equitable right must assert it in a reasonable time. 55 Ark. 85.

Geo. B. Pugh, for appellees.

A *bona fide* purchaser under a plain power need not see to the application of the purchase money. 34 Ark. 463; 44 Ark. 73; 2 Dembitz, Land Titles, p. 937. Appellant is guilty of the grossest laches, and cannot recover. Sand. & H. Dig., § 4815; 34 Ark. 467; 43 Ark. 484; 55 Ark. 85. The property sold should remain undisturbed in the possession of the purchasers. 38 Ark. 430; 53 Ark. 358.

Bridges & Wooldridge, for appellees.

When the statute begins to run, nothing stops it. Plaintiff's coverture would not avail her. 16 Ark. 159. The statute makes no exception in favor of a married woman. 46 Ark. 37; 16 *id.* 671; 32 *ib.* 97; 113 U. S. 449. The statute runs as to constructive trusts. 46 Ark. 37; 52 Ark. 168; 49 Ark. 468; 58 Ark. 84.

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

In construction of wills, the testator's intention must prevail. 31 Ark. 146. An estate may be created by implication. Bigelow, Wills, 302; 152 Mass. 95; 128 Mass. 370; 13 Pick. 159; 23 Pick. 287; 37 Me. 264; 3 Paige, 9. A gift of the proceeds of real estate is a devise of the real estate itself. 53 Pa. St. 79; 6 Laws. Rights & Remedies, p. 4427. Beneficiary could sue only a life estate, and the vendors were bound to take notice of its character. 51 Ark. 72; 38 Ark. 438; 52 Ark. 113; 104 U. S. 291; 93 U. S. 326; 22 Ark. 567. A life tenant who sells by quit-claim advises his vendee thereby that a life estate only is sold. 5 Laws. Rights & Remedies, p. 3788; 99 Am. Dec. 179; 48 Ark. 550; 31 Ark. 352; 47 Ark. 268; 49 Ark. 576; 56 Ark. 398; 45 Ark. 549. No bill is multifarious which presents a common point of litigation. 85 Fed. Rep. 55; *id.* 67; 113 U. S. 340. No right of action occurred in favor of remainderman until life estate terminated. 51 Ark. 75; 53 Ark. 359.

RIDDICK, J., (after stating the facts.) The first question presented by this appeal arises on the contention that the complaint in this case was multifarious. But we agree with counsel for appellant that "no bill is multifarious which presents a common point of litigation, the decision of which will affect the whole subject-matter and settle the rights of all the parties." *Kelley* v. *Boettcher*, 85 Fed. Rep. 55; *Curran* v. *Campion*, *ib.* 67; Bliss on Code Pleadings, § 110. All the defendants in this case derive title to the real estate claimed by them from the estate of Henry C. Dade through conveyances made by Elizabeth Dade under power conferred upon her by the will of Henry C. Dade. The determination of the question of

whether Mrs. Dade had under the will power to convey the fee or only an estate for her life will settle the rights of all the parties, so far as the legal title to the land is concerned, and for that reason they were all properly joined in this action. The will which we are called upon to construe contains the following provision: "I do hereby ordain, constitute and appoint my wife, Elizabeth Dade, my sole executrix and *sole trustee* of my estate, whether of moneys, credits or effects, and the sole guardian of my children, * * * without requiring of her, my said wife Elizabeth Dade, security for the same; with power to sell any and every portion of said property, and reinvest the money arising from said sale again, whenever she may find it advantageous so to do for the best interest of my children aforesaid, except all slaves which I am possessed of at this time or may hereafter own; making use of the proceeds of said property for her own maintenance and the education and support of my children during her natural life, to be equally divided amongst them, share and share alike, at her death."

A consideration of the entire will convinces us that the power to sell conferred upon the trustee, Mrs. Dade, embraced all the property of the estate, both real and personal. A different construction would lead to the conclusion that the testator only intended to dispose of his personal property by his will, whereas it seems more reasonable to believe that, in referring to his estate and making his wife trustee thereof with power to sell, he intended to dispose of his entire property. But the language of the will above quoted did not confer upon Mrs. Dade, the trustee, an estate in her own right, either for life or in fee. The testator does not bequeath or devise his property to his wife, but appoints her executrix and trustee of his estate, with power to sell any and every portion of the property and reinvest the proceeds whenever she may deem it for the best interest of the children to do so. If she held an estate in this property under the will, it was not for herself, but as trustee of her children. The beneficial interest which she obtained in the property devised only extended to a maintenance out of the income or proceeds of the property. It is not her property which she is authorized to sell and reinvest, but the

property of the children which she held as trustee. It would seem unreasonable to believe that the testator, in making provision that the trustee might sell this property for the purpose of reinvestment, intended she should only sell a life estate therein. We therefore conclude that the power given was an absolute power to dispose of all the interest owned by the testator. If the will had devised to the executrix an estate for life in the lands, in her own right, with the power to dispose thereof, we might, as this court did in *Patty* v. *Goolsby*, 51 Ark. 61, infer that the power of disposal referred to the estate of the executrix, and not to the remainder left to the children. But no estate is conferred upon the executrix in her own right by the will. As before stated, she is appointed trustee of the property, with power to sell and invest for the children, giving to her the right to use so much of the income or proceeds of the property as might be necessary for her own maintenance. The beneficial interest which she obtained in the property devised only extended to a maintenance out of the income or proceeds of the property. For this reason, we do not think the rule laid down in *Patty* v. *Goolsby* applies in this case, and we hold that Mrs. Dade had, under the will, power as trustee to make an absolute disposition of the property devised.

It was the manifest intention of the testator that his property should, after the termination of the trust conferred upon Mrs. Dade, be equally divided among his children, and the will directed that she might make this division before her death. But it is clear that she had no right to prefer one child to another in such division nor could she do so by a pretended sale or gift of the property to one child in preference to another. There is some evidence tending to show that Mrs. Dade did attempt to confer an undue portion of the property upon her daughter, Mrs. Williams, but the evidence on that point is not very clear, and we are not called upon by the pleadings to go into a discussion of that question in this case, a question with which a large number of the defendants, who are not children or heirs of the testator, have no connection, and in which they have no interest.

For this reason, the decree of dismissal entered by the

chancery court must be affirmed, but the decree below is modified, so that this dismissal may be without prejudice to any future action by plaintiff against Mrs. Williams or other children and heirs of Henry C. Dade, to secure an equal distribution of the land or distribution of the property devised by him.

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

Opinion delivered November 17, 1900.

NEGLIGENCE—FRIGHTENED HORSE—INJURY AT BRIDGE.—Where, without the fault of the railway company, a horse became frightened and ran upon a railroad bridge that was not open for ordinary travel, and was injured, the railway company is not liable for damages. (Page 416.)

Appeal from Pulaski Circuit Court.

JOSEPH W. MARTIN, Judge.

Dodge & Johnson, for appellant.

The railway company was guilty of no negligence. It owed appellee no duty to keep its bridge in a safe condition for passage of runaway animals. 48 Ark. 493; 57 Ark. 21; 36 Ark. 607; 37 Ark. 593; 48 Ark. 368; 6 Pa. St. 472.

A. M. Fulk and *E. M. Merriman*, for appellee.

It was the duty of appellant to erect and maintain suitable guards to prevent persons and animals passing on the near-by public road from accidentally being injured on the bridge. 57 Ark. 21.

BUNN, C. J. This is a suit by the appellee, W. H. Scott, a citizen of Little Rock, against the appellant company, for damages to a horse. Verdict and judgment for $55 in favor of the plaintiff, and defendant appealed to this court.

The plaintiff, with others, had been to a picnic at Hill's lake some miles northeast of Little Rock and north of the Arkansas river, and was returning home in his buggy along the

road that, coming from the direction of Hill's lake, approaches the river below the lower Iron Mountain railroad bridge; and, about one hundred yards from the northern end of this bridge, stopped to water his horse at a watering trough placed there for that purpose. From this point, apparently, the road plaintiff was traveling led directly across the track of the railroad that crosses this bridge. In fact, up to a month or six weeks before this time this road turned in and crossed this bridge, which had been floored and used as a toll-bridge for ordinary travel, but which use had been discontinued after the building of the free county bridge a short distance above, over which all travel over the Hill's lake and other dirt roads passed. Due notice and warning had been given in the city papers and by posters at the ends of the Iron Mountain bridge aforementioned, and a watchman or guard was kept at the northern end to give notice, and also to prevent further passage of said bridge, except for railroad purposes.

When the plaintiff attempted to get into his buggy, the horse in starting had become frightened at something the evidence does not disclose, and, increasing its speed, was in a run when it reached the railroad crossing, and at that point turned in towards the bridge, and ran 15 or 20 feet on to the cross ties and then fell through, as to its feet and legs. The plaintiff in the meantime had failed to get into his buggy, but, running along between the body and fore and aft wheels, was constantly endeavoring to get into it, until it was stopped by the falling of the horse. From this position he was extricated by the bridge watchman, who with some others extricated the horse, which by the fall had suffered some injury about the legs. The watchman had endeavored to stop the horse before he reached the bridge, but in its frightened condition he was unable to do so.

Railway companies are not expected to keep their bridges and culverts closed to prevent persons and animals from crossing thereon. Ordinarily, these bridges are not for the use of the public. The one in question had formerly been so used, but this use had ceased, and notice had been given thereof, and reasonable precautions taken, if any were necessary to be shown. See *Railway Company* v. *Ferguson*, 57 Ark. 21.

This is not a case where the fright of the animal was occasioned by the running of defendant's trains, or by anything done by the railroad company or by its employees; but it is simply an injury to a runaway horse, which had got beyond the control of its driver, who was also its owner, and in its fright had left the road upon which it was being driven for some cause, we know not what, and had turned and run upon the railroad track into the bridge as stated. Nor is this a case where the railroad had produced the necessity for the bridge, and was therefore bound to keep it in condition to admit passage over it by persons and animals, as in case of a ditch or other artificial excavation near and closely connected with the use of a public highway, and over which a bridge is necessary for the public safety or convenience, as was the case in *St. Louis, etc. Ry. Co.* v. *Aven*, 61 Ark. 141. We see no negligence in the defendants which occasioned the injury complained of in this case, and therefore no liability of the defendant. The judgment is therefore reversed, and judgment here for the defendant.

ARKADELPHIA LUMBER COMPANY *v.* MCNUTT.

Opinion delivered November 17, 1900.

1. PRIORITY—ATTACHMENTS—. Where two writs of attachment were placed in the hands of different officers to be levied, the one first levied upon defendant's personal property acquired priority. *Derrick* v. *Cole*, 60 Ark. 394, followed. (Page 421.)

2. SAME—SPECIFIC AND GENERAL ATTACHMENTS.—The levy of a specific attachment upon personal property for the purchase money thereof does not give to a lien thereby acquired any precedence over that created by the prior levy of an order of general attachment. (Page 421.)

3. CONFLICTING LIENS—SUFFICIENCY OF COMPLAINT.—A complaint alleging that plaintiff has a lien by attachment on personal property on which defendant has a junior lien by attachment, and that the defendant, proceeding under its lien, has had the property sold, and that, on account of the conflicting levies, the title to the property is rendered uncertain, and that bidders will be deterred from bidding at a sale under

plaintiff's attachment, with a prayer that the sale under defendant's writ be set aside, states no cause of action, as it does not show that plaintiff was affected by the lien claimed by defendant. (Page 422.)

Appeal from Clark Circuit Court in Chancery.

JOEL D. CONWAY, Judge.

The complaint in this cause was as follows:

"The plaintiffs, S. R. McNutt, J. C. Wallis, Dave Graves, and J. M. Gordon, complaining of the defendant, Arkadelphia Lumber Company, state: That the Arkadelphia Lumber Company is a domestic corporation under the laws of the state of Arkansas. That on the 18th day of October, 1898, the plaintiff S. R. McNutt brought a suit in the Clark county court of common pleas against H. J. Edgarton on a demand for $1,300 or $1,400 on several distinct causes of action, each of them being within the jurisdiction of the court of common pleas, and sued out a writ of general attachment against the property of said H. J. Edgarton in Clark county, Arkansas, and placed the same on that day for service in the hands of the sheriff of Clark county, and the same was from that date a lien upon all of the personal property of the said H. J. Edgarton which was situated in Clark county. That on the 22d day of October, 1898, the said plaintiff caused said writ of attachment to be levied as a first lien, and prior to all other writs or the process of any other court, upon a certain planer before that time in the possession of, and as the personal property of said H. J. Edgarton, and the said property is still up to this time in the possession and under the control of the sheriff by virtue of said levy. That the said sheriff made his return of the said writ of attachment showing said levy to said court of common pleas, and at the December term, 1898, of said court, a judgment was rendered against said H. J. Edgarton, and in favor of S. R. McNutt, and said planer was by said court ordered to be sold in satisfaction thereof. That, after said levy was made, the plaintiffs, J. C. Wallis, Dave Graves and J. M. Gordon, each having instituted suits in justice-of-the-peace courts against said Edgarton, caused said suits to be transferred to said court of common pleas, where by proper orders said causes were consolidated with the case of S. R. McNutt *versus*

H. J. Edgarton, and thereafter presented under the name and style of S. R. McNutt, et al., *versus* H. J. Edgarton. That on the 22d day of October, 1898, the defendant, the Arkadelphia Lumber Company, commenced an ordinary suit for about a hundred dollars, in which suit it claimed a vendor's lien against and upon the said planer levied on as aforesaid by said sheriff in the case of S. R. McNutt. And the said Arkadelphia Lumber Company in that action sought to enforce its said vendor's lien. That said suit was not an attachment suit, and was prosecuted in the justice court of J. P. Hart, one of the justices of the peace in and for Caddo township, Clark county, Arkansas. That no bond or affidavit for attachment was filed in that cause. That no personal service was had upon the said H. J. Edgarton, but only a service by constructive process. That on the said 22d day of October, 1898, and just after the said levy was made by the said sheriff in the case of S. R. McNutt *versus* H. J. Edgarton, the said defendant, the Arkadelphia Lumber Company, caused the constable of Caddo township to levy upon the said planer, which levy he, the said constable, falsely claimed to be prior to the said levy of the said sheriff. That on the 16th day of December, 1898, the said Arkadelphia Lumber Company obtained a judgment against said H. J. Edgarton, and an order condemning the said planer to be sold in satisfaction of its said pretended vendor's lien. That, in pursuance of said order, the said constable, after advertising, proceeded on the 26th day of December, 1898, to sell or attempt to sell the said planer, which was bought at said sale by the Arkadelphia Lumber Company for $100. That at the time the defendant, Arkadelphia Lumber Company, commenced its suit against the said H. J. Edgarton it had no vendor's lien against him for the purchase money of said planer for any amount, for the reason that the purchase money heretofore had been paid long prior thereto by H. J. Edgarton. That, on account of the said conflicting levies recited herein, the title to the said planer is rendered uncertain, and bidders will be deterred from buying the planer at the sheriff's sale. That the plaintiffs had no adequate remedy in a court of law, wherefore the plaintiffs pray that this court determine the rights of the parties to this suit, and on the hear-

ing quash and set aside the sale heretofore made at the instance of the defendant, Arkadelphia Lumber Company, by the said constable. * * * And plaintiffs pray judgment for their costs and all other proper relief."

On the calling of the cause for trial the defendant (appellant) interposed the following demurrer:

"Comes the defendant, Arkadelphia Lumber Company, and demurs to the petition of the plaintiffs herein, and for cause says:

"First: That the matter set forth in said petition is not the subject of equitable jurisdiction.

"Second: Because said petition does not set forth the judgment alleged to have been obtained before the court of common pleas of Clark county, Arkansas, the manner of service of summons, nor the writ of attachment, together with the return thereon and other pleadings therein had before the rendition of said judgment.

"Third: Because the judgment, as alleged in said petition, in behalf of S. R. McNutt is void by reason of the fact that it is in excess of the jurisdiction of the said common pleas court.

"Fourth: Because said petition does not state facts sufficient to constitute a cause of action nor for the relief therein prayed for."

The demurrer was overruled, and defendant, failing to plead further, stood upon its demurrer. Judgment was rendered in favor of plaintiffs as prayed for, and defendant appealed to this court.

John E. Bradley, for appellant.

Equity has no jurisdiction of the subject-matter of this suit, since there was a plain and adequate remedy at law, under Sand. & H. Dig., § 372. Appellees lost their right to assert their right to the *res* by failure to appear in the proceeding *in rem* in the justice's court. Waples, Attach. § 789. That they could have so appeared, see: 57 Ark. 541; 63 *ib.* 157; 50 Ark. 140; 47 Ark. 31. The petition should have set forth the judgment of common pleas court, together with manner of service, the writ of attachment and return thereon. Bailey,

Jurisd. § 129; 46 N. Y. S. R. 139; 148 N. Y. 202; 54 Ark. 627; Bl. Judg. § 281.

Dougald McMillan and *J. H. Crawford*, for appellees.

Motion to transfer to law, and not demurrer, was the proper means of raising the question of jurisdiction of equity. 27 Ark. 585; 28 Ark. 358; 37 Ark. 286; 51 Ark. 235. The statutory remedy is not exclusive. 20 Ia. 27; 30 N. W. 4; 3 Pom. Eq. Jur. § 355; 65 Ark. 467. *Cf.* Sand. & H. Dig., §§ 3088, 5636, 5583. Equity had jurisdiction. 33 Ohio St. 661; 16 N. J. Eq. 299; 11 Ark. 411.

BATTLE, J. Appellees fail to show in their complaint any cause of action against the appellant. They show that appellee, S. R. McNutt, had acquired a lien on the planer, the property attached, prior to that claimed by the appellant. The planer was seized by the sheriff under the order of attachment in favor of McNutt, and was in the possession of that officer before the constable undertook to levy upon it under the order in favor of the Arkadelphia Lumber Company. This being true, the lien acquired by McNutt was prior and superior to any that could have been claimed by the lumber company. *Derrick* v. *Cole*, 60 Ark. 394. The fact that the debt the appellant sought to recover by his action was for the purchase money for which the planer sold did not create a lien. It only excepts it from exemption from seizure and sale under an execution in favor of the vendor or his assigns upon a judgment for the purchase money, and enables the vendor or assigns in a suit for the purchase money to seize the planer at once, if in the control of the vendee, without alleging the ordinary grounds for an attachment. *Bridgeford* v. *Adams*, 45 Ark. 136. The action instituted for the purchase money, the issue of an order under section 4728 of Sandels & Hill's Digest, and seizure under such order do not give to a lien thereby acquired precedence over that created by the levy of an order of attachment prior in time to such seizure. The lien in the action for the purchase money is subject to that of the order of attachment. *Swanger* v. *Godwin*, 49 Ark. 290; *Fox* v. *Arkansas Industrial Company*, 52 Ark. 450.

Appellees fail to show any cause of action in favor of any of them. All they allege as to any of the co-appellees of McNutt is as follows: "That after said levy was made (that is, the levy of the order of attachment in favor of McNutt) the plaintiffs, J. C. Wallis, Dave Graves, and J. M. Gordon, each having instituted suits in justice-of-the-peace courts against said Edgarton, caused said suits to be transferred to said court of common pleas, where by proper orders said causes were consolidated with the case of S. R. McNutt *versus* H. J. Edgarton, and thereafter prosecuted under the name and style of S. R. McNutt et al. *versus* H. J. Edgarton." The co-appellees do not show a cause of action against any one—simply show that they instituted suits.

No one has a right to complain of a lien which does not injuriously affect him. He has no right to constitute himself guardian of another, and interpose a defense in an action against such person, or have a judgment in such action set aside "on the ground that the defendant had defenses which he might have asserted, or that, in the transaction between the plaintiff and the defendant out of which the judgment grew, the former overreached the latter." Unless he is injuriously affected, he has no right to institute an action to set aside a lien, sale or judgment. *Glaser* v. *First National Bank*, 62 Ark. 175. In the case before us the appellees did not show that they were affected by any lien claimed by the appellant. The demurrer to their complaint should have been sustained.

The judgment of the circuit court is therefore reversed, and the cause is remanded, with instructions to the court to sustain the demurrer, and allow the appellees to amend their complaint, so as to show a cause of action, if they can, and so desire.

WOOD, J., dissents.

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BRADDOCK v. WERTHEIMER.

Opinion delivered November 17, 1900.

PROMISSORY NOTE—GUARANTY.—Demand and notice are not necessary to hold the guarantor of a note liable where nothing remains to be done on the part of the guarantee to perfect his rights as against the maker of the note, the guarantor's liability being absolute and not collateral. (Page 425.)

Appeal from Pulaski Circuit Court.

JOSEPH W. MARTIN, Judge.

De E. Bradshaw and *E. B. Braddock*, for appellant.

In the absence of proof to the contrary, the presumption is that the common law prevails in a sister state. 10 Ark. 169. The best evidence of the statutes of Ohio would have been the statutes themselves. Sand. & H. Dig., § 2875. The usual and best mode to prove the unwritten laws, customs or usages of a foreign state is by introducing some one familiar therewith. 1 Gr. Ev. § 488. The demurrer should have been sustained. Demand and notice were necessary. 14 Oh. St. 246; 2 Ohio, 431; 2 Dan. Neg. Inst. § 1753; 4 Oh. St. 263. As to what constitutes a guaranty, see: 3 Kent's Comm. 121; Dan. Neg. Inst. § 1753; 2 Pars. B. & N. 117. A guarantor's liability is only secondary. 52 Pa. St. 525; 11 Oh. St. 188. For distinctions between liability of guarantors and that of sureties or joint makers, see: 2 Dan. Neg. Inst. § 1753; 2 Rand. Comm. Pap. 849. A guarantor's contract is to be strictly construed, and any variation will discharge him. Rand. Comm. Pap. § 852; 5 Hill, 634; 104 N. Y. 441. On a guaranty of "collection" of a note, notice of default is necessary to bind the guarantor. Fed. Cas. No. 4909; 19 N. Car. 222; 23 Minn. 485; 10 Ia. 193; 16 Cal. 152. And, to the extent of his damage, the guarantor is discharged by failure of such notice. 13 Cal. 579; 50 Cal. 254; 8 Cush. 156; 12 Gray, 260. Even guaranties of "payment" of notes are often held conditional upon proper

demand and notice. 19 N. Car. 222; 13 Cal. 179; 5 Cal. 138. Appellee's recovery is precluded by his laches. 30 Hun, 226; 35 N. W. 644; 9 Am. & Eng. Enc. Law, 799. The Ohio decisions introduced in evidence are not applicable.

Cantrell & Loughborough, for appellant.

The *lex loci* governs as to the validity, nature, interpretation and effect of contracts of guaranty. 3 Ark. 96; 6 Ark. 142; 22 Ark. 125; 25 Ark. 261; 40 Ark. 423; 44 Ark. 213; 46 Ark. 66; 47 Ark. 54; 61 Ark. 329; 20 Wis. 410; 14 Vt. 147; 4 Mich. 450. The objection to the competency and sufficiency of the Ohio decisions, introduced in evidence, comes too late, not having been specified on the trial. 58 Ark. 373; 58 Ark. 389; 60 Ark. 87; 60 Ark. 342; 9 Ark. 233. As to what was the *lex loci*: 19 Oh. St. 551; 31 Oh. St. 15; 4 Oh. St. 263; 14 Oh. St. 246. Notice was not necessary, upon general principles of law irrespective of the *lex loci*. 59 Ark. 91; Baylies, Sur. & Guar. 200; 1 Brandt, Sur. & Guar. 199; 4 Day, 444; 7 Conn. 523; 58 Ga. 54; 68 Ill. 604; 79 Ill. 63; 21 Oh. St. 86; 10 Ia. 193; 69 Ind. 356; 70 Ind. 274; 111 Ind. 308; 1 Duval, 83; 2 Sm. & M. 147; 71 Mo. 91; 56 Mo. 276; 61 Mo. 409; 56 N. H. 34; 15 Wend. 502; 10 J. & S. 517; 24 Wend. 35; 2 N. Y. 227; 104 Pa. St. 330; 1 Rich. Law, 281; 3 Yerg. 330; 10 Humph. 37; 13 Vt. 93; 27 Vt. 539; 20 Vt. 500; 28 Vt. 175; 3 Primey, 443; *ib.* 452. For the rule of construction of absolute guaranties, see: 14 Am. & Eng. Enc. Law (2d. Ed.) 1143; 2 Dan. Neg. Inst. § 1781.

BATTLE, J. On the 4th of September, 1890, at Mount Vernon, Ohio, W. H. Mitchell, executed to John S. Braddock three promissory notes, each for the sum of one hundred dollars, payable to the order of Braddock at his office in Mt. Vernon, Ohio, and due, respectively, in two, three and four years after date. Subsequently, and before the maturity of the notes, Braddock sold and assigned them to M. Wertheimer, and indorsed upon each of them a guaranty as follows: "I assign the within notes to M. Wertheimer, and guaranty collection and payment thereof when due. [Signed] J. S. Braddock." Mitchell did not pay the notes. On the 4th of April, 1898,

Wertheimer instituted an action on the guaranties on these notes before T. W. Wilson, a justice of the peace of Pulaski county, and recovered judgment. Braddock appealed to the circuit court, where judgment was rendered against him; and he appealed to this court.

The appellee, to sustain his action, read as evidence, on the trial, the notes and guaranties sued on; and also read as evidence, over the objection of appellant, *Clay* v. *Edgerton*, 19 Ohio St. Rep. 551, *Neil* v. *Board*, 31 Ohio St. Rep. 15, and *Kautzman* v. *Weirick*, 26 Ohio St. Rep. 330, to prove that, according to the laws of Ohio, no demand by appellee upon Mitchell, the maker of the notes, for payment thereof, and notice to Braddock of the non-payment, were necessary to render appellant liable for the payment of the notes.

"The appellant testified that, shortly after he got the notes from Mitchell, he went to appellee and negotiated the notes to him, and wrote the following indorsement on the notes: 'I assign the within note to M. Wertheimer, and guaranty the collection thereof when due.' Appellee then asked that he be permitted to exhibit said indorsement to his lawyer for advice, which appellant agreed to, and returned with said notes, saying that his lawyer advised that the words 'and payment' should be inserted in said indorsement after the word 'collection' and before the word 'thereof,' and thereupon appellant interlined the said word as requested, and appellee then accepted the notes."

The reading of the opinions of the supreme court of Ohio as evidence was not prejudicial to appellant; for, in the absence of evidence to the contrary, the presumption is that the common law is in force in Ohio.

The only question in the case which demands serious consideration is, was appellant, according to common law, discharged from liability upon his guaranties by any failure of appellee to demand payment of the notes by Mitchell, and to give notice to Braddock of the non-payment? According to the decisions of this court, he was not. The guaranty of the appellant was absolute. Nothing was necessary to be done to fix the liability of Mitchell, the maker of the notes. The rule is that demand and notice are not necessary to hold the guaran-

tor of a debt liable where nothing remains to be done on the part of the guarantee to perfect his rights as against the principal—the maker of the notes in this case. In such cases his undertaking is not treated or considered as a collateral liability, but as a primary and positive agreement, by which he binds himself to see that the principal debt is paid. *Lane* v. *Levillian*, 4 Ark. 76; *Killian* v. *Ashley*, 24 Ark. 517; *Friend* v. *Smith Gin Co.* 59 Ark. 86; *Read* v. *Cutts*, 7 Greenleaf, 186, marginal page.

Judgment affirmed.

BUNN, C. J., dissents.

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68 426 d89 142

THWEATT v. HOWARD.

Opinion delivered November 17, 1900.

1. TAX-SALE—NOTICE.—Publication of the list of delinquent lands for eleven days before the day of sale is not a compliance with the statute which requires that such list shall be published "weekly for two weeks" (Sand. & H. Dig., § 6605). (Page 429.)

2. CONFIRMATION OF TAX TITLE—PRACTICE.—To entitle one not in adverse possession to oppose the confirmation of a tax title, it is sufficient for him to allege and prove such a state of facts as will show that he might in good faith claim some interest in or right to the land. (Page 430.)

3 CONSTITUTIONAL LAW—SALE OF STATE LANDS DURING WAR.—If the intent of the act of March 23, 1871, which provides "that all lands claimed, held or occupied under any pretended sale [by the pretended authorities of the state after the 5th day of May, 1861, and before the 18th day of April, 1864] shall be sold and disposed of as other state lands," was absolutely to annul all sales between the dates named, the act is void. (Page 431.)

Appeal from Prairie Circuit Court in Chancery.

JAMES S. THOMAS, Judge.

Rose, Hemingway & Rose, for appellants.

One who has no interest in land can not contest a petition for the confirmation of a tax title thereto. 1 Ark. 472;

Sand. & H. Dig., § 627. Appellees' claim is based upon a fraudulent entry under the swamp land act (Gould's Dig. chap. 101, § 15, as amended by act February 8, 1859), and hence void. By issuing a subsequent patent to another claimant, the land department adjudged appellees' entry void; and, until this ruling is reversed by the courts, it must stand. 171 U. S. 93, 99; 7 Wheat. 218; 163 U. S. 321, 323; 169 U. S. 363; 34 Ark. 213; 24 Ark. 40; 31 Ark. 426. The act of March 23, 1871, is valid. 95 U. S. 628; 104 *id.* 668; 137 *id.* 246; 168 *id.* 90. There would be no valid conveyance of the patented property before the issuance of the patent. 34 Ark. 762; 47 *id.* 357; 64 *id.* 361.

Eugene Lankford, for appellees.

The sale was void because the record showed publication of the notice of sale for only eleven days, instead of two weeks, before the sale. Sand. & H. Dig., § 6605; 30 Ark. 661; 55 Ark. 192; 55 Ark. 213; Black, Tax Titles, 83; Cooley, Taxation, 335. Any right, title or interest, whether legal or equitable, vested or inchoate, is sufficient to entitle one to redeem from a tax sale or contest its confirmation. Black, Tax Titles, 189; 10 L. R. A. 292; Cooley, Taxation, 366; 39 Ark. 580; 1 Ark. 472. No one but the state had the right to complain that the parties who made first entry did not comply with the law. 36 Ark. 471; 41 Ark. 465; 31 Ark. 279; 54 Ark. 251; 47 Ark. 199; 1 N. Dak. 284; 19 Am. & Eng. Enc. Law, 19, 300. When the lands were paid for, and the certificates of purchase issued, the equitable title and the control of the land passed out of the state, and could not be re-vested by any act of its officers. 46 Ark. 18; 21 Ark. 240; 9 How. 328; 20 Am. Dec. 490; 30 Ark. 761; 19 Am. & Eng. Enc. Law, 334; 24 Ark. 448; 26 Ark. 60; 36 Ark. 334; 49 Ark. 87; 44 Ark. 452; 1 Ind. 343. The acts of the officers of the land department in passing upon questions of fact are conclusive. 24 Ark. 431; 8 Ark. 328; 24 Ark. 40; *id.* 402; 142 U. S. 162; 139 U. S. 508; 125 U. S. 625; 163 U. S. 321; 46 Ark. 18, S. C. 20 Am. Dec. 490. But, after the entry is once made, the officers of the land department cannot set aside or cancel such entry and re-sell the land. 44 Ark. 455; 21 Ark. 240;

49 Ark. 87; 42 Ark. 170; 147 U. S. 165; 171 U. S. 93; 25 Kas. 340; 13 Wall. 72; 91 U. S. 330; 2 Wall. 605; 78 Wis. 501; 128 U. S. 456; 106 U. S. 447; 41 Mich. 423; 6 Wall. 409; 30 Kas. 67; 34 Fla. 130; 142 U. S. 161. The acts of the different departments of the governments of the seceded states, relating to their own affairs and not impairing the authority of the general government, are valid and obligatory. 24 Ark. 286; 29 Ark. 414; 30 Ark. 198; *id.* 761; 37 Ark. 110; 7 Wall. 700; 15 *id.* 429; 17 *id.* 570; 96 U. S. 192; 97 U. S. 454; 106 Cal. 486. The patent relates back to the date of the entry. 6 Wall. 402; 13 Wall. 92; 32 Fed. 195; 21 How. 228.

BATTLE, J. Appellants brought this action in the Prairie circuit court to confirm the title to certain lands, acquired under a sale thereof that was made for the purpose of collecting the taxes assessed against them for the year 1890; describing the lands in their petition, and alleging that they had been purchased at the tax sale by the Hammett Grocer Company, which had sold to George C. Cooper, who had sold to petitioners, the appellants. Appellees answered the petition of the appellants, and claimed a part of the lands purchased at the tax sale, and traced their title to the same through various persons to the state of Arkansas; the purchases from the state by the persons through whom they claim title being made in 1862. They also alleged that the lands in controversy were not advertised to be sold for the taxes of 1890 by weekly publications in a newspaper for two weeks between the second Mondays in May and June, 1891, as required by law, and that the sale of the lands for such taxes was consequently void. The appellants replied to the answer, and alleged that the purchases from the state or entries through which the appellees claim title were illegal and fraudulent; that the parties claiming under said purchases failed to comply with an act entitled "An act to define the condition of certain state lands, and for other purposes," approved March 23, 1871; that the said purchases or entries, by reason of such failure, became void on the 31st day of March, 1872; and that, on the first day of April, 1872, D. C. Duell entered the lands in controversy in the land office of the

state, and received a certificate of purchase, which he afterwards assigned to B. D. Williams, to whom the state of Arkansas issued a patent therefor, and that Williams afterwards conveyed the lands to the Hammett Grocer Company, which conveyed them to George C. Cooper, who conveyed to appellants.

Evidence was adduced at the hearing of this cause tending to prove that the lands in controversy were purchased by various persons from the state of Arkansas in the year 1862, and were conveyed by them to other persons, and by them and others, through deeds and a will, to the appellees; that D. C. Duell entered these lands as swamp lands, in the land office of the state, on the first day of April, 1872, and received a certificate of purchase, and afterwards assigned it to B. D. Williams, to whom the state of Arkansas issued a patent; that Williams afterwards conveyed the lands to the Hammett Grocer Company, and it conveyed them to George C. Cooper, and he conveyed to appellants. Evidence was also adduced for the purpose of showing that the lands were never occupied by the persons who entered them in 1862, and that there were no ditches on them in 1862, 1865 and 1866, and in those years there were no indications that any ditches had been made on them; and it was proved that the list of lands returned delinquent on account of the non-payment of the taxes of 1890, of which the lands in controversy were a part, was not published weekly for two weeks between the second Monday in May and the second Monday in June, and was published only eleven days.

The circuit court did not decide whether the appellees had a valid claim, but found that the sale of the lands for the taxes of 1890, which appellants asked the court to confirm, was void, and refused to confirm the same as to the lands in controversy, because only eleven days' notice of the sale was given; and, finding that the petitioners and their grantors paid a certain sum as taxes, interest and costs, for which the lands were chargeable, declared it a lien upon them, and ordered the lands sold to pay the same. No order was made as to the lands which were not in controversy. Petitioners appealed.

The list of lands returned delinquent on account of the non-payment of the taxes of 1890, of which the lands in ques-

tion were a part, was not published in the manner prescribed by law. This rendered the sale which the appellants asked the court to confirm null and void. *Pennell* v. *Monroe*, 30 Ark. 661; *Townsend* v. *Martin*, 55 Ark. 192; *Martin* v. *McDiarmid*, 55 Ark. 213.

Should the sale have been confirmed, notwithstanding its nullity? In speaking of what shall be done in the hearing of a petition for confirmation of sales, the statutes say: "On the trial of the cause, the petitioner shall exhibit to the court the tax receipts showing the payment of the taxes for at least three successive years and the deed or deeds under which he claims title, or the record thereof, or a certified copy or copies of the record, and oral or written proof by one or more witnesses acquainted with the lands, showing that no one is in possession claiming adversely to the petitioner. * * * If the deed or deeds are in proper legal form and properly executed, and the tax receipts show payment of the taxes, and if the evidence shows that no one is in possession adverse to the petitioner, then, in case no one has appeared to show cause against the prayer of the petition, the petition shall be taken as confessed, and the court shall render final decrees confirming the sale in question. In case any person or persons claiming title to the land oppose the confirmation of sale, then the court shall try the validity of the sale, and, if valid, confirm it; but if the sale has been made contrary to law, the court shall annul it." Sand. & H. Dig., §§ 633, 635, 636.

The proceeding to confirm sales of land is not authorized by the statute when any one is in possession of the land claiming adversely to the person seeking confirmation. If no one claiming adversely is in possession, and the other conditions prescribed by the statute are complied with, and any one claiming title to the land opposes the confirmation of the sale, then it is the duty of the court to try the validity of the sale. No investigation or inquiry into the validity of the title of the person opposing confirmation is required by the statute. The person claiming title must, however, do so in good faith. He should not be permitted to contest the validity of the sale solely for the purpose of defeating its confirmation. The privilege granted

to him is for the purpose of enabling him to protect his interest in the land; and it is necessary and sufficient for him to allege and prove such a state of facts as will show that he might claim in good faith some interest in or right to the land.

The evidence adduced at the hearing of this cause was sufficient to prove that appellees claimed title to the lands in controversy through the last will and testament of Eliza T. Hays, and that she acquired title to the same through various conveyances from the original purchasers from the state, who entered the lands on the 12th of February, 1862. They were "swamp and overflowed lands," and the parties who entered them did so under the act entitled "An act amendatory of existing laws regulating the landed interests of this state," approved 12th January, 1853. The evidence shows that they applied to the land agents of the state for the privilege of purchasing the lands at private entry, and offered to pay for the same at the rate of fifty cents per acre in reclamation certificates; and that they purchased and paid for the same in that manner; and that certificates of purchase were severally issued to them by such agents. So far their purchases seem to have been in substantial compliance with the statutes in such cases made and provided. Gould's Digest, p. 717, sec. 1; p. 719, sec. 6. But appellants say that these entries or purchases were afterwards canceled, and the lands were lawfully sold to D. C. Duell on the 1st of April, 1872, by authority of an act entitled "An act to define the condition of certain state lands and for other purposes," approved March 23, 1871, which provides in part as follows:

"Section 1. That any person claiming, holding or occupying any lands belonging to the state of Arkansas, under and by virtue of any pretended sale made to such party by any pretended authorities of the state after the 5th day of May, 1861, and before the 18th day of April, 1864, may present their claims to the commissioner of immigration and state lands on or before the 31st day of March, 1872. Upon the presentation of any such claims to said commissioner, he shall proceed immediately to investigate and make record of the same. If upon such investigation it appears that the person making said claim is en-

titled to a certificate of purchase for any land belonging to the state by reason of labor performed for the redemption of swamp lands, the said commissioner shall issue a certificate of sale to such person for the same, and said certificate shall be of like effect as though no action had been taken by any pretended authorities as aforesaid.

"Section 2. That all lands claimed, held or occupied under any pretended sale, as aforesaid, and no certificate issued therefor, as provided in section 1 of this act, before the 1st day of April, 1872, shall be sold and disposed of as other state lands; provided that any person holding any pretended certificate or patent from any pretended state authority for any lands shall have a pre-emption right thereto until the 31st day of March, 1872."

This view of the act may be reasonably entertained: it treats the sale of lands by the state after the 5th day of May, 1861, and before the 18th day of April, 1864, as void, and the land sold as still belonging to the state, and gives to the persons holding certificates of purchase or patents from the state for the same the right to pre-empt until the 31st day of March, 1872. It denominates all such sales as "pretended sales" by "pretended authorities of the state." It did not call in the certificates of purchase or patents issued by the state for these lands for the purpose of ascertaining whether they were valid or not. But the commissioner of immigration and state lands was required to investigate the claims of persons holding under such certificates and patents which were presented, and if he found that such persons were entitled to a certificate of purchase by reason of labor performed for the redemption of swamp lands, he was directed to issue certificates of sale to such persons; and the act declares that such certificates so issued by the commissioner "shall be of like effect as though no action had been taken by any pretended authorities as aforesaid." He was not authorized by the act to issue certificates of purchase to persons who had purchased and paid for land with money. The intent and effect of the act, if enforced, was absolutely to annul all sales by the state between the dates named. If this view of the act be correct, it was void.

We theretore think that appellees claimed such title to the lands in controversy as permitted them to oppose the confirmation of the sale thereof, and the decree as to such lands is affirmed.

RIDDICK, J., did not participate.

NEBRASKA NATIONAL BANK *v.* WALSH.

Opinion delivered November 17, 1900.

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LIMITATION OF ACTION—STATUTORY LIABILITY.—Sand. & H. Dig., § 1347, providing that if the president and secretary of any corporation shall neglect or refuse to file the certificate required of them by § 1337, *ib.*, they shall "jointly and severally be liable to an action, founded on this statute, for all debts of such corporation contracted during the period of any such neglect or refusal," creates a statutory liability, and not a penalty, and the statute of limitations applicable to a suit to enforce such liability is the three-years' statute (Sand. & H. Dig., § 4822) applicable to "all actions founded upon any contract or liability, expressed or implied, not in writing." (Page 436.)

Appeal from Pulaski Circuit Court.

JOSEPH W. MARTIN, Judge.

STATEMENT BY THE COURT.

This is an action by appellant against appellee for the statutory liability arising upon the following sections of Sand. & H. Digest:

"Section 1337. The president and secretary of every corporation organized under the provisions of this act shall annually make a certificate showing the condition of the affairs of such corporation, as nearly as the same can be ascertained, on the first day of January or July next preceding the time of making such certificate, in the following particulars, viz.: The amount of capital actually paid in; the cash value of its personal estate; the cash value of its credits; the amount of its debts; the name and number of shares of each stockholder; which certificate shall be deposited on or before the 15th day of February

or August with the county clerk of the county in which said corporation transacts its business, who shall record the same at length in a book to be kept by him for that purpose."

"Section 1346. The certificates required by sections 1334, 1337, 1343 and 1344, except certificates of transfers of stock, shall be made under oath or affirmation by the person subscribing the same; and if any person shall knowingly swear or affirm falsely as to any material facts, he shall be deemed guilty of perjury, and be punished accordingly."

"Section 1347. If the president or secretary of any such corporation shall neglect or refuse to comply with the provisions of section 1337, and to perform the duties required of them respectively, the persons so neglecting or refusing shall jointly and severally be liable to an action, founded on this statute, for all debts of such corporation contracted during the period of any such neglect or refusal."

The defendant pleaded the statute of limitations. The case was tried before the court, which, upon the evidence, made the following finding:

"The court finds the facts as follows: The Southern Stave & Lumber Company was a corporation organized under the laws of Arkansas, November 3, 1890. H. J. Walsh, the defendant, was president thereof till May 23, 1893. January 26, 1893, the Southern Stave & Lumber Company made its note of $10,000 to the Western Manufacturing Company, due May 29, 1893, which was before maturity duly transferred to plaintiff bank. March 29, 1893, Western Manufacturing Company made its note to plaintiff bank for $10,000, due August 1, 1893, and assigned to it as collateral security the note of Southern Stave & Lumber Company for $13,002.70, executed to said Western Manufacturing Company on the 4th day of March, 1893, due October 7, 1893. None of these notes have been paid, but have been renewed from time to time, and the debts then created are represented by the notes in suit. The first certificate ever filed by the president, as called for by section 1337 of Sandels & Hill's Digest, was filed March 15, 1893, in the county court house of Pulaski county, Arkansas, the domicile of the corporation, and was not supported by affidavit, but contained only the cer-

tificate of the notary that it had been acknowledged as signed by the president and secretary. This suit was filed January 13, 1896, and writ then issued more than two years after the right of action accrued. On this state of facts the defendant became liable to plaintiff for the debts sued on, which had their inception during the time of his default in filing his certificate. But the causes of action are barred by the statute of limitations of two years pleaded by the defendant, and the defendant is entitled to judgment, and it is so ordered." Judgment was entered accordingly, and this appeal duly prosecuted.

Rose, Hemingway & Rose, for appellant.

The two-year statute of limitations on penal action (Sand. & H. Dig., § 4826) does not apply to this action. The liability fixed by that statute is not a penalty. 146 U. S. 567. Statutes creating a mere personal liability, however great, in favor of a person aggrieved, are not penal. 2 T. R. 148, 154, construing the English statute of limitation (re-enacted in this state). 31 Eliz. c. 5, § 5; 1 H. Blackst. 10; 2 W. Blackst. 1226; 9 Price, 301; 13 Pick. 94, 100, 101; 16 Pick. 128, 132; 20 Me. 218; 38 Me. 107; 31 Me. 528; 18 Me. 166; 2 Story, 432; 12 Ga. 117. Debt was the proper action at common law for the enforcement of such a liability as in the case at bar. 16 Ala. 214; 1 Mason, 243; 13 Wall. 531; 18 *id.* 516; 1 Gall. 26; 11 Ohio, 130; 8 Pick. 514; 15 Ala. 452; 7 Porter, 284; 1 Head, 72; 18 Am. & Eng. Enc. Law, 274; Wood, Lim. § 25. Indeed, the statute under consideration is remedial, rather than penal. 2 Morawetz, Corp. § 908; 3 Thompson, Corp. § 4164; 12 Ga. 106; 18 Ga. 909; 30 Ga. 580; 1 Shower, 353–4; 4 Carth. 233; Comb. 194; 4 Mod. 129; 12 Mod. 27; 3 M. & Selw. 434; 22 Pick. 495; 6 Gray, 338; 103 Mass. 160, 162. 118 Mass. 298; 14 Cal. 265; 34 Cal. 505; 53 Vt. 632, 639, 640; 45 N. W. 922; S. C. 29 Neb. 545; 47 N. W. 208; S. C. 30 Neb. 798; 23 N. E. 1007; S. C. 132 Ill. 197; 76 Fed. 695; Wood, Lim. 682, 683; 118 N. Y. 365, 378; 23 N. E. 544, 547; 51 N. W. 117; 101 U. S. 188; 146 U. S. 679; 8 Oh. St. 215, 222.

Jno. M. Moore and *J. A. Watkins*, for appellee.

The statute on which this action is based is penal, and the

action was barred by Sand. & H. Dig., § 4826. 115 U. S. 112, 122; 13 Abb. Pr. 225, 229; 233, 234; 64 N. Y. 173; 96 N. Y. 323; 101 U. S. 188; 12 Allen, 438; 3 Dutch. 166; 8 Oh. St. 215; 33 Md. 487; 23 Col. 472; 1 Robt. 383; 9 R. I. 541; Thompson, Corp. § 4164; 60 N. Y. 533; 17 N. Y. 458; 56 N. Y. 559; 11 Abb. Pr. (N. S.) 366; 10 Abb. Pr. 39; 35 N. Y. 412; 7 Robt. 391; 10 Hun, 65; 67 Barb. 9; 19 Mo, 327; 4 Biss. 327; 3 Col. 332; 12 Gray, 203; 30 N. J. Eq. 478; 7 Lans. 206; 60 N. Y. 396; 50 N. Y. 314; 27 N. J. L. 166; 103 N. Y. 242; 13 Abb. Pr. 225; 11 N. Y. S. 1049; 96 N. Y. 323; 64 N. Y. 173; 80 N. Y. 610; 83 N. Y. 156; 86 N. Y. 613; 103 N. Y. 242; 29 Pac. 183; 86 Fed. 85.

WOOD, J., (after stating the facts.) The statute upon which this action was founded does not come within the scope of the statute of limitations of two years. That statute is as follows: 'All actions upon penal statutes, where the penalty, or any part thereof, goes to the state, or any county or person suing for the same, shall be commenced within two years after the offense shall have been committed, or the cause of action shall have accrued." Sand. & H. Dig., § 4826.

First. The prime object of every statute strictly penal is to enforce obedience to the mandates of the law by inflicting punishment upon those who disregard them; and, in statutes primarily aud properly penal, the provision for punishment never rests in uncertainty, is never based upon a contingency. The general public is supposed to be injured by the violation of every penal statute, whether any special injury results to any particular individual or class of individuals or not. The punishment is provided as a sanction to the law, and is imposed for the public good, to deter others from the commission of like offenses. It would, therefore, be palpably incongruous to call a statute penal which did not contain a definite and certain provision for punishment in every case where the duties enjoined by it were ignored. Black, Law Dict. "Penal Statutes," "Penal Laws;" Bouvier, Law Dict. "Penal Statutes;" Potter's Dwarris on Stat. & Con. 74. Measured by these simple but infallible tests, the statute upon which this action was based is not penal. Here the behests of the law may be ignored re-

peatedly by the officers failing to file the certificate required, and still no unpleasant or severe consequences would be visited upon them unless there were creditors who had debts contracted with the corporation during the period of such disobedience. And even then the officers could be made to pay only at the instance of these creditors, and not by them if the debts had already been paid by the corporation. This shows conclusively that the public in general is not one whit interested in the enforcement of the duties enjoined by this statute, and that punishment of the officers for failure to perform the duties it prescribes is not the dominant idea. The duty which the statute enjoins upon, and the liability which it creates against, the officers is in favor of creditors. The measure of the liability is the amount of the debts which the corporation has incurred. There is no arbitrary amount fixed as a pecuniary mulct against the officers for each failure to file the certificate required. The amount is fixed, for compensation and indemnity, at the actual amount due the creditors. No additional sum is allowed them against the officers. They are only required to pay to prevent a loss which would otherwise result, directly or indirectly, from their neglect or failure. "By the principles of the common law," says Judge Thompson, "all men are answerable out of their estates for the debts which they contract by themselves or their agents. Now, when the legislature says that the managing officers of corporations shall not enjoy this granted immunity, provided * * * they fail to make and publish certain reports to apprise the public of its financial condition, it is no more than to say to them that these things which it requires of them are conditions precedent upon which alone they shall enjoy this granted immunity." 3 Thompson, Corp. § 4164; *National New Haven Bank* v. *Northwestern Guaranty Loan Co.* 61 Minn. 375. The liabilities created, and the remedies provided, by this statute are private and civil. There is nothing in the mere wording to give it even a penal semblance, which, of itself, is persuasive. We conclude, from these considerations, that the statute is not penal, but highly remedial, even when construed independent of the statute of limitations

Second. But when viewed, as we must view it here, in connection with that statute, the correctness of the above conclusion seems all the more obvious. The statute of limitation was modeled after the 31st of Eliz., c. 5, § 5. According to the familiar rule, which we have often followed, where a statute is borrowed from another jurisdiction in which it has received definite construction, it is taken with the construction which has there been placed upon it. Up to 1838, when our statute of limitation was passed, penal statutes in England were limited to actions brought either for the government by the public prosecutor, or to *qui tam* actions brought, not by the party injured or aggrieved, but by any one else who prosecuted both for himself and the queen—the common informer. *Qui tam pro domino rege quam pro se ipso in hac parte sequitur.* But statutes which gave the remedy to the party aggrieved were never regarded as penal, but as remedial, even though such party might have been given damages beyond indemnity or mere compensation. *Woodgate* v. *Knatchbull*, 2 Term Rep. 148; *Ward* v. *Snell*, 1 H. Blackst. 10; *Bones* v. *Booth*, 2 W. Blackst. 1226.

But, whether our statute was borrowed from England or not, it is very similar to 31st of Eliz. and the distinction *supra*, between penal and remedial statutes, under it was correct then, and, under the peculiar wording of our statute, it is correct now; for, in our opinion, the phraseology of our statute indicates that the legislature had in mind only those statutes which imposed a pecuniary mulct for the doing or not doing of some act commanded or forbidden by the law for the benefit of the public, and for which pardon might be granted, and for which the government alone, or its designated agent, or the common informer, might bring an action; in other words, penal statutes in the strict and proper sense, and not statutes creating private rights and remedies. The words, "or person," mean simply any other person who sues as a common informer, and not one having a special interest by reason of any injury or grievance. The words, "or cause of action shall have accrued," refer to those numerous penal statutes where the cause of action does not accrue to the state or county until the common informer

has been given an opportunity to sue for the penalty, or *vice versa*, or to cases where an opportunity is given to the offender to make compensation or restitution, before he can be proceeded against. In all such cases, of course, the cause of action accrues after the commission of the offense.

We are aware that there is quite an array of respectable authorities holding that statutes similar to the one sued on here are penal, and subject to the statute of limitations for suits based on penal statutes. See brief of counsel for appellee.

Much depends, of course, upon the language of the respective statutes as to the construction to be given them and the correct application of the decisions construing them. Many New York cases are cited as authority for holding our statute penal. The New York limitation statute is as follows: "An action upon a statute for a penalty or forfeiture when the action is given to the person aggrieved, or to that person and the people of the state, except where the statute imposing it prescribes a different limitation, shall be brought within three years." Other cases based on statutes embodying similar language are cited. We do not consider cases based upon such statutes as in conflict with the view we have expressed, it matters not in what language the opinions may be couched; for the words, "when the action is given to the person aggrieved," may have been considered by those courts as tantamount to a legislative determination that actions by aggrieved parties to recover on statutes similar to ours are penal.

With due deference to all authorities which hold that statutes similar to ours are penal, we are constrained to believe that such views are erroneous, and we fully agree with Mr. Morawetz that "it is not quite clear what the courts mean to express by saying that statutes of this character are penal, and that they impose upon the directors a penal liability." 2 Mor. Corp. § 908. The better view, as Judge Thompson says, is that expressed by the supreme court of Georgia, in the early case of *Neal* v. *Moultrie*, 12 Ga. 116. This opinion is usually clear and strong. The following authorities also support the view we have taken. *Goodridge* v. *Rogers*, 22 Pick. 495; *Adams* v. *Palmer*, 6 Gray, 338; *Norfolk* v. *American Steam Gas*

Co. 103 Mass. 160–162; *Nickerson* v. *Wheeler*, 118 Mass. 298; *Mokelumne Hill &c. Co.* v. *Woodbury*, 14 Cal. 265; *Davidson* v. *Rankin*, 34 Cal. 505; *Cady* v. *Sanford*, 53 Vt. 632; *Seeley* v. *Smith*, 45 N. W. 922; *Stanley* v. *Wharton*, 9 Price, 301; *Coy* v. *Jones*, 47 W. W. 208; *Wolverton* v. *Taylor*, 23 N.E. 1007; *Fitzgerald* v. *Weidenbeck*, 76 Fed. Rep. 695; *Huntington* v. *Attrill*, 146 U. S. 567. The decision in the last case was put upon the ground that the statute under consideration was not penal in the international sense. Still, what is said in the opinion decidedly supports the view we have expressed. The authorities above cited are all found in the brief of counsel for the appellant, and we may say, in this connection, that it would be a work of supererogation to attempt to go beyond the reasoning and research of the most excellent briefs of counsel on both sides. They seem to have exhausted the subject. We have agreed with the counsel for appellant, and this opinion, couched in my own language, reflects, in the main, though in a less forceful and attractive form, the arguments which they have presented.

Having reached the conclusion that this is a statutory liability, and not a penalty, the statute of limitations would be that applicable to "all actions founded upon any contract or liability, expressed or implied, not in writing" (sec. 4822, Sand. & H. Dig.; Rev. Stat. c. 91, § 6); for, before the forms of action were abolished, debt was the proper action for enforcing a statutory liability of the kind under consideration. *Lewis* v. *Stein*, 16 Ala. 214; *Bullard* v. *Bell*, 1 Mason, 243; *Stockwell* v. *U. S.* 13 Wall. 531; *Chaffee* v. *U. S.* 18 Wall. 516; *Cross* v. *U. S.* 1 Gall. 26; *Reed* v. *Davis*, 8 Pick. 514; *Rockwell* v. *State*, 11 Ohio, 130; *Strange* v. *Powell*, 15 Ala. 452; *Blackburn* v. *Baker*, 7 Port. 284; *Kelly* v. *Davis*, 1 Head, 71; 18 Am. & Eng. Enc. Law, 274; Wood, Limitations, § 25.

The finding of facts by the court being correct, there is no reason for sending the cause back for retrial. The judgment of the circuit court is reversed for the error in finding the actions barred by the two years' statute of limitations, and judgment is entered here for the appellant.

WILKINS v. STATE.

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Opinion delivered December 1, 1900.

1. ABSENT WITNESS—FORMER TESTIMONY.—The testimony of an absent witness taken at an examining trial and reduced to writing by a clerk is admissible where the examining magistrate testifies that the written statement was read over and signed by the witness, and that defendant and his counsel were present and had opportunity to cross-examine the witness, and that the writing correctly stated the testimony of the witness as given in the examining court. (Page 442.)

2. INSTRUCTION—PREJUDICE.—An instruction that the written statement of the former testimony of an absent witness is to be considered the same as if the witness had testified in person is not prejudicial if it is not disputed that the statement is a true copy of such testimony. (Page 443.)

Appeal from Cross Circuit Court.

FELIX G. TAYLOR, Judge.

J. T. Patterson, *J. D. Block* and *N. F. Lamb*, for appellant.

It was error to admit the reading of the alleged evidence of witness Poteet. 52 S. W. 276; 40 Ark. 476. It was error for the court to give undue prominence to evidence of Poteet when instructing the jury. 36 S. W. 587; 45 Ark. 165; 45 Ark. 492; 23 Ark. 115; 57 Ark. 580; 44 Ark. 115; 49 Ark 439; 37 Ark. 88; 37 Ark. 33; 57 Ark. 512; 62 Ark 286; 30 Ark. 383; 18 So. 121; 64 N. W. 961; 19 So. 711. The case of *Payne* v. *State* announces a safe and sound rule. 36 S. W. 587; 45 Ark. 165; 50 Ark. 477; 53 Ark. 381; 7 Ark. 470; 15 Ark. 491; 23 Ark. 115; 31 Ark. 306; 37 Ark. 580; 44 Ark. 115; 45 Ark. 492; 49 Ark. 439; 52 Ark. 263; 54 Ark. 621; 55 Ark. 244; 58 Ark. 108; 5 Ark. 403.

Jeff Davis and *Chas. Jacobson*, for appellees.

The testimony of witness Poteet was properly admitted. 33 Ark. 539; 40 Ark. 454; 36 S. W. 587.

PER CURIAM. Sid Wilkins was indicted for murder of one James Stephens. On a trial of such charge he was convicted

of murder in the second degree, and his punishment assessed at ten years in the penitentiary. From this judgment he appealed.

The main question presented by this appeal is raised by the contention that the court erred in permitting counsel for the state to read to the jury the testimony of John Poteet, a witness absent from the state, but whose testimony in the examining court had been reduced to writing and signed by him. The clerk who reduced this testimony to writing was not sworn, but the writing was identified by the examining magistrate as the testimony of the witness, John Poteet, as given on the examining trial at a time when the defendant and his counsel were present and had opportunity to cross-examine. He also testified that the testimony was taken down in writing, read over and signed by the witness Poteet. The writing of itself, standing alone, might be inadmissible, but it rests in this case on the testimony of the examining magistrate. He heard Poteet testify in the examining court, and, after his testimony had been reduced to writing, he heard it read to Poteet in that court. This was during the trial before the examining magistrate, and we infer from the statements of the magistrate on the stand that the testimony of Poteet, after being reduced to writing at the examining trial, was read to Poteet in the presence of the defendant and the magistrate, and was then signed by the witness Poteet. Before testifying in the circuit court, the magistrate had again examined this written testimony, and testified, not only that it was the copy of the testimony of Poteet which was made and signed at the examining trial, but that it correctly stated the testimony as given in that court. This testimony of the magistrate was not contradicted. The defendant himself testified on his trial, but he did not dispute those statements made by the magistrate, and we think this evidence was sufficient to identify the written copy of the testimony read in evidence as a correct and true copy of the evidence of the absent witness Poteet. It is true that the person who reduces the testimony to writing is generally the proper witness to establish the correctness of the writing, but this may also be shown by the magistrate or other person having sufficient knowledge of the fact.

The facts in the case of *Payne* v. *State*, 66 Ark. 545, to

which counsel for defendant refer in support of their contention that this evidence was improperly admitted, were very different from those in this case. The magistrate in that case did not testify that the minutes correctly stated the testimony of the absent witness. He was only asked to identify the writing as the copy of the evidence made by the clerk at the examining trial. His statements on that point were not very positive. Having stated that one Pheener acted as clerk, and reduced the testimony of the absent witness to writing, he was shown the writing, and asked if it was the testimony taken down by Pheener, and to this he replied, "I think it is. It looks just like it. * * * I wouldn't swear that is Mr. Pheener's writing, but believe it is." Even if this was sufficient to identify the copy of the testimony, it did not show that it was the full or correct testimony of the witness, and it was properly rejected as evidence in that case. The facts on this point are not very fully stated in the opinion in that case, but an examination of the transcript will leave no doubt as to the correctness of the decision in that case. Some of the statements in the opinion of the court in that case may seem to support the contention of appellant here, but those statements must be construed in the light of the facts in that case, which were very different from those here. Our conclusion is that the court committed no error in the admission of this evidence.

The contention that the court committed prejudicial error in instructing the jury that the written evidence of John Poteet was "to be treated and considered in all respects the same as if Poteet had given his evidence in person upon the witness stand," must also be overruled. Abstractly considered, that instruction was not proper, for it was a question for the jury to say whether the writing introduced was a true copy of the testimony of Poteet, and the testimony seems to take this question away from them. In other words, the court assumes in this instruction that the writing was a true copy of Poteet's testimony before the examining court. If there had been any conflict in the evidence on that point, the instruction would have been prejudicial, but there was no conflict on that point.

The examining magistrate testified that it was the testimony of Poteet, and no one disputed his statement. The defendant himself was sworn as a witness, but neither he nor any other witness questioned the accuracy of the testimony of the magistrate on that point. We therefore conclude that this testimony was true, and that the defendant was not prejudiced by the instruction in which its correctness was assumed.

On the whole case, our conclusion is that there was no prejudicial error, and the judgment is therefore affirmed.

DUNBAR v. COWGER.

Opinion delivered December 1, 1900

NEW TRIAL—INADEQUACY OF DAMAGES.—A verdict for defendant for one dollar as damages for an assault and battery will be set aside as inadequate where the evidence showed that the plaintiff was severely wounded and suffered great pain in consequence of his injury; that he paid a doctor's bill of $63 for being treated for the injury, and $10 for other things needful to one in his condition; and that he had made a contract to teach a three months' school at a salary of $40 per month, which he was unable to fulfill by reason of said injury. (Page 446.)

Appeal from Yell Circuit Court, Dardanelle District.

WM. L. MOOSE, Judge.

STATEMENT BY THE COURT.

This suit was brought by appellant against appellee in the Yell circuit court, for the Dardanelle district, for the recovery of $3,000 damages for personal injuries inflicted upon appellant by appellee. There is no complaint of any error in the admission or rejection of testimony, nor were there any objections made or exceptions saved to the instructions of the court. A new trial was asked simply on the ground that the verdict was contrary to the law and the evidence. The court refused to grant the motion for new trial. The plaintiff excepted, and this is the only error complained of in the case.

Omitting the formal parts, the complaint is as follows:

That on the 21st day of December, 1898, the appellee did cruelly, unlawfully and maliciously beat, bruise and wound the appellant by striking him in the head with a fence rail, whereby appellant was sick, sore, lame and disordered, and has so continued until the present time, and by reason of said personal injuries he has ever since been unable to attend to his lawful business, and has been confined to his bed; and that he was compelled to expend, and did expend, $63 for necessary services of physicians, and $10 for medicines and other necessaries incidental to his said sickness in endeavoring to be cured of the said soreness, bruises and wounds; and that, as a direct result of such beating, wounding and ill-treatment, he was unable to enter upon the duties as principal of the Spring Creek school, which he had contracted with the directors of said school to teach for a period of three months, beginning on the 2d day of January, 1899, and ending on the 24th day of March, 1899, for which appellant was to receive $40 per month—to his further damage, $120. That, as a further result of such beating, bruising, wounding and ill-treatment, he has undergone great bodily suffering and mental anguish, and has been greatly depleted and exhausted in physical strength and vigor. And in consequence thereof his hearing has been greatly impaired and enfeebled, and from which he has suffered and is suffering great inconvenience. Wherefore appellant prayed judgment for the sum of $3,000 for the injuries so inflicted upon him by the appellee.

Defendant's answer (omitting the formal parts) is as follows: He admits that he struck the appellant at the date set out in said complaint. That, immediately before the alleged assault, appellant assaulted appellee with a hatchet, and would have beaten, wounded and ill-treated appellee if he had not defended himself against the violent assault so made against him; and, in order to save himself from death or great bodily harm, he necessarily and unavoidably struck the appellant, using no more force than necessary to repel the force and violence at the time made upon him by said appellant.

The evidence in the case showed that the plaintiff was severely wounded, and that he suffered great pain in consequence

of his injury, that he paid $63 doctor's bill for being treated for the injury, and $10 for other things needful to one in his condition; and that he had made a contract to teach a three months' school at $40 per month, which he was unable to teach by reason of said injury.

H. M. Jacoway, Jr., for appellant.

There being no evidence to support the verdict, the verdict will be set aside, and a new trial ordered. 7 Ark. 462; 5 Ark. 640; 27 Ark. 592; 24 Ark. 224; 20 Ark. 443; 22 Ark. 54; 55 Ark. 294; 65 Ark. 280. A new trial will be directed when the verdict is so against the weight of evidence as to shock a sense of justice. 34 Ark. 632; 33 Ark. 751; 39 Ark. 387; 42 Ark. 527; 44 Ark. 258; 25 Ark. 49, 380; 26 Ark. 365; 28 Ark. 550; 2 Ark. 360; 5 Ark. 407; 6 Ark. 86; 6 Ark. 428; 10 Ark. 138; 10 Ark. 491; 26 Ark. 309; 39 Ark, 491; 5 Ark. 640. A new trial will be granted when the verdict is against the evidence. 21 Ark. 468; 24 Ark. 224; 13 Ark. 71; 8 Ark. 155; 10 Ark. 309. The verdict was in open defiance of the instructions of the court. 42 Ark. 527; 39 Ark. 387.

Bullock & Davis, for appellee.

Provocation should be considered in mitigation of damages. 48 Ark. 396. Damages was a question for the jury. 53 Ark. 11; 34 Ark. 361. When the verdict is not without evidence to support it, this court will not disturb it. 18 Ark. 453; 14 Ark. 419; 13 Ark. 285, 236, 712; 12 Ark. 43; 17 Ark. 385; 25 Ark. 91; 47 Ark. 567.

HUGHES, J., (after stating the facts.) The jury found by their verdict for the plaintiff that the defendant had made a wrongful and unlawful assault upon, and had beaten, the plaintiff, which there was ample testimony to support. But they assessed only one dollar damages, while the evidence is unquestioned that the damages suffered by the plaintiff by reason of his injury amounted to a very much larger sum. To suffer such a verdict as to the damages to stand would be a travesty upon justice. It is evident that the motion for a new trial in the circuit court ought to have been granted. For refusal to grant said motion, the judgment is reversed, and the cause is remanded for a new trial.

CORNWELL v. STATE.

Opinion delivered December 8, 1900.

CARRYING ARMS—INTENT.—One who carries a pistol for the purpose of killing hogs is not guilty of carrying a pistol as a weapon, within Sand. & H. Dig., § 1498. (Page 448.)

Appeal from Calhoun Circuit Court.

CHAS. W. SMITH, Judge.

Thornton & Thornton, for appellant.

The object of the legislature was to prohibit the carrying of a pistol for use as a weapon. 34 Ark. 448; 56 Ark. 559; 33 Ark. 559. The second instruction is faulty because the definition of the term "carry as a weapon" is contrary to 56 Ark. 559 and 34 Ark. 448.

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

A pistol carried for the purpose of shooting hogs constitutes the offense. Sand. & H., Dig. 1498; McCain, Cr. Law, vol. 2, § 1032. The case of *Wilson* v. *State*, 33 Ark. 559, is entirely different from the case of *Pittman* v. *State*, 22 Ark. 357.

BATTLE, J. W. T. Cornwell was indicted for carrying a pistol as a weapon, and was convicted.

The facts in the case are substantially as follows: He was seen with a pistol on the premises of J. W. Pearce. He carried it there from his residence, a distance of three miles. In going to that place he traveled through the woods and along the railroad track, by-roads and trails. Although he could have done so, he did not travel the public road. He carried the pistol to Pearce's premises to kill hogs, which he did, and, after he had done so, he carried it back to his home, where he put it away, as he had no further use for it.

Upon these facts the court instructed the jury, at the request of the state, over the objections of the defendant, as follows:

"1. The jury are instructed that if a man carry a pistol loaded in his pocket, not on his own premises, he is guilty of carrying a weapon.

"2. In saying to you that the state must prove that the defendant carried the pistol as a weapon, the court does not mean that he must have carried it for the purpose of killing or injuring some human being. A weapon may be used for other purposes; and if you believe, beyond a doubt, that it was carried in a way that it could be used as a weapon as charged in the indictment, you will convict the defendant."

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

"3. If the jury believe from the evidence that the defendant carried the pistol for the sole purpose of killing hogs, and not for use against any individual, they will acquit him."

The instructions given to the jury at the request of the state are not the law. The second instruction asked for by the defendant and refused by the court should have been given. So much of the statute as is applicable to this case is as follows: "Any person who shall wear or carry in any manner whatever *as a weapon* * * * any pistol of any kind whatever, except such pistols as are used in the army or navy of the United States, shall be guilty of a misdemeanor." Sand. & Dig., § 1498. The object of this part of the statute, as said by the supreme court of Tennessee of another statute, "is to prevent the carrying a pistol with a view of being armed and ready for offense or defense in case of conflict with a citizen (person) or wantonly to go armed." *Moorefield* v. *State*, 5 Lea, 348. The carrying of a pistol partly or entirely with this view or purpose is a violation of the statute; otherwise, it is not.

Reversed and remanded for a new trial.

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SALINGER v. BLACK.

Opinion delivered December 8, 1900.

1. LIMITATION OF ACTION—FRAUDULENT CONCEALMENT.—Where, to rebut the defense of the statute of limitations, plaintiffs claim that they were prevented from suing at an earlier day by the fraud of the defendants, they must show by evidence how they came to be so long ignorant of their rights and the means used by defendants to keep them in ignorance, and how and when they first came to a knowledge of their cause of action. (Page 455.)

2. SAME—JUDICIAL SALES.—The five-years statute of limitation to actions "for the recovery of lands sold at judicial sales" (Sand. & H. Dig., § 4818) applies to an action by the heirs and creditors of an estate of a deceased person to have certain lands formerly belonging to the estate and purchased by defendants decreed to be held in trust for such heirs and creditors. (Page 456.)

3. DOWER—MORTGAGED LAND.—A widow is entitled to dower in lands of her husband subject to a mortgage in which she joined, but not to an appropriation of the personal estate to relieve such lands from the incumbrance. (Page 457.)

4. SAME—CONTRIBUTION.—Where lands of an estate subject to a mortgage, in which the widow joined, were redeemed with money of the estate, and were assigned to her as dower, and the estate is insolvent, the widow is not entitled to hold such lands as dower unless she pays her proportionate and equitable share of the sum paid to redeem, which share must equal the sum of an annuity of the amount of one-third of the interest upon the sum so paid, at the time of such payment, for the residue of her life. (Page 457.)

5. SUBROGATION—ADMINISTRATION.—Where lands of an insolvent estate were redeemed from a mortgage in which the widow had released dower, and were subsequently assigned to the widow as dower, the administrators are entitled to be subrogated to the rights of the mortgagees to collect so much of the mortgage debt as is equal to the widow's share of the amount paid to redeem by causing the interest assigned to her as dower to be sold for the purpose of foreclosing the mortgage to that extent. (Page 458.)

6. JUDGMENT—MISTAKE.—Where an order of the probate court directing the redemption of mortgaged lands of an estate was made under a mistake of fact, it being thought that the estate was solvent when it was not, and the lands were assigned to the widow as dower, although she had released dower therein, such lands will be liable for their proportionate part of the unpaid debts of the estate. (Page 458.)

7. LIMITATION OF ACTION—DEATH.—If the maker of a promissory note die before action thereon is barred, and letters of administration are granted upon his estate, the statute of limitation of five years ceases to run, and the statute of non-claim begins to run from the grant of letters upon his estate. (Page 459.)

8. WIDOW—RIGHT TO MANSION—WAIVER.—Where a widow charged herself, as administratrix, with the rents of her husband's mansion from the date of his death until dower was assigned, she will be deemed to have waived her right to the same. (Page 460.)

9. ACTION TO SUBJECT DOWER LANDS TO DEBTS—CREDITS.—In a suit to hold lands of an estate, which have been redeemed from a mortgage and assigned to the widow as dower, liable for their proportion of the estate's debts, the widow is not entitled to credits which she might have allowed to her as administratrix of the estate in a future settlement with the probate court. (Page 461.)

Appeal from Monroe Chancery Court.

JOHN C. HAWTHORNE, Special Judge.

J. W. House, for appellants.

The proof did not warrant the court in setting aside the sale of real estate to Andrews on June 1, 1887. A probate court judgment, if erroneous, can be corrected only on appeal. 48 Ark. 544; 11 Ark. 519; 12 Ark. 84; 54 Ark. 480; 54 Ark. 341; 33 Ark. 575; 27 Ark. 647. The lands brought their full market value, and the sale is valid. If the price was inadequate, a re-sale should have been ordered, and a showing made that the price offered by Andrews was less than would be obtained on such re-sale. 13 Allen, 417; 1 Gratt. 4. The evidence fails to show that Andrews bought the property for Mrs. Salinger. Even if she had bought the land herself, the sale, upon confirmation, was not void, but voidable, and any deficit could be waived by the parties in interest. 30 Am. St. Rep. 245; 74 Me. 465; 19 Am. Dec. 257; 105 Pa. St. 375; 56 Am. Dec. 88; 13 Allen, 417; 23 Ga. 249; 7 Sm. & M. 409; 55 Ark. 85. While the administratrix could not buy at her own sale, she could buy from another after confirmation. 27 Ark. 647; 33 Ark. 575; 55 Ala. 525; 72 Ala. 224. Appellees are barred by laches. 34 Ark. 467; 36 Ark, 400–1; 23 Ga. 249; 94 Ga. 496; 2 Bro. Ch. 426. By analogy, the statute of limitation applies. 55 Ark. 85. In order for a plaintiff

to excuse delay in bringing a suit, upon the ground of the defendant's fraud, he must set forth and prove specifically the impediment to an earlier prosecution, how he came to be so long ignorant of his rights, the means used by defendant to keep him so, and how and when he first came to a knowledge thereof. 46 Ark. 36; 21 Wall. 178. The settlements were of record, and were notice to all parties; and appellees are chargeable with laches in not ascertaining their contents. 46 Ark. 36; 42 Ark. 491; 58 Ark. 94. A charge of fraud must be specific. 51 Ark. 1. Appellant's plea of the five-years statute of limitation should have been sustained. Sales of real estate made pursuant to orders of probate court are judicial sales within that statute. 54 Ark. 641; 46 Ark. 35; 44 Ark. 479. Appellees are chargeable with a knowledge of the facts in this case sufficient to apprise them of their alleged rights within the period of limitation; and the statute began to run against them at the date when they could and should have known of their rights. 46 Ark. 35; 41 Ark. 303–4; 58 Ark. 91; 2 Wall. 87; 20 Mo. 541; 53 Fed. 875; 58 Ark. 91; 101 U. S. 135–141; 53 Fed. 415; 149 U. S. 231. If appellant was in actual possession, claiming the legal title, it is no bar to the running of the statute that appellees claimed the equitable title. 22 Ark. 178; 22 Ark. 483; 23 Ark. 336; 39 Ga. 381. The court erred in opening the first annual settlement. 40 Ark. 393; 42 Ark. 186; 43 Ark. 186; 50 Ark. 217; 36 Ark. 395. The remedy was by appeal. 51 Ark. 1; 35 Ark. 137; 36 Ark. 383. It was error to decree that appellees be subrogated to the rights of the mortgagees. On the point of an administrator's right to compromise debts due the estate, see: 49 Ark. 236–7; 13 N. H. 18; 11 Am. & Eng. Enc. Law (2 Ed.); 26 Me. 538. Appellant was entitled to rents on the home place until her dower was assigned. 34 Ark. 63; 40 Ark. 405–6; 42 Ark. 515; 44 Ark. 490.

Manning & Lee, *C. F. Greenlee*, and *Norton & Prewitt*, for appellee.

The purchase of the reversionary interest should be set aside as fraudulent. The statute of five years does not apply.

54 Ark. 627; 53 Ark. 400, S. C. 14 S. W. 96; 58 Ark. 84, S. C. 23 S. W. 4; 58 Ark. 252, S. C. 24 S. W. 495. Mere lapse of time is not the only ingredient of laches. 19 Ark. 16; 22 Ark. 1; 52 Ark. 502, 510. Appellant's plea of laches is not made out. A widow can not have incumbered lands redeemed for her benefit. 55 Ark. 225.

BATTLE, J. On the 21st day of August, 1883, Saul Salinger died intestate, leaving surviving him Mittie Salinger, his widow, but no children. He died seized and possessed of personal property and lands. Letters of administration were granted by the Monroe probate court to Louis Salinger and Mittie Salinger, authorizing them to administer his estate. One-half of the personal estate was set apart, by order of the probate court, to the widow as dower.

Among the lands which belonged to the estate of Saul Salinger at the time of his death were the following: The north half of the southeast quarter, and the southeast quarter of the southwest quarter, and the south half of the southeast quarter, and the north half of the southwest quarter, of section 8; the southwest quarter of section 9; the northeast quarter of the northwest quarter, and the northeast quarter, and the north half of the southeast quarter, of section 17,—in township 4 north, and in range 2 west. These lands were incumbered by mortgages, which were executed by Saul Salinger, in his lifetime, to Furstenheim & Wellford, to secure a debt he owed to them. Mrs. Salinger joined in the execution of the mortgages, and relinquished her dower in the lands. On the 14th of April, 1884, Mrs. Salinger and her co-administrator filed a petition in the probate court of Monroe county, representing that it would be to the interest of the estate of Saul Salinger, deceased, and not to the injury of the creditors, to use the general assets of the estate to redeem the lands. On the same day the petition was granted by the court, and the administrator and the administratrix were authorized and directed to pay the debt secured by the mortgages out of the general assets of the estate; and they thereafter, at different times, paid in discharge of the debt, out of the assets of the estate, no part of which constituted the dower of the widow, the sum of $31,-

859.72. The debt so paid had been previously probated against the estate. At the time the order to redeem was made the debts other than the mortgage debt, which had been probated against the estate, amounted to only $968; and the estate appeared to be solvent.

On the 14th day of November, 1885, commissioners appointed by the Monroe probate court set apart and allotted to Mrs. Salinger, as a part of her dower, the following lands: The southeast quarter and the southeast quarter of the southwest quarter, and the north half of the southwest quarter of section 8, the southwest quarter of section 9, and the northeast quarter of the northeast quarter of section 17, in township 4 north, and in range 2 west, which were a part of the lands incumbered by the mortgages and redeemed as before stated. They reported their proceedings to the probate court, and it approved their action.

On the first day of June, 1887, the administrator and administratrix sold, under an order of the probate court, the following among other lands: The northwest quarter of the northwest quarter, and the northeast quarter of the northwest quarter, and the south half of the northeast quarter, and the north half of the southeast quarter, of section 17, in township 4 north, and in range 2 west; and I. T. Andrews purchased them, he being the highest bidder. On the 18th day of April, 1890, the administrator and administratrix, under the same authority, sold, at vendue, to the same purchaser, the lands assigned to the widow, described above, subject to her dower. Both sales were reported to and confirmed by the probate court, the former at its October term, 1887, and the latter at its April term, 1891, The administrators conveyed to Andrews the lands sold to him on the 1st of June, 1887, by deed bearing date the 1st of March, 1888, which has been recorded. They also conveyed to him the reversionary interest in lands which he purchased on the 18th of April, 1890. On the 30th of May, 1888, Andrews conveyed to Mrs. Salinger the lands purchased by him on the 1st of June, 1887, receiving for the same three hundred dollars more than it cost him. She filed her deed for record on the 19th of June, 1888, and immediately after her purchase took

possession of the land, and held it adversely to all persons, and cultivated and improved it as her own.

The administrators filed as many as six annual accounts current, showing their debits to the estate and the credits to which they are entitled. The administration of the estate is still open.

On the 27th of October, 1893, certain creditors of the estate and the heirs of Saul Salinger, deceased, commenced a suit against Mittie Salinger (Louis Salinger having died) and I. T. Andrews, alleging that the purchases of real estate by Andrews on the first day of June, 1887, and on the 18th of April, 1890, were made for the use and benefit of Mrs. Salinger, and asked that Mrs. Salinger and Andrews "be decreed to hold said lands in trust for the creditors and heirs of Saul Salinger, deceased; that an accounting be had of rents and profits, to the end that the debts of said estate may be paid, and distribution of any surplus made to heirs." In May, 1894, they filed an amendment to their complaint in which they alleged the foregoing facts as to the mortgage of land to Furstenheim & Wellford, the redemption of the same, and the assignment of dower to widow in a part of the same; and asked that they be subrogated to the rights of Furstenheim & Wellford under the mortgages, and for the foreclosure of the same to the extent it may be necessary to pay the claims probated against said estate. They filed many other amendments, alleging that the settlements filed contained many errors, and asked that the same be surcharged and falsified. The defendants answered, and denied that Andrews purchased the real estate for the use and benefit of Mrs. Salinger, and alleged that he purchased the same in good faith for himself, and pleaded the five and seven years statutes of limitation in bar of the action.

After hearing the evidence adduced at the hearing, the court found that the lands sold on the 1st of June, 1887, were purchased by Andrews for Mrs. Salinger, and that she holds the title to the same for the benefit of her intestate's estate; that the purchase of real estate by Andrews at the sale on the 18th of April, 1890, was made in good faith and valid; that Mrs. Salinger was not entitled to dower in the lands mortgaged

to Furstenheim & Wellford, and is responsible for the rents she has received for the same; and that the mortgages in favor of them be foreclosed for the benefit of the plaintiffs, and that the life estate assigned to the widow in the lands thereby incumbered as dower be sold to satisfy the same; and decreed that the creditors of the estate of Saul Salinger, deceased, be subrogated to the rights of Furstenheim & Wellford under the mortgages in their favor, and that the lands purchased by Andrews at the sale on the 1st of June, 1887, and the life estate set apart to Mrs. Salinger as dower in the lands mortgaged to Furstenheim & Wellford, be sold at public sale to pay the unpaid debts probated against said estate, and for other purposes. And the defendants appealed; and from so much of the decree as found the purchase of the reversionary interest in the lands by Andrews at the sale on the 18th of April, 1890, to be in good faith and valid the plaintiffs appealed.

It appears from the allegations in the complaint of the plaintiffs that Mrs. Salinger has been in the possession of the lands sold on the first of June, 1887, and purchased by Andrews, at all times since the sale controlling the same and enjoying the profits thereof; ,and, although it is not expressly alleged, it clearly appears from the complaint that she has been in the open and adverse possession of the same for more than five years before the commencement of this suit. The defendants having pleaded the five years statute of limitation, it devolved upon the plaintiffs to prove that their suit came within some exception to the general rule adopted by the statute. They claim they were prevented from suing at an earlier day by the fraud of the defendants. To maintain their suit upon that ground, they should have shown by evidence how they came to be so long ignorant of their rights, and the means used by the defendants to fraudulently keep them in ignorance, and how and when they first came to a knowledge of the fact, if it be a fact, that the lands were purchased by Andrews for Mrs. Salinger. Having failed to do this, they are barred by the statute pleaded from maintaining this suit. *McGaughey* v. *Brown*, 46 Ark. 25; 2 Greenleaf on Evidence (16th Ed.) § 448, and cases cited; 2 Wood on Limitations (2d Ed.) § 276, and cases cited.

But the plaintiffs contend that the five-years' statute of limitation has no application to this case. What was said in *Hindman* v. *O'Connor*, 54 Ark. 641, in response to a like contention, may be appropriately said in response to plaintiff's contention in this case. In the case cited this court said: "Mrs. O'Connor relies on the five years' statute of limitation to sustain her title. That statute provides: 'All actions against the purchaser, his heirs or assigns, for the *recovery* of lands sold at judicial sales shall be brought within five years after the date of such sale, and not thereafter; saving to minors and persons of unsound mind the period of three years after such disability shall have been removed.' Appellants insist that that statute has no application to an action like this, the object of which is to set aside a sale of land for fraud. So *McGaughey* v. *Brown*, 46 Ark. 25, was an action to set aside a sale of land for fraud. The prayer of the bill in that case was that the sale be set aside; that a master be appointed to take an account of the rents and profits; that the conveyances of the land, which were alleged to be fraudulent, be removed as a cloud upon the title of plaintiffs; and that they be put into the possession of the land. This court held that the object of the bill was to get possession of the land, and that the action was barred by the five years' statute. In this case (*Hindman* v. *O'Connor*) the prayer of the complaint is that the sale be set aside; that an account be taken between the plaintiffs and defendants as to the rents and profits of the block in question and the sums paid by defendants for the benefit of plaintiffs; and that 'the correct and true balance be ascertained between them;' and that said property be sold for purposes of partition and to satisfy the balance found by the master; and for other relief. One of the obvious objects of the complaint was the recovery of the land. That was necessary to accomplish the purpose of the action. The statute applies."

In the case before us the prayer of the complaint is that the defendants, Mittie Salinger and I. T. Andrews, be decreed to hold said lands in trust for the creditors and heirs of Saul Salinger, deceased; that an accounting be had of the rents and profits, to the end that the debts of said estate may be paid,

and that the distribution of any surplus may be made to the heirs; and for other relief. One of the obvious objects of the suit was the recovery of the lands. How could the possession of the land held by Mrs. Salinger in her own right be transferred to the defendants as trustees? How could they be used for the purpose of paying the debts of the estate unless they were recovered? That was necessary to accomplish the purpose of the suit. The statute applies.

We see no sufficient reason for disturbing the finding of the court as to the validity of the purchase by Andrews of the reversionary interest in lands at the sale on the 18th of April, 1890. It is presumed to be *bona fide* until the contrary is shown. The burden of showing that it was fraudulent was upon plaintiffs. They have failed to do so.

The circuit court erred in holding that Mrs. Salinger was not entitled to dower in the lands mortgaged to Furstenheim & Wellford. She was entitled to dower therein subject to the mortgages, but she was not entitled to an appropriation of the personal estate to relieve the lands from the incumbrance upon them. *Hewitt* v. *Cox*, 55 Ark. 225.

When the interest in the land which was assigned to her as dower was redeemed by the payment of the mortgage debts, she received more than she was entitled to. At the time the probate court directed the administrators to redeem the lands from the mortgages, the estate of Saul Salinger, deceased, appeared to be solvent, but the reverse proved to be true. The result was, assets that should have been used in paying the debts of the estate were appropriated to the redemption of the lands. The creditors virtually redeemed the lands, including the widow's dower in the same, and are entitled to be reimbursed in some manner and to some extent on account of moneys expended in the redemption.

Mrs. Salinger should not be required to pay the whole of the mortgage debt in order to redeem the interest in the lands mortgaged which were assigned to her as dower. She was under no personal obligation to do so. The mortgages were a burden upon the lands, and the payment of them by her was not a personal debt. But, the creditors having redeemed in the

manner stated, and all the estate in the lands incumbered, except her dower interest, having been sold, and the proceeds of the sale having been appropriated to the part payment of their claims, and the debts of the estate being still unpaid, she is not entitled to hold dower in the lands free of charge, unless she pays her proportionate and equitable share of the sum paid to redeem. That share can be ascertained by finding out what part of the total value of all the lands encumbered by the mortgages the value of the estate in fee in so much thereof as was assigned to the widow is, and by setting apart such part of the sum paid to redeem to the lands allotted to the widow. Her part of the sum so paid will be equal to the sum of an annuity of the amount of one-half of the interest upon the sum so set apart, at the time of such payment, for the residue of her life. To illustrate: If the value of the fee in the lands assigned to her was one-half of the total value of the lands mortgaged, and the sum paid to redeem was $30,000, her share of this amount will be a sum which will be equal to the value of an annuity of the amount of one-half of the interest upon fifteen thousand dollars, at the time of the payment, for the residue of her life. *Bell* v. *Mayor of New York*, 10 Paige, 49, 71; *House* v. *House*, 10 Paige, 158, 164; 1 Scribner, Dower, (2d Ed.), pp. 537, 539.

The administrators of Saul Salinger, deceased, who represented the creditors, having redeemed the lands, are subrogated to the right of the mortgagees to collect so much of the mortgage debt as is equal to the widow's share of the amount paid to redeem, by causing the interest assigned to her as dower to be sold for the purpose of foreclosing the mortgages to that extent. They hold this right for the benefit of the creditors, without any assignment or act of transfer, as *quasi* assignees, for the purpose of compelling contribution. Sheldon on Subrogation (2d Ed.) § 45, and cases cited; 3 Pomeroy's Eq. Jurisprudence, §§ 1222, 1223.

The defendants argue that the lands were redeemed in pursuance of an order of a court having jurisdiction to make it, and therefore cannot be again charged with the mortgage debt. There is no occasion for disregarding or setting the order aside. It was made under a mistake of fact. At the time it was made

it was thought that the estate was solvent, and that it could be made without injury to the creditors. But this was afterwards discovered to be a mistake. Treating the redemption as having been lawfully made, the question is, ought the widow or her dower, under the circumstances, to be made to contribute any part of the sum paid to redeem? In *Wilson* v. *Harris*, 13 Ark. 559, the administrator made a final settlement, and delivered the residue of the assets in his hands to the widow and heirs of his intestate, and was discharged by the court. At the time the order discharging him was made, a demand which had been duly probated against the estate remained unpaid, and was overlooked. This court held that the unpaid creditor had the right to file a bill against the widow and heirs for contribution and payment of his demand. So in this case the widow has received the benefit of assets which should have been appropriated to the payment of creditors, and she should restore to the creditors her proportion of such assets. In both cases the order was made by a court of competent jurisdiction, in an *ex parte* proceeding, under a mistake of fact; and the result is the same. While the facts in the two cases are different, the principle upon which each rests is the same.

Defendants further say that the right to foreclose the mortgages, as to the estate assigned to the widow as dower in the lands incumbered thereby, was barred by the statute of limitation before the commencement of this suit. But they are in error. So much of the statute which provides when actions to foreclose mortgages shall be brought as is applicable to this case is as follows: "In suits to foreclose or enforce mortgages or deeds of trust, it shall be a sufficient defense that they have not been brought within the period of limitation prescribed by law for a suit on the debt or liability for the security of which they were given." Sand. & H. Dig., § 5094. The debt secured by the mortgages in this case were evidenced by promissory notes, and the period of limitation within which the statute provides actions shall be brought on promissory notes is five years after the cause of action shall accrue. But if the maker of promissory notes shall die before an action upon the notes is barred, and letters of administration are granted upon his

estate, the five-years statute ceases to run as to him, because, under our law, it is displaced at once by the two-years' statute of non-claim, which runs against all subsisting claims against the estate of the maker not barred, not from the accrual of the cause of action, but from the grant of letters upon his estate.* In the case at bar the promissory notes secured by the mortgages were not barred by the statute of limitation at the death of Saul Salinger, their maker, and were duly probated within the time prescribed by the statute. After this no statute of limitation ran against them until after the close of the administration of the estate of the deceased, which was open at the commencement of this suit. *Biscoe* v. *Madden*, 17 Ark. 533, 539; *Walker* v. *Byers*, 14 Ark. 256; *Bennett* v. *Dawson*, 18 Ark. 336; *Bennett* v. *Dawson*, 15 Ark. 412; *Worthington* v. *DeBardlekin*, 33 Ark. 651; *Mays* v. *Rogers*, 37 Ark. 155; *Fort* v. *Blagg*, 38 Ark. 474; *German Savings & L. Society* v. *Hutchinson*, 68 Cal. 52.

Defendants say that the court erred in refusing to allow Mittie Salinger, as administratrix of Saul Salinger, deceased, a credit for the rents of the farm attached to the mansion or chief dwelling house of her late husband, for the years 1883, 1884 and 1885, amounting, without interest, to about $2,500. Their reason for this contention is, she was entitled to the use and possession of such farm, free of charge, from the date of her husband's death until her dower was assigned, which was the 11th day of January, 1886. It is true that the statute provides: "If the dower of any widow is not assigned and laid off to her within three months after the death of her husband, she shall remain and possess the mansion or chief dwelling-house of her late husband, together with the farm thereto attached, free of all rent, until her dower shall be laid off and

*In *Whipple* v. *Johnson*, 66 Ark. 204, it was held that the running of the general statute of limitations of five years as to a note would not, upon the death of the maker, be suspended by the statute of non-claim until letters of administration are granted upon deceased's estate. It seems to have been held in *Biscoe* v. *Madden*, 17 Ark. 539, that the general statute of limitation would cease to run at the debtor's death, and that the statute of non-claim would commence to run from the grant of letters upon his estate. **(Reporter.)**

assigned to her." Sand. & H. Dig., § 2537. But she has charged herself with these rents in her annual settlements with the estate of her deceased husband, and thereby waived her right to the same under the statute. This course of conduct was calculated to lead the heirs and creditors of the estate to believe that she would continue to charge herself with the rents of such farm, and to postpone the assignment of her dower in the lands on account of it, believing that they had lost and would lose nothing by the postponement. It would be unjust and inequitable to allow her credit for the rents after she had for so many years waived her rights under the statute, and after the parties interested had probably suffered her to remain in possession of the farm for many years under the belief that she had waived her rights under the statute quoted, and would continue to do so until her dower was assigned.

They further contend that Mittie Salinger, as administratrix, is entitled to additional credits for $1,285 and $1,181.57. These are amounts for which the probate court has authorized her to take credit in some future settlement to be filed by her. It appears that she has not asked for a credit for the same in any settlement, and that her administration is still open. Under these circumstances, the proper place in which to ask for them is a settlement filed by her as administratrix in the probate court. *Hankins* v. *Layne*, 48 Ark. 544.

The decree of the circuit court is, therefore, reversed as to the land sold on the first day of June, 1887, and the plaintiff's complaint is dismissed as to the same; is affirmed as to the reversionary interest in lands sold on the 18th of April, 1890; and is reversed as to the dower set apart in lands mortgaged to Furstenheim & Wellford; and this cause is remanded with instructions to the court to ascertain Mrs. Salinger's portion of the amount paid to redeem the land so mortgaged, and to render a decree directing the interest assigned her as dower in the lands redeemed, or so much as may be necessary, to be sold, and the proceeds of the sale to be appropriated to the payment of her said portion, if the same be not paid within a specified time, and to change and conform its decree to this opinion, and for other proceedings.

WOOD, J., did not participate.

COX v. STATE.

68 462
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Opinion delivered December 8, 1900.

1. JUDICIAL NOTICE—COUNTY LINES.—Courts take judicial notice of county lines as described in public acts. (Page 463.)
2. CRIMINAL LAW—VENUE.—Proof that whiskey was sold upon a steamboat on a certain river, the center of which is the boundary line between Lafayette and Miller counties, will not support a conviction of selling liquor in Lafayette county. (Page 463.)
3. VENUE—BURDEN OF PROOF.—The burden is on the state in criminal cases to prove the venue. (Page 463.)

Appeal from Lafayette Circuit Court.

CHAS. W. SMITH, Judge.

King & Searcy, for appellant.

No venue is proved. 23 Ark. 156. The burden of proving venue is on the state. 42 Ark. 73–77. So much of § 1938, Sand. & H. Dig., that authorizes an indictment to be found and a trial had in either county where the boundary line is uncertain is unconstitutional. Decl. Rights, § 10, Const. 1874. Legislature cannot invest a court with jurisdiction of crimes committed beyond the limits of the county. 30 Ark. 41; 32 Ark. 565. The first instruction given was based on a false assumption. 57 Ark. 1; 36 Ark. 242; 34 Ark. 224. There was no evidence that the offense was committed on the boundary line. 34 Ark, 469; 34 Ark. 275; 13 Ark. 319. Courts take judicial notice of the divisions of the state into counties, their boundaries *et cetera*. 34 Ark. 224.

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

The proof shows the boundary line between Lafayette and Miller counties is Red river, and § 1938, Sand. & H. Dig., settles the question.

HUGHES, J. This is an appeal from a judgment of conviction upon an indictment for selling whiskey unlawfully. The

indictment charges that the appellant sold the whiskey in Lafayette county, Arkansas. The proof is that the whiskey was sold on the steamer Waukeshaw, upon Red river. The center of the main channel of Red river is the boundary line between Lafayette and Miller counties. This line is fixed by act of the legislature, which was in proof in the case. Act December 22, 1874, § 1, creating Miller county. Besides, the court takes judicial notice of county lines as described in public acts. *Bittle* v. *Stuart*, 34 Ark. 224.

The evidence to show on which side of this boundary line the whiskey was sold is not satisfactory to us. Therefore, it seems there is a failure to prove the venue. It is true, W. H. Baker, captain of the steamboat Waukeshaw, over the objection of appellant, was allowed to testify that Red river was considered the boundary line between Lafayette and Miller counties; but this was error, the line having been fixed by act of the general assembly, according to which it is not Red river, but the "center of the main channel of Red river." There is no uncertainty as to the boundary line between these two counties, but the uncertainty is as to the place where the offense was committed, whether it was on the one or the other side of this line. *State* v. *Rhoda*, 23 Ark. 156. The burden of proving the venue was on the state. *Scott* v. *State*, 42 Ark. 73, 77.

The court committed error in the first instruction given for the state, which assumes that Red river was the boundary line between Lafayette and Miller counties, and, even if there was evidence from which the jury might have found that the venue was proved, the giving of this instruction was prejudicial error, for which the judgment is reversed, and the cause is remanded for a new trial.

BUNN, C. J., and BATTLE, J., not participating.

JAMES v. STATE.

Opinion delivered December 8, 1900.

JUROR—INCOMPETENCY—WHEN OBJECTION AVAILABLE.—Objection that a juror has not paid his poll tax, if available at all, comes too late after verdict. (Page 465.)

Appeal from Chicot Circuit Court.

ZACHARIAH T. WOOD, Judge.

Robinson & Merritt and *W. G. Streett*, for appellant.

There is no proof of venue, and the judgment must be reversed. 58 Ark. 390; 56 Ark. 242; 25 Ark. 435; 16 Ark. 499; 8 Ark. 400; 8 Ark. 451; 13 Ark. 110. None but electors are qualified to act as grand or petit jurors. Sand. & H. Dig., §§ 4271, 4273. An elector is one who has the right to make choice of public officers, or one who has the right to vote. Bouv. Law Dict. Payment of poll tax is one qualification of an elector in this state. Amendment No. 2, art. 21, Const. 1874. Failure to pay poll tax disqualifies as a juror. 2 Scam. 476.

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

Payment of poll tax is not a requisite to competency as a juryman. A *voter* is necessarily an *elector*, but an *elector* is not necessarily a *voter*. *Cf.* Const. 1874, art. 3, § 1; 25 S. W. 898; 76 Mo. 681; 54 S. Car. 147, S. C. 31 S. E. 868; 104 Ga. 174; 105 Ga. 592; 47 S. W. 695.

HUGHES, J. Appellant, Joshua James, was indicted by the grand jury of Chicot county for the crime of murder in the first degree. He was duly served with a copy of the indictment, waived arraignment and the drawing of the jury, entered his plea of not guilty, was tried, convicted of murder in the first degree, and sentenced to be hanged, filed his motion for a new trial, which was overruled, and appealed to this court.

There are only two questions presented by counsel in their brief for a reversal of this cause. The first is that there was no proof of venue in the original record filed in this court. The venue was inadvertently omitted, but this was supplied by certiorari, which leaves only one other question in the case.

Felix Lawson was summoned as a juror in the case, and, upon being asked whether he was a qualified elector, answered that he was. He was duly accepted as a juror, and served on the case. After the verdict was returned, it was found that said Felix Lawson had not paid his poll tax. This was shown by the list of paid-up poll taxes as certified to by the collector of Chicot county. This is an attempt to raise the question in the case, whether one who has not paid his poll tax, although otherwise qualified, could legally serve on a petit jury. This objection comes too late after verdict. It was not shown nor contended that the juror was prejudiced, that he was corrupt, or had been bribed, or anything of that kind, and only the technical objection is made that he had not paid his poll tax. Even if the failure to pay his poll tax had been a disqualification as a juror, which we do not decide, still the objection should have been made to the juror before he was accepted as such. It is not shown that appellant cross-examined the juror Lawson on his *voir dire*, or that he was challenged for cause or peremptorily. It was not attempted to be shown that the appellant was prejudiced in any manner by the presence of the juror Lawson upon the jury. Section 4255 of Sand. & H. Dig. provides that "no person shall be qualified to serve as a grand juryman unless he is an elector and citizen of the county in which he may be called to serve, temperate and of good behavior." Section 4256 provides that "no person shall serve as a petit juror who is related to either party to a suit within the fourth degree of consanguinity or affinity." Section 4259 provides that "no verdict shall be void or voidable because any of the jurymen fail to possess any of the qualifications required in this chapter, nor shall exceptions be taken to any juryman for that cause, after he is taken upon the jury and sworn as a juryman." The appellant should have used some diligence to ascertain the qualifications of the juror before accepting him

as one of the jury, and, having failed to do so, and no prejudice appearing, his objection after verdict comes too late.

Cases may be imagined where an objection after verdict to the qualification of a juror might be available, but the objection in this case is not such. In *Casat* v. *State*, 40 Ark. 515, Judge Smith delivering the opinion of the court said: "Ordinarily, objections of this sort come too late after verdict. Still it is possible to imagine a case, where a person who had prejudged the matter to be tried might, by concealment or prevarication, impose himself upon the panel. But it ought to appear that the party complaining had availed himself of all the privileges which the law affords him for obtaining an impartial jury. The defendant in a prosecution for felony has an opportunity to examine each individual juror, when he is produced, touching his qualifications, and to challenge him for bias or other sufficient cause." When the juror Felix Lawson answered that he was a qualified elector, he doubtless thought he was. It was his opinion that he was. He was not asked if he had paid his poll tax, and, if we conclude that this was necessary to qualify him as an elector, no diligence was used to ascertain that fact, and the objection to him as a juror comes too late after verdict.

The judgment is affirmed.

WARD *v.* STATE.

Opinion delivered December 8, 1900.

VENUE—PETITION FOR CHANGE—PRACTICE.—It is error arbitrarily to refuse to grant a change of venue asked by defendant, upon the ground that the court knows that defendant can get a fair and impartial trial in the county. (Page 467.)

Appeal from Lee Circuit Court.

HANCE N. HUTTON, Judge.

Fletcher Roleson and *McCulloch & McCulloch*, for appellant.

The defendant's motion for a change of venue being in due form, as prescribed by act April 4, 1899, it was error for the court to overrule it without hearing evidence touching the credibility of the supporting affiants. 25 Ark. 445; 54 Ark. 243.

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

RIDDICK, J. The defendant in this case was indicted and convicted of the crime of grand larceny, and sentenced to be imprisoned in the state penitentiary for a term of three years. Before the trial of the case he made an application for a change of venue on the ground that the minds of the inhabitants of Lee county were so prejudiced against him that a fair and impartial trial of this cause could not be had in that county. Both the petition for a change of venue and the supporting affidavits made by two witnesses are in proper form, and set out the facts required by the statute in order to obtain a change of venue. The record recites that when the petition for a change of venue came on for hearing the prosecuting attorney asked leave of the court to call upon the witness stand the two supporting witnesses to the petition, for the purpose of examining them in order to determine their credibility, but the presiding judge declined to permit this, and stated that it was unnecessary, as he knew that the defendant could get a fair and impartial trial in Lee county, and that he would not permit two persons to come into court and recklessly swear to the contrary, The court thereupon overruled the petition for a change of venue, and the defendant excepted.

The attorney general has on this point filed a written confession of error, on the ground that this was "an arbitrary refusal of the court to grant a change of venue on a proper showing. We are of the opinion that this confession of error should be sustained. The defendant made affidavit to the facts set out in his petition, and the allegations of his petition were supported by the affidavits of two persons, who make oath that they are qualified electors and actual residents of Lee county, and not related to the defendant in any way. It is true that the prosecuting attorney offered to show that these affiants

were not credible persons, as required by the statute, but the presiding judge refused to allow this, on the ground that he knew that the facts stated in the affidavits were not true. But the presiding judge was not a witness, and this knowledge that he possessed was not evidence. As there is nothing in the record to contradict the facts stated in the petition and in the supporting affidavits, we must take it that the witnesses were credible, and the facts stated true.

For the error confessed the judgment is reversed, and a new trial granted, with an order to permit the prosecuting attorney to introduce evidence touching the credibility of the supporting witnesses.

TAYLOR v. STATE.

Opinion delivered December 8, 1900.

LIQUORS—UNLAWFUL SALE—INSTRUCTION.—Under an indictment for an unlawful sale of beer, the court instructed the jury that if they find from the testimony that *no money was given by the prosecuting witness to defendant*, but that witness said to defendant that he might get witness beer for the balance he owed him, then defendant would be guilty; and, if defendant owed witness fifty cents, and witness told defendant to get him some beer for it, *and gave him no instructions to buy it from a licensed dealer*, then defendant would be guilty. *Held*, that the instruction was erroneous, for defendant may not have been paid money by the prosecuting witness, and witness may not have instructed him to purchase the beer from a licensed dealer, and yet defendant might be innocent, if he purchased the beer as the agent of witness at his request with the money he owed him. (Page 470.)

Appeal from Lee Circuit Court.

HANCE N. HUTTON, Judge.

STATEMENT BY THE COURT.

Arthur Taylor was indicted for selling intoxicating liquors without license. One Williams testified that Taylor hired a buggy from him, for which he was to pay two dollars. Taylor paid witness $1.50, and said to witness that he would pay the

balance soon. To this witness replied: "I will take the balance in beer." Taylor said "he didn't have any beer right then, but could get me some. I told him all right." That evening or next day Taylor delivered the beer to witness. Taylor in his own behalf testified, in part, as follows: "Last summer I owed Mr. Williams two dollars. I went to pay him, and gave him $1.50, and still owed him fifty cents. He asked me if I could get him some beer with the balance of fifty cents, and I told him I would do so. The next day I went out to the saloon of W. H. Lewis, who is a licensed liquor dealer about five miles from town and bought six bottles of beer, paying 50 cents for them. I bought them for Mr. Williams." He further testified that he was not employed by the saloon-keeper, but was running his wagon on his own account, and charging the purchasers for bringing in their orders.

In addition to a short written instruction, which correctly stated the law so far as it went, the court gave to the jury the following oral instruction: "If the jury find from the testimony that no money was given by the prosecuting witness Williams to the defendant with instructions to buy beer with it, but that witness said to defendant that defendant might get witness beer for the balance he owed him, then defendant would be guilty, even though defendant bought the beer from a licensed saloon, and delivered it to Williams. If the defendant owed Williams fifty cents, and Williams told defendant to get him some beer for it, and gave defendant no instructions to buy it for him from a licensed dealer, then defendant would be guilty, if you further find that he bought the beer and delivered it to Williams. And it would be no defense that he bought it from a licensed dealer."

The defendant was convicted, and fined five hundred dollars, from which judgment he appealed.

H. F. Roleson, for appellant.

Defendant acted merely as agent, and is not criminally liable. 41 Ark. 355. The verdict of the jury is not upon the issue presented in the record. 1 Bish. Cr. Proc. § 1005.

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

RIDDICK, J., (after stating the facts.) The defendant was indicted and tried for an unlawful sale of beer to one Williams. His defense was that he did not sell the beer he was accused of selling, but purchased it for Williams at his request and with money that he owed Williams. It is not disputed that he owed Williams fifty cents, and the question for the jury to determine was whether he sold Williams the beer in payment of his debt or purchased it for him at his request and as his agent. If he purchased the beer and delivered it to Williams in payment of his debt, it would constitute a sale, and he would be guilty of violating the law. But if, at the request of Williams, the defendant expended the fifty cents he owed Williams in the purchase of beer for Williams, which he afterwards delivered, there would be no violation of the law against selling beer without license by defendant, for the reason that in such a case there would be no sale by him. We do not doubt that the presiding judge fully comprehended the law on this point, but we are of the opinion that the oral instruction given by him was calculated to mislead the jury. The first portion of that instruction seems to lay stress on the fact that no money was paid by Williams to defendant at the time he requested defendant to get the beer, and the last paragraph lays stress on the fact that Williams did not direct defendant to purchase the beer at a licensed saloon. Now, such circumstances may be considered by the jury, along with other facts in evidence, in determining whether the defendant sold the beer or not, but the trial judge cannot in his charge make such circumstances the criterion by which to determine the guilt of defendant. To do so would be to invade the province of the jury.

The defendant may not have been paid money by Williams, and Williams may not have directed him to purchase the beer at a licensed saloon; and yet defendant may have been innocent of the crime charged, for he may have in good faith purchased the beer as the agent of Williams at his request with the money he owed him.

It should be remembered that the defendant was not accused of purchasing intoxicating liquor for another in a prohibited district or from an unlicensed dealer. He was accused

of selling, not of buying, intoxicating liquor. Even had it been shown that he purchased the beer as the agent of Williams from an unlicensed dealer, he could not have been convicted under an indictment charging an unlawful sale of beer. But it is not disputed that he purchased the beer which he delivered to Williams from a licensed dealer, and for this reason the reference to the question of a purchase from an unlicensed dealer in the instructions, both those asked by the defendant and those given by the court, was unnecessary, and tended more or less to confuse the issue, which was whether defendant had sold beer, not whether he had made a purchase for another in a prohibited district.

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

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

WINTER v. KIRBY.

Opinion delivered December 15, 1900.

FRAUDULENT CONVEYANCE—ASSIGNMENT WITH RESERVATION.—An attachment of the property of an insolvent upon the ground that the partners were about to make a fraudulent disposition of their property with intent to cheat their creditors should be sustained where the firm, as an entire transaction, were about to execute an assignment of certain policies of fire insurance, with a secret reservation of an interest in the proceeds thereof, together with an assigment of all the remainder of the firm's assets subject to process. (Page 475.)

Appeal from Miller Circuit Court.

RUFUS D. HEARN, Judge.

Scott & Jones, for appellant.

Parol evidence of facts collateral to those stated in the instrument is admitted to show their full intention. 52 Ark. 30, 42; 42 Me. 435; 39 Mich. 565. Both instruments will be considered as one transaction. 5 Ala. 324. The court will

not look outside of the deed to determine whether there was enough property to pay all debts. 47 Ark. 367. The transfer of policies must have been absolute, else void. 47 Ark. 347; 46 Ark. 405. Acts done subsequently to the transaction may be considered in determining the original intention. 41 Ark. 192. A colorable conveyance from father to son is void. 24 Ark. 410. The first instruction asked by appellants should have been given. 47 Ark. 367; 53 Ark. 88; 47 Ark. 347. Fraud may be conclusively presumed. 41 Ark. 188, 192; 44 Pac. 447; 19 Fed. 70.

Kirby & Carter, for appellees.

There were no assets withheld, and no reservation of surplus or benefit. 47 Ark. 347; *id.* 367; 59 Ark. 54. Fraud can never be presumed. Burrill, Ass. § 340–1; 38 Ark. 419. A threat to make an assignment furnishes no evidence of an intended fraudulent disposition of property. 53 Ark. 329; 55 Ark. 329. Appellees has a right to transfer the policies of insurance. 56 Ark. 417. And the same would have been legal had they been insolvent. 52 Ark. 41. There being evidence to sustain the verdict, the court will not disturb the judgment. 46 Ark. 142; 51 Ark. 466; 56 Ark. 314. Finding of the trial judge is as conclusive as a verdict of a jury. 55 Ark. 329; 53 Ark. 161; 60 Ark. 267. The transcript not containing all the evidence, this court must presume there was sufficient evidence to support the findings. 54 Ark. 159; 44 Ark. 74; 43 Ark. 151; 45 Ark. 240. The note sued on herein was included in the judgment pleaded, and cannot be made the basis of another action. 2 Black, Judg. §§ 864, 876, 674; Freeman, Judg. §§ 218, 221, 249, 791; 1 Herman, Estop. §§ 498, 572, 124; 2 *id.* § 1267; 29 Ark. 80, 472; 43 Ark. 232; 76 Hun, 424.

Scott & Jones, for appellants in reply.

Stipulation of counsel and signature of judge establish bill of exceptions. Sand. & H. Dig., § 5848. The bill of exceptions sufficiently shows all the declarations of law given and refused. 36 Ark. 496; 49 Ark. 365; 55 Ark. 329. Not applicable to facts in this case. See 59 Ark. 64.

BUNN, C. J. On the 20th September, 1893, the plaintiffs, Winter & Schott, a firm of merchants, composed of Joseph Winter and Max Schott, doing business in Texarkana, Arkansas, sued the defendants, J. F. Kirby & Co., a firm of saw-mill men, composed of J. F. Kirby, J. G. Brickley and J. J. Kirby, doing business in Bowie county near the city of Texarkana, on two promissory notes,—the one dated 13th June, 1893, and due 60 days after date, for the sum of $910, with interest at the rate of ten per centum per annum from maturity until paid, upon which there was a credit of $266.40, dated August 22, 1893; and another promissory note for the sum of $456.10, dated July 14, 1893, due 60 days after date, and bearing interest at the rate of ten per centum per annum from maturity until paid, upon which nothing had been paid. Both notes were made payable at the Texarkana National Bank, Texas. Both provided for the payment to the holder of reasonable attorney's fees, in case it should be necessary to bring suit theron for its collection, and both were shown to be Texas contracts, in which state it was alleged and shown that such provision for attorney's fees was allowable.

At the same time an affidavit for an order of attachment was filed by plaintiffs, bond given, and the order issued and in due course levied upon certain real estate in Arkansas belonging to the defendant firm, and to J. F. Kirby, the principal member thereof and manager of its business. Said affidavit, omitting unnecessary parts, is as follows: "The claim in this action against the defendants, J. F. Kirby & Co., is for money due upon two certain promissory notes; that it is a just claim; that plaintiffs, as they believe, ought to recover thereon the sum of $1,210.19; and that defendants have removed a material part of their property out of this state, not leaving enough therein to satisfy plaintiff's claim and the claims of defendant's creditors."

Nothing more appears to have been done in this suit until the 11th day of December, 1894, about fifteen months after the institution thereof, when defendants filed their motion to discharge the attachment, and at the same time answered, denying the truth of the affidavit of plaintiffs, and averring that some of

the property attached was the individual property of J. F. Kirby; that he was manager of the defendants' business, and that defendants had been damaged in the sum of $5,000 by the wrongful issuance of the attachment, and prayed judgment; that said firm was not indebted to plaintiffs in any sum as claimed; that J. F. Kirby himself had fully settled all of said indebtedness by agreeing to judgments, with attachment liens sustained, for the sum of $2,946.57, in a suit of plaintiffs against them in the Bowie county, Texas, district court; and securing said sum by his notes secured by his property in Miller county, Arkansas, and by paying all costs in this and the said Texas suit, in consideration that this suit be dismissed, and these defendants had fully complied with their part of said agreement. Wherefore defendants prayed judgment for the dissolution of the attachment, for damages claimed, and for general relief. At the same time defendants filed their motion to strike out "the motion of plaintiffs to re-instate and to dismiss." The record does not state what was done with this motion, nor does it disclose that there was ever such a motion by the the plaintiffs to re-instate, and the motion to strike out has no explanation in the record, and no further notice was taken of it. Nor does the record show that such agreement was made, but on the contrary that a judgment by confession in the Texas case was entered on the 4th of April, 1894, and a stay of execution was entered for six months.

On the 13th December, 1894, plaintiffs filed an amendment to their original affidavit for the order of attachment, in the following words, to-wit: "That defendant J. F. Kirby, prior to the institution of this suit, had removed a material part of his property out of the state of Arkansas, not leaving enough therein to satisfy plaintiffs' claim and the claims of said defendants' creditors." To which the defendant J. F. Kirby filed his counter affidavit on the 7th February, 1895.

On the 6th June, 1895, a jury trial was had on the question of the debt, and the same resulted in a verdict and judgment for the plaintiffs in full amount of their claim, and the defendants excepted, prayed and were granted an appeal, but nothing further was done in the prosecution of this appeal.

No bill of exceptions was filed, and the term of the trial court lapsed. The judgment on the debt having been rendered, the trial of the issue in the attachment part was postponed, and on the 9th September, 1895, plaintiffs filed a second amendment to their affidavit for the order of attachment, assigning the following ground for attachment, to-wit: "That, immediately prior to the institution of this suit, defendants were about to sell, convey or otherwise dispose of their property with the fraudulent intent to cheat, hinder and delay their creditors." To this defendants filed their controverting affidavit on the 12th September, and re-iterated, in substance, their defense to the action on the debt, suggesting a filing of a bill of exceptions at the proper time, it is said with the approval of the court. On the 10th September, 1895, plaintiffs filed their supplemental complaint, reciting in substance the proceedings in the Bowie county, Texas, district court, referred to by defendants in their answer to the complaint in this action, and seemingly declare upon said Texas judgments.

The trial court appears to have ignored all these efforts to reopen the controversy over the debt, and at the November term following a trial was had on the issue made by the affidavits in attachment, resulting in a judgment by the court in favor of the defendants, and a dissolution of the order of attachment, from which plaintiffs in due form and in due time appealed, and the assessment of damages was postponed until the next succeeding term of the court.

The only question, therefore, before us is the rightful or wrongful issuance and levy of the order of attachment, and this issue is further narrowed by the abandonment by the plaintiffs of the first ground of the attachment, or rather the ground assigned in the original affidavit, and the first amendment thereto, and the only question remaining is whether or not, immediately prior to the institution of this suit, the defendants were about to dispose of their property with the fraudulent intent to cheat, hinder and delay their creditors.

The evidence shows that on the 20th September, 1893, sometime during the day, the defendants' milling plant near the city of Texarkana, in Bowie county, Texas, was destroyed

by fire; that upon this property defendants held policies of insurance aggregating the sum of $5,000, which appears the only cash assets in the firm of any particular consequence; that between 7 and 8 o'clock p. m. of that day the defendants, with some of their creditors, had a meeting in the office of the Texarkana (Texas) National Bank, for the purpose of determining what to do under the circumstances. It was shown that there were debts amounting to more than $18,000 at the time, and that the assets of the firm and of the members thereof consisted of a considerable quantity of timber lands, from which the merchantable timber had largely been cut, and some railroad track, etc.

It was finally determined that the best thing to be done was the making of a general assignment, by the firm and all the members thereof, of all their property, real, personal and mixed, including choses in action and evidences of debt, to a trustee for the benefit of their creditors, which was accordingly done, an assignee being named. In this assignment all the property of the firm and of the members thereof was assigned, except the individual exemptions of the several members, which were claimed. This assignment was duly executed, acknowledged and prepared for record, but in fact was never delivered nor recorded, but seems to have been withdrawn, for the reason, as given by J. F. Kirby, that, the firm's assets being sufficient to pay the debts, it was finally thought better to settle directly with the creditors than to go through the trouble and expense of effecting the same purpose through the medium of an assignment and a trustee. The assignment appears to have been executed and acknowledged between 12 and 1 o'clock on the night of the 20th September, and as a result of the meeting aforesaid.

While the negotiations and discussion of this matter were in progress, sometime between 7 and 8 o'clock p. m. of the 20th of September, the disposition of the insurance policies was sprung as a subject of discussion. First, J. W. Harris, of the produce company of Texarkana, one of the creditors of J. F. Kirby & Co., proposed that one of the insurance policies should be assigned to his firm in payment of its debt. This was

declined by J. F. Kirby, speaking for defendant firm, on the ground that the produce company's debt was not equal to any one of the policies. Next, the Texarkana National Bank proposed that the policies should be assigned to it in payment of its debt. But this was declined, because, as stated by J. F. Kirby, the debt of the bank had already been sufficiently secured. But, the matter having been opened in this manner, the consideration thereof was continued until an agreement was reached (which was in the early part of the night) to the effect that the policies would be assigned and transferred to O'Dwyer & Ahern, J. C. Kirby, Jr., J. E. Kirby, H. W. Kirby and Joshua Kirby, whose claims against J. F. Kirby & Co. aggregated the sum of $2,999.66.

J. E. Kirby testified: "On the morning after the fire which destroyed the saw-mill, witness went to Winter & Schott, and to O'Dwyer & Ahern, and told them that the mill had been destroyed by fire, and that witness' father had gone out to the mill to see the extent of the injury; that all the property, individual as well as that of the firm, was subject to the debts; that his father would convey it to any one the creditors might name, or do with it whatever the creditors thought best, and that his father had instructed him to say this to them."

W. F. Kirby, a witness for defendant, testified as follows: "I am the son of J. F. Kirby, one of the defendants in this suit. I am an attorney at law at Texarkana, Arkansas. On the 20th September, 1893, I was in the bank where the conference was had between my father and certain of the creditors. All present seemed to think that a general assignment was the best thing that could be done, and as we left the bank I told father that he would better make a general assignment of what the company had, and we set about doing it at once. In the conference at the bank it was suggested that the insurance policies be assigned to the bank, and my father refused absolutely to do any such thing, saying that the bank was amply secured already, and that it was his and the company's purpose to pay all the creditors. J. W. Harris, of the produce company, then tried to get him to assign one of the policies to him to pay his company's debt, and father told him that J. F. Kirby

& Co. did not owe the amount of the policy, and he would do no such thing. On the evening of September 20th, between 7 and 8 o'clock, the assignment of the insurance policies, covering the mill property destroyed by fire, which have been introduced as evidence, was prepared by myself and executed as shown by the [their] assignment. When the assignment of the policies of insurance was being discussed in our office just prior to the execution of the assignment, my father, J. F. Kirby, and J. J. Kirby were present. The purpose was to assign these policies of insurance to some creditor or creditors of J. F. Kirby & Co. who would be willing to take the assignment in full satisfaction of their claims against Kirby & Co., and would agree to let Kirby & Co. have back the money which was collected on these policies of insurance, when collected, to enable Kirby & Co. to re-establish and rebuild their mill plant and continue their saw-mill business. To this view several creditors were considered, among them O'Dwyer & Ahern and DeMarce. We decided that the Kirby boys, mentioned in this assignment of insurance policies, would be more likely to take an assignment of the insurance policies in absolute payment of their debts, and then let Kirby & Co. have back the insurance money, when collected, or enough of it to enable them to rebuild their saw mill, than strangers would be. This is the reason the policies of insurance were assigned to the Kirby boys, named in the written assignment of the policies. I instructed J. F. and J. J. Kirby that the policies must be transferred in absolute payment of the claims of the creditors to whom they were assigned, to keep it from furnishing ground for the attachment. Harry Kirby did accept the assignment in payment of his claims, and if the said company concluded to rebuild, he would let them have what money he got out of it to use for that purpose, and to pay little debts due laborers, and no security or repayment was mentioned. Our whole object was to transfer the policies to some one in absolute payment of debt, who, it was thought, would most likely let Kirby & Co. have the money back to start up their business. All refused to let the company have any part of their money realized out of the policies except Harry W. Kirby. At the time this

deed of trust was made to DeMarce in which H. W. Kirby's claim was secured (October 25, 1893) I told my father that if J. F. Kirby & Co. expected to use H. W. Kirby's part of the insurance when collected, it was nothing but right that his claim should be put in the trust deed. H. W. Kirby was in Michigan University at the time, and knew nothing about his claim being thus secured." On cross-examination, witness said: "This was to place the policies beyond the reach of process by attachment or garnishment, which might be issued in suits brought by the creditors of Kirby & Co. in Texas. It was in absolute payment of the debts mentioned. The policies of insurance were not collected in full. There was only $2,550 insurance collected. This was divided among the creditors of J. F. Kirby & Co., to whom the polices had been assigned and accepted in full payment of their debts. Harry's part of the insurance money was used by Kirby & Co. and by J. F. Kirby to pay taxes and the little debts due laborers, and some other expenses. His (Harry's) debt was included in the deed of trust executed on October 25, 1893, to DeMarce as trustee, which deed of trust was not executed until after this suit was fully settled, as we thought.

It is not altogether clear whether these policies were assigned at the office of the witness, W. F. Kirby, before or after the conference at the bank. However, for the reason that some matters were talked of at the law office that were not mentioned at the bank, and for other reasons, we conclude that the assignment of the policies was made immediately after leaving the bank and returning to the office, when only J. F., J. E. Kirby and W. F. Kirby were present, others having been present at the conference at the bank. The general assignment to the trustee for the benefit of creditors, determined upon at the bank conference, appears to have been signed and acknowledged at a later hour in the night, probably between 12 m. and 1 a. m. Whether this was done at the bank or elsewhere does not appear, but the assignment was agreed upon, we infer, before 8 or 9 o'clock p. m. of the 20th September. After this conference had agreed upon an assignment, the plaintiff's attorneys were informed by one of the witnesses as to

what had taken place at the bank, in part at least. When the witness gave this information, plaintiffs' attorneys were preparing the papers in this case, as he thought, having doubtless been previously informed. At all events, the order of attachment was placed in the hands of the sheriff sometime during the night. So we cannot escape the conclusion that the general assignment, the assignment of the policies and the attachment proper were contemporaneously made, and the latter at once placed in the hands of the sheriff, who proceeded to levy the same early the following morning.

On the trial of the attachment issue, the plaintiffs asked the court to declare the law as follows, to-wit: "1. The court declares the law to be that if the defendants, at the time of the suing out of the attachment in this case, were about to dispose of their property, or a material part thereof, with the fraudulent intent to cheat, hinder and delay their creditors, and such intended transfer would only amount to a legal or constructive fraud, and not to a fraud in fact, then the attachment should be sustained." This declaration the court refused to make, but in lieu thereof made the following: "3. The court declares the law to be that if, at the time of the suing out of the attachment in the case, the defendants were about to dispose of their property with the fraudulent intent to cheat, hinder or delay their creditors, the attachment should be sustained."

The second declaration was made as asked, but, as that was applicable to the first ground of the attachment only, and that ground seems to have been virtually abandoned, we deem it unnecessary to make further reference to it. Whether there is any real difference between the first declaration as asked, and as made by the court, we shall not stop to discuss. The principle that every one is presumed to know the law may be a fiction only, but it is a fiction necessary to be kept up. Otherwise, all government would be subverted in the futile efforts to execute its mandates. The kindred principle that every one is presumed to intend the consequences of his own acts is equally important for its purposes. If, then, one acts in violation of law, and thereby injures another, the presumption is that he

intended the injury, and his error is not one of fact but of law. The affidavit in attachment upon which this case turns was, it is true, made long after the original affidavit was filed, and long after the order of attachment was issued and served. This is allowable under section 331 of Sand. & H. Digest, and has the force and effect, if sustained, as therein provided. At the time the order of attachment was sued out, the defendants are charged with being about to dispose of their property with the fraudulent intent to cheat, hinder or delay their creditors. There is no question but that at that time they were about to dispose of their property. They admit this, but contend that the disposition of their property they were about to make was altogether lawful, and not to cheat, hinder nor delay their creditors. It makes little difference that the general assignment agreed upon, and signed and acknowledged as stated, was left unexecuted in full, and in fact abandoned as a plan of settlement. Nor does it matter for what cause it was abandoned. It was, in itself, the exponent of intentions existing in the minds of the parties to it at the time when it was agreed upon and until it was abandoned. And it may be urged with reason that, of itself and in itself, this deed of general assignment furnished no ground for an attachment, but the contemporaneous act of assigning the policies of insurance puts a very different phase upon the whole transaction, which seems to have been one transaction, so far as the assignors and the creditors (who were the assignees of the policies, and therefore the assignees in both conveyances) are concerned.

The fact that the policies were assigned after the general assignment was agreed upon, and that, too, in the absence of the other creditors, if such was the fact, can only make a stronger case against the *bona fides* of the whole transaction, for the assignment of the policies was certainly against the interest of those creditors who had agreed to the general assignment, but were not made beneficiaries in the assignment of the policies. The discovery of this fact and their objection to the proceeding, so far as we can know, may have been the efficient occasion, if not the real cause, of the abandonment of the general assignment. Under the circumstances, we are to

consider all the reasonable probabilities arising upon the evidence, and to so declare and administer the law as to allow of the least opportunity to commit what is termed by the parties mere legal frauds.

It is a well-settled principle that, in making a general assignment for the benefit of creditors, one cannot reserve a benefit to himself. It is, of course, a principle that he cannot do in secret an act which counteracts or contradicts what is said in the written assignment. Regarding the whole plan as a single transaction, so far as the assignors and their privies are concerned, and as constituting an attempt to make a general assignment for the benefit of creditors, and that plaintiffs at the time of suing out their attachment could reasonably so regard it, what is there in the assignment of the insurance policies but to make a species of preferences contrary to the stipulations in the deed of general assignment. It was nothing more nor less than a plan to have the beneficiaries by name in the assignment of the insurance policies empowered to collect the insurance money for the use of the assignors. That is the effect of it, and the plan was carried into effect as to Harry W. Kirby's part.

It may be conceded, and we are inclined to think from the evidence that such was this case, that the defendants acted in what they thought to be the best of good faith in this matter, but the law puts a different construction upon their acts. In this there was no mistake or misapprehension of facts, but only of the law, and that cannot excuse.

There are indications that the whole case of the defendants is not contained in the transcript. But of this we cannot say. For the reason stated in the foregoing, the judgment is reversed, and the cause remanded for a new trial.

WOOD, J., not participating.

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STRICKLAND v. LITTLE ROCK.

Opinion delivered December 15, 1900.

RESISTING POLICE OFFICER—EVIDENCE OF DUTIES.—A conviction of violating a city ordinance against resisting any member of the police department in the discharge of his duties will not be sustained by proof that defendant prevented a sanitary policeman from examining his premises where no proof was offered showing the powers and duties of such policeman. (Page 484.)

Appeal from Pulaski Circuit Court.

ROBERT J. LEA, Judge.

Fulk, Fulk & Fulk, for appellant.

Evidence which does not tend to prove any issue is inadmissible. 57 Ark. 512. Incompetent evidence is prejudicial where the verdict is otherwise slightly supported. 51 Ark. 509; 14 Ark. 502. If a defendant indicted for resisting an officer can prove that he was ignorant that the party resisted was an officer, this is a defense for such resistance. 1 Whart. Cr. Law, 649; 32 N. Y. 509; 38 Pa. St. 265; 76 N. C. 10; 26 Texas, 119. Resistance must be to the service or execution of or the attempt to serve or execute some writ or process. Sand. & H. Dig., § 1826. A police officer is a creature of the statute, and can only exercise such powers as he is authorized to exercise. 86 N. C. 684; Whart. Cr. Law, 651; 30 Ga. 426. Arrests cannot be made without due process of law, except where public security requires it. 41 Mich. 300. To search without a warrant and with force and arms is an offense. 31 Ark. 44; 1 Whart. Cr. Law, 646. Resistance is justifiable if the officer has no warrant. Bish. New Cr. Law, vol. 1, 440. To constitute the offense, there must be some overt act of obstruction. 1 Whart. Cr. Law, 649; 37 Wis. 196; 3 Wash. 335. The words of a penal statute ought not be extended beyond what they will fairly and reasonably bear. Bish. Stat. Cr. 216; 37 Wis. 196.

W. J. Terry, for appellee.

The law imposed the duty of searching appellant's premises. Sand. & H. Dig., §§ 5286–5203. Greater authority and privileges are extended to a sanitary officer than ordinary police officers. Dillon, Mun. Corp. § 145. Where the instructions do not appear in the record, the presumption is the verdict is in accord with them. 31 Ark. 196; 4 Ark. 87; 2 Ark. 14.

BATTLE, J. William Strickland has appealed from the judgment of the Pulaski circuit court, wherein he was fined for interfering with a police officer of the city of Little Rock while in the discharge of his official duties. The prosecution for the offense originated in the Little Rock police court. The facts are, substantially, as follows: B. S. Farrow, a sanitary policeman of the city of Little Rock, in this state, was instructed to examine the premises of appellant. He went to his shop at 908 Main street, in said city; went into the alley behind the shop, and there saw four sheep in a stable. He went away, and in about an hour he returned, and found the four sheep were gone. He went to the front, and tried to get into the back room of the shop, in order to examine for "signs of slaughtered sheep." Strickland stepped in front of him, and said: "You can't go in there." He went away, and afterwards returned with two other policemen, and was admitted into the shop, and "found four sheep, just killed, hanging in front."

An ordinance of the city was read as evidence in the trial, and is as follows: "Whoever in the city shall resist any member of the police department in the discharge of his duty, or shall in any way interfere with or hinder or prevent him from discharging his duty as such member of the police department, or shall offer or endeavor so to do, shall be fined not less than $10 nor more than $25." The powers and duties of the sanitary policeman were not shown in the evidence. No ordinance of the city defining such powers and duties were read. If such ordinances were in existence, the circuit court or this court cannot take judicial notice of them. It follows then that the evidence fails to show that the appellant interfered with the policeman in the discharge of his duties.

The statutes of this state empower cities to prevent "injury

or annoyances within the limits of the corporation from anything dangerous, offensive or unhealthy, and to cause any nuisance to be abated within the jurisdiction given to the board of health;" and to prevent or regulate the carrying on of any trade, business or vocation dangerous to morals, health or safety within the corporate limits; and to create a board of health, with jurisdiction for one mile beyond the city limits, and for quarantine purposes, in case of epidemic, five miles, and to invest with such powers and impose upon it such duties as shall be necessary to secure the city and the inhabitants thereof from the evils of contagious and malignant and infectious diseases. (Sand. & H. Dig., §§ 5132, 5203, 5313.) The evidence totally fails to show that the city of Little Rock has ever exercised these powers.

Reversed and remanded for a new trial.

STATE v. BILLINGSLEY.

Opinion delivered December 15, 1900.

CARRYING WEAPONS—BOND FOR COSTS IN JUSTICE'S COURT.—Under Sand. & H. Dig., § 1502, which provides that "any justice of the peace in this state who, from his own knowledge or from legal information, knows, or has reasonable grounds to believe, any person guilty of a violation of the provisions of this act [against carrying weapons], and shall fail or refuse to proceed against such person, shall be deemed guilty of a non-feasance in office," etc. *Held*, that a justice of the peace cannot dismiss a proceeding under the act because the prosecuting witness failed to file a bond for costs. (Page 486.)

Appeal from Phillips Circuit Court.

HANCE N. HUTTON, Judge.

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

HUGHES, J. On January 11, 1900, Louis Miller caused a warrant to be issued before a justice of the peace of Phillips county against Will Billingsley, charging him with carrying a

pistol. When the cause came on for hearing before the magistrate, Billingsley filed a motion to require the prosecuting witness to give a bond for costs. Before the motion was acted upon, the prosecuting attorney filed his information in due form, charging Billingsley with carrying a pistol, and thereupon the court overruled Billingsley's motion. Upon trial Billingsley was found guilty, his fine assessed at $50, and he appealed to the circuit court. In the circuit court Billingsley again filed his motion to dismiss the proceedings against him for want of a bond for costs, which motion was by the court sustained, and he was ordered discharged, and thereupon the prosecuting attorney, in behalf of the state, prayed an appeal to the supreme court, which was granted.

Section 2332, Sand. & H. Digest, provides that in all cases of prosecution less than a felony in courts of justices of the peace, the prosecutor shall enter into a bond with sufficient security for the payment of all costs which may accrue in said prosecution. This statute was a part of the act of March 23, 1871. On March 13, 1893, the legislature passed an act providing that wherever the prosecuting attorney shall file a written information or accusation before a magistrate that a criminal offense has been committed, it shall be the duty of the magistrate forthwith to issue a warrant for the arrest of such offenders, and such case shall proceed to trial without requirement of a bond for costs of such prosecution. This statute was further broadened by the act of April 8, 1895, which authorized deputy prosecuting attorneys to have the power to file with any justice of the peace in his county information charging any person with carrying weapons unlawfully, and whereupon it became the duty of the justice of the peace to issue a warrant for the arrest of the offender, and no bond should be required for costs of the prosecution.

There is a section of the digest, being a part of the act of April 1, 1881, (Sand. & H. Dig., § 1502), that settles this question in this case. That section of the digest provides: "Any justice of the peace in this state who, from his own knowledge or from legal information, knows, or has reasonable grounds to believe, any person guilty of a violation of the pro-

visions of this act [act against carrying weapons unlawfully], and shall fail or refuse to proceed against such person, shall be deemed guilty of a non-feasance in office, and, upon conviction thereof, shall be punished by the same fine and penalty provided in section 1501, and shall be removed from office." Section 1501 provides for a penalty of not less than $50 nor more than $200 for violation of the act. Without regard to a bond for costs, the justice of the peace was bound, under this section, to proceed in this case upon the legal information given him by the affidavit of the prosecuting witness. This section seems to have escaped the attention of the court below, and of the attorney general.

The judgment is reversed, and the cause is remanded, with directions to overrule the motion to dismiss, and to proceed to try the case.

BATTLE, J., did not participate.

ROETZEL v. STATE.

Opinion delivered December 15, 1900.

FISH—SIZE OF SEINES.—Construing the act of June 26, 1897, *held:*

(1) It is not unlawful to use a seine of any length in any of the waters of this state to catch fish where the meshes of such seine are four or more inches square in width.

(2) One may use a seine not over sixty feet in length, regardless of the size of the meshes, in any unnavigable stream or lake to catch fish for family use or for picnics, and not for sale.

(3) One may catch minnows to be used for bait or stocking other waters, but for no other purpose, with a seine not to exceed fifteen feet in length. (Page 489.)

Appeal from White Circuit Court.

HANCE N. HUTTON, Judge.

Grant Green, for appellant.

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

WOOD, J. The indictment charges that Frank Roetzel "on the 22d day of December, 1899, in the county of White aforesaid, then and there unlawfully did catch fish with a net in the waters of this state, to-wit: Horseshoe lake, said fish not then and there being caught for family use, nor for a picnic."

There was proof from which the jury might have found that defendant assisted in seining Horseshoe lake with a seine over 60 feet in length, and the meshes of which were less than 4 inches apart; that fish were taken from said lake; and that defendant took two of them home with him. There was evidence also to the effect that the meshes of the seine were 4 inches or over.

The court read to the jury the act of June 26, 1897, and gave the following instructions:

"1. The material allegations in the indictment are that the defendant, Frank Roetzel, in the county of White, on or about the time alleged in the indictment, or within one year next before the filing of the indictment, which was filed in this court on the 23d day of January, 1900, unlawfully caught fish, or aided and abetted or assented to the unlawful catching of fish, in Horseshoe lake.

"2. The first thing for the jury to determine is, did the defendant take fish from Horseshoe lake unlawfully, or aid or assist in doing so? The next question, did the defendant use a seine 60 feet in length? If you so find beyond a reasonable doubt, then the defendant would be guilty.

"3. Meshes 4 inches square applies to a lawful seine, and 60 feet is a lawful seine. Over that length is unlawful.

"4. The jury are instructed that one may use a seine not to exceed 60 feet in length, with meshes not less than 4 inches square, to catch fish for family use, or for picnics, or for stocking other waters or ponds.

"5. The jury are instructed that the use of a seine of more than 60 feet for taking or catching fish is unlawful without regard to the size of the meshes. To the giving of each of which instructions, the defendant excepted separately."

The defendant asked, but the court refused, to instruct the jury, as follows:

"1. Before the defendant, Frank Roetzel, can be convicted of the offense charged in this indictment, it must appear to the jury from the testimony, beyond a reasonable doubt, that the defendant caught fish with a net in Horseshoe lake, in White county, Arkansas, not for family use or picnic, and that the net used by him was so made that the meshes of the net were less than 4 inches square, or that he was aiding or abetting in such fishing."

"2. The court instructs the jury that it is not unlawful to catch fish in the waters of this state by use of a seine with meshes not less than 4 inches square."

The first section of the act of 1897 is as follows: "No person shall be allowed to place, erect, or cause to be placed or erected, or maintained in any of the waters of this state, * * * any seine, net, etc., or by any such means to take or catch any fish in the waters of this state. * * * Provided, further, it may be lawful to use a very small seine not to exceed 15 feet, for catching very small fish, usually called minnows, which may be thus caught to be used for bait or for stocking other waters with fish, but for no other purposes. * * * Provided, further, it shall not be unlawful for any person or persons to use a seine with meshes not less than 4 inches square in width, and any person using a seine with meshes less than 4 inches in width shall be guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than twenty-five dollars nor more than fifty dollars, etc.* * * Provided, further, it shall not be unlawful for any person or persons to use a seine or net not exceeding 60 feet in length in any unnavigable stream or lake in this state to catch fish for family use, or for picnics, and not for sale," etc.

The circuit court erred in its charge. It is not unlawful to use a seine of any length in any of the waters of this state to catch fish where the meshes of such seine are 4 or more inches square in width. One may use a seine not over 60 feet in length, regardless of the size of the meshes, in any unnavigable stream or lake to catch fish for family use, or for picnics, and not for sale. One may catch minnows to be used for bait or stocking other waters, but for no other purpose, with a seine not to exceed 15 feet in length.

The court should have granted appellant's prayer for instruction numbered two.

Reversed and remanded for a new trial.

BATTLE and HUGHES, JJ., not participating.

McCASKILL v. STATE.

Opinion delivered December 15, 1900.

REMOVAL OF MORTGAGED PROPERTY—PROOF OF DEBT.—A conviction of removing property upon which a lien existed will be set aside if there was no proof of the existence of the debt which the lien was intended to secure. (Page 491.)

Appeal from Prairie Circuit Court.

EUGENE LANKFORD, Special Judge.

J. G. Thweatt and *James P. Clarke*, for appellant.

It was necessary, to convict the appellant, to show the indebtedness under the mortgage, and that the same was valid and unpaid. 49 Ark. 436; 1 Texas, App. 438; 50 Iowa, 194. There is no proof that the removal of the property was made without the consent of Campbell, Hunt and Adams. 44 Ark. 39. Under the proof in this case no conviction can be had. Sand. & H. Dig., § 2230; 25 Ark. 92; 43 Ark. 367; 80 Ky. 349; 24 Texas, App. 404; 25 Texas, App. 661. The presiding judge was a state senator and incompetent, and the verdict should be set aside. Const. of Ark. art. 5, § 10; 25 Ark. 622.

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

The indictment charges a valid and subsisting lien at the time of the removal. Sand. & H. Dig., §§ 1868, 5091. The presiding judge was at least an officer *de facto*, and his actions would not be subject to collateral attack. 38 Conn. 449; 33 La. An. 1413; 17 Wis. 528; 29 Pa. St. 109. A direct proceeding to try his title is necessary. 2 Texas App. 560; Throop, Pub. Officers, § 651.

BUNN, C. J. This is an indictment against the defendant J. C. McCaskill and others for the crime of "removing property upon which a lien existed," as charged in one paragraph, but, as charged in another, "of accessory before the fact to removing property upon which a lien existed." A demurrer in short upon the record was interposed to both counts of the indictment, and, the same being overruled, defendants moved for a severance on the trial, which motion being sustained the defendants elected to try J. C. McCaskill first, and a trial was accordingly had, resulting in a verdict against him assessing the punishment at one year in the penitentiary.

The defendant then moved the court in arrest of judgment because of the disqualification of the special judge, the Hon. Eugene Lankford, who tried the case, in this, that the trial was heard during his term as state senator. The motion in arrest being overruled, defendant filed his motion on thirty-one several grounds, to set aside the verdict and for a new trial, which being overruled defendant filed his bill of exceptions and appealed.

In brief of counsel the discussion is narrowed down to only a few of the errors complained of in the motion for new trial, and the second of these is as to the allegation of the existence of the lien and the want of evidence in relation thereto. In a case like this, the allegation of the existence of the debt at the time the offense is alleged to have been committed is a material allegation. It is material because, without the existence of the debt, there can be no lien, and the existence of the lien on the property removed, when taken in connection with the act of removal, is the very gravamen of the charge against the defendant. *State* v. *Gustafson*, 50 Ia. 194; *Satchell* v. *State*, 1 Texas App. 438. It goes without saying that the prosecution must sustain by evidence every material allegation in the indictment. The indictment in this case contains the allegations referred to in both counts. The existence of the lien in a mortgage is wholly dependent upon the existence of the debt it is intended to secure, for such, in express terms, is the condition upon which the mortgage is given. In this case there is no proof of the existence of the debt at the time the offense is

alleged to have been committed. There is, consequently, no proof that the lien existed at that time. The charge, therefore, that the defendant had removed property upon which the beneficiaries in the mortgage had a lien at the time, or had aided and abetted others in such removal, knowing of the existence of the lien thereon, for the purpose of defeating the beneficiaries in the collection of their debt, is not sustained by the evidence in the case, and for that reason the judgment must be reversed.

As some of the objections will not arise on a new trial, and others involve, more or less, a discussion of the weight of the evidence, we deem it unnecessary to say more, trusting to the trial court to avoid all real errors.

Reversed and remanded for a new trial.

SCOTT v. PENN.

68 492
73 444
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Opinion delivered December 22, 1900.

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f90 171
f90 263

1. ADMINISTRATION—ALLOWANCE—RIGHT OF APPEAL.—The devisees of a testator cannot appeal from an order of allowance of a claim against the estate, not being parties to the record. (Page 495.)
2. EQUITY—JURISDICTION—FRAUD.—Chancery has jurisdiction to set aside the allowance of a claim in the probate court obtained by fraud. (Page 495.)
3. PAYMENT—PRESUMPTION FROM LAPSE OF TIME.—A finding of the chancellor that a claim against testator's estate in favor of his brother had been paid is supported by proof that twelve years have elapsed since the claim was barred, and that claimant has made no effort to collect it, although he resided near the testator. (Page 495.)

Appeal from Little River Circuit Court in Chancery.

WILL P. FEAZEL, Judge.

STATEMENT BY THE COURT.

This is an appeal from a decree in chancery setting aside the allowance by the probate court of Little River county of a claim for $1,200 in favor of the appellant, Thomas M. Scott,

against the estate of his deceased brother, Robert N. Scott. The claim had been duly sworn to, and was allowed by W. D. Miller, the administrator of the estate of Robert N. Scott, before it was presented to and allowed by the probate court.

Thomas N. Scott died in 1891, leaving a will, by which most of his estate was bequeathed and devised to his nephew, Thomas Penn, and the Ouachita Baptist College, and E. T. Evans was appointed administrator with the will annexed of his estate, who having died in 1892, W. D. Miller, who married a grand niece of Robert M. Scott, Frances S. Nolan, administered upon the estate. Miller had been employed by Thomas M. Scott, and worked under his superintendence on the farm of Mrs. Nolan, and was induced by Mrs. Nolan and Robert M. Scott to administer upon the estate. At the time this claim was allowed by Miller as administrator, and by the probate court, it had been barred by the statute of limitations for twelve years or more. A suit was then pending in the supreme court on appeal, by Thomas M. Scott and W. D. Miller, contesting the will of Thomas N. Scott. The claim of Robert M. Scott was presented to W. D. Miller, administrator, and allowed, and filed with the clerk of the probate court on the same day, and was allowed by the probate court in April. While the contest over the will of Thomas N. Scott was pending, Thomas Penn and the Ouachita Baptist College brought this their suit to have the judgment of the probate court annulled allowing said claim of Robert M. Scott, alleging fraud and collusion between Robert M. Scott and W. D. Miller in procuring the allowance of said claim.

There was proof that Thos. N. Scott was possessed of some $970 worth of personal property before his death, and 340 acres of real estate valued at $1,871, partly in cultivation, and tending to show that he was prompt in paying his debts, and that his financial standing was good. There was evidence that E. T. Evans, at the time he was administrator of Thos. N. Scott's estate, lived only about one-half mile from the Thos. N. Scott place on the Richmond road, in Little River county; that Robert M. Scott's place is about a mile from the Thos. N. Scott place; that Evans, in coming from his home to Richmond in

1891 and 1892, would pass by the place where Robert M. Scott lived. It was in evidence that W. D. Miller, as administrator of the estate of Thos. N. Scott, paid McCain and Jones $100 to represent him in the contest of the will in the supreme court. It was also in evidence that Miller, the administrator of Thos. N. Scott's estate, was requested by the appellees here to appeal from the allowance of the claim of Robert M. Scott, which he declined to do; that Miller consulted no attorney about the allowance of the claim before he allowed it. There was also evidence, other than that of Robert M. Scott, tending to show that Thos. N. Scott had borrowed of Robert M. Scott, a considerable amount of money about the time he claims to have loaned Thos. N. Scott the $1,200. Robert M. testifies that he had notes for the amount, but that they had been lost or taken out of his trunk, and some evidence is introduced tending to show that the wife of Thos. N. had the opportunity to have taken them from the trunk.

J. C. Head, and *T. E. Webber*, for appellants.

The claim being allowed, it became a final judgment, from which an appeal could have been taken by any party interested. 1 Ark. 391; 12 Ark. 95; 23 Ark. 641; 33 Ark. 727; 36 Ark. 383; 51 Ark. 9; 63 Ark. 4; 64 Ark. 351. An adequate remedy being at law, a chancery court will not entertain a bill. 1 Ark. 197; 9 Wheaton, 534; Story, Eq. Jur. (10 Ed.) § 1572 and note; 1573–4; 64 Ark. 130; 58 Ark. 317; 56 Ark. 391; 48 Ark. 331; 48 Ark. 510; 27 Ark. 77; 27 Ark. 157. Errors in the probate court that might be corrected by appeal cannot be reached in chancery. 42 Ark. 186; 39 Ark. 256; 36 Ark. 390; 64 Ark. 6. The allowance of a claim which is barred by statute is not, *per se*, a fraud. 50 Ark. 228. Is it the duty of the administrator to plead the statute of limitations? 22 Ark. 302; 13 Ark. 512; 20 Ark. 83; 3 Ired. Eq. 442; 1 Ashm. (Pa.) 352; 2 Am. & Eng. Enc. Law, 919; 100 N. C. 99; 25 Ga. 594; 51 Texas, 27.

E. F. Friedell, for appellees.

That the appellees' rights might be protected, they had to resort to equity. 28 Ark. 479; 47 Ark. 411; 30 Ark. 578; 26

Ark. 461; 25 Ark. 557. Chancery will give relief from a judgment obtained in a court of law by fraud. 28 Ark. 49; 25 Ark. 557; 33 Ark. 575; 33 Ark. 728; 17 Ark. 512. Modern decisions favor the pleading of the statute of limitations by administrators. 18 Am. Dec. 93; 1 Pet. 351–360; 6 Ark. 514; 13 Ark. 500. An illegal act prejudicial to the rights of others is a fraud upon such rights. Harrington, Ch. Rep. 100; 11 Wend. 224. It is the duty of the administrator to protect the estate, and plead the statute of limitations. 13 Ark. 509; 20 Ark. 83; 20 Ark. 308; 18 Am. Dec. 93; 24 La. An. 83; 49 Am. Dec. 42; 14 Tex. 384; 10 Tex. 472; 40 Miss. 704; 50 Miss. 711; 11 Am. Law Reg. 328; 12 Wheaton, 565; 1 Pet. 351.

HUGHES, J., (after stating the facts.) Appellant contends that the appellees had a remedy at law by appeal from the judgment of the probate court allowing the claim of Robert M. Scott. The administrator, Miller, might have appealed, and was urged to do so, but he would not. The appellees here could not appeal, because they were not parties to the record. *Austin* v. *Crawford County*, 30 Ark. 578; *Arnett* v. *McCain*, 47 Ark. 411.

Even if appellees had a remedy at law, chancery had concurrent jurisdiction, and fraud is always the subject of chancery jurisdiction. Our own court has decided that a chancery court has the jurisdiction to set aside the allowance of a claim in the probate court obtained by fraud. The fraud must consist in obtaining the allowance. *West* v. *Waddill*, 33 Ark. 575; *Reinhardt* v. *Gartrell*, 33 Ark. 727.

An administrator is not bound to plead the statute of limitations under ordinary circumstances. There are extraordinary circumstances in this case. Twelve years had elapsed since the claim was barred. No effort appears to have been made to collect it. The claimant testified that he had notes for the amount which had been lost or taken from his trunk, but he seems to have made no effort to get new notes instead of the ones said to have been lost or taken from him. This is not natural, even in a brother who intended finally to insist on payment of a debt. Under some circumstances, less than twenty

years will afford a presumption of payment. Long delay in presenting a claim may in some circumstances be a circumstance tending to prove payment, and in other instances it may be sufficient, when taken in connection with other circumstances, to create a presumption of payment. *Long* v. *Straus*, 124 Ind. 84. There was less than twenty years' delay in presenting the claim in the case cited. The presumption of payment after the lapse of twenty years is one of law, if not satisfactorily rebutted or explained. The presumption of payment from lapse of time less than twenty years is one of fact, from lapse of time in connection with other circumstances. 1 Greenleaf, Ev. p. 136, § 39 (16 Ed.) In *Woodruff* v. *Saunders*, 15 Ark. 144, Judge Scott, delivering the opinion of the court, said: "At common law, a debt was presumed to be paid if unclaimed and without recognition for the space of twenty years, in the absence of any explanatory evidence. * * * Before the expiration of twenty years, the law did not make the presumption; nevertheless the jury, upon issue of payment, might infer the fact of payment for [from] a lapse of time short of twenty years in combination with other circumstances in evidence, such as * * * the parties residing in the same neighborhood with each other, without any demand being made, and other like circumstances."

We think the circumstances in this case, in connection with the long delay in presenting the claim for payment, and the absence of any effort to keep it alive, raise the presumption that the debt had been paid. We are therefore constrained to find that there is not a clear preponderance in the evidence against the decree of the chancellor, which is affirmed.

MATTHEWS v. BLANKS.

Opinion delivered December 22, 1900.

1. SETOFF—JUDGMENTS.—Replevin was brought by the owner of chattels in possession of an employee. The employer procured a retention bond to be executed in the employee's name, and sold the chattels. Judgment was rendered on the bond in favor of the plaintiff therein against the employee. The employer paid off the judgment, and took an assignment thereof to himself. Subsequently the employee obtained a judgment upon contract against his employer, against which the latter sought to setoff the first-named judgment. *Held*, that the employer made himself liable for the judgment against his employee by selling the chattels, and that the setoff of judgments was not allowable. (Page 504.)

2. SALE—WARRANTY OF TITLE—REMEDY.—A purchaser who loses a chattel by the interposition of one who has a paramount title must look for redress to his immediate vendor, and cannot, by suing the latter's vendor, cut off any defenses which he may have against his immediate vendee. (Page 505.)

Appeal from Little River Circuit Court in Chancery.

WILL P. FEAZEL, Judge.

STATEMENT BY THE COURT.

The appellees, R. B. Blanks, doing business under the name and style of the Monroe Stave Factory, at Monroe, Louisiana, George Rosenberg and A. Goldsmith, filed a complaint on the chancery docket in Little River county, Arkansas, July 15, 1896, against James M. Matthews, alleging that on the 14th day of July, 1896, the said Matthews had recovered a judgment against them for $730.10, besides costs of suit. The said A. Goldsmith and George Rosenberg were sureties for said Blanks to discharge the attachment that had been issued and levied on certain staves when the suit was begun. That on the 19th day of May, 1896, one Arthur G. Newton recovered a judgment against the said James M. Matthews for the sum of $1,293.60 for his debt and costs of suit, $439.20, amounting in the aggregate to $1,732.80; that on the 5th of June, 1896, Newton

assigned and transferred the judgment to R. B. Williams, and in June, 1896, the said Williams transferred the judgment to R. B. Blanks; that said judgment had never been satisfied, vacated or superseded; that said James M. Matthews was hopelessly insolvent, and that plaintiffs were solvent. They prayed that the judgment which Newton had recovered against Matthews be setoff *pro tanto* against the judgment recovered by Matthews against said plaintiffs.

1. The answer of defendant Matthews admitted the recovery of the judgment against him in the United States circuit court by Newton, but averred that the said judgment was rendered in a replevin suit by Newton against him and others wherein Newton had claimed to be the owner and entitled to the immediate possession of 80,000 oak staves, of the value of $3,600; that the judgment was rendered for the recovery of 61,600 staves, which the jury found to be worth $1,293.60.

2. That when the said staves were seized by the marshal, the said R. B. Blanks caused to be executed a cross or retention bond, which he delivered to the marshal, who approved said bond, and thereupon the said Blanks received from the said marshal the possession of said staves, and converted the same to his own use, whereby the said Blanks caused it to be impossible to comply with the judgment of said court to return said staves, and therefore said Blanks was estopped from claiming any benefits from said judgment.

3. The defendant further alleged that, for work and labor done and performed by him in getting out said staves for and under contract with the French Oak Stave Co., said company was indebted to him in the sum of $1,200, which was a laborer's lien upon said staves; that said French Oak Stave Co. sold said staves to said R. B. Blanks, and after it became known that said Newton was claiming said staves, or a large portion thereof, and while the defendant's lien was in full force and effect as between himself and the said Blanks, it was agreed that, in consideration of $500 of said indebtedness, which was secured by said lien, the said Blanks would and did assume to hold harmless the said Matthews from said Newton's claim or suit, and agreed to pay off and discharge any judgment the said Newton might there-

after recover; and that, relying upon said agreement, the defendant released his lien on said staves to the extent of $500, and did not attempt to foreclose it.

4. Defendant claimed his exemptions out of the judgment rendered in the circuit court of Little River county.

5. Denied that Scott & Jones, as attorneys for Newton, had the right to transfer said judgment without authority from Newton.

6. Alleged that the Newton judgment had been fully paid off and discharged,

7. Alleged that Scott & Jones as attorneys for him were entitled to a lien to the extent of one-tenth of the judgment recovered in the circuit court of Little River county.

An amendment to the complaint was filed in the Little River circuit court, re-affirming the allegations of the original complaint, showing that the bond made in the Newton case to retain possession of the staves was made in behalf of said James M. Matthews, so that said Blanks might retain possession of said staves, and that judgment was rendered against the sureties on said bond; that subsequently the said R. B. Blanks, who had induced said sureties to make said bond, paid off said judgment, taking the assignment thereof to himself, and prayed to be subrogated to all rights and remedies of said Newton against said Matthews.

We find from the record that the statement of facts by the counsel for appellant is substantially correct as follows:

"Appellant, Matthews, sold and delivered to the French Oak Stave Co. about 450,000 staves. They were delivered to and accepted by said company on the banks of the Cossatot, Saline and Little rivers. A portion of these staves were cut by Matthews or his sub-contractors from the lands of A. G. Newton. Other persons besides Matthews or his sub-contractors cut staves from the same land, and sold and delivered them to the French Oak Co. along the banks of said rivers. After Matthews had sold and delivered these staves, Newton claimed the staves which had been cut upon his lands, not only by Matthews, but the other persons, and had them (about 86,000) branded with his (Newton's) brand. The French Oak Co. afterwards

sold all its property, including these staves, to appellee, Blanks, doing business as the Monroe Stave Factory. After this last sale Newton instituted suit in the United States court at Texarkana, and under an order of replevin in that case about 66,000 staves were seized by the marshal. This suit was against A. Ehrman, Matthews and others. Ehrman was at the time the general agent and manager of the Monroe Stave Factory, and as such had the possession of its staves in Arkansas. The other defendants were employees of the Monroe Stave Factory, and as such in actual charge or possession of some of the staves. They had this possession by reason of their employment as the representatives of the Monroe Stave Factory, and no claim of possession or ownership in themselves. At the request of Blanks, the Taylor Store Co. and W. H. McWhorter executed the bond to enable Blanks to regain possession of the staves replevied. Under this bond Blanks did so regain possession, and shipped the staves out of Arkansas to Monroe, La. Matthews did not sign this bond, nor was he advised the bond had been executed. The bond was made solely for the benefit of Blanks, who asserted ownership of said staves by reason of his purchase from the French Oak Co., and he states in his deposition that the defendants held the staves as his employees. Blanks employed attorneys, and took the burden of the litigation upon himself. Upon the trial of this cause in the United States court, the staves were found and adjudged to be Newton's property, and judgment entered for their return, or their value as assessed by the jury. Newton, through his attorneys, Scott & Jones, demanded a compliance with this judgment, and threatened the issuance of an execution. The staves were beyond the jurisdiction of the process of the court, and, to relieve McWhorter and prevent the execution being issued against him, R. B. Williams, one of Blanks' attorneys, paid the value of the staves as assessed and the costs to Scott & Jones, and obtained from Scott a transfer of the judgment. The money used in this payment was the money of the said Williams, and the transfer was made directly to him. Mr. Williams stated to Scott, in effect, that he desired this transfer to protect him against any loss he might

sustain by reason of said payment, and Scott stated to Williams that he had no authority to transfer the judgment outside their employment as attorneys by Newton in that case. Very shortly afterwards Blanks paid to Williams the amount by Williams paid on the Newton judgment, and Williams then transferred the judgment to Blanks. The Monroe Stave Factory became indebted to Matthews upon contract, and Matthews brought suit thereon in the Sevier circuit court. The stave factory changed the venue to Little River county, and then, in consideration that Matthews would withdraw from his demand a claim of a double overcharge therein, which he did, it was agreed that judgment by default should be entered in that case, and the same was accordingly entered."

Matthews claimed that, prior to the sale by the French Oak Co. to the Monroe Stave Factory, there was an agreement between Matthews and Ehrman, as the representative of the French Oak Co., that, in consideration of $500 to be retained by the company out of the amount, then about $3,000, which Matthews claimed the French Oak Co. then owed him, it would release him from all liability arising out of the Newton claim, and that this agreement was consummated. It is disputed however by Ehrman that there was such an agreement. It is unnecessary, in the view we have of the case, to set out the evidence pro and con upon this point. It is sufficient to state that the proof by Matthews shows that he was claiming, at the time of the purchase of the staves by Blanks or the Monroe Stave Factory from the French Oak Co., that the latter company was indebted to him in a large sum. Ehrman, while not admitting, does not anywhere positively deny that the French Oak Stave Co. was indebted to Matthews for staves, including the staves sold by the French Oak Co. to Blanks. While Blanks says in one place in his testimony that Matthews "got pay for the staves that judgment was rendered for, he does not pretend to say where nor how." Matthews' testimony was positive that the French Oak Co., the vendor of Blanks, was largely indebted to him for staves. The proof shows by Ehrman, through whom the sale was made, that Blanks "bought all the assets and property of the French Oak Co. wherever

located, free from all claims and incumbrances." The French Oak Co. guarantied the property free from incumbrances.

At the hearing the court found that Blanks, by reason of having paid off and satisfied the Newton judgment against Langfelder, Matthews *et al.*, should be subrogated to all the rights of Newton against said Matthews, and that said judgments and costs should be setoff *pro tanto* against the judgment recovered by Matthews against Blanks in the circuit court of Little River county, save $73.10, the attorneys' fees to Scott & Jones, which had been paid by Blanks, and decree was accordingly entered, and Matthews enjoined from attempting to collect his judgment.

Scott & Jones, for appellant.

Upon the sale of a chattel for a fair price the law implies a warranty of title. 1 Parsons, Contracts, 467; 2 Kent's Com. 478; Story, Sales, § 367. The rule which applies to covenants of warranty in transfers of real estate has no application to the sale of shares or other chattels. 5 Cranch, 351; 9 Dana, 43; 4 Ala. 700; 19 Ark. 447. A stranger paying the debt of another is not subrogated to the creditor's right against the principal debtor. Harris, Subrogation, §§ 793, 800, 810; 9 Martin, 602; 3 Paige, 123; 2 Bland, Ch. 199; 12 Am. Dec. 577; 25 Ark. 133; 50 Ark. 586. The payment of a debt, and the assignment thereof to one who is ultimately liable for its payment, will give him no legal right to subrogation. Harris, Sub. § 643; 25 Me. 383; 6 Cush. 143. The person claiming subrogation must be a third person in respect to the obligation of the debt, and not the original debtor. 9 So. Rep. 442. Blanks could not have used the Newton judgment as a setoff in the Little River circuit court. Sand. & H. Dig., §§ 5727, 5861. A judgment may be selected as exempt property. 47 Ark. 464.

Williams & Arnold, for appellees.

Upon payment of the Newton judgments, the appellee was subrogated to the rights of Newton under his judgment. 55 Ark. 175; 60 Ark. 325; 19 Ark. 547. The right of subrogation arises by operation of law. Harris, Sub. § 4. In replevin,

if property can be found, the plaintiff has the right to insist upon its return, instead of its value. 50 Ark. 300. Appellee is entitled to subrogation. Brandt, Surety & Guaranty, § 210, 254–298; 55 Ark. 163; Harris, Sub. § 345. The right of subrogation is not confined to strict suretyships. 65 Ark. 444; 60 *id.* 390; 50 *ib.* 73; 56 *ib.* 563–574; 54 *ib.* 273; 53 *ib.* 305, 562, 559; 52 Ark. 1. It is a mode which equity adopts to compel the payment of a debt by one who ought to pay it. Harris, Sub. §§ 1, 2, 13. When one agrees to pay the debt of another, the relation of principal and surety is established. Brandt, Sur. & Guar. § 35; Harris, Sub. 761; 40 Ark. 132. As to the general doctrine of subrogation, see: 32 Ark. 346; Bispham, Eq. §§ 335, 338; 31 Ark. 422. Upon full payment, the surety is subrogated to the remedies of a creditor. Harris, Sub. §§ 153–162, 2, 103, 499, 472, 424; 7 Am. Dec. 494. In English law if a party has two funds, he shall not, by his election, disappoint another who has only one. 1 Vern. 455; 10 Mod. 488; Amb. 614; 8 Ves. 388–391; 9 Ves. 209; Pothier Traite des Oblig., notes 275, 280, 427, 519, 520, 522. A surety is entitled to every remedy which the creditor has against the debtor. 14 Ves. 160; 34 Am. Dec. 739; 26 Am. Dec. 387; 24 Am. Dec. 489; 36 Am. Dec. 591; 93 Am. Dec. 783; 38 Ark. 385; 53 Ark. 545. A purchaser at a foreclosure sale succeeds to rights of mortgagee. 54 Ark. 273. A purchaser at void tax sale will be subrogated to the state's lien for taxes paid. 41 Ark. 119; 42 Ark. 77; 42 Ark. 100; 42 Ark. 140; 55 Ark. 30. Between mortgagor and grantee, the grantee becomes principal debtor, and the mortgagor the surety. 3 Pom. Eq. (2d Ed.) 1206; 24 Am. & Eng. Enc. Law, 256, 253. Courts of equity do not grant relief where it would injure an innocent party. 3 Pomeroy. Eq. § 1414; 31 Ark. 203; Brandt, Sur. & Guar. (2d Ed.) 263. Responsibility in a replevin suit cannot be avoided by wrongfully transferring possession of property. 34 Ark. 93. The doctrine of subrogation has its origin in a sense of natural justice. 34 Am. Rep. 286; 11 Ves. 12; 2 Vern. 208; 1 Story, Eq. Jur. § 499. The chancellor's finding will not be disturbed unless it is against the clear preponderance of the evidence. 44 Ark. 216; 42 Ark. 246; 49 Ark. 465.

In the absence of special findings, the presumption is indulged that the decision of the lower court was correct until the contrary appears. 33 Ark. 828; 42 Ark. 310; 52 Ark. 75. The record must show that the same matter might have come in question on a former trial, and this may be shown by extrinsic proof. 2 Black, Judg. § 624. The exemption of personal property is in cases of debt by contract only. 33 Ark. 688; Const. art. 9, § 1. A defendant cannot claim exemptions against an execution on a judgment in replevin. 36 Ark. 297; 45 Ark. 17. The adjustment of the rights of these parties is a matter of equitable cognizance, and independent of and in addition to the right of setoff given by the statute. 28 Am. Dec. 495; 22 Am. & Eng. Enc. Law, 456; Waterman, Setoff, §§ 431, 441, 298, 400.

WOOD, J., (after stating the facts.) The doctrine of subrogation has no application here. The staves involved in the replevin suit had been purchased by Blanks from the French Oak Stave Co. He had taken possession of same, through his employees, the defendants in that suit. It was Blank's title and right to possession that was determined in that suit, for, confessedly, the defendants had no title and possession of their own. Upon the execution of the bond in replevin, Blanks retained the possession of the staves, and converted them to his own use, making it impossible for any of the defendants in the suit in replevin to satisfy the judgment for a return of the staves. By so doing he chose rather to pay off the Newton judgment than to return the staves. But his plea was that it was necessary for him to do this in order to protect his interest in the staves and the interest of his immediate vendor, the French Oak Stave Co. Very well, then, if he has any rights of subrogation at all, it must be the right of the French Oak Stave Co. against Matthews. But the French Oak Stave Co. was not a party to the suit in replevin. Its rights against Matthews for a failure of title in the staves was not and could not have been determined in that suit. Now, the proof in this case tends strongly to show that at the time the judgment in replevin was rendered, and at the time Blanks acquired his interest in same, the French Oak Stave Co. was indebted to

Matthews in a large sum for staves, including the staves in controversy in the replevin suit. So that, in any suit that may have been brought against him by his immediate vendee, the French Oak Stave Co., for a breach of his warranty of title to the staves replevied by Newton, he might have shown that the French Oak Co. was indebted to him in an equal or greater amount than any sum that might have been claimed by the French Oak Stave Co. against him for the failure of title to these particular staves. The principle announced in *Boyd* v. *Whitfield*, 19 Ark. 447, that a purchaser who loses a chattel by the interposition of one who has a paramount title must look for redress to his immediate vendor, applies here. Blanks acquired only the rights of the French Oak Stave Co. in the staves. He had no right by this proceeding to shut off any defenses which Matthews had against his immediate vendee, to whom alone he was responsible for a breach of warranty.

This ends the case, and renders it unnecessary to discuss other interesting questions raised by counsel.

Reversed and remanded, with directions to dissolve the injunction, and to dismiss the complaint for want of equity.

UNION CENTRAL LIFE INSURANCE COMPANY *v.* CALDWELL.

Opinion delivered July 21, 1900.

1. EVIDENCE—LAW OF FOREIGN STATE.—The unwritten law of another state may be proved by the testimony of one skilled therein. (Page 517.)

2. PROMISSORY NOTE—CONSIDERATION—PAROL EVIDENCE.—The presumption that a note executed in settlement of an account correctly states the amount of the maker's indebtedness to the payee may be rebutted in equity by proof that it was executed under a mistake. (Page 519.)

3. FORFEITURE—WHEN SET ASIDE.—Where a note given to an insurance company for a loan stipulated that the policy, which was given as collateral security, might be sold by a trustee named to satisfy the loan if the accruing interest should not be paid when due, a sale by the trustee to the insurer will be set aside in equity if it appears that at the time of the sale no interest was due. (Page 520.)

4. MUTUAL LIFE INSURANCE—APPLICATION OF DIVIDENDS.—It is the duty of a mutual life insurance company to apply dividends to the payment of interest on loans made on the policy, when by so doing a forfeiture of all rights and benefits under the policy will be prevented. (Page 521.)

5. SAME—FORFEITURE OF POLICY.—It is the duty of a mutual life insurance company, before taking a forfeiture of a policy for default in the payment of an obligation, to notify the assured or beneficiary of the amount of declared dividends on the policy, where such dividends are insufficient to meet the obligation. (Page 524.)

Appeal from Sebastian Circuit Court, Ft. Smith District.

EDGAR E. BRYANT, Judge.

STATEMENT BY THE COURT.

Appellee, as the beneficiary of a life insurance policy issued to his mother by the appellant, sued appellant for the amount of the policy, less an amount loaned his mother by the appellant. The answer admitted the policy and death of the assured, but denied that the policy became a paid-up policy in favor of appellee upon the death of the assured, and set up a loan made to assured upon the joint note of herself and the appellee, with the policy as collateral. It averred that this policy, pursuant to the authority contained in the note, was sold after default was made in the payment of interest on the note, which default rendered the entire note due.

The suit was brought at law, and, after the introduction of evidence for the plaintiff and defendant, the defendant requested of the court, among other instructions, to direct a verdict for the defendant, and moved the court to find for the defendant. Whereupon the court announced that the case was properly one of equitable cognizance to set aside a forfeiture. which, if not void, was inequitable; that the facts were undisputed, and left nothing to the jury, and the court would entertain a motion to transfer to equity, and was ready to decide it. Plaintiff moved to transfer to equity, which motion was granted, and the defendant excepted to all of these actions, and then, after reserving their exceptions, requested time in which to take testimony in addition to the testimony then before the court, which it was agreed the chancellor should consider. This time was given, and the company took additional evidence. At a

subsequent day the decree was rendered from which this appeal was taken.

The facts are, substantially, as follows: In 1869, the Cincinnati Mutual Life Insurance Company issued to Louisa Caldwell, the mother of the appellee, Walter O. Caldwell, a policy of life insurance in the sum of $2,000, with participation in profits, to be paid at her death, in consideration of the payment of five annual premiums of $189.34 each. Under an agreement the assured paid but $126.34 per annum on the premiums, $63 each year being loaned to her on the faith and credit of the policy. On December 13, 1872, the appellant issued to said Louisa Caldwell, in lieu of the policy issued by the Cincinnati Mutual Insurance Company, a policy of life insurance on her life, with participation in the profits, for the benefit of the appellee, in the sum of $2,000, in consideration of the payment of five annual premiums of $189.34 each, with a stipulation that the sum of $63 of each of said annual premiums should be allowed as a loan bearing interest at six per cent. from their respective dates, and acknowledged by all parties as a just indebtedness against said policy until paid or canceled by profits or otherwise. Mrs. Caldwell paid the five annual premiums, the last being July 5, 1873, when the policy was paid up. In 1894 Mrs. Caldwell applied to appellant, through Messrs. Yowell & Williams, who were state agents of appellant, for a loan with the policy as collateral security. She received the following letter:

"Little Rock, Ark., Feb. 13, 1894. Mrs. Louisa D. Caldwell, City. Madam: We have a letter from the company in regard to your policy, No. 10062. There are premium loans on this policy amounting to $487.80. If you are willing for the company to deduct the amount of the present loan, they will make a new loan of $800. If you desire this loan, please call at our office, with your son, Walter O., and we will arrange the matter for you. We have no cash surrender value, but loan you a great deal more than any other company will give you. Yours truly, Yowell & Williams, State Agents."

After this the following instrument was executed:

"$800. Cincinnati, Ohio, April 12, 1894. On or before

five (5) years after date, for value received, we jointly and severally promise to pay to the order of the Union Central Life Insurance Company eight hundred dollars, without discount or defalcation, at its office in Cincinnati, Ohio, with interest at eight per cent. per annum, payable annually, with the condition that if any installment of interest shall become due and be unpaid, then and forthwith the whole amount of principal and accrued interest shall be and become immediately due and payable. Having deposited with said company, as collateral security, policy No. 10062, upon the life of Louisa D. Caldwell in said company, we hereby authorize J. R. Clark to sell said policy at any time without notice, at public or private sale, or otherwise, in Cincinnati or any other place, at his option, in case of the non-performance of this promise, and at such sale the Union Central Life Insurance Company may be a purchaser, if it shall desire; but the sale to said company shall not be made at a price below the amount of the indebtedness evidenced by this note, applying the net proceeds to the payment of this note, including interest and cost, accounting to the undersigned for the surplus, if any. For that purpose we do hereby constitute and appoint J. R. Clark our true and lawful attorney, irrevocable, with full power of substitution for us, and in our name and stead, to sell, assign, and transfer said policy, hereby ratifying and confirming all the said attorney or substitute or substitutes may lawfully do in the premises. If said policy shall at any time lapse for non-payment of premium, all provisions in said policy providing for the issue of a paid-up or a term policy shall thereupon, and by reason whereof, forthwith become null and void. Lou D. Caldwell, Walter O. Caldwell.

"Union Central Life Insurance Company, of Cincinnati, Ohio. Received of Louisa D. Caldwell policy No. 10062, issued by the Union Central Life Insurance Company on the life of Louisa D. Caldwell for the amount of $2,000, and dated July 7, 1869, which policy is to be held as collateral security for the payment of a certain promissory note executed by Lou D. Caldwell and Walter O. Caldwell for $800 with eight per cent. interest annually, and payable to the order of said company; said note bearing date April 12, 1894, and due five years after date. The

company hereby agrees to return said policy to the said Louisa D. Caldwell when the obligations of the above note are fulfilled and its conditions complied with. Dated at Cincinnati, Ohio, April 10, 1894. E. P. Marshall, Secretary."

The amount $487.80, stated in letter *supra* as premium loans due on the policy, was deducted from the $800, and Mrs. Caldwell was paid the balance, $312.20 cash. On the policy issued by the Union Central Company was this indorsement: "Loans on Policy No. 10062. Date, December 30, 1872. Loans outstanding to July, 1873, on Cincinnati Mutual Policy 1523, $257.45. Surrendered loan for July, 1873, $42.18. Total loan against policy, $299.63. There was a clause in the policy providing that, in case of default after two years of insurance, on surrender of the policy within sixty days after default, it would issue a "new paid-up policy for an equitable amount, being not less than $800 after two years, $1,200 after three years, $1,600 after four years, and $2,000 after five years."

The secretary of the appellant appended a statement showing all the debits and credits between the defendant company and Louisa D. Caldwell upon said policy No. 10062, as the same appears upon the books of the company, together with the amount of dividends earned upon said policy and the amount of reserve or undivided profits which would have accrued to said policy if the same had been kept alive until June 14, 1895, as follows:

Statement of policy No. 10062, issued by Union Central Life Insurance Company upon the life of Louisa D. Caldwell: Loans on policy transferred by Cincinnati Mutual Life Insurance Company..... $257.45

		Int.	Div.	Bal. Loans.
July 7, 1873	New Loan $63.	$17.98	$20.82	$317.61
" 1874		18.12	15.99	319.74
" 1875		18.30	14.70	323.34
" 1876		18.50	15.09	326.79
" 1877		18.49	18.69	326.59
" 1878		19.02	9.62	335.99
" 1879		19.57	9.82	345.74
" 1880		20.14	10.04	355.84

July 7, 1881	$20.74	$10.23	$366.35
" 1882	21.58	6.70	381.23
" 1883	22.32	9.29	394.26
" 1884	22.93	12.17	405.02
" 1885	23.45	14.16	414.31
" 1886	23.99	14.54	423.76
" 1887	24.35	17.90	430.21
" 1888	24.69	18.74	436.16
" 1889	25.03	18.96	442.23
" 1890	25.38	19.18	448.43
" 1891	25.73	19.68	454.48
" 1892	26.54	11.80	469.24
" 1893	27.61	9.05	487.80

The dividend on the Cincinnati mutual policy up to 1871 was $16.88, and in 1872 the dividend was $14.89.

H. C. Mechem testified: That he practiced law in Ohio from 1867 to 1870, and at that time he undertook to be familiar with the laws of Ohio. That there was no statutory law in Ohio governing the computation of interest where there were partial payments made, but that the rule he had seen applied in courts, computations made by masters and referees and counsel and approved by the court, was that where there were partial payments made upon the indebtedness, if the partial payments exceeded the interest due at the time it was made, the interest at the legal rate was calculated, and the over-plus applied to the principal. If the payment at the time it was made did not exceed the then due interest, the payment then drew interest at the legal rate from the time it was made until such a time as the payments combined exceeded the then due interest, and then the interest due on the principal sum was calculated, and the balance, if any, was applied toward the satisfaction of the principal. If a partial payment was made, and it was less than the amount of interest at the time it was made, it would not affect the principal. The principal would go on drawing its rate of interest, and in such a case the remaining interest, after the application of the payment, would not be carried into the principal for the computation of further interest thereon. When, however, interest became due, either annually or semi-

annually, then interest was allowed on that interest. The rule had no application to interest which was past due and entitled to draw interest. Witness was not able to say whether the correctness of the rule had ever been raised, or whether there was a decision of the courts of Ohio saying that the rule given was the law of Ohio. He had no recollection of any such decision, although the rule was the current principle on the matter as applied in the courts.

Before the first annual interest on the note matured, the following notice was sent to Mrs. Caldwell at Little Rock, Ark., to-wit:

"Collateral Loan Interest Notice. Office of the Union Central Life Insurance Company. Louisa D. Caldwell, Little Rock, Ark. Dear Sir: The annual interest of $64 upon your loan No. 5058 falls due April 12, 1895. Please remit promptly for same by draft, post office order, or express, direct to the Union Central Life Insurance Company, Cincinnati, Ohio. Prompt payment of same on day when due is of great importance to the validity of your policy of insurance. All interest is payable direct to the company, and no agent has authority to extend the time of payment of interest. Return this notice with remittance and notify company of any change of address."

Also the following communication was written on stationery from the office of the Union Central Life Insurance Company: "Cincinnati, Ohio, April 22, 1895. Louisa D. Caldwell, Little Rock, Arkansas. Dear Sir: I beg to call your attention to the fact that the interest, $64, upon your note to this company was due April 12. I think you must have overlooked this payment, and it is only necessary to call your attention to the same, to have it paid at this office by first mail. If you desire to preserve the validity of your policy No. 10062, it will be necessary for you to remit immediately."

On May 11, 1895, Mrs. Caldwell paid to Yowell & Williams $23, to be credited on the interest due by her on April 12, 1895, on the $800 note.

The following letters were written:

"Cincinnati, Ohio, May 16, 1895. Louisa D. Caldwell, Little Rock, Ark. Dear Sir: We have not received, in response to

our letter of April 23d, your interest of $64, due April 12, 1895. The terms of the note provide that the non-payment of interest when due matures the principal, and the whole debt becomes due and immediately payable, You are therefore notified that your principal note of $800, dated April 12, 1894, together with all accrued interest to this date, is now due and payable. If you will pay the interest of $64, together with interest upon that amount from the date it was due to this date by return mail, we will waive the collection of the principal at the present time. Yours respectfully, E. P. Marshall, Secretary."

"May 25, 1895. Yowell & Williams, corner Second and Center streets, Little Rock, Ark. Gentlemen: We enclose a letter which we have received from Louisa D. Caldwell. It is evident that the lady has had some conversation with you in reference to her policy No. 10062, and, as you probably have most of the facts in the matter, we thought best to forward this letter to you. The original policy was upon the five-year payment plan, issued in 1869, in the old Cincinnati mutual. The premiums were not paid in full, as is customary now, but only two-thirds of the premiums were paid in cash, leaving the other third to be held as a loan against the policy. In all of these years these annual premium loans, together with the accrued interest, have accumulated to $487.80. On April 12, 1894, she applied for a loan upon the policy, and the company granted her a total loan of $800, a note for which the company holds. The premium notes, $487.80, which were already a loan against the policy, were deducted from the loan, and the lady received a check for the difference, $312.20. It is evident that she has entirely overlooked the items of premium loans, which have been accumulating for nearly twenty-five years. She was notified in regard to the interest due April 12, 1895, but the notice apparently did not reach her. She states that she has paid the interest to you. If you have not already sent the same to the home office, you will of course do so, and the same will be applied as a credit upon the total amount. Of course, she will have to pay interest upon the entire $800, as that is the amount the company has actually loaned her. The company does not care to allow her an additional $300 for the

surrender of the policy. Will you be kind enough to explain this matter to her, if you have not already done so, or let us know how matters stand, so we can write her? Yours respectfully, E. P. Marshall, Secretary."

In a letter of May 27, 1885, Yowell & Williams sent the $23 received from Mrs. Caldwell to the company, and received the following letter in reply, which they mailed to Mrs. Caldwell at Little Rock, May 31, 1895, to-wit:

"Cincinnati, Ohio, May 29, 1895. Dear Sir: We are in receipt of your favor of May 27, 1895, enclosing check amounting to $23 (L. D. Caldwell) in part payment of your premium due——on policy 10062. Premium note due ——on mortgage——. Interest due April 12, 1895, $64—$23; $41 balance. We herewith hand you the proper receipt. Yours truly, W. L. Davis, Cashier. To Yowell & Williams, Little Rock, Arkansas, Second and Center streets. There is a balance of $41 due. Kindly have party forward same, and we will send receipt."

On the same day (May 29, 1895) the secretary of the company wrote to Mrs. Caldwell as follows: "Not having received from you the interest of $64 due April 12, 1895, on your note of $800, dated April 12, 1894, you are again hereby notified that both the principal and interest are therefore due and payable. Policy No. 10062 issued by this company, and which has been assigned to it as collateral security, will be sold at auction at the home office of this company, corner Fourth and Central Ave., Cincinnati, Ohio, on June 13, 1895, at 10 o'clock a. m. to satisfy said note above described. In accordance with the terms of the note, this company is permitted to be a purchaser at that sale. You can prevent the sale of your policy by remitting $64 with interest from the date it was due to the date of remittance."

On the 13th of June the treasurer of the company sold the policy in question at the home office of the company. It was sold at public auction and bought by the company for $851.66, the principal and interest on the note. The value of the policy at that time as shown by the actuary table, was $1,180. The appellee testified that he never received any notice

from the company in regard to non-payment of interest on the policy, or of the sale of the policy, and that he never received any of the proceeds of the $800 loan; that his mother never communicated to him that she was in default in payment of the interest, or that the policy had been sold, nor did he ever receive such information from any other source until after her death, which occurred February 5, 1897. And there is no proof in the record which contradicts his testimony.

There was an amendment of the complaint on the trial, alleging that the correct amount due the company at the time the $800 loan was made was not $487.20, but $395.89. The prayer of the amended complaint was that said forfeiture and sale be set aside and held for naught, and for judgment for the sum of $2,000 and for $ ———, the amount of profits upon said policy, less the sum of $312.20, with interest thereon from the 12th day of April, 1894, at the rate of eight per cent. per annum with a credit thereon of $23 of date May 11, 1895, and less the loans reserved from the premium, to-wit: $63 for five years, with interest thereon at the rate of six per cent. per annum from the respective dates of the creation of said loans until the making of said note of the 12th of April, 1894, when said loans would, by virtue of said note, bear interest at the rate of eight per cent. per annum, and for all other and further relief.

The court rendered a decree in the cause, finding that plaintiff was never notified of the forfeiture and sale of the policy set out in the pleadings, and that no demand for the payment of the $800 note, or of the interest thereon, was ever made on him; that he did not know of said sale and forfeiture, or of any default made in the payment of the interest on said note, until after the death of Mrs. Caldwell. And the court held that, for said reasons and on other grounds, the said forfeiture and sale of said policy should be set aside in equity, and that the plaintiff should recover of defendant the amount of said policy with interest from July 5, 1897, and $65.78, the estimated dividends thereon from July 7, 1894, to February 5, 1897, the total amount being $2,169.06; and that defendant should recover from plaintiff the sum of $800 with interest at

eight per cent. from April 12, 1894, less $23 paid May 11,1895, total $1,006.40, and that judgment should be rendered for plaintiff for $2,169.06, less $1,006.40, or the sum of $1,162.66.

Such other facts as are necessary will be stated in the opinion.

Jesse Turner, for appellant.

The collateral promissory note and the power to sell, granted therein, were valid. Colebrooke, Coll. Secur. §§ 118, 119c.; 18 Am. & Eng. Enc. Law, 672; 32 Ark. 742. Demand and notice are not necessary where, by a contract of pledge, a power of sale is given upon default in payment of the principal debt at a definite time. Colebrooke, Coll. Secur. § 122; 18 Am. & Eng. Enc. Law, 670; 32 Ark. 742. The stipulation in the note that, on default of any interest payment, the principal might be declared due and payable, does not constitute a penalty, and is enforceable in law or equity. Pom. Eq. Jur. § 439; 8 Am. & Eng. Enc. Law, 450. The giving of the promissory note by appellee's intestate was *prima facie* evidence that there had been an accounting between the parties, and that the amount set out in the note was the amount found due by the maker. Dan. Neg. Inst. § 71; 28 Ark. 66; 8 Ark. 213. The assured was bound by the by-laws and rules of the association, and hence by its custom as to the application of dividends to the the purchase of new insurance. Joyce, Ins. §§ 318, 367, 3824; 82 N. Y. 543. Appellant did not, by accepting and crediting the $23, waive its rights under said collateral promissory note. 1 Pom. Eq. Jur. 439; 2 Joyce, Ins. §§ 1114, 1179, 1185, 1186; 49 N. Y. 449; 14 N. E. 466; 3 Cow. 230; 45 S. W. 539; 11 Am. & Eng. Enc. Law, 310. The sale under the power granted in the note was not a "forfeiture, and will not be annulled in equity on that ground. 8 Am. & Eng. Enc. Law, 447, 449; Joyce, Ins. §§ 1103, 1104–1114; Pom. Eq. Jur. § 439; 49 N. Y. 448; 53 N. Y. 508; 104 U. S. 88; 104 U. S. 252; 93 U. S. 24; 82 N. Y. 543. Appellee was a joint maker in the note, and is estopped to say that he stood in any other relation. 24 Am. & Eng. Enc. Law, 718; 54 Ark. 97. Demand did not have to be alleged. 3 Ark.

402; 4 Ark. 592. Appellee, being a joint maker, was not entitled to presentation, demand or protest. 40 Ark. 545.

Hill & Brizzolara, for appellee.

The insured had a right to have the dividends applied to the payment of interest due, in order to prevent a forfeiture. 80 Ill. 410; 93 Ind. 7; 97 Pa. St. 15; 100 Pa. St. 172; 39 Wis. 397; 82 Ky. 269; 1 Bidd. Ins. § 363; 73 Ky. 310. Notice of dividends must be given. 93 Ind. 7; 106 U. S. 30; 44 Oh. St. 156; 75 Ill. 426; 65 N. H. 27. The beneficiary (appellee) was entitled to notice of the dividend. 44 Oh. St. 156; 2 May, Ins. §§ 399, 6 N. E. 268. The waiver of notice of sale is not a waiver of the demand of payment. 2 N. Y. 445; 12 Wis. 465. The forfeiture was waived. 80 Ill. 410; 2 Joyce, Ins. § 1376; 47 Mo. 406; 30 Ia. 133; 30 Oh. St. 441; 1 Joyce, Ins. § 542. For application of doctrine that forfeitures are not favored in insurance cases, see: 80 Ill. 410; 93 Ind. 7· 82 Ky. 269; 97 Pa. St. 15; 73 Ky. 310; 65 N. H. 27; 75 Ill. 426; 30 Oh. St. 240; 47 Mo. 407. Where power is given a pledgee to sell a pledge, the relation of the parties becomes analagous to that of trustee and *cestui que trust*, and the power will be construed most favorably to the pledgor, so far as possible. Coleb. Coll. Secur. §§ 118, 332; 93 Ill. 458; 32 Ark. 56; 32 Ark. 742, 748, Denis, Pledges, §§ 311–3, 466; 2 N. Y. 443. Hence, no forfeiture was authorized, because only a part, and not a whole, "installment" of interest was due. The note was only *prima facie* evidence of the amount due. 1 Dan. Neg. Inst. § 71. The facts in this case make out a clear case of attempted enforcement of a forfeiture. 106 U. S. 47; 7 Pa. Ch. 179; 36 Mich. 160, 169.

Jesse Turner, for appellant, in reply.

There was a breach of the condition in the collateral note, by non-payment of interest. The assured had not paid said interest in any manner, because: (a) No credit was due her for interest upon dividends. 100 Pa. St. 182. (b) No credit was due her on said interest by reason of the dividend of July 7, 1894, because the interest was not due until nine months after the declaration of the dividend, and the company had, in

the meantime, in pursuance of its usual custom, used said dividend in the purchase of new insurance. The clause in the policy making the interest a charge on the policy "until paid or conceled by profits or otherwise" leaves it optional whether the interest be so settled or "otherwise." But under the new contract the interest was payable in cash. On the question of application of dividends, see: 73 Ky. 310; 80 Ill. 410; 93 Ind. 7; 97 Pa. St. 15; 39 Wis. 397. (c) Until a dividend is actually *declared*, no stockholder could demand that he be credited with it or any part of it. 100 Pa. St. 172. (d) Even with credit allowed for the dividend, a balance of the interest remained due; and this authorized a forfeiture. The stipulation for the acceleration in the time of payment was not a *penalty*. Pom. Eq. §§ 436, 439. Under the agreement in the note, appellant had the right to purchase at its own sale. 55 Ark. 268; 21 S. W. 469; 32 Am. St. 704; 70 Mo. 290; 84 Me. 72.

Hill & Brizzolara, for appellee, in reply.

While statute law of another state must be proved by the printed statute itself, the *common law*, *usages* and *practice of the courts* may be proved by those acquainted therewith. 11 Ark. 157; 17 Ark. 154; 33 Ark. 645; 43 Ark. 209.

WOOD, J., (after stating the facts.) 1. The policy under which the premium loans accrued was an Ohio contract, and the rule prevailing there for the computation of interest, when the contract was executed, is applicable. It was shown that Ohio had no statutory rule upon the subject. It was, therefore, proper to prove the unwritten law, custom, usage, or practice obtaining in Ohio upon the subject by one skilled in or familiar with it. *Barkman* v. *Hopkins*, 11 Ark. 157; *McNeill* v. *Arnold*, 17 Ark. 154; *Bowles* v. *Eddy*, 33 Ark. 645; *Blackwell* v. *Glass*, 43 Ark. 209. Taking the figures furnished by the secretary of the company, and applying the Ohio rule for the calculation of interest, we have the following result:

Loan July 7, 1869	$ 63.00
Interest July 7, 1869, to July 7, 1871, two years	7.56
Loan July 7, 1870	63.00
Interest on same to July 7, 1871, one year	3.78
	$137.34

Less credit by dividend	$ 16.88
Balance due July 7, 1871	$120.46
Loan	63.00
	$183.46
Interest July 7, 1871, to July 7, 1872, 6 per cent	11.01
	$194.47
Less credit by dividend	14.89
	$179.58
Loan	63.00
	$242.58
Interest July 7, 1872, to July 7, 1873	14.55
	$257.13
Credit by dividend	20.82
	$236.31
Loan	63.00
	$299.31
Interest July 7, 1873, to April 12, 1894, twenty years, nine months, five days, at 6 per cent	372.89
	$672.20
Less dividends	276.31
Due April 12, 1894	$395.89

This calculation does not allow interest on dividends. No interest should be allowed on these, because until declared they were not due the company, and when declared they were applied on the principal. But the amount of premium loans for which the note was executed was $487.80, which amount, it appears from the figures given by the secretary of the company, was ascertained as follows: In the years where the annual interest on the principal exceeded the dividend for those years, the excess was added to the original principal, and interest computed on this new principal for the next year, and so continued until the result ($487.80) was reached. This was the reverse of the rule that obtained in Ohio; for Mr. Mechem says: "If there was a partial payment made, and it was less than the amount of interest at the time it was made, it would not affect the principal. The principal would go on drawing its rate of interest." And interest on the principal would not itself draw

interest from year to year because no time was fixed for the principal to mature. The contract was "until paid by profits or otherwise." So, according to the most liberal calculation that could legally be made for the company, Mrs. Caldwell, at the time the note was executed, owed it on premium loans $395.89, instead of $487.80. The difference, $91.91, represents the amount of cash which she should have received in addition to the $312.20 in order to have made the cash and premium loans, for both of which the note was executed, equal to the consideration named of $800. Can the appellee claim the benefit of this $91.91 in this proceeding? Proof of the giving of a promissory note by one person to another, without anything else appearing, is *prima facie* evidence of an accounting and settlement of all demands between the parties, and that the maker at the date of the note was indebted to the payee upon such settlement to the amount of such note. But this is a mere presumption, which may be repelled by proofs of the consideration of such note, and the occasion for and circumstances attending the giving of same." 1 Dan. Neg. Ins. § 71; *Costar* v. *Davies*, 8 Ark. 213; *Carlton* v. *Buckner*, 28 Ark. 66. Now, the occasion for and the circumstances attending the execution of this note show that the intention of Mrs. Caldwell, primarily, at least, was to obtain an additional loan on her policy to that which she already had. As incidental to this, she, by signing the note, indicated that she was willing to acknowledge her indebtedness for the loans which had already accrued, and to pay an increased interest on same. The company rendered a general statement of the amount of such loans, without itemizing or disclosing the methods by which it was ascertained. She had no access to the books of the company. The company had once before (July 1873), when her policy became a paid-up policy, indorsed upon the same total loan against the policy at that time of $299.63, showing substantially the correct amount, as per calculation *supra*. Mrs. Caldwell had the right to suppose that the same method of calculation was used in arriving at the amount which had accrued in the succeeding years. No statement of the amount of dividends for all those years from 1873 to 1894 was

rendered her. She had no notice of a change in methods of calculation, by which a different amount was shown on the books of the company to be due in 1873 than that indorsed on her policy.

This is not like the case where there are disputed matters of account between parties, and a note is given to evidence the settlement of such account. The company was purporting to claim only that which was due, and Mrs. Caldwell was proposing to promise to pay only that. The company was not proposing to charge her a bonus for the additional loan. If so, it did not reveal the matter to Mrs. Caldwell. The company was representing that $487.80 was the true amount of the premium loans due, and Mrs. Caldwell, without knowing, or having the means of ascertaining, accepted that as the correct amount. But it turns out that, by an erroneous method of calculation, compounding interest, she was charged $91.91 more than she owed, which was carried into the note and collected by the company. It is unimportant to consider whether the mistake was wilful or occasioned by ignorance or inadvertance. It was a mistake for which the company, and not Mrs. Caldwell, was responsible, and she cannot be held to have acquiesced therein by merely signing the note. Acquiescence implies a knowledge of the facts.

Then how stood the account between them April 12, 1895, when the first installment of interest was due? At that time Mrs. Caldwell was due the company $64 interest, and the company was due her $91.91, and also $18.34 dividend declared July 7, 1894. For the alleged default in the payment of this interest, the company proceeded to declare the whole amount of $800 due under the contract, and sold the policy having a cash value of $380 more than the amount of the debt, and closed up the account between them. Appellee shows that he had no notice of the proceeding until the death of his mother. Equity will not permit a forfeiture of his rights under the policy. To do so, under the circumstances, would be rank injustice.

But, to entitle him to the relief sought, it is insisted that he should have manifested a disposition to do equity himself by

seeking earlier to undo that which had already been done, and making a tender of the amount due. Mrs. Caldwell died February 5, 1897, and the suit was begun in March following. The suit was begun in apt time. The correspondence shows that, after the sale, a tender of less than the full amount of the principal and interest would not have been accepted; and even this amount would not have been accepted unless accompanied by a certificate of good health. A tender does not have to be made where it is made clear beforehand that if made it would be rejected. *Manhattan Life Ins. Co.* v. *Smith*, 44 Ohio St. 170.

But, if there was no breach of the contract, no tender of any amount was necessary. In April, 1896, Mrs. Caldwell owed $64 interest. After paying the interest of 1895 out of the $91.91 and the $18.34 dividend, she would have a balance to her credit with the company of $46.25, and in May, 1895, she had paid the company $23 cash. These sums make $69.25, leaving an excess of $5.25 due her after paying the interest of April 12, 1896. So that there was no failure to pay the interest due April 12, 1896, and there could have been no breach of the contract at that time if it was proper to apply the declared dividend to the payment of interest on the loan note. This brings us to consider that question.

2. The company was a mutual company. The policy provides that the assured should participate in the profits. A by-law of the company shows that dividends were to be ascertained and declared yearly. The proof shows this was done. There is a clause in the policy to the effect that the premium loans "are a just indebtedness against this policy until paid or cancelled by profits or otherwise." The secretary testified "that the policy, application, and the loan note evidenced the contract relations between Mrs. Caldwell and defendant. This was true in law, as well as fact. The giving of the note for the premium loans did not abrogate the provision of the policy, "until paid or cancelled by profits or otherwise." There is no provision of the note in conflict with this clause of the policy. The giving of the note was not in any sense a payment of the premium loans. These would not be paid until the note itself

was paid. The note was but the receipt, *pro tanto*, for the premium loans already had, or an acknowledgment, in a new and different form, of an indebtedness to the company for premium loans, and the additional loan in cash. We think, therefore, that the assured may very well insist that the policy itself contained an express direction that the profits or dividends should go to pay the premium loans. Of course, if we are right about this, equity would compel the application of the dividends to the interest to prevent a forfeiture of the rights of the beneficiary under the policy.

But, if we concede that the policy is silent as to the application of dividends to premium loans, equity would still compel their application in this case to the payment of the interest on the note. This, too, notwithstanding the "uniform practice and custom of the company to use the dividends to increase the policy, unless requested or directed by the assured to apply otherwise."

The proof showed that the assured had the right to have the dividends applied otherwise. In the absence of any stipulation in the policy, and of any directions otherwise by the assured as to the application of dividends which have been declared, it is the duty of a mutual company to apply such dividends to the payment of interest on loans made on the policy, when by so doing a forfeiture of all rights and benefits under the policy will be prevented. This is the rule in the case of premiums to keep the policy in force from year to year, and, of course, would be for the payment of interest on an ordinary loan, which prevents a sale of the policy. *Chicago Life Ins. Co.* v. *Warner*, 80 Ill. 410; *Franklin Life Ins. Co.* v. *Wallace*, 93 Ind. 7; *Girard Life Ins. &c. Co.* v. *Mutual Life Ins. Co.* 97 Pa. St. 15; *Mutual Life Ins. Co.* v. *Girard Life Ins. &c. Co.* 100 Pa. St. 172; *Hull* v. *Northwestern Mut. Life Ins. Co.* 39 Wis. 397; *Northwestern Mut. Life Ins. Co.* v. *Fort*, 82 Ky. 269; *Phœnix Ins. Co.* v. *Doster*, 106 U. S. 30; *Manhattan Life Ins. Co.* v. *Smith*, 44 Ohio St. 156; *Home Life Ins. Co.* v. *Pierce*, 75 Ill. 426; *Eddy* v. *Phœnix Ins. Co.* 65 N. H. 27; *Smith* v. *St. Louis Mut. Life Ins. Co.* 2 Tenn. Ch. 727; *Van Norman* v. *Ins. Co.* 51 Minn. 57; 1 Biddle, Ins. § 363; 2 May,

Ins. §§ 345a, 572; 2 Joyce, Ins. §§ 1166, 1235; 2 Bacon, Ben. Soc. & Life Ins. § 365; 1 Beach, Ins. §§ 117, 118.

Most of the above cases are cited in the brief of counsel for the appellee. The learned counsel for appellant says: "These cases all arise under very different facts from those existing in the case at bar, and these differences are so vital and essential in their nature as to make them valueless as authorities." We will not review them here. But in our opinion the difference in the facts does not destroy the application or lessen the efficacy of the principle. It is true that in some of them there was a contract, custom or course of dealing. But because insurance companies enter upon contracts or establish a usage in conformity to the doctrine above announced, from which they have not been allowed to deviate, does not prove the unsoundness of the doctrine itself, but, rather, the contrary. The doctrine does not arise out of the peculiar facts of any particular case. It does not depend upon contract, custom or course of dealing for its existence and potency. It has its origin in that fundamental principle of justice which will compel one who has funds in his hands belonging to another, which may be used, to use such funds, if at all, for the benefit, and not to the injury, of the owner; for his consent to the one, and dissent to the other, will be presumed. The language of Judge Cooper in *Smith* v. *Ins. Co.*, *supra*, is pertinent here: "I am of the opinion," says he, "that the company was bound, upon the plainest principle of equity, to apply the dividend first in such manner as to save the forfeiture. *The usage of the company in deducting the dividends from the principal in cases where the insured elects to continue the policy, even if uniform and unvarying, cannot control where the insured ceases to pay, and the contract is silent as to what should be done with the dividend. The law, which tempers justice with mercy, makes the proper application.* * * * *The dividend, as the property of the insured, should be applied to what he is bound to pay—the interest.*"

3. The authorities also establish the rule that it is the duty of the company, before taking a forfeiture for default in the payment of a maturing obligation, to notify the assured or

beneficiary of the amount of declared dividends where such dividends are insufficient to meet the obligation. See some of cases, *supra*. These principles are founded upon reason and common fairness and honesty, and they will have application wherever it becomes necessary to prevent a forfeiture, which is favored neither at law nor in equity. See following cases cited in appellee's brief where the doctrine that forfeitures are not favored is applied to insurance cases: *Chicago Life Ins. Co.* v. *Warner*, 80 Ill. 410; *Franklin Life Ins. Co.* v. *Wallace*, 93 Ind. 7; *Northwestern Mut. Life Ins. Co.* v. *Fort*, 82 Ky. 269; *Girard Life Ins. &c. Co.* v. *Mutual Life Ins. Co.* 97 Pa. St. 15; *St. Louis Mut. Life Ins. Co.* v. *Grigsby*, 73 Ky. 310; *Eddy* v. *Phœnix Ins. Co.* 65 N. H. 27; *Home Life Ins. Co.* v. *Pierce*, 75 Ill. 426; *Mutual Life Ins. Co.* v. *French*, 30 Ohio St. 240; *Froelich* v. *Insurance Co.* 47 Mo. 407.

4. A more righteous application of these principles than to the case at bar would be difficult to conceive. For more than twenty years the uniform practice of the company under the policy had been to apply the dividends to the loan. The only statement of her account ever rendered showed that they had been so applied. If the giving of the note abrogated the provision of the policy requiring this to be done, then it left the parties without any contract upon the subject. How could Mrs. Caldwell know what had been the custom of the company except as to her own policy? The company does not bring home to her any knowledge of what its custom was. Only one dividend was declared after the note was signed and before the sale of the policy. She had no notice that the company would proceed differently under the policy from what it had done for all those years with reference to dividends. She would be justified in concluding that the company would do as it had done before—credit the loans with the dividends. She had no knowledge of what the dividend was. Without consulting her as to her wishes about her own money in its hands, the company, assuming to act for her, proceeds to make a contract with itself for increasing her policy and its own security. Leaving out of view for the moment the $91.91, which the company disputes, on April 12, 1895, the company had in its

hands $18.34 of dividends which belonged to Mrs. Caldwell. True, it claims it had appropriated this to the purchase of additional insurance. But this purchase was made of itself, and the whole matter was in its hands. It was a matter of bookkeeping. When it saw that Mrs. Caldwell "had overlooked the items of premium loans," and understood, as its letter of May 25, 1895, indicates, that she was probably confused as to the amount of interest she ought to pay, what was its duty? Clearly to inform her of the true status of her account; to notify her that she had $18.34 to her credit which might be used, if she so elected, to pay interest on her note. Mrs. Caldwell paid to Yowell & Williams $23, and, it seems, notified the company that she had paid the interest, thus indicating that she thought that the interest would be $23. The company realized that she seemed to be in error and confusion about the matter. Under the circumstances, a notice to her of the amount of the declared dividends was imperatively demanded.

The clause of the contract providing for sale of the policy in case of non-performance of the stipulation for the payment of interest, making the whole debt due, etc., if not a forfeiture in the strict technical sense, certainly has that similitude, and should be treated accordingly. Pom. Eq. Jur. § 437; *Chicago & V. R. Co.* v. *Fosdick*, 106 U. S. 47; *Noyes* v. *Clark*, 7 Paige, 179; *Wilcox* v. *Allen*, 36 Mich. 160–169, A court of equity will relieve against the effect of such provision where the default of the debtor is the result of accident or mistake, and *a fortiori* when it is procured by the fraud or other inequitable or improper conduct of the creditor. 1 Pom. Eq. 439; 2 Jones on Mortgages, § 1185. No fraud is charged or proved. But the facts do show that the sale of the policy was compassed by a mistake of the appellant, and by conduct which was improper and inequitable, for which the sale should be set aside. We conclude, therefore, that there was no breach of the contract for failure to pay interest for the years 1895 and 1896. Hence there could have been no forfeiture for either of those years, and no tender was necessary.

Other interesting questions are elaborately presented in the excellent briefs of counsel. But we pretermit a discussion of

them, as it becomes unnecessary, in the view we have taken. The court made an allowance of $65.78 of dividends up to February 5, 1897. We have only taken into consideration the declared dividend July 7, 1894, and in rendering the decree for the amount due under the policy the dividends which should have been declared July 7, 1895 and 1896, should also be considered. The dividend estimated for 1895 was $18.72, and, considering that it would be the same for 1896, the total amount of these dividends would be $55.78 or a difference of $10. But this difference would be a little more than offset in the interest of $91.91 for one year which the company received the benefit of, and in the small balance that would have remained to her credit after the payment of the installments of interest which had accrued before the death of the assured.

The decree upon the whole is therefore correct, and is in all things affirmed.

BATTLE, J., dissenting

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s79 286

ARKADELPHIA LUMBER COMPANY *v.* ASMAN.

Opinion delivered November 17, 1900.

CONTRACT OF EMPLOYMENT—TERMINATION.—A contract of employment for a certain salary per month, but not for any definite time, may be terminated at will by either party. (Page 528.)

Appeal from Clark Circuit Court.

JOEL D. CONWAY, Judge.

J. H. Crawford, for appellant.

The evidence fails to support the verdict, because it fails to show any mutuality of understanding. 17 Ark. 78; 1 Ark. 415. An indefinite hiring is a hiring at will. 56 Pac. 652; 11 Atl. 176, S. C. 76 Md. 554; 42 N. E. 416, S. C. 148 N. Y. 117; Wood, Mast. and Serv. § 136; 36 Atl. 714, S. C. 19

R. I. 697; 35 Ark. 156; 22 Pac. 1126, S. C. 81 Cal. 596; 48 N. E. 597, S. C. 18 Ind. App. 474.

Dougald McMillan, for appellee.

The evidence sustained the verdict. Appellant's failure to introduce its president, who knew all about the actual contract, was to be construed against it. 48 Ark. 497; 33 Ark. 91; 56 Ark. 384. The general course of dealing between parties is competent in proof of their contract. Beach, Cont. §§ 14, 34. The court will not disturb the finding of the jury on disputed questions of fact. 19 Ark. 674; 20 N. W. 878; 49 Ark. 122.

BUNN, C. J. This is a suit for balance of salary claimed to be due, amounting to the sum of $400 and interest. Judgment for plaintiff, and defendant appealed.

The evidence shows that one F. R. Pierce was vice-president of the Arkadelphia Lumber Company up to the first Monday in February, 1897, when he was succeeded by the plaintiff, H. R. Asman. While vice-president, Pierce was agent to sell the product of the mill. He received for his services $2400 per annum. It seems that Asman took the place of Pierce, nothing being said further as to pay or how long the employment should continue. Asman worked for the company one year, and was paid for his services at the rate of $2400 per annum, or $200 per month. He continued in his second year without anything being said further, and, we infer, continued to be paid monthly at the same rate until in September, 1898, his resignation was demanded on the ground that his services were no longer needed. He did not directly respond to this demand, but sent a blank to the president and principal officer of the company, who had given him the appointment in the first instance, for him, the president, to fill out and return to him, which was done; but Asman declined to sign the form of resignation himself. This correspondence resulted in Asman's absolute refusal to resign, explaining in the meantime his attitude in the matter, so as to relieve himself of the charge of having conceded the right of the defendant company to discharge him. He seems to have been paid up to December, and sued for two months' salary.

The general rule on this subject is that when one is employed to be paid so much per month, the employment is merely at will, or as long as the employee shall work, the stated amount being merely indicative of the rate at which the employee is to be paid for the time he may work. *Wright* v. *Morris*, 15 Ark. 444; *Haney* v. *Caldwell*, 35 *ib.* 156; *Martin* v. *N. Y. Life Ins. Co.*, 148 N. Y. 117, 42 N. E. Rep. 416.

But it is argued, in effect, that the extraneous circumstances in evidence take this case of the general rule, and one of these circumstances is that the employment as agent to sell the product of the mill was, in some way, so intimately connected with the office of vice-president that the time for which this employment ran was the same as the tenure of office of vice-president, which is conceded to be one year. Indeed, this, as a question, was submitted to the jury by the court in the sixth instruction, which reads as follows, viz.: "If you believe that there was no compensation attached to the office of vice-president, he can recover nothing on that score. But if you believe the election of vice-president placed him in a position to manage and conduct the business, and for that he was to receive a salary while vice-president, you may take that into consideration in determining whether that was a matter which fixed the period of his contract. That is to say, if he was employed as vice-president, for which he received no emolument, but by reason of his vice-presidency he was assigned to another position, for which he was to receive $2400 per annum, you can take that fact into consideration in determining whether it was understood between the parties that he was to receive $2400 a year, or $200 per month." That instruction would have been allowable, had there been any evidence to support it. It is true, Asman, while vice-president, was appointed to perform this outside duty, which had no relation to the duties of the vice-presidency, so far as the record shows, and which, in effect, is conceded to be the fact. The vice-president, moreover, was elected by the stockholders at an authorized meeting; whereas we gather that the plaintiff was appointed to sell the products of the mill by the president of the company, who apparently had the general management of the

affairs of the company, and could make this appointment. No rule or by-law is shown by which this agent appointed by the president was to exercise the duties of his agency during the time he should hold the vice-presidential office; or that the agency was a necessary adjunct to the vice-presidential office. In other words, there is nothing shown that Asman was vice-president and *ex-officio* agent to sell the products of the mill. All that is shown is that Pierce, the predecessor of appellee, was the vice-president of the company, and at the same time he was the traveling salesman of the company, and had free transportation from the company to travel in performing the duties of salesman; and that the president and general manager gave Asman Pierce's place as such agent, the company having given him a small amount of stock and elected him vice-president.

The instruction therefore was not supported by the evidence, and was misleading, and therefore erroneous.

For this error, the judgment is reversed, and cause remanded for further proceedings not inconsistently herewith.

We express no further opinion as to the evidence, as the case goes back for re-trial.

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68 529
85 362

FRANCE v. STATE.

Opinion delivered December 22, 1900.

LARCENY—FLIGHT AS EVIDENCE OF GUILT.—The flight of an accused person to avoid arrest is evidence of his guilt, but, standing alone, is insufficient to sustain a conviction. (Page 532.)

Appeal from Crawford Circuit Court.

JEPHTHA H. EVANS, Judge.

STATEMENT BY THE COURT.

The appellant, L. France, was jointly indicted with Charles Clem and Boley Kuykendall for the crime of grand

larceny. The indictment charged that they stole 250 pounds of meat belonging to one Oliver. France and the two other defendants lived a short distance from Van Buren, while Oliver lived about eleven miles north of that place. The meat was stolen from Oliver's smoke-house on the night of April 9, 1900. Late in the afternoon of that day these three young men were seen going along a public road which ran in the direction of Cedar creek and along towards Oliver's house. Oliver lived beyond the creek about a mile and a half, and the men were not seen beyond the creek. About a mile or mile and a half before they came to the creek, they passed by the dwelling of Will Prewitt. Prewitt had at his place two gray horses which were owned by one Wiyzer, a brother-in-law of Prewitt, who lived near Van Buren. Prewitt had kept the horses several months, and, although they were often turned out at night, they had shown no disposition to return to the home of their owner at Van Buren. On the morning after the meat was stolen, these horses were gone from Prewitt's place, and on that same morning were found near Van Buren, not far from the home of their owner, and not far from the homes of the defendants. There was grease on the mane and shoulders of the horses.

The defendant, France, and several other witnesses, several of whom were put on the stand by the state, testified that these three men, France, Clem and Kuykendall, had gone that afternoon to Cedar creek, intending to fish and spend the night on the creek. After they got to the creek the clouds threatened rain, and on this account they say that they returned early in the night, reaching home about nine o'clock. They say that they did not go nearer to Oliver's place than the creek, which was a mile and a half away, and no witness saw them nearer. Search was made for the meat, but it was never found, and the only indication or trace of it discovered was the grease on the shoulders of the two horses of Wiyzer.

A day or two after the meat was stolen, these three went to the Indian Territory, which adjoined the county where they lived, and was only a few miles away. They remained there a day and two nights, and then came back home. When

officers attempted to arrest them, they ran, and stayed out one or two nights, and it was several days before they were arrested. Their excuse for endeavoring to evade the officers was that they had learned that warrants were issued for their arrest, and, not being able to make bond, they ran to avoid being put in jail, but intended to surrender soon.

Upon trial France was convicted and sentenced to imprisonment for one year in the penitentiary, and from this judgment he appealed.

Chew & Fitzhugh, for appellant.

Jeff Davis, attorney general and *Chas. Jacobson*, for appellee.

RIDDICK, J. (after stating the facts.) The main contention on this appeal is that the evidence is not sufficient to sustain the verdict. It is the theory of the prosecution that the accused men stole Oliver's meat, and used the two horses of Wiyzer to bring it down to Van Buren, or near there. The meat was undoubtedly stolen, and we believe that the thieves used the horses of Wiyzer to carry it away, but who those thieves were the evidence does not show. Leaving out the fact that France and the two other suspected men endeavored to evade arrest, there is nothing in the evidence to connect them with the crime charged. The evidence shows that, late in the afternoon before the meat was stolen, they were seen going along a public highway leading towards the place from which the meat was stolen. But they explained this by saying that they were going to Cedar creek to spend the night fishing. The testimony was not contradicted, but was corroborated by several witnesses who testified for the state. These witnesses, though introduced by the state, were relations and friends of defendant, and the jury may not have believed them. But if we disregard the testimony favorable to defendants, we have only the fact that they were seen on a public road a mile and a half from Oliver's on the afternoon or evening before the meat was stolen at night.

The fact that one passes in the afternoon along a public highway by a house where a larceny is committed at night is,

of itself, no evidence that he committed the larceny. But it is said that the circumstance of the horses being found near Van Buren with grease on their shoulders tends to show that the meat was carried to that neighborhood, and that the accused men lived near Van Buren, and by their own confession had been in a mile and a half of Oliver's, and returned to Van Buren on the night the meat was stolen. Assuming that the grease upon the horses came from the meat, the fact that these horses were found near Van Buren, and near the home of their owner, shortly after the theft may be some evidence, though not very strong, that the meat was carried in that direction; for it may have been carried to another neighborhood, and the horses, upon being released, may have, of their own volition, returned to their former home. But if the meat was carried towards Van Buren, this is hardly sufficient to raise a suspicion against the defendants more than against many others, and is really no evidence that they were connected with the crime. Van Buren is a populous town, and numbers of people lived in the neighborhood where the meat was stolen. People were continually going back and forth between the two neighborhoods, but this does not show that any particular one of them took the meat. The circumstances tend to show that the meat was carried down the road after midnight of the night it was stolen, but the defendants and several witnesses for the state say that, although defendants were on Cedar creek about a mile and a half from Oliver's place the day before the larceny, yet they returned home early in the night, about eight or nine o'clock. There is nothing to contradict this testimony, and nothing to connect the defendants with the crime except the fact that they afterwards endeavored to evade arrest. This circumstance, taken in connection with the fact that these parties were in the neighborhood of the crime shortly before the larceny was committed, does raise a suspicion that they were connected with the crime. But is this sufficient to sustain the verdict? "When a suspected person attempts to escape or evade a threatened prosecution," says Wharton, "it may be argued that he does so from a consciousness of guilt; and though this inference is by no means strong enough by itself to warrant a

conviction, yet it may become one of a series of circumstances from which guilt may be inferred." Wharton, Crim. Ev. § 750. The court of appeals of New York, speaking of this question, said: "The evidence that the defendant made an effort to keep out of the way of the sheriff was very slight, if any, evidence of guilt. There are so many reasons for such conduct consistent with innocence that it scarcely comes up to the standard of evidence tending to establish guilt, but this and similar evidence has been allowed upon the theory that the jury will give it such weight as it deserves depending upon surrounding circumstances." *Ryan* v. *People*, 79 N. Y. 601. This language was quoted with approval by the supreme court of the United States in a recent case where the court reversed the judgment of the district judge, saying of the charge to the jury that "it lays too much stress upon the fact of flight, and allows the jury to infer that this fact alone is sufficient to create a presumption of guilt." *Alberty* v. *United States*, 162 U. S. 511.

There may be cases where the flight of a person to avoid arrest for a crime tends very strongly to show guilt or connection with the crime, and the weight to be given such circumstance is for the jury to determine. But their decision is subject to review by the court on a motion for new trial. Now, the evidence in this case shows, we think, that this defendant and those charged with him did not intend permanently to avoid arrest. They stated that they endeavored to avoid arrest at the time, for the reason that they could not give a bond, and did not wish to lie in jail until they could have a trial, but intended to surrender soon. The fact that they continued to remain in the neighborhood of their homes until arrested, although they could easily have left the state, seems to support this statement. Although this endeavor to avoid arrest was a circumstance against defendant calculated to arouse a suspicion that he was guilty, yet, taken in connection with the explanation given for it, we think it hardly sufficient to justify the conviction, when standing alone without other circumstance to connect defendant with the crime.

The defendant may be guilty. A jury of his county have found that he is, and the circumstances are suspicious. But a

consideration of the evidence has convinced a majority of the judges that it is too slight to support the verdict, and that it would be safer to submit the facts to another jury. We are therefore of the opinion that a new trial should have been granted. Judgment reversed, and cause remanded for a new trial.

DUNAVANT v. FIELDS.

68 534
185 421

Opinion delivered January 5, 1901.

1. ACCOUNT STATED—IMPEACHMENT.—An account rendered, if not objected to within a reasonable time, becomes an account stated, and cannot afterwards be impeached by either party, save for fraud or mistake. (Page 540.)

2. SAME—RATIFICATION BY MINOR.—An account rendered to a minor becomes an account stated upon her subsequent ratification of it after becoming of age. (Page 540.)

3. TENANCY IN COMMON—REIMBURSEMENT FOR IMPROVEMENTS.—For improvements placed upon land by a tenant thereof in common, or by others holding under him, he will be indemnified in a suit in equity to partition the land, at least where his co-tenants are *sui juris*, either by having that portion of the land which contains the improvements allotted to him, or by compensation if the improvements are thrown into the common mass. (Page 541.)

4. TRUSTEE—REIMBURSEMENT FOR IMPROVEMENTS.—A tenant in common, who is trustee for his co-tenants, will be entitled to an allowance for money expended, but not for his personal services, in improving the land held in common, in the absence of a contract authorizing him to make such improvements. (Page 543.)

5. TENANCY IN COMMON—LIEN.—A tenant in common is not entitled to a lien on the interest of his co-tenant for his share of the proceeds of land and timber sold and rents collected by such co-tenant. (Page 543.)

Appeal from Mississippi Chancery Court.

EDWARD D. ROBERTSON, Chancellor.

James P. Clarke and *Henry M. Armistead*, for appellant.

Mutuality is necessary to an account stated. 1 Wait, Act. & Def. 191; 38 Neb. 161; Beach, Cont. § 425; 63 N. Y.

631. The rendering of an account stated does not estop the creditor from correcting errors or omissions. 1 Wait, Act. & Def. 192; Whart. Cont. § 778. In an equitable partition, a tenant in common who has placed improvements upon land will be compensated or be allotted such portions of the land as will carry to him the improvements. 21 Ark. 539. A tenant in common is liable for only those rents actually received by him. 2 Am. & Eng. Enc. Law, 1098; 138 Mass. 584. Nor is he chargeable for rents and profits of an exclusive possession. 48 Ark. 135; 56 Ark. 624. On death of a legatee before the testator, the legacy lapses. 2 Woerner, Administration, § 434; 13 Am. & Eng. Enc. Law, 28; 18 Pick. 141; 15 R. I. 138; 5 Allen, 249; 1 Jarm. Wills, 293. It was error to decree the lien for the excess of rents. 52 Ark. 485; 56 Ark. 627.

Henry Burnett and *Rose & Coleman*, for appellees.

An account stated can be impeached for fraud or mistake. 41 Ark. 507; 21 Ark. 420; 16 Ark. 202; 13 Ark. 616; 12 S. W. 781; 107 U. S. 325; 45 Mich. 141; 28 Ark. 447. The mistake must be "some unintentional act, omission or error, arising from unconsciousness, ignorance, forgetfulness, imposition or misplaced confidence." Kerr, Fraud & Mist. 396. An account stated cannot be impeached by matters known to a party at the time of settlement. 26 Ill. App. 564; 93 Ga. 515; 80 Mo. 65; 71 Fed. 58; 64 Ark. 52. Nor on account of mistake due to negligence of the complaining party. 25 N. J. Eq. 48; Id. 66; 38 Minn. 454; 26 N. J. Eq. 434; 12 Cl. & F. 286. Or where he has been guilty of negligence in detecting the error. 2 Barb. 595; 54 Ala. 654. The evidence of mistake must be clear and convincing. 15 Ark. 277; 12 S. W. 781. Appellant's fiduciary relationship to appellees forbids his making any profit from their estate. 5 Johns. Ch. 388; 1 Story, Eq. 330; Bisph. Eq. § 92; 40 Ark. 393; 41 Ark. 104; 54 Ark. 635; 61 Ark. 575; Schouler, Dom. Rel. § 326; 49 Ark. 245; 2 Johns. Ch. 388; 114 U. S. 259; 150 U. S. 578; 159 Pa. St. 277; 92 Va. 144. Though the rule was different at common law, under Sand. & H. Dig., § 5917, a joint tenant in exclusive possession is answerable for rents and profits. 61 Ark. 547; *id.* 26; 56 Ark. 593. Appellant, having failed to

claim curtesy in the lower court, can not do so on appeal. 19 Mo. App. 287; 57 Mo. App. 400; 39 N. J. Eq. 303; 57 Ark. 638; 96 U. S. 267; 46 Ark. 103; 55 Ark. 217; 56 Ark. 263; *id.* 444.

BUNN, C. J. This is a bill in equity to partition the lands mentioned and described therein, between the plaintiff, Henry C. Dunavant, and the defendants, Georgia L. Fields, *nee* Lanier, and Julia Pelham, *nee* Dunavant, and to state an account between them, involving rents and profits, on the one hand, and expenses of improvements, taxes, etc., on the other. The lands were partitioned, and a decree entered by the Hon. E. D. Robertson, chancellor of the fifth chancery district, in favor of the defendant Georgia L. Fields, and against the plaintiff, for the sum of $454.54 and in favor of defendant Julia Pelham, and against the plaintiff, for the sum of $2,835.37.

This litigation grew out of the following state of facts, to-wit: Hattie C. Dunavant, the wife of the plaintiff, and mother of Georgia L. by her first husband, and of Julia by the plaintiff, on 7th of March, 1878, made her last will and testament, and departed this life in 1879, and her will was duly and in due time admitted to probate. The testatrix, by her said will, devised all her property of which she might die seized and possessed, consisting of the lands described in the complaint herein and 640 acres of other lands, equally between plaintiff and defendant Georgia L. Lanier, and a son, Harry Dunavant, and it was provided also that after-born children should come in and take equal shares with those named. Harry C. Dunavant died, unmarried, without issue and intestate, and his share went to the other devisees. Julia Dunavant was born after the making of the will. The plaintiff, Georgia L., and Julia became thus the sole devisees. The lands were to be partitioned when the defendants should reach their majorities, and until then the plaintiff was to have the sole management and control of the property devised. When the younger of the two children, Julia, had reached her majority, being unable to effect a partition otherwise, the plaintiff filed this bill for that purpose, asking to be reimbursed for the value of the improvements he had made on the lands described in the bill, and for

the expenditures he had made for taxes, and so forth, and for his costs, in excess of rents and profits he had received from the property, to the amount of six thousand dollars, two-thirds of which he claimed the defendants owed him, and that said two-thirds of that amount be paid by them, or that additional property to that extent be allotted to him in the partition.

Warning orders were duly issued for the defendants, who were both non-residents of the state at the time, and an attorney was appointed to defend for them as such, and afterwards, to-wit, on October 1, 1897, the defendants appeared by their solicitors, and filed their joint answer to the bill of the plaintiff, and, among other things, set up that for the ensuing year (1897) plaintiff had rented out the farm on said lands to various tenants (naming them) for the aggregate sum of $1,875, and averred that, if plaintiff should be permitted to collect said rents, they would lose their share of the same, as he had no property out of which the same could be made. Therefore they prayed an injunction against said renters, prohibiting them from paying said rents to plaintiff, and asked that a receiver be appointed to receive and collect the same, all of which was done. The injunction was issued by the county and probate judge of the county in the absence of the chancellor therefrom. In their answer the defendants deny that all the lands of which the testatrix had died seized and possessed were included in the complaint, but that 640 acres had been sold soon after the death of the testatrix, by the plaintiff, for the sum of $3,240, which he had never accounted for. They say also that, while the greater part of the lands were wild and unimproved, yet that there were thirty acres cleared and in good state of cultivation, when the plaintiff took charge of the lands described in the complaint. They deny that they are indebted to the plaintiff in the sum of $4000 ($6000) for costs and expenditures in making improvements on said lands, or in any other sum, but, on the contrary, the plaintiff is indebted to them for lands and timber sold and rents in the aggregate sum of $26,838, naming the several items. Defendants further allege that plaintiff had theretofore mortgaged his share of the

estate to one W. P. Hale for an amount equal to its full value. They pray for general relief.

Thereupon plaintiff filed an amendment to his bill, to the effect that, by the terms of said will, he was vested with the sole management and use of the lands in controversy until his co-devisees, the defendants herein, should become of age, at which time said lands should be divided between them, and that therefore he is not chargeable with nor accountable for any rents and profits (other than for lands and timber sold) arising from said lands, but that he is entitled to the full value of his improvements for taxes and other expenditures, amounting to the sum of $20,000. That he had expended upon defendant, Georgia L. Fields, the sum of $3,200 on acount of her education and maintenance, which he claims is a charge against her separate estate, and should be deducted out of anything he may owe her by way of rents and profits. Wherefore he asks that said will be construed to ascertain whether he is chargeable with the rents and profits; and, if not so, that he be allowed the sum of $3,200 against defendant Georgia L. Fields in adjusting the amounts that are due him under this controversy, and for general relief.

Thereupon defendants filed an amendment to their answer, in which they deny that the will contained the words set out in the amended complaint, and say that, on the contrary, said will did not devise the use of the lands, but only gave the management and control of same to plaintiff during their minorities. They say further that for more than eleven years after the death of the testatrix plaintiff charged himself and credited them each with one-third of the rents and profits, and on the 20th of November, 1889, rendered an account between himself and them, in which he showed defendant Georgia L, Fields to be indebted to him on a balance struck in the sum of $268. They say that plaintiff is estopped from going behind said stated account, and is estopped from adopting any other mode of charging and crediting either of these defendants. They say that, since the rendition of said stated account, plaintiff has collected the sum of $12,000 in rents; that he had already sold land to the amount of $3,200, making in the

aggregate the sum of $15,240, and has not accounted for the same, one-third of which belongs to each of these defendants; that is, each is entitled to the sum of $5,080 from the plaintiff. They deny that plaintiff had power, under the will, to make the improvements for which he makes his claim, and allege that he agreed with the testatrix that he would support and educate the defendants, and she gave him a valuable consideration therefor, to-wit, a residence and lot. They deny that he has paid over to Georgia L. Fields anything except her share of a $1,030 claim against the United States government. They say that plaintiff had no right nor intention to charge for his personal services in managing said property, and deny that he had expended any money in improvements upon the lands, except in horses, well, fencing, etc.

The clerk of the trial court was appointed special master to take and state an account between the parties upon the evidence in the case, which was done, and to the master's report both parties excepted; the defendants taking exception to most of the items in it. The commissioners to partition the lands made their report, and this was excepted to by defendants on various grounds, and the receiver to collect the rents for 1897 also made his report, and this was not the subject of exceptions on the part of either, and was treated as correct.

The chancellor held, in construing the will, that plaintiff was not entitled, by its terms, to the use of the lands during the minority of the defendants, but only to their management and control, and therefore chargeable with rents and profits. He also held that the account or statement made on the 20th of November, 1889, should be treated as a stated account, and he therefore sustained the exceptions to the master's report as to all matters arising before that date, except such as were admitted to be true and correct, and should have been included therein, and that said stated account showed the state of account between the parties up to that date by which all parties are bound, and accordingly found and decreed that plaintiff was indebted to defendant Georgia L. Fields in the sum of $454.54, and to defendant Julia Pelham in the sum of $2,835.37, and judgment was rendered therefor, and execution awarded as at

law, and said judgments were declared to be liens on the plaintiff's share and interest in said property. The chancellor also overruled the objections to the report of the commissioners to partition the lands, and confirmed the same.

There is apparently no discrepancy between the finding of fact by the master and the chancellor. The chancellor held that one or more items arising before the stated account, and not included therein, were improperly considered by the master as reopening the stated account. He also held that no interest pro and con should be taken into account in such a settlement as this, whereas the master had included interest pro and con in his statement of the account between the parties. There was evidence to sustain the chancellor in his finding, as there was also to sustain the master's report. In fact, the difference between the two was not one of fact, but one of law; that is, as to what was and was not allowable as credits to plaintiff. The chancellor was correct in his construction of the will, for by its terms neither the word "use" nor any equivalent is employed therein, and the plaintiff was chargeable with the rents and profits.

Whether or not the statement furnished Georgia L. Fields in 1889 should be treated as a stated account binding all the parties presents another question of law. "Where parties have had mutual dealings, and one renders to the other a statement purporting to set forth all the items of indebtedness on the one side and of credit on the other, the account so rendered, if not objected to in a reasonable time, becomes an account stated, and cannot afterwards be impeached except for fraud or mistake." *Lawrence* v. *Ellsworth*, 41 Ark. 502. This definition of a stated account is taken from *Oil Co.* v. *Van Etten*, 107 U. S. 325. The same doctrine is held in *Weed* v. *Dyer*, 53 Ark. 155, and in fact is universally so held, so far as our researches go. Under that rule the account rendered by the plaintiff to defendant Georgia L. Fields has all the essential elements of an account stated, and, unless there is something else to affect its character as such, it must be so treated.

It is not precisely stated anywhere in the record, but we infer that the defendant Georgia L. Fields at the time of the

rendition of this stated account to her was of age, and her failure to make objection to it estops her from objecting to it now, except on the ground of fraud or mistake; and by the same rule the plaintiff is also bound by it; and we may well conclude that the charge for proceeds of land sale, not found in the stated account, but which plaintiff concedes to be a proper charge against him, was left out by inadvertence or mistake.

But the stated account was not rendered to the defendant, Julia Pelham, for at the time she was a minor, and could not be bound by any implied assent to the correctness of it. But she was of age when this suit was instituted, and when she answered jointly with her co-defendant. If, in said answer, she in effect relied upon the statement as an account stated, and conceded it to be a settlement of all matters between the parties up to that time,—in other words, if, after becoming of age, she ratified the same as a settlement of all matters, subject to correction for fraud or mistake only,—then it is but fair to conclude she is also bound by said stated account in so far as the same effects her. Prior to the 20th of November, 1889, her individual account was little or nothing, and she is only interested in matters arising upon the care, improvement and renting of the farm and the sale of lands and timber up to that time. In our view of the subject, it matters little whether or not the items accruing prior to the making of the stated account, but which were not included in it, should not be left out under the rule stated, for the only remaining ones left in this situation were the items for clearing, fencing and putting the 450 acres of the land in a good state of cultivation at the rate of $30 per acre; and this is not, and could not be, a proper charge against the defendant, for another and distinct reason—that is, because it is, in effect, a charge for the personal services of one sustaining a fiduciary relation not provided for by law against minors who are incapable of making contracts to that effect.

In his relation as tenant in common one has a right to make improvements on the land without the consent of his co-tenants, and, although he has no lien in such case upon the

land for the value of the improvements, yet he will be indemnified for them, whether made by himself or those holding under him, in a proceeding in equity to partition the lands between himself and co-tenants in common, either by having the part upon which are the improvements allotted to him, or by compensation, if thrown into the common mass. The reason of the rule is that the common estate is permanently benefited and enhanced in value, and all should contribute to it. *Drennen* v. *Walker*, 21 Ark. 539. That is the rule where the tenants in common are *sui juris*, and it is doubtless more liberal towards the claimant for improvements, since the others interested in such case are the better able to guard against abuses in this direction than minors are.

In *Clements* v. *Cates*, 49 Ark. 242, this court said: "The law forbids a trustee, and all other persons occupying a fiduciary or *quasi* fiduciary position, from taking any personal advantage touching the thing or subject as to which such fiduciary position exists; or, as expressed by another, 'wherever one person is placed in such relation to another, by the act or consent of that other, or the act of a third person, or of the law, that he becomes interested for him or interested with him in any subject of property or business, he is prohibited from acquiring rights in the subject antagonistic to the person with whose interest he has become associated.' * * * This rule applies to tenants in common by descent with the same force and reason as it does to persons standing in a direct fiduciary relation to others." There is no perceptible difference, in this regard, between the case of tenants in common by descent, and that of tenants in common by devise. Moreover, the plaintiff in this case occupied not only a fiduciary position as tenant in common, but by direct appointment of the testatrix, the common source of title. In *Trimble* v. *James*, 40 Ark. 393, this court said: "It is an inflexible rule that all profits made by a trustee must enure to the benefit of the *cestui que trust;* and if an administrator or his attorney buy up claims against the estate at a discount, the profit enures to the heir, although the purchase be made by borrowing money at ruinous rates of interest and the sale of his own property,

and the estate be thereby saved from insolvency." Such is the strictness of the rule.

In the case at bar, the plaintiff was allowed for his outlay of money in making improvements, but he was not allowed for his personal services, which he insists should be paid him. This charge for services consists in an item as follows: Thirty dollars per acre for clearing and putting in a good state of cultivation the 450 acres included in said farm—that is to say, a mere estimated amount. He could not thus speculate upon the estate, or take an advantage of the kind to himself in relation thereto. *Imboden* v. *Hunter*, 23 Ark. 622. The law would not permit him to go further than to seek reimbursement for money actually paid out on the improvements, in the absence of a contract authorizing him to make them. This item for personal services the chancellor disallowed, for the reason, apparently, that they were not included in the stated account. They were not allowable for the other reason just stated.

The item of $3,240 for land and timber sold, we infer, was left out of the stated account by oversight. At all events, it was finally admitted by the plaintiff to be a correct charge against him.

The master charged interest pro and con on all items of credit and debit, which the chancellor declined to do, holding that the circumstances showed this to be a case in which interest would not be allowed for or against either party. These constitute the substantial differences between the findings of the master and those of the chancellor. We have seen that the chancellor was correct as to items for personal services; and as to the interest, the error, if it was an error, is not insisted on by the defendants, and is to the benefit, if anything, of the plaintiff.

Therefore, as to the balance struck and the decree therefor, the same is affirmed, as is the decree as to the report of the receiver and the commissioners to partition the lands. Also as to the mortgage of the defendants. But, in so far as the decree seeks to make the balance due from plaintiff to defendants a lien on the plaintiff's interests in the land, the decree is reversed, since there is no lien on lands for rents by

operation of law in this state, and for other reasons there is no lien in favor of the other tenants in common upon the interest of the co-tenant for any sum he may owe them. *Hamby* v. *Wall*, 48 Ark. 135; *Bertrand* v. *Taylor*, 32 Ark. 470; *Brittinum* v. *Jones*, 56 Ark. 624; *McKneely* v. *Terry*, 61 Ark. 527.

The decree is affirmed in all things except as to the lien in favor of the appellees on the interest in the lands of appellant to secure the amounts decreed. It is reversed as to that, and the cause is remanded, with directions to foreclose the mortgage to Hale and the others.

WALKER v. DAVID.

Opinion delivered January 5, 1901.

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1. DEED—CONSTRUCTION.—A deed is not to be held void for uncertainty if by any reasonable construction it can be made available. (Page 546.)

2. SAME—CONDUCT OF PARTIES.—Though a description in a clear and unambiguous deed cannot be set aside by parol proof of the acts of the parties, either before or after the deed, still in a case of doubtful description it is competent to look to the construction placed on the deed by the parties themselves as an aid to its meaning. (Page 546.)

3. SAME—SUFFICIENCY OF DESCRIPTION.—Where the owner of land properly described as the north half of the west half of a certain quarter section, containing 44 acres, sold it and placed his grantee in possession under a deed describing it as the north part of the west half of such quarter section, "containing 44 acres, more or less," the deed will be sufficient to convey the land, at least where the grantor owned no other land in the quarter section described. (Page 546.)

4. SAME—QUANTITY OF LAND.—In a deed conveying a certain number of acres "more or less," the words "more or less" are precautionary, and intended to cover slight or unimportant inaccuracies, but not to weaken or destroy the indications of quantity, when no other guide is furnished. (Page 547.)

5. SAME—OPERATION AS CONTRACT TO CONVEY.—If the grantee in a deed describing the land insufficiently has paid the purchase money and gone into possession, the heirs of the grantor cannot recover the land in ejectment, as the deed, if denied effect as a conveyance, would be good as an executory contract to convey. (Page 548.)

Appeal from St. Francis Circuit Court.

HANCE N. HUTTON, Judge.

STATEMENT BY THE COURT.

John H. David and others brought this action of ejectment against India A. Walker and others to recover a tract of land in St. Francis county containing 44 acres. The plaintiffs claim the land as heirs of Rebecca Cook, who at one time owned the land, and was in possession of it at her death. During her life, and while she held the land, she and her husband, S. W. Cook, made and recorded a written declaration adopting her sister, Clementine D. David, as their heir at law. After the death of his wife, Cook married her sister and adopted heir, Clementine David. Subsequently Cook and his wife, Clementine, sold and conveyed this land to Lymus Walker, and placed him in possession of it. Walker held possession until his death, and the land is now claimed by his widow and children, who are defendants in this action. On the trial there was a finding and judgment in favor of the plaintiffs, from which judgment defendants appealed.

John Gatling, for appellants.

As to title in the husband by adverse possession, see 71 N. W. 593. Appellant's possession has been adverse to all other claimants. 28 S. W. 156; 36 Ark. 356. The description in the deed is sufficient. 40 Ark. 240.

Norton & Prewett and *S. H. Mann*, for appellees.

A husband cannot acquire title adverse to his wife when holding under her. 35 Ark. 84; 47 Ark. 287. The burden of proof is on the one alleging adverse possession. 65 Ark. 422. The description of the land in the deed was too indefinite. 48 Ark. 419. Patent ambiguities cannot be corrected by parol. 41 Ark. 495.

RIDDICK, J., (after stating the facts.) This is an action of ejectment. The plaintiffs claim as the heirs of Rebecca Cook, and also as the heirs of Clementine Cook. The defendants claim under a purchase and deed from Clementine Cook. It is not

disputed that Clementine Cook was the adopted heir of Rebecca Cook, the former owner of the land sued for, and the only question presented by the appeal has reference to the deed executed by Clementine Cook and her husband, S. W. Cook, to Lymus Walker, the ancestor of the defendants. The plaintiffs contend that such deed is void for uncertainty in the description of the land attempted to be conveyed.

The land owned by Mrs. Cook, and which she and her husband sold and undertook to convey to Lymus Walker, was the northwest quarter of the southwest quarter of section 30, township 5 north, range 3 east, containing 44 acres. The deed from Cook and his wife described the land as "the north part of the west half of the southwest quarter of section 30, township 5 north, range 3 east, containing 44 acres, more or less." If the deed, instead of describing the land as the "north part" of the west half of southwest quarter of section 30, had described it as the "north half" of the west half of southwest quarter of section 30, etc., there would have been no controversy about the description, but as written there is room for doubt as to its validity. But a deed is not to be held void for uncertainty if by any reasonable construction it can be made available. *Dorr* v. *School District*, 40 Ark. 237. It is clear that the parties intended that it should have effect, and that intention should be carried out if consistent with a reasonable construction of the language used.

When the description of the land as given in the deed is doubtful, the courts, in their endeavor to arrive at its meaning, should assume the position of the parties. The circumstances of the transaction should be carefully considered, and in the light of these circumstances the words should be read and interpreted. 2 Devlin, Deeds (2 Ed.) § 1012.

The circumstances here are that Cook and his wife owned the north half of the west half of the southwest quarter of section 30, containing 44 acres, and owned no other land in that section. The land was improved and nearly all under fence. They sold it to Lymus Walker, and put him in possession of it, describing it in the deed which they executed and delivered to him as the north part of the southwest quar-

ter of section 30, etc., containing 44 acres, more or less. Now, apart from the circumstances surrounding the conveyance, a description of that kind shows *prima facie* an intention to convey 44 acres off the north part of the west half of the quarter section laid off in the shape of a rectangular parallelogram with the north line of the west half of the quarter section as one of its sides. *Watson* v. *Crutcher*, 56 Ark. 44. The proof shows that a rectangular tract containing 44 acres laid off in that way in the north part of the west half of the quarter section would take exactly the north half of the west half of the quarter section. And the circumstances in proof show that such a construction of the deed coincides with the intention of the parties thereto. Though a description in a deed which is clear and unambiguous cannot be set aside by parol proof of the acts of the parties, either before or after the deed, still in a case of doubtful description it is competent to look to the construction placed on the deed by the parties themselves as an aid to ascertain its meaning. 1 Jones, Real Prop. § 334; *Harris* v. *Oakley*, 130 N. Y. 1.

Taking into consideration the fact that Cook and his wife owned no other land in that section, that they sold the tract in controversy to Walker and put him in possession of it, and thereafter recognized it as his land, there cannot be the slightest doubt as to what land they intended to convey. But it is said that the construction we have placed on this deed cannot be maintained here for the reason that the quantity of land s given in the deed as "forty-four acres, more or less." It is urged that the addition of the words "more or less" makes the number of acres given of no avail in the description, and that the court cannot say what quantity of land was intended to be conveyed. But we are of the opinion that the use of the words "more or less" do not alter the conclusion to be derived from the number of acres given. These, said the court of appeals of New York, are words of precaution, and intended to cover slight or unimportant inaccuracies, but they do not weaken or destroy the indications of quantity, when no other guide is furnished. *Oakes* v. *DeLancey*, 133 N. Y. 231; 1 Jones, Real Prop. § 407.

For these reasons we think the circuit judge erred in holding the deed to be void for uncertainty, and in excluding it from the jury.

But, even if we should concede the contention of counsel that the description of the land in the deed was too vague and indefinite to pass the title, it would not follow that the plaintiffs could recover the land. The heirs of the vendor could not in such a case avoid the consequences of his deed; for, while it might be denied effect as a deed, it would be good as an executory contract to convey. Warvelle, Vendors, §§ 342, 946; *Gilmore* v. *Hamblin*, 37 Ark. 626; *Conrad* v. *Schwamb*, 53 Wis. 372. The case then would be that the vendor, having put the vendee in possession of the premises under a written contract to convey, could not maintain ejectment without showing that the vendee, or those holding under him, were in default in the performance of the contract. But it is not claimed that there was any default on the part of the vendee here. On the contrary, we infer from statements in the briefs of counsel that the purchase money has been paid in full, though the record is silent on that point. It is true that this view of the case does not seem to have been presented by counsel, either here or in the circuit court, but under the admitted facts it constitutes, we think, another reason why plaintiffs should not recover in this action.

For the reasons given the judgment is reversed, and a new trial ordered.

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KANSAS CITY, PITTSBURG & GULF RAILWAY COMPANY *v.* PIRTLE.

Opinion Delivered January 19, 1901.

1. EVIDENCE—PROOF OF SERVICE OF NOTICE.—As the law does not make it the official duty of constables to serve notices to railroad companies to construct and maintain stock guards at enclosures, a written statement by a constable that he served such a notice is not competent to prove such service. *Kansas City, Pittsburg & Gulf Railway Co.* v. *Lowther*, *ante*, p. 238 followed. (Page 550.)

2. RAILROAD—STOCK GUARD—PENALTY.—Under Sand. & H. Dig., § 6239, providing that any railroad company failing to comply with the requirements of the preceding section as to the construction and maintenance of stock guards at an enclosure "shall be liable to the person or persons aggrieved thereby for a penalty of not less than $25 nor more than $200 for each and every offense," it is not necessary that the owner of the enclosure prove that he is actually damaged, though the amount of his recovery depends upon the extent of the wrong he has suffered by the failure to construct the cattle guards. (Page 551.)

Appeal from Polk Circuit Court.

WILL P. FEAZEL, Judge.

Read & McDonough, for appellants.

Notice is a fact, to be proved as all other facts. 16 Am. & Eng. Enc. Law, 857; 35 Mo. 71; 47 Mo. 304; 7 Vt. 152. The notice to the railway company required by § 6238, Sand. & H. Dig., need not be served in any particular manner; and it was error to permit the return of the constable to be offered in evidence. *Cf.* Murfree, Sher. § 866.

BATTLE, J. This action is based upon sections 6238 and 6239 of Sandels & Hill's Digest, which 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 enclosure 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 a civil action in any court having jurisdiction thereof."

Plaintiff, C. F. Pirtle, alleged in his complaint that he was the owner of a certain tract of land; that the defendant, Kansas City, Pittsburg & Gulf Railway Company, in the years

1896 and 1897, constructed their railroad upon and over the same, which was at the time enclosed; that the defendant, when constructing its road, built stock guards at the entrance of said enclosure, which at all times thereafter have been insufficient and unsafe; that he caused written notice to be served upon the defendant, as required by section 6238 of Sandels & Hill's Digest, but the defendant wholly failed and refused to construct safe and suitable stock guards on either side of said enclosure where the railroad enters and keep the same in good repair; and for such failure and negligence he asked for a judgment for a penalty of $200. The defendant answered and denied these allegations.

After hearing the evidence the jury returned a verdict in favor of the plaintiff for $75. Judgment was rendered accordingly; and the defendant appealed.

In the progress of the trial the plaintiff read as evidence a notice in writing in words and figures as follows: "To the Kansas City, Pittsburg & Gulf Railway Company, Greeting: I am the owner of the southwest quarter of the southwest quarter of section 23, township 25, range 31 west, Polk county, Arkansas; that the said railroad company, the Kansas City, Pittsburg & Gulf Railway Company, passes in, through and out of said above-described land, which is enclosed. Therefore you will take notice to construct suitable and safe stock guards at points where your said railroad passes in and out of said lands on either side of said enclosure, and keep the same in good repair. [Signed] C. J. Pirtle." Over the objections of the defendant the following return on the notice was read as evidence: "This came to my hand on October 23, 1897. I duly served within Kansas City, Pittsburg & Gulf Railway Company by handing a true copy of the same to D. J. Cavit, agent of within railroad company, at their station in Mena, Arkansas, on the 23d day of October, 1897. S. H. Smith, Constable." The court erred in permitting it to be read. The law does not make it the official duty of constables to serve such notices; and hence a statement by them in writing, saying how they have served the same, is not competent evidence. *Kansas City, Pittsburg & Gulf Ry. Co.* v. *Lowther*, *ante*, p. 238. As

there was no evidence adduced at the trial tending to show that the defendant received ten days' notice in writing from the plaintiff to construct suitable and safe stock guards, the error committed by the permission to read the return of the constable as evidence was prejudicial to the appellant.

The appellant insists that the word "aggrieved" in the statute allowing the penalty "shows that before any person is entitled to recover he must prove that he is damaged." But we do not so understand it. The statute makes it the duty of any railroad company, which has constructed a railroad through or upon any enclosed lands of another, upon receiving ten days' notice in writing from the owner of the land, to construct suitable and safe stock guards on either side of the enclosure and keep the same in repair. Upon giving the notice the owner is entitled to the guards, and he is aggrieved if the railroad company fails to construct them, and is entitled to the penalty. The amount of the penalty to which he is entitled depends upon the circumstances of each case, the extent of the wrong he has suffered by the failure to construct the stock guards.

Reversed and remanded for a new trial.

DRIVER v. MARTIN.

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Opinion Delivered January 19, 1901.

ADVERSE POSSESSION—WHAT DOES NOT CONSTITUTE.—Prior to the act of March 18, 1899, payment of taxes on wild and unimproved lands, in connection with fitful acts of ownership, such as cutting trees for fuel and rails, did not constitute such adverse possession as would set the statute of limitations in motion. (Page 553.)

Appeal from Mississippi Circuit Court.

FELIX G. TAYLOR, Judge.

G. W. Thomason, *John M. Moore* and *W. B. Smith*, for appellant.

Appellees' ancestor did not hold actual adverse possession of any portion of the lands in controversy continuously during seven years. He could not prove his possession by declarations to that effect or the understanding of the neighbors. 90 Ga. 52. Fitful acts of ownership, in connection with payment of taxes, are not sufficient. 45 Ark. 81; 49 Ark. 266; 48 Ark. 201; 57 Ark. 104–5. Such intermittent "acts of ownership" as merely going on the land to cut timber several times a year are more in the nature of trespasses than of indications of title. 56 Vt. 165. Such acts are insufficient to constitute adverse possession. 101 N. Y. 67; 71 N. Y. 380; 28 W. V. 54; 78 N. C. 356; 2 N. & McC. 535; 4 Jones, Law, 25; 32 Wis. 478; 82 N. C. 483; 49 Mo. 461; 48 Ark. 312; 49 Ark. 274.

S. S. Semmes, for appellees.

Adverse possession is a mixed question of law and fact. 1 Am. & Eng. Enc. Law (2 Ed.) 886. Whilst residence, cultivation, inclosure and improvement are the usual decisive accompaniments of adverse possession, it may be established by other open, visible and exclusive acts of ownership. 1 Am. & Eng. Enc. Law (2 Ed.) 823; 3 Washb. Real Prop. 134; 30 Ark. 655; 40 Ark. 243. The declarations of appellees' ancestor were admissible to show the object of the purchase of the land and the character of the use he proposed to make of it. 1 Am. & Eng Enc. Law (2 Ed.) 891. Adverse possession is not necessarily proved by any specific acts. 1 Am. & Eng. Enc. Law, 823; 3 Washb. Real Prop. 134; 30 Ark. 655; 40 Ark. 243. There was no error in the instructions on this point. Whatever error may have been embodied in the third instruction for appellee was caused by other instructions given. 20 Ark. 8; 23 Ark. 264; 23 Ark. 115.

BATTLE, J. This action was brought by Martha Martin and the other heirs of Dudley Lynch, deceased, against James D. Driver, to recover the possession of a certain tract of land described in their complaint. They allege that Dudley Lynch, under whom they claim, held seven years adverse possession of the land, and thereby acquired title to the same. Upon this possession they base their claim.

The defendant answered, and denied that Lynch acquired title to the land by adverse possession or in any other manner, and alleged that he is vested with the legal title to the same, and is the owner thereof.

The evidence adduced at the trial in this action tended to prove that the land in controversy is wild and unimproved, and is situate one and a half or two miles from the land upon which Lynch resided in his lifetime; that he held color of title to it, and claimed it as his own; and that annually for more than seven years Lynch cut fire wood and made rails of a part of the timber on the lands in controversy, and used the same on his homestead, and paid the taxes on the land sued for. Upon this evidence the plaintiffs, being the heirs of Lynch, recovered judgment for the land. Was the evidence sufficient to support the judgment?

Seven years adverse possession of the land in controversy by the plaintiffs, or those under whom they claim, was necessary to sustain this action. Such possession must have been "actual, open, continuous, hostile, exclusive, and be accompanied by an intent to hold adversely and 'in derogation of' and not in 'conformity with' the rights of the true owner, * * * and must continue for the full period prescribed by the statute of limitations. * * * It must be actual, either of all or part of the land claimed, as the same may be held with color of title or without; because constructive possession follows the title, and there cannot be two possessions of the same land at the same time; and the owner, being in possession by virtue of his title, remains until he is disseized or ousted by another entering and holding for himself. It must be open, in order to give the owner notice of the adverse claim, and to force him to protect his rights, or lose them by a failure to assert them within a period of time allowed him by the statute to do so. It must be continuous, because when it ceases the seizin of the owner revests, and the statute ceases to run; and any subsequent ouster or disseizin forms the beginning of a new period of limitation and of a new adverse possession. It must be hostile, in order to show that it is not held in subordination and subserviency to the title of the

owner. It must be exclusive, because the owner's possession continues until he is disseized, and there can not be two actual possessions of the same premises at the same time; and in case the owner and another are in actual occupation of the same land, the legal possession follows the title. It should be accompanied by the adverse intent, because it is necessary to fix 'the character of the original entry, and determine whether it be an ouster or a mere trespass, or whether the possession be in subordination or in hostility to the true owner.' The possession should be continuous and unbroken during the statutory period so 'as to leave no doubt on the mind of the true owner, not only who the adverse claimant was, but that it was his purpose to keep him out of his land.'" *Ringo* v. *Woodruff*, 43 Ark. 464, 486.

Absence from the land during the period of limitation prescribed by the statute will revest the owner with seizin, and stop the running of the statute, unless the adverse claimant left it under circumstances indicating that he has not left the possession, but still holds it. If he would continue the statute in motion, "he must so leave it that the condition and appearance of the premises themselves show to the world that there is still a person in actual control and exercise of dominion. If he should leave the premises personally, but not in the condition or manner indicated, before the expiration of the time prescribed by the statute of limitations, he acquires no title by adverse possession." *Scott* v. *Mills*, 49 Ark. 266, 274.

The "payment of taxes and the assertion of the exclusive right to lands do not constitute possession or disseize the holder of the true title. A claim of possession, without the fact agreeing therewith, is not to be recognized by law as productive of right. The fitful acts of ownership above detailed, in connection with the payment of taxes and claim of title, were not of such notoriety as to put the owner upon his guard against a continuous disseizin and adverse possession for seven years." *Brown* v. *Bocquin*, 57 Ark. 97, 104. They lack the continuity that is necessary to constitute the seven years' unbroken possession that will bar the recovery of the land by the true owner, and vest the title in the adverse occupant.

They were disconnected trespasses, and vested title in no one.

The act entitled, "An act for the protection of those who pay taxes on land," approved March 19, 1899, (Acts 1899, p. 117,) which provides that unimproved and unenclosed land shall be deemed and held to be in possession of the person who pays the taxes thereon if he have color of title thereto, does not affect the rights of the parties to this action. The taxes referred to in this opinion were paid long before its passage.

Reversed and remanded for a new trial.

WHITTAKER v. WATSON.

Opinion Delivered January 19, 1901.

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1. ELECTION CONTEST—JURISDICTION.—Jurisdiction to hear and determine contests of elections for the office of mayor, not being vested elsewhere, is in the circuit court, under Const. 1874, art. 7, sec. 11. (Page 558.)

2. SAME—JOINDER OF PARTIES.—Under Sand. & H. Dig., § 7366, providing that "whenever a person usurps an office or franchise to which he is not entitled by law, an action by proceedings at law may be instituted against him, either by the state or the party entitled to the office or franchise, to prevent the usurper from exercising the office or franchise," a joint action for the usurpation of an office may by maintained by the state and the party entitled to the office. (Page 558.)

3. VOTER—PAYMENT OF POLL TAX.—Payment of one's poll tax by another not by request but as a gift, in order to influence his vote, without any offer on the voter's part to reimburse the other for such payment, will not constitute him a competent voter, though otherwise qualified. (Page 558.)

Appeal from Jackson Circuit court.

RICHARD H. POWELL, Judge.

Gustave Jones, for appellant.

The state was not a proper party, and the demurrer for misjoinder should have been sustained. 54 Ark. 468. The filing of the bond required by Sand. & H. Dig., §§ 2702–3, was a prerequisite to the issuance of summons. 5 Ark. 457;

6 Ark. 408; 3 Ark. 501; 17 Ark. 286; 30 Ark. 359. The circuit court had no jurisdiction of a contest for a municipal office. *Cf.* Const. Ark., § 24, art. 19; 27 S. W. 123; 33 Col. 581.

M. M. Stuckey, *J. M. Stayton* and *Phillips & Campbell*, for appellees.

The circuit court had jurisdiction. 66 Ark. 201. Contests for municipal offices are not provided for expressly. *Cf.* Sand. & H. Dig., §§ 2693–2719. Hence the remedy is under the "usurpation act" (Sand. & H. Dig., Ch. 153), in lieu of the writs of *scire facias* and *quo warranto*, which would have been the remedy at common law. Const. Ark., art. 7, § 11; Paine, El. § 868; McCrary, El. § 369; 2 Dill, Mun. Corp. § 892; 6 Am. & Eng. Enc. Law, 386; 50 Ark. 266; 84 Am. Dec. 242. The circuit court's jurisdiction is broad enough to include the present case. 50 Ark. 271; 28 Ark. 451. The testimony of the tax collector was competent. 1 Greenleaf, Ev. § 436. There is no error in the court's declarations of law. The court's first declaration of law was correct. McCrary, Elections, §§ 369, 389, 381, 425; 66 Ark. 201. And so was the second. 6 Am. & Eng. Enc. Law, 352; Paine, Elections, § 513; 54 Ark. 409. Poll taxes cannot be paid by a candidate to procure the vote of the one for whom payment is made, so as to enable him to vote. 5 Met. 162. Suffrage is a grant from the state. 62 Am. St. 487; 29 Am. Rep. 591; 97 Am. Dec. 263. Such votes are void. 17 Am. Rep. 485; 36 *id.* 222; 20 *id.* 746; 37 *id.* 417. The burden was on appellant to prove his authority. 2 Dill. Mun. Corp. § 893; 1 Ark. 513; 3 Ark. 570; 27 Ark. 176; McCrary, El. § 459; 50 Ark. 85.

BATTLE, J. This action was instituted by the state of Arkansas and Thomas J. Watson against Franklin Whittaker, in the Jackson circuit court, to contest the election of the defendant to the office of mayor of the city of Newport, and to recover that office for Watson. They alleged in their complaint and the amendments thereof that Watson is a citizen of Newport, and a qualified elector; that at the election held at Newport on the fifth day of April, 1898, there were cast for the office of mayor of said city 507 votes; that Watson, Whit-

taker and Thomas Ward, being candidates for that office, received of said votes as follows: Watson, 216; Whittaker, 218; and Ward, 73; that Whittaker, having received the greatest number of votes, as shown by the returns, received the certificate of election; that Whittaker was not legally elected, because of the votes cast and counted for him forty-four were cast by persons who had not paid their poll tax and were not entitled to vote, eight were cast by persons who were non-residents of the city at the time of the election, and three by persons who had been convicted of larceny; that Watson received of said votes 216, which was the greatest number of legal votes cast for any one for the office of mayor at that election, and was duly elected; and that, notwithstanding this fact, Whittaker has usurped the office, and excluded Watson therefrom. And plaintiffs asked that the election be inquired into, and that the legal votes be counted, and that Watson be declared elected, and that the defendant be ousted from the office, and for other relief.

The defendant answered, and denied that Watson was elected, and alleged that he was, and that Watson had received of the votes cast at the election fourteen which were cast by persons who had not paid their poll tax and were not qualified electors, twenty-eight of which were cast by non-residents of the city, and one cast by a person convicted of a felony.

After hearing the evidence, the court found, in part, as follows:

"1. That there was a regular election duly held in the city of Newport, Jackson county, Arkansas, on Tuesday, the 5th day of April, 1898, for the purpose of electing a mayor and other officers of said city * * * for the ensuing term of two years, and at said election Thomas J. Watson, Franklin Whittaker and T. T. Ward were candidates for mayor, * * * and were the only persons for whom votes were cast for the office of mayor.

"2. That the commissioners of election for Jackson county, on the returns made to them by the judges and clerks of said election, declared that Franklin Whittaker had received 218 votes for the office of mayor of the city of Newport, that T.

J. Watson had received 216 votes, * * * and T. T. Ward had received 73 votes. * * * And that said commissioners issued a certificate of election to said Franklin Whittaker. Whereupon he received a commission as mayor of said city, and thereupon assumed to exercise said office of mayor of said city, and was prior to and at the time of the institution of this proceeding, and is now, exercising said office." And it is further found that Whittaker received at said election for said office 156 legal votes and no more, and Watson 197—41 more than were received by the defendant, and 124 more than Ward; and rendered judgment in favor of Watson for the office; and the defendant appealed.

This action is based upon chapter 153 of Sandels & Hill's Digest, the object of which is to provide a remedy for usurpation of office or franchise. The statutes and laws of this state do not provide for the contests of elections for mayor in any manner except as provided in the chapter named. No other court being vested with the right to hear and determine such contests, the circuit court has jurisdiction to do so; and chapter 153 of Sand. & H. Dig. furnishes a remedy. *Lambert* v. *Gallagher*, 28 Ark. 451; *Payne* v. *Rittman*, 66 Ark. 201; McCrary, Elections (4th Ed.) 369; 2 Dillon, Municipal Corporations (4th Ed.) § 892.

Appellant insists that there was a misjoinder of parties plaintiff, because Sand. & H. Dig., § 7366, provides that "whenever a person usurps an office or franchise to which he is not entitled by law, an action by proceedings at law may be instituted against him, either by the state or the party entitled to the office or franchise, to prevent the usurper from exercising the office or franchise." While it authorizes either party to institute the action, there is nothing in it prohibiting both from doing so. Either being authorized to do so, we see no reason why both cannot join in bringing the action, or how the defendant can be prejudiced by such joinder.

Many persons voted for the appellant for mayor at the election in question who had not paid their poll taxes, or previously requested or subsequently undertaken to reimburse those who had done so. Other persons paid the tax for them,

and delivered to them a receipt of the collector showing that the tax had been paid. Upon exhibiting these receipts to the judges of the election, they were permitted to vote. Appellant contends that they had the right to vote, and their votes should be counted; and appellees insist that they should not be.

The constitution of this state declares that "every male citizen of the United States, or male person who has declared his intention of becoming a citizen of the same, of the age of twenty-one years, who has resided in the state twelve months, in the county six months, and in the precinct or ward one month, next preceding any election at which he may propose to vote, except such persons as may for the commission of some felony be deprived of the right to vote by law passed by the general assembly, and who shall exhibit a poll tax receipt or other evidence that he has paid his poll tax at the time of collecting taxes next preceding such election, shall be allowed to vote at any election in the state of Arkansas," etc. Amdt. No. 2. The object of the requirement of the receipt or other evidence of the payment of the poll tax is to make the payment of the tax by the elector a condition upon which he shall be allowed to vote, and to prohibit him from voting until he does so. We conceive the object and intent of this provision of the constitution to be not only to induce the citizen to whom the right of suffrage is granted to contribute to the support of the common schools, for which the tax is levied, but to exclude from voting the citizen who does not take an interest in the welfare of his country or value his vote sufficiently to pay a poll tax. He, however, need not pay the tax in person, but may in good faith authorize another to pay it for him, or, if another has done so without having been previously authorized, he may adopt or ratify the act, but he must do so with a *bona fide* intent and promise to reimburse him. In this way only can the voter be secured in the free and untrammeled exercise of his right of suffrage. The acceptance of the payment of a poll tax as a gift tends to induce him to so vote as to please the partisan, candidate or other person, who paid the same for him. This is contrary to the spirit of the requirement of the

constitution. *Contested Election of Harry White*, 4 Pa. Dist. Rep. 363, 372, 373; *Humphrey* v. *Kingman*, 5 Met. 162; McCrary on Elections (4th Ed.) §§ 109, 110.

In Pennsylvania the organic law declares: "Every male citizen, if twenty-two years of age or upwards, who shall have paid a state or county tax which shall have been assessed at least two months, and paid at least one month before the election, shall be entitled to vote at all elections." In speaking of this provision, the court, in *Contested Election of Harry White*, *supra*, said: "The plain intent of the law is to secure the purity of the ballot and the freedom of the voter in his right of suffrage. The voter is supposed to have either a defined political faith to which he adheres, or the candidate is possessed of qualifications which the voter admires, and, if permitted to have freedom in his choice, he will cast his ballot either in support of the principles of his political faith, or for the candidate or candidates whose qualifications for office he recognizes as superior. Now, anything, either in payment of taxes for him or in any other way, which will induce the voter to cast his ballot contrary to his will, and his choice unchanged, is but a species of bribery, and cannot be tolerated by the law. It may, by some, be said that there are voters who do not have any political faith or choice as to candidates. In reply to such, we say that if there are voters of this character, and they wish to exercise the right of suffrage, they should be encouraged to make a choice by political committees, partisans and candidates refraining from offering to them any inducement by paying their taxes, or in any other way, to secure their votes." These remarks of the Pennsylvania court are appropriate in this case.

Excluding the votes of those persons who had not paid their poll taxes, as required by the constitution, and all other illegal ballots, and counting only the legal, we think the evidence shows that Watson was elected mayor; and that the judgment of the circuit court should be affirmed; and it is so ordered.

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SAINT LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY *v.* STATE.

Opinion Delivered January 19, 1901.

1. PLEADING—SUFFICIENCY OF INDICTMENT AS COMPLAINT.—Although the statute which provides a penalty for failure of a railroad company to signal at a highway crossing contemplates a recovery by civil action, a pleading in the form of an indictment may be good as a complaint at law if it contains allegations sufficient to disclose a violation of the statute. (Page 564.)

2. PLEADING—ALLEGATION OF VENUE.—A complaint in a penal action against a foreign railway company which alleges that defendant, doing business in the state and complying with the laws relating to foreign corporations, ran a train over a certain highway crossing without making the statutory signals sufficiently states that the offense was committed within the state. (Page 564.)

3. JUDICIAL NOTICE—COUNTY SEATS.—As the courts take judicial notice of the location of county seats, it is unnecessary to allege it in a pleading. (Page 565.)

4. SAME—POLITICAL TOWNSHIPS.—The courts take judicial notice of the division of counties into judicial districts and townships and of the location of a particular township with reference to the two judicial districts of a county. (Page 565.)

5. APPEAL—DEFAULT JUDGMENT—WANT OF NOTICE.—A judgment by default will be reversed on appeal if the transcript fails to set out a summons showing service upon defendant, or to allege that defendant appeared in the action before judgment. (Page 566.)

6. SAME—SUFFICIENCY OF APPEARANCE.—By appearing in the action after judgment by default for the purpose of moving in arrest of judgment, and for a new trial, defendant did not waive the objection that the judgment was rendered without notice. (Page 566.)

Appeal from Sebastian Circuit Court, Greenwood District.

STYLES T. ROWE, Judge.

Oscar L. Miles and *Dodge & Johnson*, for appellant.

The suit contemplated by the statute (Sand. & H. Dig., § 6196) is a civil suit, and a proceeding by indictment was not warranted. 55 Ark. 550; *ib.* 206; 56 Ark. 156, 157. The default judgment rendered on the indictment is voidable by

direct attack. 93 U. S. 283, 284. The indictment did not lay the venue, and hence is fatally defective. 58 Ark. 41; 12 Ark. 399; 34 Ark. 497; 41 Ark. 42; 54 Ark. 546. No service is shown, and hence no default judgment could be rendered.

Jeff Davis, attorney general, and *Charles Jacobson*, for appellee.

The indictment against appellant was sufficient as a complaint in the proceeding authorized by statute. 54 Ark. 546; 58 Ark. 39. The court takes judicial notice of towns, counties and townships. 53 Ark. 48; 29 Ark. 293; 7 Pet. 324.

BATTLE, J. On the 13th of September, 1899, the grand jury of the Sebastian circuit court for the Greenwood district returned into said court an indictment in the words and figures following:

"The grand jury accuses the defendant of failing to ring a bell or sound a whistle at a road crossing in this: On August 18, 1899, defendant being a corporation organized under the laws of Missouri, doing business in the state of Arkansas and complying with her laws providing for the doing of business in this state by foreign corporations, unlawfully did fail to ring a bell and fail to sound a whistle at or near or within 80 rods of the crossing of the railroad belonging to defendant running from Fort Smith to Greenwood, and the Fort Smith and Waldron wagon road, at road district No. 3 in Marion township, at which time and place defendant did run and cause to be run southward over said railway and across said road district a locomotive engine and train of cars, said engine bearing a number which is unknown to the grand jury, but which is believed to be "62," against the peace and dignity of the state of Arkansas."

On the third day of January, 1900, it being the third day of the January term, 1900, of the Sebastian circuit court for the Greenwood district, the state of Arkansas, by its prosecuting attorney, demanded a trial of the St. Louis, Iron Mountain & Southern Railway Company, in said court, under the indictment against it, which was ordered; and, the defendant not

being present in person or by attorney, a plea of not guilty was entered for it, and a jury was impaneled to try the issues thereby joined; and the plaintiff introduced witnesses, who testified substantially as follows:

That the defendant failed to ring a bell and failed to sound a whistle at or near or within 80 rods of a crossing of the railroad belonging to the defendant, running from Fort Smith to Greenwood, and the Fort Smith and Waldron wagon road in district No. 10, in Marion township, at which time and place the defendant did run and cause to be run southward over said railroad and across said road district a locomotive engine and train of cars, said engine being a number unknown to the grand jury, but which is believed to be "62."

The plaintiff introduced also a mortgage executed by the St. Louis, Iron Mountain & Southern Railway Company, which on its face showed that the St. Louis, Iron Mountain & Southern Railway Company was a consolidated corporation, duly organized under the laws of Missouri and Arkansas, and the plaintiff thereupon rested its case.

The court instructed the jury, and they afterwards returned a verdict in favor of the plaintiff against the defendant for two hundred dollars, the penalty allowed by the statute for the failure specified in the indictment, and the court rendered judgment accordingly.

On the 5th day of January, 1900, the defendant filed a motion to arrest the judgment as follows: "Comes the defendant, the St. Louis, Iron Mountain & Southern Railway Company, and moves the court to arrest the judgment in this cause rendered on the 3d day of January, 1900, and for cause says: (1) That there was no sufficient indictment pending against this defendant upon which this defendant could be tried. (2) That the alleged indictment against this defendant did not state facts sufficient to constitute a public offense under the laws of this state. (3) That the facts stated in the alleged indictment do not constitute a public offense within the jurisdiction of the court."

The court overruled this motion; and the defendant thereupon filed a motion for a new trial, which, omitting its caption,

is as follows: "Comes the defendant, the St. Louis, Iron Mountain & Southern Railway Company, and moves the court to set aside the verdict in this cause rendered, and grant it a new trial, and for cause says: (1) The court erred in forcing the defendant to trial in the absence of counsel for the defendant on the first day of the term of this court. (2) The court erred in overruling defendant's motion in arrest of judgment in this cause. (3) The verdict of the jury is contrary to the law. (4) The verdict of the jury is not supported by sufficient evidence. (5) The verdict of the jury is against both the law and the evidence. (6) The court erred in admitting illegal and incompetent evidence against the defendant upon the trial of the cause."

The motion for new trial was filed on the 20th of January, 1900, and was on the same day overruled by the court; and the defendant appealed.

Appellant's first contention is that appellee sought to recover the penalty sued for by an indictment, which could be recovered only in a civil proceeding, and that the court below was therefore without jurisdiction. It is true that the penalty can be recovered only by a civil action. *Railway Company* v. *State*, 55 Ark. 200; *Kansas City, Springfield & Memphis Railroad Company* v. *State*, 63 Ark. 134. The statement of the facts constituting plaintiff's cause of action, though in the form of an indictment, could have been properly treated as a complaint. It contained allegations which were intended to disclose a violation of the statute, and was intended to serve as a demand for the penalty for such violation. "It was prepared and signed by the prosecuting attorney, and its prosecution was subject to his discretion and control as fully as if he had filed an ordinary complaint." "For all practical purposes, the suit was as much a suit by the prosecuting attorney as though it had been begun by formal complaint expressed in the aptest technical phraseology." *Railway Company* v. *State*, 55 Ark. 200.

Appellant insists that the complaint in this action is defective because it does not state that the failure to ring a bell or sound a whistle was within this state or the Greenwood dis-

trict of Sebastian county. We find no defect in this respect. It is alleged in the complaint that "defendant * * * doing business in the state of Arkansas, and complying with her laws providing for the doing of business in this state by foreign corporations, unlawfully did fail to ring a bell, and fail to sound a whistle," etc. The obvious meaning of this allegation is that the failure occurred while the defendant was doing business in this state. At this time it is alleged that the "defendant did run and cause to be run southward, over said railway and across said road district, a locomotive engine and train of cars" Taking these allegations together, we understand the complaint to mean that the defendant, while running a train of cars over a railway in this state, failed to ring a bell or sound a whistle at the time and place mentioned. If this be true, the failure was within this state. The place mentioned was at least eighty rods from the place where the railroad belonging to the appellant and running from Fort Smith to Greenwood crosses the Fort Smith and Waldron wagon road. We take judicial notice of the fact that the places of Fort Smith and Greenwood in this state are towns in Sebastian county , the former being the county seat of the Fort Smith district, and the latter of the Greenwood district, in said county. But the county is divided into these two districts, and each one, for judicial purposes, is constituted a county, and actions for penalties must be brought in the county where the cause, or some part thereof, arose (Sand. & H. Dig., § 5685). Did the cause in this case arise in the Greenwood district, in which this action was brought?

The failure to ring the bell or sound the whistle, it is alleged, was at "road district No. 3, in Marion township." Can we take judicial notice of the fact that Marion township is within the Greenwood district? In *Bittle* v. *Stuart*, 34 Ark. 227, this court held that "the courts take judicial notice of the United States system of land surveys, with the base lines, meridians, townships and ranges thereby established, and the relative positions of the sections in the townships; also of the division of the state into counties, and the boundaries of these counties as described in public acts; and also of the principal

geographical features of the state, including the navigable rivers." In *Wilder* v. *State*, 29 Ark. 293, it was held that the jury could take notice of the fact that Richmond, a small town, was in the county of Little River; and in *Webb* v. *Kelsey*, 66 Ark. 180, it was held that "courts must take judicial notice of who are justices of the peace within their territorial jurisdiction."

The division of counties into townships is made necessary by the constitution of the state, which ordains that the qualified electors of each township in the state shall elect at least two justices of the peace, who shall be commissioned by the governor, and a constable. It is made the duty of these justices of the peace to sit with and assist the county judge in levying the county taxes, and in making appropriation for the expenses of the county. A majority of them is made necessary to constitute a quorum for that purpose. In many ways such townships are important and necessary in the enforcement of the laws of the state. This being true, and courts taking judicial notice of the fact that a small town is in a certain county, of the principal geographical features of the state, and who are justices of the peace within their territorial jurisdiction, it seems that they ought to take notice of the division of counties into townships within their territorial jurisdiction, a matter of as much importance and as well known as many of those of which they do take notice. It follows, then, that the court below should have taken judicial notice of the fact that Marion township in Sebastian county was and is in the Greenwood district; and, being a matter of which judicial notice is taken, it need not have been stated in the complaint. Sand. & H. Dig., § 5751.

It is next contended by appellant that the judgment rendered against it is void because no process was served upon it, and no appearance was entered by it before the rendition of the judgment. While the transcript in this case purports to be a full and complete copy of all the record entries, of the indictment, and of the original papers, and is certified to be such, it contains no copy of a summons or other process. In the judgment it is stated that the defendant came not, and the

court ordered a plea of not guilty to be entered. Nowhere in the transcript is it shown that notice of the pendency of the action was served upon the appellant, or that it appeared in the action before the judgment. This being true, the judgment should be set aside. *Baskins* v. *Wylds*, 39 Ark. 347, 352.

The judgment of the court below is therefore reversed with costs, and the cause is remanded to be proceeded in as if the appellant was duly served with process in this action.

MAMMOTH SPRINGS ROLLER MILL COMPANY *v.* COOK.

Opinion delivered January 5, 1901.

CONTRACT—TERMINATION.—Appellant employed appellee as manager of its mill at a stated salary, and sold him a certain number of shares of its stock, agreeing to repurchase them at the end of twelve months, if his services were not satisfactory. At the end of twelve months appellee continued to act as manager for two months, when a new contract was entered into wherein it was provided that the same salary should be paid to appellee as manager, and that, if dissatisfied with his services, appellant should give thirty days' notice of a termination of the contract. Subsequently upon due notice appellant terminated the contract. *Held*, that the original contract was no longer in force, and that under the second contract appellant was not bound to repurchase appellee's stock. (Page 571.)

Appeal from Fulton Circuit Court in Chancery.

JOHN B. MCCALEB, Judge.

John W. Meeks and *Sam H. Davidson*, for appellant.

The original contract was not such as to bind appellant to purchase appellee's stock at market price when the office of general manager was discontinued. The action of the board on Sept. 8, 1895, put an end to such a contract, if it ever existed. In construing a contract made between a corporation and its officers, whereby a corporate liability is created in favor of the officer, that construction should be adopted which is most favorable to the corporation. 20 S. W. 379. Appellant,

having no charter authority to do so, cannot purchase its own stock. 1 Morawetz, Corp. §§ 7 and 8; Sand. & H. Dig. § 1328; Ang. & A., Corp. 600; Thompson, Liability of Stockholders § 13; 19 Kan. 65. Indeed, such a contract is against public policy and unenforcable, on general principles. 6 Ill. App. 258; Ang. & A., Corp. § 600, p. 640; Morawetz, Corp. § 112, p. 109; 35 Ohio St. 263; 38 Ohio St. 278; 32 S. W. 267; 54 Ark. 567.

Appellee, *pro se.*

Oral evidence was inadmissible to vary the original contract, its meaning being clear. Smith, Cont. 97, 98, 99, §§ 34 and 36; 2 Pars. Cont. 36–40. A contract will be read and construed as a whole, in the light of the circumstances and their relation to the subject-matter. 20 So. 81. The contemporaneous construction of the parties will govern. 71 N. W. 1019. A formal rescission was not necessary. 37 Mich. 576. Nor was any tender of the stock. 26 Mich. 453, 454; 13 R. I. 483.

BUNN, C. J. This was originally a suit at law for the recovery of the sum of $7000 and interest, from the appellant company by the appellee, on a breach of contract alleged to have been entered into between them on the 8th of September, 1894. The cause was transferred to the equity docket, and on final hearing, upon the pleadings, testimony and argument of counsel, on the 31st day of August, 1898, it being a day of the Fulton circuit court, it was decreed that the plaintiff, the said W. D. Cook, do have and recover of the defendant, the Mammoth Springs Roller Mill Company, the sum of $5923.75, with 6 per cent. per annum interest and his costs. From this decree the defendant duly and in due time appealed to this court.

This litigation grows out of the following state of facts, to-wit: The appellant is a corporation, organized and doing business at Mammoth Springs, Fulton county, and at a special meeting of its board of directors, on the 8th day of September, 1894, a proposition was made in writing to said board by the appellee, W. D. Cook, of which the following is a copy, viz.: "To G. C. Buford, President Mammoth Springs Roller Mill Com-

pany: Dear Sir—I make the following proposition: First. I will buy $7000 treasury stock of the Mammoth Springs Roller Mill Company at 75 cents on the dollar. I will take charge of the mill at a fixed salary of $2000 per year, this salary to come out of the first earnings of the mill. After this salary is charged to the mill, then a dividend of six per cent. is to be paid out of the net earnings on the entire issue of capital stock outstanding. If the net earnings are sufficient to pay the dividend—leave a surplus above the dividend—then I am to receive an additional amount of $1500; then the remainder of all net earnings is to be declared on all outstanding stock *pro rata*; the company aiding me with credits and endorsements to furnish the working capital to run the mill. And the company agrees to take the $7000 stock from W. D. Cook at the market price at the expiration of twelve months, provided his services should not be satisfactory to the company. [Signed] W. D. Cook."

The meaning of the proposition is: The proponent would engage to manage the operations of the mill of defendant, and at once purchase from it $7000 of its stock at 75 cents on the dollar, amounting to $5250. He was to receive $2000 per annum as a fixed salary, and this fixed salary was to be paid out of the first earnings of the mill. This $2000 fixed salary was, then, a preferred claim to all others, and to be paid before a balance was struck upon which a dividend might be declared. After this fixed amount of $2000 should be charged to the milling company, then the net earnings should be ascertained, and a dividend of 6 per cent. should be declared thereon, and paid out on all the outstanding stock. If these net earnings should be sufficient to pay the dividend aforesaid—6 per cent on the capital stock outstanding—then out of the same the proponent, as such manager, should be paid for the year an additional $1500. After that the remainder of the net earnings should be divided on all outstanding stock *pro rata*. The company, by its credit and indorsement, should enable him to procure funds for the running expenses of the mill. At the expiration of twelve months, if the services of the proponent should not be satisfactory to the company, the latter should repurchase the $7000 of stock he purchased from it in the outset at the

then market price. This proposition was accepted by the board of directors of the milling company then and there, and both parties at once entered upon the work of carrying it out as a contract between them, the appellee taking charge of the mill as the company's secretary and manager, and drawing his salary from that date according to the terms of the contract, and until 8th September, 1895, amounting to the sum of $3500.

At the regular annual meeting of the board of directors of the milling company held in June, 1895, appellee was elected secretary and manager for the ensuing year, but the amount of salary he was to receive was not then mentioned. On the 8th September, 1895, the first year of the appellee's employment as secretary and manager expired, he having been in June previously, however, elected for a second year as stated. The appellee continued to act as secretary and manager, not only from his second election to the expiration of his first year, but afterwards, that is, from the 8th of September, 1895, to the 21st of November, 1895, and was paid his salary of $2000 per annum monthly at the rate of $166.66 until the latter date. At a special meeting of the board of directors, held on the 21st of November, 1895, the appellee tendered his resignation as secretary and manager, which was accepted, as we infer. Appellee still retained his place as stockholder and director, attending all the meetings of the board of directors except one held in February, 1896. At the same meeting at which appellee's resignation as secretary and manager was tendered and accepted as aforesaid, the board of directors by resolution fixed the salary of appellee at $166.66 per month, to be paid monthly, and it was further provided that in the event the board of directors should become dissatisfied at any time with the services of appellee, each party agreed on a notice of thirty days for terminating the contract. We understand by this that each party might terminate the contract by giving the required notice of thirty days. But appellee seems to contend that the contract could only be terminated by the appellant becoming dissatisfied with his services, and giving him thirty days' notice. That is the very letter of the contract, it is true, but its spirit was doubtless such that either party could terminate it on the same conditions. However that may be, the appellee

accepted and acted upon the new contract, and was paid $166.66 monthly according to the terms thereof until in June following—the time of the regular meeting, when the office of general manager was abolished, and the employment of appellee ended, without any expression of dissatisfaction with his services, except such as may be implied in the desire to avoid the further expense of the office. Due notice of the termination of his employment appears to have been given appellee according to the new contract, before his services were dispensed with, and he then quit the company's employment accordingly. The arrangement or new contract to pay for services, made on November, 21, 1895, appears to have been a new contract, and seems to have been a substitute for the old one in some important particulars.

At the close of the first year, no dissatisfaction with the services of the appellee was expressed or shown in any way. On the contrary, he had just before that time been re-elected to his place for another year, and had entered upon the performance of his duties for the second year. Apparently, his management had been a success. Under this state of things, the contingency had not happened in which the company was bound to repurchase the stock. It was doubtless thought at that time that the stock was no burden to appellee, as the business had prospered, and he was still occupying his same position. In fact, after the lapse of the first year, with everything satisfactory, that part of the contract relating to the repurchase of the stock was *functus officio*, according to its very terms.

The contract did not require the company to repurchase the stock, in case a repurchase should be made, at the same price appellee gave for it—75 cents on the dollar for the $7000, amounting to the sum of $5250. There is no proof that such was the market value of the stock at the institution of this suit. If the cause was maintainable at all, it was for the then market value, and not for a mere refunding of the amount paid originally by appellee for the stock with interest, as was fixed in the decree. But it makes no difference, in our view of the case; the proof is not such as to justify a decree of specific performance in any sense, and the decree of the chancellor is therefore reversed, and the complaint is dismissed for want of equity.

KING v. STATE.

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Opinion delivered February 2, 1901.

MURDER—PREMEDITATION.—Evidence that deceased was killed with an ax, and that defendant confessed that deceased first attacked him, but failed to strike him, and then walked away, with the ax in hand, about sixty feet, when defendant approached him stealthily, seized the ax and slew him, is sufficient proof of premeditation and deliberation to sustain a verdict of guilty of murder in the first degree. (Page 575.)

Appeal from Pulaski Circuit Court.

JOSEPH W. MARTIN, Judge.

C. T. Lindsey and *Austin Nichols*, for appellant.

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

BATTLE, J. John King was indicted by a grand jury of the Pulaski circuit court for murder in the first degree, committed by unlawfully, wilfully, feloniously, with malice aforethought and with deliberation and premeditation, killing and murdering William Davenport with an ax; and he pleaded not guilty, and was tried and convicted of the degree of homicide charged against him, and was sentenced to be hung.

In the trial of the defendant the wife of deceased testified, substantially, as follows: Her husband died on the 6th of February, 1900. The defendant was at her house on that day and the day before. Her husband owed him thirty cents, and paid him twenty-five cents, and still owed him the remainder. The defendant promised to return the day after this, the 6th of February, 1900, and work for her husband. He did so, and on the morning of that day went to the woods carrying an ax furnished him by the deceased to cut wood. About a half hour after this her husband left her house to hunt his mules. About an hour afterwards, in the absence of her husband, the defendant returned with the ax, and inquired where her husband was. She told him, and he asked her to tell her husband that

he would return on tomorrow to work. In ten or fifteen minutes he left, leaving the ax. In a short time afterwards she became uneasy about her husband, and looked for him, and found him within three or four hundred yards of her house, lying in a thicket, dying. Her husband was nearly blind, but could see well enough to find his mules in the wood and identify them. The defendant had worked for him about two weeks before his death. They were apparently friendly. At the time her husband paid him her husband had four dollars, and she thinks that defendant saw them.

John Fountain testified as follows: He knew the deceased. He went with his wife to the place where he was found in a thicket, dying. He found four wounds on him. There was a "split" across the nose; a deep "gash," three or four inches long, on the back of the head, from which his brains ran out; one across his forehead and temple, and one under his right ear; and all appeared to have been made with an ax.

Bob Jones testified: He was a deputy constable. He was at the Klondyke saloon in Argenta, Ark., and had a conversation with the defendant, in which he (the defendant) said he knew the deceased, "and had been out to his house." Witness offered "to treat the defendant with beer, but he dashed off and got away." Did not let him know that he was an officer.

J. H. Nowlin testified: "I am constable of Big Rock township. I remember the time William Davenport was killed. I received a telephone from Bob Jones, one of my deputies, who had located a man answering the description of the one wanted for killing William Davenport. When I got over in Argenta, Ark., Mr. Walpole and I went in search for defendant. I saw him running and jumping fences, and I went near him and ordered him to stop. I drew a six-shooter, and told him to throw up his hands, which he did, and I arrested him. * * * I then asked him what made him kill William Davenport, and he said, if he had not killed Davenport, he would have killed him. I asked defendant how it happened. Defendant said while he was in the woods Davenport came to him, saying he wanted to see the ax. Defendant handed him the ax, which deceased took and struck at him, and that he dodged the blow,

and Davenport started to leave with the ax in his hand, and that he slipped up behind him, and snatched the ax out of his hand, and struck him on the back of the head, and after he fell that he struck him twice more. I asked the defendant how far the deceased (Davenport) had gotten from him with the ax before he (defendant) went after him. Defendant pointed out the distance, which was about sixty or seventy-five feet. * * * This was at the time of his arrest, and before taking him to jail. I offered the defendant no inducement to make the confession or a statement made in jail in presence of Sam Speight. * * * The defendant seemed to be excited, for a large crowd was gathering, and talking of lynching, and I hurried across the river, and put him in jail. This was after the defendant was first arrested, and made his statement."

Sam Speight testified: "I know the defendant and heard him make the confession to Mr. Nowlin, stating he killed William Davenport in the manner told by Mr. Nowlin, after he got to the county jail."

John King, the defendant, testified: "I am fifteen years old. I worked for Mr. Davenport two weeks. On the morning of February 6, 1900, I was at Mr. Davenport's house, and went out to cut wood with an ax, and Mr. Davenport came to where I was working. I asked him for the nickel which he owed me. He then cursed me, and asked me to let him see the ax, if it was sharp. I handed it to him, and the next thing I knew he struck at me with the ax, and I ran out from under it, and dodged around, while he still held the ax on the side of him, and took the ax away from him, and struck him on the back of the head, and he fell, and I struck him twice more. I took the ax back to the house, and went away. I never told Mr. Bob Jones, the gentleman who testified on the stand, anything whatever, and never saw him before. I never told Mr. Nowlin anything about slipping up behind Mr. Davenport and snatching the ax and killing him with it. I did not tell him that I killed him (Mr. Davenport) to keep him from killing me, and that I grabbed the ax while he had it drawn on me. I was born in Arkansas, October, 1885, and was never in trouble before. I never had any malice against Mr. Davenport. I never saw any

money or change. Mr. Davenport gave me groceries for my work, and he owed me five cents. While in jail, the officers took me on the gallows, and put a rope around my neck. I refused to make any statements, so they swung me, and then I said what Mr. Constable Nowlin testified to awhile ago, and that was when Sam Speight, Jailer Nowlin and other officers who were unknown to me [were present]."

Nowlin and Speight testified that the confession about which they testified was made before the defendant was taken to the gallows or the rope was put around his neck; that the gallows and rope were used to elicit information about another matter, but not about the killing of Davenport.

It was proved that Davenport was killed in the county of Pulaski and state of Arkansas.

The defendant contends that this evidence was not sufficient to convict him of murder in the first degree. Is it sufficient?

In *Green* v. *State*, 51 Ark. 192, it is said: "In order to constitute the killing of a human being murder in the first degree, there must be a specific intent to take life formed in the mind of the slayer before the act of killing was done. It is not necessary, however, that the intention be conceived for any particular length of time before the killing. It may be formed and deliberately executed in a very brief space of time. If it was the conception of a moment, but the result of deliberation and premeditation, reason being on its throne, it would be sufficient. The law fixes no time in which it must be formed, but leaves its existence as a fact to be determined by the jury from the evidence." *Bivens* v. *State*, 11 Ark. 455; *McAdams* v. *State*, 25 Ark. 405; *McKenzie* v. *State*, 26 Ark. 339; *Fitzpatrick* v. *State*, 37 Ark. 256; *Casat* v. *State*, 40 Ark. 524; *State* v. *Wieners*, 66 Mo. 13; *Com.* v. *Drum*, 58 Pa. St. 9; *People* v. *Majone*, 91 N. Y. 211; Bishop, Crim. Law (7th Ed), § 728; Wharton, Crim. Law (9th Ed.), § 380.

In *Ex parte Brown*, 65 Ala. 446, it is said: "The law has declared, and can declare, no length of time within which the manslayer must deliberate, or premeditate, to raise the offense to the highest grade of homicide, murder in the first

degree. If the mind reasons about or resolves upon the act before committing it, or if the purpose be formed, no matter for how brief a period, on an event then future, or on a contingency that may happen, to use a deadly weapon, this is deliberation, premeditation; and a homicide committed pursuant thereto is murder in the first degree."

In *State* v. *Wieners*, 66 Mo. 27, it is said: "A purpose to kill may be conceived and deliberately executed, although but a very brief time elapse between the conception and the execution of the purpose. Deliberation does not mean brooded over, considered, reflected upon for a week, a day or an hour, but it means an intent to kill, executed by the party, not under the influence of a violent passion suddenly aroused, amounting to a temporary dethronement of reason, but in the furtherance of a formed design, to gratify a feeling of revenge or to accomplish some other unlawful purpose."

In the case before us the evidence was sufficient to prove that William Davenport, the deceased, was killed with an ax; and a part of it tended to prove that the defendant confessed that the deceased first attacked him with an ax but failed to strike him; and then walked away, with the ax in his hand, about sixty or seventy-five feet, when he, the defendant, approached him stealthily, seized the ax, took it from his hand, and slew him. These acts were evidence of a brief premeditation and deliberation. They show that he conceived the intent to kill; determined to kill with the ax; resolved how he would get possession of the ax; and, when all this was done, deliberately proceeded to carry his plan into execution by stealthily approaching Davenport and seizing the ax and slaying him. They show a formed design, reason, self-control, premeditation and deliberation—all the essentials of murder in the first degree. This evidence, however unsatisfactory it may be to us, is sufficient to sustain the verdict of the jury in this court.

Judgment affirmed.

BUNN, C. J., dissents as to degree.

ALLEN v. STATE.

Opinion delivered February 2, 1901.

EVIDENCE—COMPETENCY.—In a prosecution for murder in which there was evidence that defendant had been criminally intimate with deceased's wife, and that he shot deceased from his wife's bed, a witness testified that deceased, on an occasion prior to the killing, asked him to go to defendant and request him to let his wife alone, and that defendant, upon being so requested, replied that he would. There was evidence tending to prove an *alibi* for defendant. *Held*, that defendant's reply was inadmissible, as the fact that defendant had previously been intimate with deceased's wife would not tend to show that he killed deceased. (Page 579.)

Appeal from Miller Circuit Court.

JOEL D. CONWAY, Judge.

STATEMENT BY THE COURT.

At the June term, 1900, of the Miller circuit court, on the 7th day thereof, defendant was indicted for murder in the first degree, and on the 18th day thereof was tried. On said 18th day of June the jury were unable to agree upon a verdict, and on the next day they returned a verdict against the defendant, assessing his punishment at seven years in penitentiary. On 21st June, defendant filed motion in arrest of judgment, which was on same day overruled, and exceptions saved. Afterwards on same day he filed his motion for new trial, which was overruled, and exceptions saved, and he prayed an appeal, and the judgment against him was suspended for sixty days, for him to apply to a judge of the supreme court for appeal and supersedeas, which were granted.

The testimony of Lottie Gayton, deceased's wife, tended to show that on Saturday night, the 31st of March last, defendant was in her room in bed with her; that there was only one opening to the room, a window, which was covered by a spread; that her husband came home, and was attempting to get in the window, and defendant raised up, and shot him once;

that no word was spoken by either of them; that deceased ran to Lottie's mother's room, and defendant jumped out of the window, and left. Deceased lived several hours. After the shooting crowds gathered in, and she did not tell any one that night how it happened, and no one asked her. She did not, for the reason that she did not want any one to know about it. That at the examining trial she denied that it was defendant, and did not tell who it was, for the reason that the next morning after the killing General Allen, defendant's brother, threatened her life if she said it was defendant. That on defendant's application for bail before W. T. Hamilton, county judge, she testified, but denied testifying that she had been intimate with so many men previous to this that she could not give the names of all of them, and denied further that she there testified that her father-in-law told her that if she would swear it was defendant he would see that she was not punished.

By the testimony of Viney McCamie and other witnesses subsequent and following her testimony in the transcript, the state introduced testimony tending to show that deceased said that night, after he was shot, that it was defendant who did it; that some of the witnesses followed his tracks away from Lottie's room, and some of them claimed to have seen him that night near deceased's house.

By the testimony of Margaret Ulford and other witnesses following her testimony in the transcript, the defendant introduced testimony tending to prove an *alibi*.

By the testimony of W. T. Hamilton, county judge, the defendant shows that Lottie Gayton testified before him on defendant's *habeas corpus* proceedings for bail, and that she testified that her step-father told her that if she would swear it was defendant that he would see that she would not be punished, and that her past conduct with other men had been so numerous that she could not name all of them, except that she gave the names of two, just previous to this trouble. Defendant also testified that he was not away from his home that night.

Appellant, *pro se.*

It is error for the court to indicate, in instructions to the jury, what weight it attaches to the evidence on any point. 52 Ark. 265; 59 Ark. 417. A subsequent correct instruction did not cure this error in instructing on the defense of *alibi.* 55 Ark. 393. It was error to admit evidence as to appellant's previous conversations with witness as to his intimacy with wife of deceased. 1 Greenleaf, Ev. § 52; Undh. Ev. 17; 43 Ark. 99; 56 Ark. 349.

Jeff Davis, attorney general, and *Charles Jacobson*, for appellee.

There was no error in the court's instructions. The evidence complained of was relevant and competent. 25 Ark. 380.

HUGHES, J., (after stating the facts.) Though there are several assignments of error in this case, yet, as the case must be reversed for the error in admitting certain testimony which a majority of the judges think was prejudicial, we do not think it necessary to notice any other.

Over the objection of the defendant, Robert Hawkins, a justice of the peace, was permitted to testify that some three or four months before the trial, John Gayton (the deceased) requested him to go to the defendant, and request him to let his wife alone, and that he told Ossey Allen, from what he had heard he had better let John Gayton and his wife alone. If he did not, there would be trouble between them. On cross-examination, witness stated that when he told Ossey Allen this, Ossey Allen replied that he would. This testimony was inadmissible. The defendant saved proper exceptions to this testimony, and embodied his exceptions in his motion for a new trial, which being overruled he excepted and appealed to this court. In view of the fact that there was testimony which tended to prove an *alibi* for the defendant, this evidence might have prejudiced the jury.

For the error of its admission, the judgment is reversed, and the cause is remanded for a new trial.

COUCH v. HARRISON.

Opinion delivered February 2, 1901.

1. ARBITRATION—PROOF OF AWARD.—It is not necessary, in a suit to enforce an award in arbitration, that the evidence show that the parties agreed in so many words to submit the matter in controversy to arbitration and to abide by the award, but such an agreement may be inferred from the acts and conduct of the parties. (Page 582.)
2. SAME—RIGHT OF PARTY TO BE PRESENT.—While a party to an arbitration is entitled to be present at the hearing, he may stay away after receiving notice of a meeting of the arbitrators, without vitiating the award. (Page 583.)
3. VERDICT—SUFFICIENCY.—Where an award fixed the amount of defendant's indebtedness to plaintiff, a general verdict for plaintiff in a suit to enforce the award, without naming the amount to be recovered, is sufficiently certain. (Page 584.)

Appeal from Saline Circuit Court.

ALEXANDER M. DUFFIE, Judge.

STATEMENT BY THE COURT.

The appellant and the appellee agreed to submit to arbitration matters of difference between them that grew out of a contract between them for the making of staves. It is not shown that the agreement for arbitration was in writing, nor are the particular terms upon which the arbitration was to be made set out or shown, except that the matter to be arbitrated was the settlement of a disputed account between them. The complaint alleges that the plaintiff in this suit and the defendant selected as arbitrators A. R. Tomlinson and Fred W. Bush, "to arbitrate and make final award" in the matter submitted to them to determine, both plaintiff and defendant agreeing each with the other to stand to, abide by and perform the award of said arbitrators. On the 31st of January, 1898, the same day of the agreement, the arbitrators met in the forenoon, and endeavored to reach an agreement, but could not, and so announced to the parties, and adjourned. Upon the suggestion

of the appellee, Harrison, the arbitrators met in the afternoon, and reached an agreement, and made an award between the parties, awarding to Harrison, the appellee, $247.88 and 6000 staves.

Upon this award Harrison sued the appellant, Couch, and demanded judgment for the $247.88, but made no demand in his complaint for the staves, or the value of them. The appellant answered the complaint, denied indebtedness, denied the submission to arbitration, and denied there was any arbitration or any award, and set up a counterclaim, to which a demurrer was sustained, to which he excepted.

A trial was had before a jury, and the following general verdict was rendered by the jury: "We, the jury, find for the plaintiff." The verdict, it will be observed, does not specify the amount for which they found. Upon this verdict the court gave judgment in favor of the plaintiff for $247.88 and for 6000 staves. The appellant, having saved his exceptions, filed a motion for a new trial, which being overruled he excepted and appealed to this court.

Murphy & Mehaffey, for appellant.

It was error for the court to render judgment on a verdict which did not fix the amount of the recovery. 5 Ark. 373; 29 Ark. 597. The award was void because appellant was not present at the hearing. 10 Ark, 657; 1 Am. & Eng. Enc. Law, 685; 82 Ala. 568; 27 Md. 401; 126 Ill. 250. Either party could revoke the submission at any time before award made. 40 Atl. 661; 32 L. R. A. 740. A departure from the strict rules of dealing equally with both parties will be fatal to the award. 90 Ga. 669; 3 Iowa, 66; 112 N. Car. 845.

J. J. Beavers and *J. H. Carmichael*, for appellee.

The jury found that the parties agreed and did submit to arbitration, and that the arbitrators found a specific amount due appellee. Hence there is no uncertainty in the verdict. The balance found by the arbitrators was equivalent to a balance struck by the parties on an account stated. 1 Am. & Eng. Enc. Law, 674. There was no error in the court's charge on this point. *Id.* p. 656. The verdict is sustained by sufficient

evidence. 1 Crawf. Dig. p. 146; 13 Ark. 317; 25 Ark. 474; 31 Ark. 163; 24 Ark. 384; 11 Ark. 630; 57 Ark. 459. Appellant is estopped by acquiescence to complain of the resubmission. Laws. Cont. 8, 9; 10 Pick. 275.

HUGHES, J., (after stating the facts.) The appellant in his motion for a new trial says that the court erred in its written instruction to the jury of its own motion. That instruction is as follows: "If you find from the evidence in this case that the plaintiff and defendant mutually agreed to submit a matter in controversy between them to arbitrators, and to abide by their award, and that said arbitrators did meet under said agreement and render an award, you should find for the plaintiff. You are further instructed that if you find from the evidence that after said arbitrators had the matter under investigation they adjourned, and notified the parties that they could not agree and had adjourned, then your verdict should be for the defendant, unless you further find from the evidence in the case that the parties afterwards agreed to submit to and abide by any award they might render. You are further instructed that it is not necessary that the evidence show that the parties plaintiff and defendant actually agreed in so many words to submit the matter in controversy to and abide by the award, but such agreement may be inferred by you from the acts and conduct of the parties plaintiff and defendant, and all the facts and circumstances introduced as evidence must show that both parties agreed to submit the matter and to abide by the award; for, if one of the parties agreed, and the other did not, the verdict should be for the defendant. You are further instructed that the plaintiff is required to make out his case by a preponderance of the evidence." We do not think there was any error in this instruction, and there was evidence upon which it seems to have been based. It was a question of fact whether there was a submission to arbitration by the parties; and whether there was an arbitration and an award, were questions of fact which were submitted to and determined by the jury, and there is evidence upon which their verdict was doubtless based.

The appellant complains of the first instruction given for

the appellee, which reads as follows: "If the parties agreed to submit and did submit a dispute to arbitration, and an award was made, the law will imply that there is an agreement to abide by such award." If this is not the law, it would be a farce to agree to arbitrate a matter. In this case there was an express agreement to abide by and perform the award alleged in the complaint, and it seems to be borne out by the facts and circumstances, though denied in the answer.

The defendant asked the court to declare in his second instruction "that the arbitrators must hear the parties in each other's presence," which was refused, and defendant (appellee) complains at this. If the parties demand this, it is their right, and it would be error to refuse it; but there are few rights a party may not waive, and if he is notified, and has the opportunity to be present, it is his own fault if he is absent, and he cannot take advantage of it. The testimony here tends to show that appellant was voluntarily absent when the arbitrators acted in the evening. The evidence tends to show that he was consulted from time to time, while the arbitration was going on, and made no objection. "It has been held that a party after receiving notice may stay away, without vitiating the award." 2 Am. & Eng. Enc. Law, (2d Ed.), 655n.; *Whitlock* v. *Ledford*, 82 Ky. 391.

The third instruction asked by the appellant and refused by the court is as follows: "When arbitrators have once acted, either by making an award, or declining to do so, their power ceases, and they have no power to re-investigate the matter, unless requested by both parties to do so." It seems, under the circumstances of this case, that this instruction would have led the jury to understand that there could be no resubmission of the case except by express agreement of the parties in so many words. Besides, the court had instructed upon this phase of the case in the written instruction given of its own motion. The fourth instruction asked by defendant was that the court take the case from the jury. There was no error in refusing these instructions.

There is no reversible error in the court's declarations of law. The other matters in the case are questions of fact,

which were submitted to and decided by the jury, and we cannot say that the evidence does not support their finding.

But objection is urged to the verdict and the judgment because the verdict is general, and does not specify the amount of the jury's finding, and the judgment is for $247.88 and 6000 staves, whereas the complaint did not demand any judgment for the staves, but only for the $247.88. It seems the plaintiff had the staves in his possession, and, as no demand was made for them or their value, no judgment should have been given for them, and the judgment of the court is so modified as not to include them. As to rendering judgment for $247.88 when the verdict did not specify the amount of the jury's finding, we think there is no reversible error in this case. As a rule, the verdict should be for a certain amount named in it. But this was a suit to enforce an award of arbitrators, whose award was in favor of the appellee here for $247.88. There was no uncertainty, therefore, in the general verdict. It was easy, as shown by the record, to ascertain the amount of the verdict. "The maxim, *Id certum est quod certum reddi potest*, is readily applicable to verdicts." 28 Am. & Eng. Enc. Law, (1st Ed.), 300, and cases cited.

The judgment is affirmed.

BATTLE, J., did not participate.

NORTH AMERICAN TRUST COMPANY *v.* BURROW.

Opinion delivered February 2, 1901.

MORTGAGE FORECLOSURE SALE—RIGHTS OF PURCHASER.—One who purchased at a sale under a mortgage is not entitled to recover from the mortgagor in possession the rents and profits accrued during the year allowed for redemption where he gave the mortgagor no notice to quit, and made no demand for rents and profits. (Page 586.)

Appeal from Pope Circuit Court.

CHARLES C. REID, Special Judge.

STATEMENT BY THE COURT.

Appellee was the owner and in possession of certain tracts of land; and, to secure a sum of money owed by him to the Jarvis-Conklin Mortgage Trust Company, conveyed said land to a trustee. After the mortgage debt fell due and on the 6th day of November, 1897, the land was sold by a substitute trustee, and bought by appellant for the full amount of the debt, interest and costs. Appellee, having had possession all the time, remained in possession until the 27th day of September, 1898, when this suit was begun against him for the land and $500, alleged to be the rental value of the land from the time of the sale until the suit was begun. The purchaser-appellant was a stranger to the mortgage. There is no allegation that it was the assignee of, or otherwise interested in, the debt or mortgage. No allegation is made that any demand was made, either for possession or rents. There is no allegation that appellee even had notice that appellant had acquired any interest in the debt, mortgage or land until the suit was begun.

The suit being the first intimation appellee had of appellant's claim to the land, he at once surrendered the possession of the land, and at the trial voluntarily submitted to a judgment for costs, and demurred to so much of the complaint as sought to recover rents.

The court sustained the demurrer to the claim for rents, and adjudged appellant the land and costs, and it appealed.

Bullock & Lawrence, for appellant.

Appellant was entitled to the rents during the year allowed for redemption. *Cf.* 65 Ark. 125; 66 Ark. 572, 573.

J. F. Sellers, for appellee.

The owner of an equity or redemption, while in unmolested possession of the land, is not accountable for rents. 36 Ark. 29; 127 U. S. 494; 15 Am. & Eng. Enc. Law, 819; 2 Washb. Real Prop. 532; 122 N. Y. 197; 15 Mass. 268; 16 Mass. 280; 8 Pick. 460; 14 Pick. 525; 4 McKay, 179; 111 U. S. 242; 70 Me. 358; 9 Conn. 216; 79 N. C. 497; 44 Vt. 601; 50 Mo. App. 665; 81 Va. 391; 87 N. Y. 239; 4 Kent's Comm. 157; 1 Ping. Mortg. § 830, et seq. He is a tenant at

sufferance. 12 Am. & Eng. Enc. Law, 668; 2 Metc. 26; 18 Vt. 346; 1 Wood, Landlord & Tenant, 21. A tenant at sufferance is not liable for rent. 1 Taylor, Landlord & Tenant, § 64; 12 Am. & Eng. Enc. Law, 669; 4 Kent's Comm. 117; 1 Wood, Landlord & Tenant, § 11. The complaint should show capacity to sue. Bliss, Code Pldg., § 246.

WOOD, J., (after stating the facts.) The rule is well settled "that a mortgagee is not entitled to demand of the owner of the equity of redemption the rents and profits of the mortgaged premises until he takes actual possession." *Teal* v. *Walker*, 111 U. S. 242; *Greer* v. *Turner*, 36 Ark. 29; *Freedman's Saving & Trust Co.* v. *Shepherd*, 127 U. S. 494; *Mayo* v. *Fletcher*, 14 Pick. Mass. 525. The purchaser at a sale under the mortgage, when a stranger to the mortgage, could certainly have no greater rights than the mortgagee when he purchased. The mortgagee, after forfeiture and sale, having purchased, is certainly entitled to possession, and to the rents and profits, after notice to quit and a demand for rents and profits has been made. But even the mortgagee himself is not entitled to any more than this. Much less would a purchaser, not the mortgagee, during the period for redemption be entitled to rents and profits without demand, notice or suit for possession.

The question of the right to possession is not involved. Appellee concedes that to appellant. The status of the owner of the equity of redemption in possession and during the period allowed for redemption is that of a tenant by sufferance, who is not required to pay rent. Wood's Landlord and Tenant, §§ 6, 11; 12 Am. & Eng. Enc. Law (1st Ed.), 668, 669; 1 Taylor, Landlord and Tenant, § 64; *Stedman* v. *Gassett*, 18 Vt. 346.

Affirm.

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

Opinion delivered December 1, 1900.

1. APPEAL—BRINGING MATTERS INTO RECORD.—Where appellant's counsel desired to impeach a witness for appellee by proof of a contradictory written statement, and embodied in the record so much of the statement as he desired to call to the witness' attention, the question whether the court erred in refusing to permit those portions of the written statement to be read to the jury is sufficiently raised, though the entire statement is not copied into the record. (Page 592.)

2. WITNESS—IMPEACHMENT—CONTRADICTORY STATEMENT.—When a witness has testified to material facts on the trial of a cause, his previous statements inconsistent with his testimony are competent by way of contradiction, and to enable the court or jury trying the case to ascertain what weight should be given to his testimony. (Page 594.)

3. SAME—PRACTICE AS TO IMPEACHMENT.—Where a party desires to impeach a witness by proof of a prior contradictory writing, the practice generally is to lay the foundation on cross-examination by showing the witness the writing and asking if he signed it, and then to abide his turn for the introduction of proof; but if the witness admits his signature, and the party desires to cross-examine him as to the contents of the writing, the proper practice is to have it read to the jury then and there. (Page 594.)

4. SAME—DISCRETION OF COURT.—Where a party neglected to introduce a contradictory written statement during his cross-examination of the witness who made it, it is in the discretion of the trial court to refuse him permission to inject it during the cross-examination of another witness. (Page 595.)

5. SAME—IMPEACHMENT—CONTRADICTORY AFFIDAVIT.—An affidavit which a witness admits having signed, though written down by another, is admissible in impeachment of his testimony, if contradictory thereof, though he denies that he made the statements therein contained, and the party before whom the affidavit was made was not introduced to support the affidavit. (Page 597.)

6. APPEAL—ERROR PREJUDICIAL WHEN.—Error of the court in refusing to permit the affidavit of a witness to be introduced to impeach his testimony cannot be said to be harmless, although the witness admitted having signed the affidavit, and that it contained a statement contradictory of his testimony. (Page 599.)

7. DOCUMENTARY EVIDENCE—OFFER.—Where two documents are offered in evidence, it is error to exclude both because one of them is inadmissible. (Page 599.)

Appeal from Saline Circuit Court.

ALEXANDER M. DUFFIE, Judge.

Dodge & Johnson, for appellants.

The burden of proof is upon plaintiff to show negligence. 2 Shear. & R. Neg. § 676; 49 Ark. 535; 33 Ark. 816; 59 Ark. 112; 30 Wis. 55; 75 Vt. 499; 54 Pa. St. 345; 52 Pa. St. 379; 43 S. W. 431; 37 S. W. 779. It was a sufficient defense to show that the spark arresters were in good order. 29 S. W. 860; 31 S. W. 319; 3 Elliott, Railroads § 1245; 29 S. W. 860; 91 Wis. 447; Wood, Ry. Law, 1576–1581. The defense was complete, in the absence of proof contradicting it. 60 Fed. Rep. 39. The fire was not the result of negligence. 141 Ind. 661; 25 S. W. 971; 31 S. W. 319; 143 N. Y. 182; 43 N. Y. 123. A railway company is only required to use such contrivances as have already been tested and put in use. Pierce, Railroads, § 433, note 4; 50 Pac. 456. It was error to permit the jury to pass upon the question as to proper equipment and condition. 33 Wis. 582; 34 Wis. 315; 54 Wis. 619; 55 Wis. 106; 33 Ill. App. 565; 101 Ga. 747; 38 S. E. 710. Unimpeached evidence cannot be arbitrarily disregarded. 51 S. W. 319; 3 N. D. 17. Uncontradicted proof that all possible precautions were taken to avoid the injury exonerates the defendant from liability. 21 Fla. 669; 74 Ala. 150; *Ib.* 113; 59 Miss. 280; 85 Ala. 208; 83 Ga. 9; 78 Ga. 714. The burden was upon the plaintiffs to show by a preponderance of evidence that the fire originated with the defendant's locomotive. 109 Ala. 509; 65 Minn. 112; 94 Wis. 270; 29 Barb. 226; 86 Wis. 466; 9 Nev. 296; 45 Mo. 327; 13 Am. & Eng. R. Cas. 487; 56 Ark. 520. If probabilities are evenly balanced, the plaintiff cannot recover. 99 Mass. 605; Will's Circ. Ev. 158; 50 N. W. 365; 74 N. W. 561; 91 Ky. 526; 101 N. Y. 661; 128 N. Y. 107. Plaintiff must show by reasonable evidence that the fire originated from defendant's locomotive. 10 Am. & Eng. R. Cas. (N. S.) 160; 75 N. W. 1114; 14 Am. & Eng. R. Cas. (N. S.) 82. The affidavits of witnesses Ulmer, Hendricks and Finley should have been admitted in evidence. Sand. & H. Dig., § 2959; 30 S. W. 856; 151 U. S. 154; 53 Fed. Rep. 1001.

J. W. Westbrook, D. M. Cloud, Murphy & Mehaffey, for appellees.

Uncertain circumstantial evidence is sufficient in civil cases. 1 Greenl. Ev. 23. The verdict is conclusive upon the question of negligence. 49 Ark. 535; 63 Ark. 636; 178 Pa. St. 367; 34 L. R. A. 577; 17 L. R. A. 33; 9 L. R. A. 824. Where all possible precautions are taken to avoid injury, the defendant is not exonerated from liability. 25 L. R. A. 161. The failure of the watchman to discover the fire does not excuse the appellant. 55 Ark. 163; 17 L. R. A. 33.

Dodge & Johnson, for appellant, in reply.

When contradictory statements are offered for the purpose of impeaching a witness, the proper foundation should be laid on cross-examination. 24 S. W. 518; 34 Ia. 533; 19 Ia. 448. The foundation having been laid, it is competent to impeach a witness by putting in evidence any material statement in contradiction of his testimony, which may have been reduced to writing by him or subscribed by him. 10 Enc. Pl. & Pr., § 291. Our statute is but an adoption of the common-law rule. 1 Greenl. Ev., § 462; Sand. & H. Dig., § 462. The statements should have been admitted as proof of the cross-examinations of witnesses who signed them. 1 Greenl. Ev. § 462; 53 Minn. 539; 79 Cal. 452; 133 Mo. 5, 6; 146 Mass. 607; 53 Fed. Rep. 1005; 76 Fed. Rep. 254; 96 Mo. 85.

Murphy & Mehaffey, for appellees, in reply.

It was not error to exclude the affidavits or statements in writing at the time the same were offered in evidence. 1 Greenl. Ev. § 463; Phill. Ev. (4th Am. Ed.) 964; 8 Enc. Pl. & Pr., 217–218, note 1, 236; 17 So. 187; 48 Ark. 182; 15 Ark. 348; 3 Enc. Pl. & Pr. 428. Every presumption is in favor of the correctness of the court's ruling. 2 Enc. Pl. & Pr. 418–20–21, 444–475; 3 Enc. Pl. & Pr. 409–14. If the error consists in the admission or rejection of evidence, such evidence must be set out in the bill of exceptions. 2 Enc. Pl. & Pr., 475–6, and note 1, 477; 8 Enc. Pl. and Pr., 217–18, note 1, 220–23; 3 Enc. Pl. & Pr., 427, and note 2; also note on 428; 52 N. W. Rep. 283; 49 N. W. Rep. 1066; 24 S. W. Rep. 518.

Dodge & Johnson, for appellants; additional reply.

A presumption should always be based upon a fact, and should be a reasonable deduction from such fact. The law does not allow presumptions of fact from presumptions. 92 Pa. St. 431; 29 Barb. 226; 86 Wis. 446; 9 N. W. 296; 45 Mo. 327; 13 Am. & Eng. R. Cas. 487. The appellant's showing of proper equipment and proper handling of its locomotive is conclusive against its liability for the injury. 178 Pa. 367; 17 L. R. A. 33; 9 L. R. A. 824.

WOOD, J. This suit was brought by B. Faisst & Co., a firm composed of B. Faisst and others, to recover damages for the burning of a mill and other property, alleged to have been negligently caused by sparks from an engine of the railway company. There was a judgment in favor of plaintiff for $17,622.25, from which this appeal was taken.

On the trial witness Ulmer testified, among other things, "that he saw the passenger train go north, and that it was throwing fire, as they usually do, and it was all going over towards the mill. The air was carrying it from the track towards the mill. The train was throwing fire enough to set anything afire, like they do in the day time. The sparks looked to be as big as the end of your finger." On the cross-examination of this witness he was shown an affidavit, and the record as to what took place concerning it is as follows:

"Q. Is that your signature? A. Yes, sir. Q. You signed that, didn't you? A. Yes, sir. Q. You swore to it before Mr. Mashburn, notary public, didn't you? A. Yes, sir. Q. Didn't you state in that connection, 'I didn't see any sparks flying from the engine?' A. No, sir; I did not. Q. You signed that statement, didn't you? A. No, sir; I didn't know about that. Q. You signed that? A. Yes, sir. Q. Was that read to you when you signed it? A. The man that wrote that out read it to me; I couldn't read it. Q. He read it to you? A. I didn't tell him, though, that I didn't see no sparks. Q. You saw that statement, 'I saw no sparks flying from the engine?' A. No, sir; I didn't tell him any such thing. Q. It is there, isn't it? Can you read? A. No, sir; I didn't say any such thing at all. Q. This statement was taken down, or at

least a statement was taken down and read over to you, and you signed it? A. He read it over, but I know that wasn't in it when he read it over. I know that much. Q. Did you know you signed that statement? A. Yes, sir; that is my handwrite. Q. Did you sign it before notary public Mashburn? A. No, sir; I signed it in the depot. Q. Didn't you swear to it? A. Yes, sir. Q. Did you go before him and swear to it? A. Yes, sir."

Witness Hendricks testified, among other things, that he was awake when the passenger train came north, and noticed the sparks being thrown out from the locomotive as it passed. They were of unusual size, and seemed to be a great many. He did not notice any fire at the mill before the passing of the train; noticed the fire sometime near two o'clock, after the passenger train had gone north. The record shows the witness was asked this question, to-wit: "Well, when you noticed the mill burning, what portion of it was burning?" The answer was as follows, to-wit: "The west end; what I call from where I live the west end of the main lumber shed. It had burned the entire west end of the main lumber shed. This was afire, and had burned to half way up the east end." On cross-examination of this witness the record shows the following: "Q. Didn't you state to Mr. Faulkinbury, when he took your statement, that the first you knew of that fire the whole west end of the mill was afire? A. No, sir. Q. You made a statement to him? A. Yes, sir. Q. You never said a word about these sparks from the engine at that time? A. He didn't ask me at that time. Q. You made no statement about it? A. Yes, sir; I made a statement in regard to the sparks on the train. Q. You think now you made a statement to him? A. I know I did. Q. Didn't you state to him and wasn't that statement taken down in writing, that 'when I first discovered the fire, all of the west end of the mill was in flames, and it burned very rapidly all over the entire building; so fast nothing could be saved,' signed by G. T. Hendricks? Is that your signature? A. Yes, sir. Q. Didn't you make that statement? A. I did not. Q. Did you sign this? A. I did. Q. Was it read over to you? A. No, sir.

Q. Did you ask it to be read over to you? A. No, sir. Q. Did he take the statements as you made them? A. He took it down as I made them."

Defendant here asked to be allowed to read to the jury those parts of the affidavits of A. B. Ulmer and G. T. Hendricks to which attention has been called, but the court refused to allow same to be read, to which refusal the defendant saved its exceptions.

Does the record raise the question as to whether or not the trial court erred in refusing to permit to be read to the jury those portions of the affidavits or written statements of witnesses Ulmer and Hendricks to which their attention had been called? Such question was treated as raised in the original brief of counsel for appellee. There is no intimation or suggestion there that the record does not properly raise the question. But, upon a careful reading of the transcript by one of the judges of this court, it was suggested that there might be some question as to whether the bill of exceptions really presented the alleged error of the ruling of the court below in rejecting the parts of the affidavits offered in evidence, so as to call for the judgment of this court upon such ruling. Whereupon the matter was deemed of such importance that the propriety of a brief upon the point by the respective counsel was suggested, and accordingly briefs have since been prepared. We must determine, therefore, *in limine* whether the question is raised. The record shows that each of the witnesses was shown an affidavit or written statement which he admitted having signed. The attention of each witness was called to certain parts of the writing which he had signed, and those parts were read to him by the appellant's counsel, and he was asked if he did not make that statement. The parts of the affidavit which counsel desired to introduce are set forth specifically in the record, and designated by quotation marks as the parts taken from the affidavit which the witness had signed. Then, when the record recites that defendant "asked to be allowed to read to the jury those parts of the affidavits of A. B. Ulmer and G. T. Hendricks to which attention had been called," it certainly sufficiently designates and sets forth the testimony

that was offered, and which the court refused to allow to go to the jury. It does not appear that there were any other parts of affidavits to which the attention of the witnesses had been called. Useless repetition is to be avoided. After identifying parts of the affidavits offered in evidence by quotation marks (setting them forth *verbatim*), it would have been an idle waste of words and space to have repeated them. Unless we close our eyes, it would be impossible for us not to read from the above record the precise parts of the affidavits of the respective witnesses that were offered and refused. The record, then, meets the requirement of the rule that where the alleged error consists in the admission or rejection of evidence, such evidence must be set out in the bill of exceptions.

It must be remembered that the purpose in view was the impeachment of these witnesses by showing that they had made statements different from their present testimony. It was unnecessary, therefore, and would have been manifestly improper, to offer the whole of the affidavit in evidence when only portions of it were contradictory of the witness' present testimony. Only such parts as were contradictory of his present testimony were relevant on the question of impeachment. § 2960, Sand & H. Dig. It was not claimed that the whole of the affidavit was contradictory. Appellant was not seeking to establish by the affidavits, as original evidence, any fact involved in the main issue. No question as to the contents of the affidavits was involved. Only the question of the credibility of the witness was raised. It was the province of appellant to offer only those parts of the affidavits which it conceived to be contradictory. If appellee had contended that there was no inconsistency in the statements, past and present, of its witnesses, when their respective affidavits were considered as a whole, then its province and duty was to object specifically to the reading of a part of the affidavits only, and to call for the reading of the whole. 1 Greenl. Ev. §§ 201, 462b; *Chicago, M. & St. P. Ry. Co.* v. *Artery*, 137 U. S. 507. The record discloses no such objection and demand of appellee. Therefore it is only necessary for the record to identify those parts of the affidavits which appellant asked to read in order

to raise the question of the correctness of the ruling of the circuit court in refusing such request. Having determined that the record calls for a review of the ruling of the trial court, the next question is, did the court err?

It is a well-established rule that when a witness has testified to material facts on the trial of a cause, any acts done or declarations made by him, which appear to be inconsistent with his statements on the stand, are competent by way of contradiction, and to enable the court or jury trying the case to ascertain what weight should be given to his testimony. *Handy* v. *Canning*, 166 Mass. 107. As witness Ulmer testified that when he saw the train go north it was throwing fire which was all going towards the mill, and was throwing fire enough to set anything afire, and that the sparks emitted "looked to be as big as the end of your finger," his testimony was exceedingly important in establishing the plaintiff's case; and, as he had previous to the trial signed an affidavit which contained the statement, "I didn't see any sparks flying from the engine," it was patent that there was a palpable contradiction between the statement contained in his affidavit and the testimony he gave upon the trial upon the most material point in the case.

The statement contained in the affidavit was, therefore, clearly competent, and should have been admitted, if offered at the proper time. "According to the ordinary rule of proceeding in such cases," says Greenleaf, "the letter is to be read as the evidence of the cross-examining counsel in his turn when he shall have opened his case; but if he suggests to the court that he wishes to have the letter read immediately, in order to found certain questions upon its contents, after they shall have been made known to the court, which otherwise could not well or effectually be done, that becomes an excepted case; and for the convenient administration of justice the letter is permitted to be read as part of the evidence of the counsel so proposing it, subject to all the consequences of its being considered." 1 Greenleaf, Ev. § 463.

The supreme court of Minnesota, discussing a question of this kind, said: "If a party desires to show the contents of a paper, and to cross-examine upon it, he must, if the writing be

admitted, introduce it as a part of his cross-examination." *O'Riley* v. *Clampet*, 53 Minn. 539. The rule of practice which generally obtains is to require the party who desires to impeach a witness by prior contradictory written statements to simply lay the foundation on cross-examination by showing the witness the writing and asking if he signed it, then to abide his turn for the introduction of his own proof before offering the writing in evidence. *State* v. *Stein*, 79 Mo. 330; *Romertze* v. *Bank*, 49 N. Y. 577. But, as shown by Prof. Greenleaf and the other authorities, *supra*, the exception, for the convenient and orderly administration of justice, is to have the writing, where the signature is admitted, read then and there to the jury, provided a cross-examination upon the contents is desired and suggested to the court. For this gives the witness the opportunity then and there to make such explanation as he may desire, and it obviates the necessity of calling him again upon the stand, should a cross-examination upon the contents be desired. The exception is quite as well established as the rule itself. But there is no exception unless the cross-examiner suggests to the court that he desires to cross-examine the witness while on the stand as to the contents of the writing. Here the counsel proceeded on cross-examination, without interruption or interference by the court, to cross-examine witness Ulmer on the contents of his affidavit. No more forcible suggestion of a desire to cross-examine on the contents of the writing could have been made than by proceeding to do that very thing. The fact that it was done is tantamount to permission asked and leave granted for so doing. As a matter of fact, however, counsel for appellant did not offer to read the portions of Ulmer's affidavit while he was on the witness stand and being cross-examined, but postponed the request to read from his affidavit until the close of the cross and re-direct examination of witness Hendricks. This was out of time as to Ulmer, and the reasons for allowing the writing to be read during the cross-examination, therefore, did not exist in his case. It cannot be said that the trial court, having a large discretion as to the order in which evidence shall be admitted, which will not usually be controlled by this court, in any

manner abused his discretion in not permitting the reading from the affidavit of Ulmer at this juncture of the proceedings. Appellant, having neglected to avail itself of the rule allowing the writing to be read during the cross-examination of the witness, might well be denied the privilege of injecting it during the cross-examination of some other witness. When appellant's time came to introduce its evidence, it did not make the request to have the alleged contradictory writing read, which would have been in order. As the trial court had no opportunity, therefore, to rule upon the question when presented in due and proper time, no error is shown. We are to presume that if the request had been seasonably made it would have been granted.

It follows from what we have said that the court should have permitted the reading of the alleged contradictory statement from the affidavit of the witness Hendricks, provided there is any statement whatever in it legally sufficient to warrant a jury in finding that such statement is inconsistent with his testimony on the trial. Primarily, the lower court must determine whether there is any evidence at all of a contradictory nature. If there be, the question is then for the jury, and the alleged contradictory evidence should be admitted.

On the trial witness Hendricks was asked, "Well, when you noticed the mill burning, what portion of it was burning?" The answer was, "The west end; what I call from where I live the west end of the main lumber shed. It had burned the entire west end of the main lumber shed. This was afire, and had burned to half way up the east end." The part of the affidavit set out in the record which appellant asked to read to contradict the witness is as follows: "When I first discovered the fire, all of the west end of the mill was in flames, and it burned very rapidly all over the entire building, so fast nothing could be saved." Witness, when asked if he did not make the above statement, answered: "I did not." He had just acknowledged, however, his signature to the writing which contained the above statement. He said also that Faulkinbury took down the statements as he made them. Having admitted signing the writing containing the alleged contradictory state-

ment, it was then a matter for the jury to determine as to whether the writing contained the statement at the time witness signed same or not. If the writing which he signed really contained the alleged contradictory statement at the time he signed it, and same was not misread to the witness when he signed it, then his present testimony was in direct conflict with the prior written statement, and such contradiction would tend strongly to impeach him.

It is argued that, as the witness admitted that the alleged contradictory statements were in the affidavit when presented to him on the witness stand, but denied that they contained such statements, or that such statements were read to him when he signed the affidavit, therefore the ruling of the circuit court was proper, because appellant did not offer the testimony of the party before whom the affidavit was made or other witness to support the affidavit. The failure to make such proof might have lessened the weight to be attached to the contradictory statements, but it could not effect the competency of such evidence. By admitting the signature to the writing, the witness must be considered, *prima facie*, at least, as having made the statements therein contained; and his denial of any knowledge of the alleged contradictory statement, or that they were in the writing when he signed same, was itself contradictory of what he had just admitted, and thus raised a question vitally affecting his credibility, which was the point of inquiry. If the writing bore no evidences of alterations or interlineations, and appeared as having been written all at the same time, in the same hand, etc., what better evidence could there have been tending to show the contradiction of the witness' present testimony? But how could the jury know about this without an inspection of the writing? The writing having been excluded, appellant, if it had desired, could not thereafter have been allowed to introduce the one who wrote it and the officer who administered the oath to show that the writing did indeed contain, at the time it was signed and sworn to, what it now contains, and thus corroborate and strengthen the proof of contradiction. The court, after having permitted cross-examination on the contents of the writing, and then, when same was offered at the proper time, having excluded it, must have

done so for the reason that he considered such writing irrelevant or incompetent. Without any suggestion to the contrary, appellant had the right to assume, under the circumstances, that such was the view of the court, and hence it was not incumbent upon it to offer it again when it had opened its case.

Furthermore, there is a variance between the statement in the writing offered in evidence and that made by the witness upon the stand as to the portion of the property he first discovered on fire. This difference was sufficient to entitle appellant to have the writing put before the jury for the purpose of impeaching him. It at least made it a question for the jury to say whether or not this witness was impeached by contradictory statements. The plaintiff was endeavoring to show that the mill and property were fired by a spark from defendant's engine. The testimony of Hendricks tended to show that the portion he first saw burning was the west end of the main lumber shed. When asked what portion of the mill he first saw burning, he answered, to quote his exact language, "The west end; what I call from where I live the west end of the main lumber shed. It had burned the entire west end of the main lumber shed, and had burned to half way up the east end." This testimony was well calculated to make the jury believe that the fire originated in the west end of the main lumber shed. This lumber shed was situated, according to the scale of distance on the plat made part of the record, within some fifteen or twenty feet of the railroad track where the train had passed. There had been no fire at all about that part of the property during that day, and from the direction of the wind, the amount and size of the sparks, and the proximity of this lumber shed to the railroad track, the jury might well have concluded that if the fire originated in the lumber shed the sparks from the engine produced it. Indeed, this would have been the most natural conclusion from the testimony of witness Hendricks, conceding it to be true, and it was very material. On the other hand, if the fire originated at the west end of the mill, which was some eighty or one hundred feet from the railroad track, and nearer to the kilns and nearer to the shaving house and engine house of the mill where there had been fire

on the day of the night of the fire, then there was less probability that the fire originated from the engine of the railway, and more reason for the contention of the railway company that the fire originated in some other way than by a spark from its engine. Now, the witness stated simply in the affidavit that "when I first discovered the fire, all of the west end of the mill was in flames, and it burned very rapidly all over the entire building; so fast nothing could be saved." This statement was without explanation or qualification, and might have been taken by the jury as meaning the "west end of the mill" and not the "west end of the main lumber shed," the two being entirely different. So that the jury might have concluded that there was a decided contradiction of the witness on a most material point. The court therefore erred in not permitting the reading of the alleged contradictory statement.

Nor can we say, as matter of law, that, because the witness admitted signing the affidavit, and admitted on the stand that the affidavit contained the contradictory statement, therefore appellant was not prejudiced by the ruling. By not permitting it to be read as evidence, the jury were prevented from examining the writing. The appellant was deprived of the right to have it considered as evidence in the case, and its counsel could not refer to or discuss it in their argument. All of this was exceedingly important to appellant, and the ruling of the court refusing it was prejudicial error.

The contention that the court did not err in refusing the request to read from the affidavit of Hendricks, because it was joined with the request to read from the affidavit of Ulmer is not well taken. The authorities cited to show that where any part of the evidence is admissible a general objection is not available are not applicable here; for, although the request of appellant to be permitted to read from the affidavits of each of these witnesses was made at one and the same time, it was a request for two separate and specific things, the one having no connection with the other. The attention of the court in the request was called to each specific affidavit that appellant desired to read from by name. The court could not have been misled, and must have known that in refusing the request it

was passing upon the admissibility of each one of the affidavits for the purpose of impeachment. The affidavits were not joint. They could not be read at the same time. The court should therefore have admitted the one properly offered and rejected the other.

We find no other error. But for this the judgment must be reversed, and the cause remanded for a new trial.

BATTLE and RIDDICK, JJ., dissent.

LITTLE ROCK & FORT SMITH RAILWAY COMPANY v. ALLISTER.

Opinion delivered February 9, 1901.

1. CONDEMNATION PROCEEDING—SALE OF LAND PENDENTE LITE.—Where a railway company instituted a proceeding against the owner to condemn a right of way through land, the defendant's right to recover damages for the taking of his land is not affected by his sale of the land during the pendency of the suit. (Page 602.)

2. SAME—DAMAGES.—Where the defendant in a condemnation suit has, pending the suit, sold the land which the railway company seeks to condemn, he will not be required to show that he received a lower price than he would have received if the railway had not been built. (Page 602.)

3. SAME—REDUCTION OF DAMAGES BY PROOF OF BENEFITS.—The damages recoverable in a railway condemnation proceeding cannot be reduced by showing that the remainder of defendant's land would be benefited by the increased facilities for shipping coal furnished by the construction of the road. (Page 603.)

Appeal from Crawford Circuit Court.

JEPHTHA H. EVANS, Judge.

STATEMENT BY THE COURT.

The Little Rock & Fort Smith Railway Company brought an action against D. and J. Allister to condemn a right of way across certain lands in which they owned a reversionary interest. Defendants filed an answer, setting up special damages and injury to that part of their land not embraced in the

the right of way. On a trial to ascertain the damages to the landowners, damages were assessed in favor of defendants in the sum of $2,000. An appeal was taken, and on a hearing in this court the judgment was reversed, and a new trial ordered. Before the case was reached for another trial the Allisters had sold and conveyed the land to third parties from whom the railway company had through mesne conveyances obtained the right of way for which the suit had been instituted. The company, having thus acquired the right of way which it sought to condemn, asked permission to dismiss its action. The court granted the request, and dismissed the action, but reserved to the defendants the right to proceed to trial upon the claim of damages set up in their answer. The company thereupon filed its reply to the answer of the defendants, denying the averments of the answer of defendants, and also alleging that the lands of defendant were coal lands, and by reason of the construction of the road over the land "the owners of the same were offered facilities for mining and shipping coal which they otherwise would not have had, and that the special value of the lands for mining purposes was made and created by the construction of the railroad."

A demurrer was sustained to the paragraph of the reply alleging benefits to the lands of defendants. Upon a trial there was a verdict and judgment against the company for the sum of $530. From this judgment the company appealed.

Dodge & Johnson and *Oscar L. Miles*, for appellant.

The court erred in sustaining appellees' demurrer to that part of appellant's answer which set up special benefits to appellees' coal lands by reason of the railroad. The statute (Sand. & H. Dig., § 2732) excluding such benefits from the compensation to be made to the owner applies only to lands actually appropriated and taken, and not to land which is merely incidentally damaged but not taken. *Cf.* 54 Ark. 140; See also Ell. Railroads, §§ 988, 989; 150 Ill. 362; 49 Ark. 381; 36 Ark. 205; 149 Ill. 272; 46 Ala. 569; 83 Cal. 240; 5 Dana, 28–34; 31 La. An. 433; 55 Hun, 165; 129 N. Y. 576; 4 Jones, Law, 89, 93; 5 Oh. St. 568; 3 Oh. St. 108; 3 Ore. 99–102; 4 Ore. 428–432; 2 Swan, 440; 95 Pa. St. 426;

5 Gray, 39; 6 Allen, 118; 42 Atl. 372; Lewis, Em. Dom. § 476.

G. O. Patterson and *J. E. Cravens*, for appellees.

The answer set up general benefits from the building of the road, instead of special benefits; and hence it was proper to sustain the demurrer. 150 Ill. 362; 118 N. Y. 618.

RIDDICK, J. (after stating the facts.) This is an action for the assessment of damages for a railroad right of way across lands of defendants. The defendants claim that their land was underlaid with coal; that they had a slope or entrance to the coal by which the coal was brought out of the mine to the surface; that this slope or entrance was destroyed or rendered useless by the construction of the railroad; and that they were in that way injured in a large amount.

The first contention on the part of the appellant company is that the defendants have no right to recover, for the reason that they had not only leased the land before the railroad had been built, but that, since the commencement of the action, they had sold their reversionary interest in the land. But if the defendants were the owners of a reversionary interest in the land across which the railroad was constructed, and if this reversionary interest was damaged by the construction of the road and the taking of the right of way, they can recover damages to the extent of that injury. The right of way here had been taken, the road constructed, and this action commenced, before the reversion was sold. Defendant's right of action was complete when the injury occurred, and they did not sell it by selling their reversionary interest. *Roberts* v. *Northern Pac. Railroad Co.*, 158 U. S. 1; 3 Elliott, Railroads, § 100.

But counsel for the company contends, as the defendants did not show that they were compelled on account of the construction of the railroad to receive a lower price for their interest in the land than they would otherwise have received, that it is not shown that they were injured. We cannot concur in this view of the matter. On the contrary, even if it was shown that defendants did not reduce their price for the land on account of the construction of the road and the taking of the right of way, if they were not compelled to receive a less price on that account, this would by no means be conclusive of their right

to recover in this action; for their right to recover depends upon whether the value of their reversionary interest was in fact injured by the taking of the right of way and construction of the road, not upon the price for which it was afterwards sold. If defendants received a full price for their reversionary interest after the construction of the railroad, this would no doubt tend to show that such estate was not injured, but it would not be conclusive, for they may have sold it for more than its value. In other words, the fact, if shown, that they sold it at a good price would not relieve the company from responsibility for any damage actually caused, though it might be evidence that none was caused. Again, it is possible, under the rules of law which govern such cases, for one to be entitled to recover damages caused by the construction of a railroad across his land when in fact the land is worth more afterwards than it was before the construction of the road; for the general benefits received from the construction of the road may be greater than the special injury, but, as general benefits cannot be considered, it not infrequently happens that a judgment for damages in right of way cases must be sustained, though, if benefits of all kinds could be considered, no injury would be found. It is apparent from this that the mere failure of defendants to prove that the price which they afterwards received for their interest was affected by the construction of the road is a matter of little consequence now. It is sufficient that the jury have found that the estate of defendants was injured as alleged, and that there is evidence to support the finding.

We are also of the opinion that the circuit judge was correct in holding that the damages occasioned to defendants by the construction of the railroad across their land could not be reduced by showing that the land of defendants not taken would be benefited by the increased facilities in shipping coal furnished by the construction of the road. It was not alleged nor shown that the advantages to be derived by the defendants were in any way special or peculiar to them or different from those which other owners of coal land in that locality would receive from the construction of the railroad, and, as before

stated, general benefits cannot be considered. The reason for the exclusion of such benefits is that it would be unjust to charge the owner of land a part of which is taken by the company with those benefits which he receives from the construction of the railroad in common with the community in general when other land owners, whose lands do not happen to be taken, receive and enjoy such benefits equally with himself, and pay nothing for them. Cooley, Const. Lim. (4th Ed.) 707.

The same reason, it is said, does not apply to special benefits, though it seems that our statute excludes such benefits also. After providing for a trial by jury to ascertain the amount of compensation which the company shall pay for the right of way, the statute provides that "the amount of damages to be paid the owner of such lands for the right of way for the use of such company shall be determined and assessed irrespective of any benefit such owner may receive from any improvement proposed by such company." Sand. & H. Dig. § 2776. Now, it has often been decided that the damages for the assessment of which this statute provides include not only the value of the land actually taken for the right of way but all injury to the remainder of the tract reasonably caused by the appropriation of the right of way and operation of the railroad. *St. L. A. & T. Rd.* v. *Anderson*, 39 Ark. 171; *Little Rock, Miss. R. & Tex. Ry. Co.* v. *Allen*, 41 *Ib.* 431; *Springfield & Memphis Railway* v. *Rhea*, 44 *Ib.* 258; *Railway* v. *Combs*, 51 *Ib.* 324.

It follows, from the rule firmly established by these decisions, that the damages, which the statute says "shall be determined and assessed irrespective of any benefit" the owner may receive from the road, include not only those for the land actually taken but all incidental damages to the remainder of the tract as well. The statute makes no distinction between damages for value of land taken and damages to remainder of the tract, but declares that the amount of damages to be paid the owner shall be determined and assessed without regard to benefits. It is true that there are many cases in our reports where the court seems to have ignored the statute, and stated that the measure of damages for a right of way taken by a railroad is the difference between the value of

the whole tract without the railroad at the time it was constructed and the value of the remainder after its construction. *Little Rock, Miss. R. & Tex. Railway Co.* v. *Allen*, 41 Ark. 431; *Springfield & Memphis Railway* v. *Rhea*, 44 *Ib.* 258; *Railway* v. *Combs*, 51 *Ib.* 324; *Newgass* v. *Railway Co.*, 54 *Ib.* 140. But in these cases the question of benefits was not raised, and the statute was not considered. The rule of assessing damages for a right of way by taking the difference between the value of the tract before and after the construction of the road across it is simple and easily understood, and no doubt works justice in most cases, but in approving it the court did not intend to abrogate the statute, which is still in force. The statute was not referred to in those cases, for the reason that there was no question of benefits involved.

We do not know of any case in which this court has discussed the distinction between general and special benefits. While, as above stated, we are inclined to the opinion that the consideration of both are excluded by our statute in the assessment of damages, still it is not necessary to determine the question here; for, conceding that special benefits may be considered, we are of the opinion that increased value founded merely upon increased facilities for travel and transportation, such as is afforded the public in general along the line of the road, is not a special but a general benefit. *Roberts* v. *Board of Com.*, 21 Kan. 186; *Mahaffey* v. *Buck Creek Rd.*, 163 Pa. St. 158; *Sullivan* v. *North Hudson County Rd. Co.*, 51 N. J. L. 518; Lewis on Eminent Domain, § 476.

It may be that the value of this land was increased by the construction of the road; but the same argument was made in *Adden* v. *White Mts. N. H. Rd.*, 55 N. H. 413, where the tract claimed to have been injured was valuable on account of pine timber which the railroad enabled the owner to market. In reply to the argument that this benefit should be considered, Cushing, C. J., said: "Now, it seems to me that if there be any class of benefits which is emphatically shared by all, it is that class which has its origin in increased facilities for transportation. One man is enabled to get his pine timber to market, another opens his granite quarry, a third may have a

large grass farm, and finds facility for taking his pressed hay to market. These facilities are greater or less in proportion to the proximity of the land to the railroad or station, but they all belong to the same class. They all belong to the class of general benefits which is open to all and shared alike by all." The same reasoning holds good in this case. If it had been alleged and shown that the company had constructed a spur or side track specially for the shipment of coal from defendants' mine, and that this added to its value, a different question might have been presented. But this was not shown. It was, in substance, only alleged that the construction of the road, by furnishing increased facilities for the transportation of coal, greatly increased the value of defendants' lands. The value of other lands of the kind in that section were no doubt affected in the same way, and, though there is some conflict of authority on this question, we are of the opinion that only a general benefit is shown, and that the question as to whether under our law special benefits can be considered is not presented. *St. Louis, Ark. & T. Rd.* v. *Anderson*, 39 Ark. 167.

The evidence in the case is not very convincing; but there is some evidence to support the verdict, and we must take the finding of the jury on that point as conclusive. Finding no prejudicial error, the judgment is affirmed.

WOOD, J., not participating.

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

Opinion delivered February 16, 1901.

1. NEGLIGENCE—SPEED OF TRAIN.—Running a train at night at the rate of sixty miles an hour, a rate of speed largely in excess of schedule time, over a crooked track, where the headlight shines only one hundred feet ahead, is such negligence as will make the carrier liable for the injuries of a passenger resulting from derailment of the train caused by striking a cow. (Page 608.)

2. EVIDENCE—LAW OF FOREIGN STATES.—Where, in an action to recover for a tort committed in another state, the statute law of that state is proved, it is not admissible to prove by oral testimony what was the construction placed upon such statute by the supreme court of that state. (Page 611.)

3. SAME—WHEN NOT PREJUDICIAL.—In an action by a passenger to recover damages for injuries received in a train wreck, proof that the railway company settled with another passenger likewise injured in the same wreck is incompetent, but not prejudicial, if the company's negligence was otherwise established. (Page 611.)

Appeal from Nevada Circuit Court.

JOEL D. CONWAY, Judge.

Dodge & Johnson, for appellants.

The injury resulted from unavoidable accident, unmixed with negligence. Being a Missouri case, the right to recover is ruled by the Missouri doctrines. 54 S. W. 865; 178 Ill. 132. The injury must be the result of negligence in failing to exercise reasonable care and foresight as to appliances, servants, etc. 102 Mo. 451; 108 Mo. 249; 133 Mo. 6; 118 Mo. 199; 127 Mo. 197; 83 Mo. 608; 102 Mo. 438; 76 Mo. App. 606; 57 Mo. App. 332; Story, Bailm. § 601; Sh. & Redf. Neg. § 405; Whart. Neg. §§ 634–5; Hutch. Carr. § 502; Rorer, Railroads, 955; 42 Fed. 37; 130 Mo. 139; 76 Mo. 283; 106 Mo. 482; 37 Mo. 240; 88 Mo. 50. It was error to refuse defendant's fifth instruction. 160 Mass. 403; 18 N. Y. 408; 85 Me. 34.

Scott & Jones, for appellee.

BUNN, C. J. The appellee, Henry H. Stewart, was in the employ of the United States government as a postal clerk, and in the performance of his duties as such was a passenger in the mail coach of defendant's passenger train, on the 5th of February, 1898, going north from Texarkana to St. Louis; and when the train reached the little town of Hematite, about thirty-five or forty miles south of St. Louis, the train was wrecked; and the appellee was injured by receiving a cut an inch long and to the bone on the left side of the head and a contusion on the left thigh, wherefrom he suffered from nervous shock, and was unable to perform his customary duties for

twenty or thirty days, thus losing $100, and paid out for medical attendance $13, and some other small amounts.

The circumstances of the wreck were substantially as follows, viz: The train was running at the rate of fifty or sixty miles an hour, greatly in excess of the schedule time, which was thirty-three miles an hour, it being some minutes behind time, and the trainmen in charge were endeavoring to make up the time. It was about 6 o'clock a. m., which was at that season of the year dark. For the distance of a thousand or twelve hundred feet before reaching the street or public crossing at Hematite, there were curves in the railroad track forming the letter "S" —that is, two curves—and the track was in a cut from six to eight feet deep, about six feet deep towards the highway crossing and up to it. The engine struck a passing cow on the highway, and was thus thrown from the track, as were the tender and several of the coaches following, among them the mail coach in which the appellee was traveling, and was at his usual work at the time. The mail coach was turned over on its side, and the appellee was thus injured. It is in evidence that one occupying the engineer's place could see a cow only a short distance ahead, owing to the curves and the depth of the cut. It was also shown that in the night time, when the headlight had to be depended on, on account of the curvature of the road bed, and the consequent diversion of the rays of the headlight, from the track, a cow could not be seen further than one hundred feet in front of the engine.

The railroad bed, the cattle guards on either side of the highway and the wire fences leading therefrom, and the train, with its running gear and appliances, were all in perfect condition. Both the engineer and fireman were instantly killed. The statutes of Missouri regarding cattle guards and track fencing, as affects this case, are not materially different from the laws of this state.

The main question in the case is, were the employees of defendant guilty of negligence in operating the train at the time of the injury complained of? All the statutory signals had been given, and the stock signals required by the regulations of the company had also been given. But was all this suffi-

cient under the circumstances of this case? There was no apparent necessity to keep a watchman or guard at this crossing. Hematite is but a very small village, and it may be admitted, for the sake of the argument, that the crossing was little different from such a crossing in the country. But this immunity from keeping a watch at the crossing does not relieve railroad companies from the exercise of such care as it reasonably can use to prevent occurrences such as this one is shown to have been. Therefore there was no necessity for an instruction on the subject of gates and watchmen. It was shown that both the engineer and firemen were experienced in their stations, and the engineer especially was regarded as one of the finest engineers on the road. Both were acquainted with this part and all parts of the road, as they had been employed for sometime in running on these trains. Was it prudent or in the exercise of due care for this engineer, with his knowledge of the surroundings, to run his train at this particular point at the rate of fifty or sixty miles per hour, when only required by the schedule to run thirty-three miles per hour? The necessity of making up lost time is never so great as that of preserving human life, and even when the making up lost time approaches necessity itself, the necessary increase of speed should be on parts of a road where a strict lookout will be reasonably effective in preventing injuries, or at least the probability of injury, to persons and property.

From the evidence, the portion of the track involved was peculiarly trying to trainmen, and some things which would have greatly aided them in the successful running of the train on other portions of the track were absent at this place—a straight track and perfectly level grade, or grade that would insure a quicker stoppage of the train than on a down grade as this was. It appears to us, as it evidently did to the jury, that, without having to resort to anything that would have rendered the service of the road to the public less effective or to the company less remunerative, a far less rate of speed would have been the proper thing in this instance. At the time of the collision the train was running at a rate of nearly a mile a minute. To run the hundred feet, which was the greatest dis-

tance the engineer could have observed the cow, required little more than a second of time. A strict lookout, as required by law, and the application of the most effective means known to slow up or stop the train, could not possibly avail anything. No effective alarm could have been given in that moment of time. These things should have been taken into account by the engineer.

On the subject of the degree of care necessary under such circumstances, the court gave, at the instance of the plaintiff, instruction number 6, and, at the instance of the defendant, instructions number 8 and 12, which, taken together or even separately, fairly define what is the law applicable, as held by this court in all its decisions on the subject. *Little Rock & F. S. Ry. Co.* v. *Miles*, 40 Ark. 298; *Eureka Springs Railway* v. *Timmons*, 51 Ark. 459; *Railway Co.* v. *Sweet*, 57 Ark. 287; *Railway Co.* v. *Sweet*, 60 Ark. 550; *George* v. *St. L. I. M. & So. Ry. Co.* 34 Ark. 613. These instructions in their order are as follows:

To the plaintiff, No. 6: "Railroad companies, in the carriage of passengers, are required to use the utmost care and foresight, and are held responsible for the slightest negligence. The first and most important duty incumbent on them is to provide for the safety of their passengers. To this end they are required to provide all things necessary to their security, reasonably consistent with their business, and appropriate to the means of conveyance employed by them, and to exercise the highest degree of practicable care, diligence and skill in the operation of their trains."

To the defendant, No. 8: "The court instructs the jury that, while the law demands the utmost care for the safety of passengers, it does not require railroad companies to exercise all the care, skill and diligence of which the human mind can conceive, nor such as will free the transportation of passengers from all possible perils. The plaintiff in this case necessarily took upon himself all the usual and ordinary perils of travel; and if they find from the evidence that defendant had exercised all the care, skill and diligence required by law, as defined in these instructions, and that nevertheless the accident

occurred, the defendant would not be responsible therefor, and your verdict should be for defendant." And

No. 12: "The care required by railroad carriers has been defined to be the highest practicable care which capable and faithful railroad men would exercise in similar circumstances."

It was objected by the defendant that, having proved what was the statute law of Missouri on the subject of cattle guards and fencing and the liability and immunity therein declared, the court refused to permit the witness Ewing to testify as to the construction put upon said statute by the supreme court of that state. We see no error in this refusal. The best evidence of what the supreme court of Missouri has said on the subject is the report of its decisions, which are easily accessible, even admitting this is a matter of proof at all.

In the course of the examination of witnesses, one witness who, we infer, had been injured in the same wreck, or claimed to have been, was asked if the railroad had settled with him, to which he answered in the affirmative. To the asking of and the answer to their question, the defendant objected, but the court overruled its objection. There was error in this, but in view of the particular point at issue and the proof sustaining the plaintiff's contention—negligence—and for other reasons, the error is not a reversible error.

There is some question as to the amount of damages. Further than the loss of wages by the loss of time, the medical bill, etc., this court has no certain evidence in the case. Pain or suffering, as elements of damage, are uncertain quantities, both for the jury and the court. We will not disturb the verdict in this particular case.

Affirmed.

APPENDIX.

I

IN MEMORIAM

STERLING ROBERTSON COCKRILL.

At a meeting of the court held on Saturday, March 2, 1901, Hon. U. M. Rose, a member of the bar, addressed the court as follows:

MAY IT PLEASE THE COURT:

Your honors are but too well aware that we have recently sustained a great loss in the death of Sterling R. Cockrill, of this city, who for some years presided in this court as its chief justice. We have lately seen his earthly form borne with tears and sorrow to that last resting place to which we all tend with unerring footsteps, leaving at last all of our faults, all of our deeds, whether for good or for evil, to the charitable judgment of the children of men who may chance for a few days to live on when we shall be no more.

Speaking for the bar, as well as from the impulses of my own heart, I feel that no apology is necessary when I come to crave a respite from the labors of the court while we pause for a moment to contemplate the magnitude of a loss that, so far as this life is concerned, will never admit of any compensation; a loss that comes home to us with peculiar force in the presence of this court, assembled in a spot so intimately associated in our thoughts and memories with the life and public services of the deceased.

Having the honor on the present occasion to speak for the bar collectively, I shall not exceed my mandate if I add a few words to what they have well said, and which I am now to present to your honors, when I confine myself to sentiments which they have expressed, and which I know them to feel; for the language that I shall use will only serve to corroborate and to confirm in some slight degree their testimony as to the worth of the deceased, and as to the affliction caused by his death.

The father of Judge Cockrill, born in Nashville, Tennessee, in 1804, was educated at Transylvania University, at Lexington, Kentucky; and from the time of his early manhood he was a successful planter, though in

his youth he had studied law so far as to qualify himself to enter upon the practice of the legal profession. He married Henrietta McDonald, the daughter of General James McDonald, of the United States Army, a lady distinguished for many accomplishments and for many virtues. From this union several children were born, of whom only one, a daughter, is now living. On his birth in Nashville, Tennessee, on the 26th day of September, 1847, Judge Cockrill received the name of his father, Sterling Robertson Cockrill, who, while engaged in agricultural pursuits both in Alabama and in this state, continued for some years to reside in Nashville; but soon after the close of the civil war he removed with his family to a plantation near Pine Bluff, in this State, which he owned, and where he lived until his death, which occurred on Mt. Nebo, Ark., on the 18th of July, 1891.

When the war broke out, Judge Cockrill was attending a primary school, which he soon after left in order to enter a military institute located at Marietta, in the state of Georgia. Two years later, when the war was most flagrant, he enlisted in the Confederate army, where he remained until the return of peace, which found him, at seventeen years of age, a sergeant of artillery in the army of Gen. Joseph E. Johnson, with more experience of men and of life than most youths of his age acquire, but much in arrear in the studies that are more requisite for the pursuits of peaceful times. His deficiences in this respect were, however, soon supplied. Entering Washington and Lee University as a student, possessed of an active and vigorous mind, and inspired by an honorable ambition, he rapidly made up by a diligent course of study for the time he had lost during a not uneventful military career. Graduating at that institution, then under the presidency of Gen. Robert E. Lee, to whom he was nearly related through his mother, he next attended a law course in Cumberland University, at Lebanon, Tennessee, and was admitted to the degree of Bachelor of Laws.

In 1870, Judge Cockrill, having been admitted to the bar, began the practice of his profession in this city; and soon afterwards he formed a partnership with the late A. H. Garland, which continued until the latter became governor of this state in 1874.

In 1884, when a vacancy was created in the office of chief justice of this state by the death of Judge English, who had long occupied that position in a manner highly honorable to himself and useful to the public, the friends of Judge Cockrill brought him forward as a candidate for the succession. As he was then only 37 years old, the principal opposition that he encountered grew out of his youth, made the more striking by contrast with the late incumbent, who had departed this life in the maturity of his powers, and in the declining years of life. But those who knew Judge Cockrill best had a well founded and a thorough conviction of his entire fitness for the place, which was afterwards amply justified by his career on the bench. Elected to fill an unexpired term, he became a candidate for re-election in 1888, by which time his qualifications for the position were so fully and conclusively established that he met with no opposition. He was accordingly re-elected for a term of eight years; and he continued in the discharge of the delicate, important and far-reaching duties imposed on him by his office with a degree of diligence, a singleness of purpose, and a devotion to duty that were among his most striking characteristics, when a circumstance occurred that at the time was painfully felt.

Judge Cockrill had accepted the place of chief justice with a full knowledge of the fact that the salary fixed by law was so low as to be out of all proportion to the labor to be performed, to the learning and intellectual training required, and to the weighty responsibility to be assumed; and that this salary could not be increased during the term for which he had been elected; and, as he had been awarded the position in a manner practically unanimous, he felt under a strong obligation to go on as he had begun, when he was confronted with a difficulty that could not be obviated, and which grew more serious, not to say desperate, as time advanced. With a family of growing children to provide for and to educate, it became impossible, even with the exercise of the wisest economy, to defray inevitable expenses with the salary that he received. He explained to a few of his friends that with the best efforts that he could put forth he was compelled continually to fall more and more into debt—a condition extremely repellant to the notions that he entertained of that independence essential in private life and indispensable to one occupying his official position, where freedom from bias or restraint growing out of individual obligations assumes a primary importance. The ultimate result was that in 1893 he reluctantly resigned his place on the bench, and resumed the practice of his profession in this city, where he was at once surrounded with an extensive clientage.

This resignation of his official position was a step taken by Judge Cockrill with regret, because he had a high appreciation of the public confidence so generously bestowed, and because his temperament was such that he preferred the nice and scientific adjustment of sound legal principles to various and complex combinations of fact, as involved in the judicial function, to the uncertain and doubtful contests of the forum, where, owing to that haste unavoidably attending trials in courts of first instance, new elements of uncertainty necessarily come into play. This preference had in it, however, none of that timidity and love of seclusion that sometimes tend to make lawyers shun the courts of assize; for in contests of that sort Judge Cockrill was as active and fearless, as full of resources, as he was learned, laborious, accurate and painstaking in his researches while on the bench.

Judge Cockrill would certainly have preferred to remain on the bench; his continuance in office would have been most grateful to the bar and to the public at large; and he felt a natural reluctance to quit a position which had been recently bestowed in a manner expressive of unbounded confidence. On this point he was perhaps unduly sensitive, since the privilege of resignation at will is implied as a condition of acceptance of official position.

From the time that he resigned his place on the bench until his death Judge Cockrill was engaged in an extensive practice, in which he displayed great ability, combined with the utmost diligence and activity. The time that he had spent as a judge had not been thrown away; his knowledge of the law had been expanded and enriched, and his experience in the formulation of legal principles gave to his investigations and to his utterances an exactness, clearness and precision which are not always acquired at the bar. It is sometimes said that labors on the bench tend to disqualify for practice, because judicial impartiality is much at variance with the zeal and combativeness that are among the most vital of the qualities demanded of the advocate. Without denying the truth of this general statement, it will

suffice to say that it found no illustration in the case of the deceased. His experience on the bench added largely to the qualities that go to the formation of the successful advocate.

Judge Cockrill was stricken with his last illness while engaged in the trial of an important cause. If, on the first appearance of disease, he had been content to withdraw from the court-room, and to apply the proper remedies, he might have recovered; but a constraining sense of duty to his clients forbade that he should take a course that prudence dictated until it was too late to derive any ultimate benefit from medical treatment; so that, after a few days of painful and distressing illness, he died surrounded by his family at his residence in this city at 6 o'clock on the morning of the 12th of January last.

Judge Cockrill was married in May, 1872, to Miss Mary Ashley Freeman, daughter of Rev. Andrew Freeman, and granddaughter of Chester Ashley, for a long time the leader of the bar of this state, and who at the time of his death was a representative from this state in the United States Senate. Judge Cockrill left surviving him his widow and six children.

The report of the death of Judge Cockrill came with a sudden and painful shock; for, though it was known that he had been ill for a few days, yet such was his physical vigor that but few had any grave apprehension of the impending calamity. He had reached the meridian of life; but he looked much younger than he was; and his habits were such as to encourage the confident hope that he was destined in the future to a long, a useful and a distinguished career, that the work that he had done so well was only an earnest of what he would afterwards accomplish; but, as the brightest day is sometimes suddenly overcast, so in this instance our fondest anticipations were destined to a sudden eclipse.

Judge Cockrill at any time or place would have been a marked personality. His character was unusually well rounded and harmonious, free from the harsh discrepancies, contrasts and contradictions which mar by their discords, though they are not always incompatible with genuine virtues and splendid endowments. Few men have ever had more of that self-control that is derived from principles deliberately formed, and from a long and persistent course of mental training, than Judge Cockrill. Having an eager desire and an unwavering resolution to perform every duty in the most thorough manner that his abilities and opportunities would permit, he had a sovereign aversion for everything that was slovenly and perfunctory; and while he was on the bench he expected the members of the bar to do their part of the labor that devolved on them in the administration of justice with fidelity and discrimination. And in this respect he set them an example well worthy of their emulation. Quick to perceive the application of legal principles, he was untiring in research, and never gave over investigation until thoroughly convinced that his conclusions were well supported by reason and by authority. Superficial views, however plausible, he discarded, as being of little importance, preferring to rest his opinions on a deeper scrutiny that rejected improbable and far-fetched theories, such as have often proved to be the bane of the law. Only those who practiced before him can fully appreciate the labor that enabled him to penetrate to the heart of the most complex and difficult controversies that he was called on to decide. It is not to be understood from his laborious methods that he

was only a plodder in the law; for his mind was deeply imbued with the principles of jurisprudence, and he had a rare insight into the practical reasons in which they had their birth, and which should control in their application. No one perceived more intuitively or more distinctly the real questions involved in any litigation presented. Whether on the bench or at the bar, in his written opinions or oral arguments, precision and accuracy of statement were eminently conspicuous. His written opinions are models of terseness, condensation and clearness; equally free from redundancy, irrelevancy and needless repetition. His mind was essentially logical; so that his conclusions seemed to flow naturally and inevitably from the premises assumed. With an enlightened and liberal conception of jurisprudence, he strove to make of the law the willing and active agent for the attainment of even-handed justice, rejecting mere technicalities more remarkable for perverted ingenuity than for real merit. No judge could in the discharge of official duty be freer from all taint of bias, favoritism or prejudice. His impartiality was in perfect harmony with the impersonality of the law itself. Zealous in his friendships, and not without aversion for men of low morals and unworthy conduct, when he ascended the bench he disclothed himself of all prepossessions and prejudices which could in the faintest degree influence the solemn discharge of his consecrated duties. We shall all remember as long as we live the rare distinction with which he presided over this court, as well as the sincerity and complete self-surrender with which he devoted himself to the arduous duties inseparable from the position that he occupied.

I need not dwell on the qualities displayed by Judge Cockrill as an advocate. He brought to the performance of his duties as such the same conscientious diligence that marked his career on the bench. No emergency found him unprepared; no honorable resource was neglected. His zeal for the interests of his clients was intense, his management of a cause was skilfull, his arguments clear, logical and weighty; and his success at the bar justified the labor bestowed and the intellectual superiority manifested in every act of professional duty.

Having known Judge Cockrill intimately ever since his admission to the bar, I can speak of him in his private relations only in terms of highest commendation. The judge may retire from the bench, the lawyer may forsake his profession; such acts may awaken regret in the public mind, and may be productive of individual disappointment; but when a friend is removed by death it is the man himself that we miss; and we are not easily consoled by reflecting on the honors that he may have won, or the distinction that he may have attained. Were it otherwise, children who die in infancy or youth would be but little lamented. The strongest ties that bind us to each other are the most difficult to define; and there are many things in human life that can neither be measured, or weighed, or analyzed with scientific accuracy.

That Judge Cockrill had many personal friends and admirers is well attested by the facts that I have mentioned, as well as by the additional fact that only a few months before his death he was unanimously elected president of the State Bar Association; a position that he held when he died, and one for which he possessed the highest qualifications. In his personal relations Judge Cockrill revealed many traits that endeared him

to a very large circle of men. His inflexible honesty, his high and uncompromising sense of honor, his strict observance of all the proprieties of life, his well defined opinions on contemporary problems of great moment, based on extensive reading and reflection, the fidelity with which he adhered to them, and the ability with which he defended them, the willingness with which he was ready to aid in any public enterprise, the faithfulness with which he adhered to attachments once formed, were so many elements that exerted an influence that had nothing about it that was casual or transient. In his hours of relaxation, when business cares were laid aside, no one was more companionable. Those who have been with him on such occasions will never forget how his suggestive and entertaining conversation relieved the tedium of the passing hours. I traveled with him at different times; and I recall with extreme pleasure, mingled now with feelings of sadness and regret, an extended journey that I made with him last summer, enlivened by his keen powers of observation, his just appreciation of the varied phases of life, and a sense of quiet humor peculiar to himself, and which never transcended appropriate bounds. His learning sat very lightly upon him; he was absolutely destitute of pedantry and affectation; and while he had the moral and mental powers that command respect and challenge the highest regard, he possessed in no less degree the indefinable qualities that conciliate friendship by adding a charm to social intercourse.

On the whole, it may be said that the death of Judge Cockrill has produced a very wide and a very painful impression. It is but a few months since he addressed your honors on the occasion of the death of Mr. Garland. As he seemed at that time to be in the most robust health, no one could foresee that he would so soon follow him of whom he spoke on that last sad journey that is appointed for all men. This unexpected event is well suited to impress upon us the uncertainty of all of our pursuits, the instability of our possessions, and the ephemeral character of our present life.

In the present instance death came into our midst with stealthy step, and struck the sudden and fatal blow that is beyond recall. It removed from our midst, in the very noonday of life, one endeared to us by ties strengthened by the association of many years. The dimensions of the loss that we have sustained cannot be measured by any known standard; and it is, alas, irreparable. His voice, so often heard in this chamber, is silent forever; and, while we hasten to the same goal that he has reached, we consecrate this fleeting hour most affectionately to his memory.

It only remains for me to call the attention of your honors respectfully to the resolutions unanimously adopted by the bar at its meeting held in this room on the 19th day of January last. They were reported by a committee composed of B. B. Battle, W. S. McCain, Morris M. Cohn, R. J. Wilson and myself. They read as follows:

"1. In Judge Cockrill the state possessed a jurist of extensive learning and remarkable ability. He presided with dignity and efficiency for some years over our court of last resort. A strong and ever-present sense of justice marked all of his decisions; and his thorough acquaintance with the principles of jurisprudence was no less conspicuous. With a mind of great quickness and acuteness, that grasped questions both of law and fact with accuracy and promptitude, he never decided any question involving

doubt or difficulty without the most thorough and painstaking investigation. Fair-minded, impartial and unbiased, he allowed nothing to disturb in the slightest degree the even balance of the scales of justice. His opinions, which are models of terse, vigorous, logical and lucid expression, must always form a valuable part of our jurisprudence. He was no less eminent at the bar than on the bench. His habits of close attention and indefatigable labor, joined to his talents and legal acquirements, gave him a position in his profession that is rarely attained. As a citizen, he was earnestly devoted to every cause that promised to promote the public welfare. Whether engaged in professional duties or in the walks of private life, he was uniformly courteous and respectful toward men of all classes and conditions. His character was unsullied, his integrity unquestioned, his sense of honor unalloyed. Called away in the meridian of life, and in the midst of an active and useful career, we express but the common sentiment of all who knew him in saying that his death was a serious and an irreparable loss to the courts, to the bar, to the city in which he lived, and to the state.

"2. We tender to the family of the deceased our heartfelt sympathy, and the secretary is requested to transmit to them an engrossed copy of these proceedings."

Sooner or later oblivion spreads her pall over all things; but not so long as we live shall we be unmindful of that spirit that was with us so long, but that shall walk with us no more. It was in the month of December last that I spent an evening with Judge Cockrill at the home of a mutual friend. He seemed then to be in perfect health; and his conversation as usual was animated and full of interest. Returning home at a late hour, we parted where our paths diverged. The noise of daily life had ceased; the brilliant but silent stars,—those far off "street lamps in the city of God,"—were shining in all the splendor of a winter night; and in the whole wide world there was no hint that our earthly journeyings together were ended, and that our last farewell had been said. Alas, how unutterably sad would have been that moment if the near future had not been veiled from our sight with that pitying kindness that makes us blind to coming events.

The opinions of Judge Cockrill, as embodied in our reports of decided cases, will convey to generations that shall come after us no inadequate conception of his learning and talents. Jurisprudence, being a progressive science, which adapts itself continually to new conditions, must undergo many changes with the lapse of years, which however chiefly affect matters of detail, incidental rather than organic. Fundamental principles on which the law is based, so far from being merely conventional, are found to pervade the codes of all civilized communities, being derived from a remote past, showing that they have their origin in that sense of justice that is the eternal heritage of man. In our laws we trace some of them to the Anglo-Saxon dominion in England, and to laws that existed before Rome became the mistress of the world. In their nature they are immortal and indestructible.

So far as the decisions rendered by Judge Cockrill served to illustrate these fundamental principles, they must survive many vicissitudes, and will be remembered when things now regarded as permanent shall have passed away. But as we desire that he shall also be remembered for the many

virtues that he exhibited in private life, known to us as they cannot be known to those who come hereafter, I move the court, in obedience to the request from the bar, that the resolutions that I have just read may be spread on the records of the court as a perpetual memorial of one who for some years presided over its deliberations and participated in its labors.

The chief justice responded as follows:

In responding to the resolutions and the remarks of the gentlemen of the committee in presenting them, we desire to express our full concurrence in all that has been so appropriately and so well said.

Judge Cockrill although the youngest of all who have occupied his place on this bench, brought to the discharge of his duties a well trained and mature mind, and great industry, fixedness of purpose, and acquirements inferior to none. His opinions (and there are many on varied subjects and subjects of the first importance) are models of judicial expression, terseness and vigor, so that they are cited and relied upon with certainty, confidence and satisfaction universally in the legal profession,—a profession in this respect the most critical and discriminating of all professions.

He died, while yet in the prime of his manhood, having some years ago voluntarily retired from the bench to again engage in the active practice of his profession, for which he ever had a liking, and to which he was devoted for the profession's sake. In this sphere also he was eminently successful, and as a lawyer and practitioner he stood among the very first in our midst.

As far as men are able to judge of such things, on account of the courage of conviction and forensic ability of this most excellent citizen, men were beginning to look towards him and speak of him as one preeminently qualified to act on the more active field of public life, and it cannot be doubted that still additional honors awaited him, had not the reaper come but too soon, and reaped the harvest already matured.

The resolutions just presented will be spread upon the records of this court, and the clerk will furnish copies to the immediate family when requested, and the presentation speeches will be filed among the official papers of the court for the use of the reporter and the court.

II

OPINIONS NOT REPORTED.

Memphis Land & Timber Co. *v.* Stotts; appeal from Craighead chancery court; Edward D. Robertson, chancellor; reversed and remanded May 5, 1900; *per* Bunn, C. J.

Aslin *v.* State; appeal from Nevada circuit court; Joel D. Conway, judge; reversed and remanded May 12, 1900; *per* Riddick, J.

Godfrey *v.* Buck; appeal from Desha circuit court; John M. Elliott, judge; reversed and judgment for appellant June 9, 1900; *per* Hughes, J.

Bower *v.* State; appeal from Arkansas circuit court; George M. Chapline, judge; affirmed June 9, 1900; *per* Riddick, J.

Jacobs *v.* Sellmyer Mercantile Co.; appeal from Greene circuit court; Felix G. Taylor, judge; reversed and remanded June 16, 1900; *per curiam.*

Foster *v.* Haglin; appeal from Crawford circuit court; Jephtha H. Evans, judge; reversed and remanded June 16, 1900; *per* Wood, J.

McClendon *v.* Moore; appeal from Garland circuit court; Alexander M. Duffie, judge; reversed and remanded July 21, 1900; *per* Battle, J.

Hembree *v.* State; appeal from Polk circuit court; William P. Feazel, judge; reversed and remanded July 21, 1900; *per curiam.*

Locke *v.* Haynes & Pylant; appeal from Clark circuit court; Joel D. Conway, judge; judgment affirmed November 3, 1900; *per* Battle, J.

Burford *v.* Earl; appeal from Conway circuit court; Jesse C. Hart, special judge; reversed and remanded December 22, 1900: *per* Riddick, J.

St. Louis, I. M. & S. Ry. Co. *v.* Linam; appeal from Hot Spring circuit court; Alexander M. Duffie, judge; reversed and remanded February 2, 1901; *per* Bunn, C. J.

Palmer *v.* Ruddell & Padgett; appeal from Independence circuit court; Richard H. Powell, judge; affirmed November 3, 1900; *per* Bunn, C. J.

III

CASES DISPOSED OF ORALLY.

Stone *v.* Alexander; appeal from Clay circuit court; Felix G. Taylor, judge; affirmed on motion, March 19, 1900; *per curiam.*

Kansas City, P. & G. Ry. Co. *v.* Blair; appeal from Benton circuit court; Edward S. McDaniel, judge; affirmed March 24, 1900; *per* Bunn, C. J.

Streett *v.* Dundee Mortgage Co.; appeal from Chicot chancery court; James F. Robinson, chancellor; appeal dismissed March 26, 1900; *per curiam.*

St. Louis & S. F. Ry. Co. *v.* Steward; appeal from Crawford circuit court; Jephtha H. Evans, judge; affirmed March 31, 1900; *per* Bunn, C. J.

Anderson *v.* Queener; appeal from Polk circuit court; Will P. Feazel, judge; affirmed March 31, 1900; *per* Battle, J.

Spellman *v.* Clemmons; appeal from Jefferson circuit court; John M. Elliott, judge; decree by consent, March 31, 1900; *per curiam.*

Adams *v.* Sanders; appeal from Chicot circuit court; Marcus L. Hawkins, judge; affirmed on motion for non-compliance with rule nine, April 2, 1900; *per curiam.*

Carpenter *v.* Price; appeal from Arkansas chancery court; James F. Robinson, chancellor; appeal dismissed for non-compliance with rule nine, April 2, 1900; *per curiam.*

Eclipse Manufacturing Co. *v.* Blass; appeal from Pulaski circuit court; Joseph W. Martin, judge; dismissed for non-compliance with rule nine, April 2, 1900; *per curiam.*

Carradine & Burton *v.* Allen-West Com. Co.; appeal from White chancery court; Thomas B. Martin, judge; affirmed April 7, 1900; *per* Wood, J.

Elzier *v.* Roth; appeal from Lincoln chancery court; James F. Robinson, chancellor; appeal dismissed for non-compliance with rule nine, April 9, 1900; *per curiam.*

Texas Produce Co. *v.* Wells; appeal from Miller circuit court in chancery; Joel D. Conway, Judge; affirmed April 14, 1900; *per* Bunn, C. J.

Potts *v.* State; appeal from Perry circuit court; William L. Moose, judge; reversed on confession of error by the attorney general, April 14, 1900; *per curiam.*

Holmes *v.* State; appeal from Benton circuit court; James M. Pittman, judge; affirmed April 14, 1900; *per* Riddick, J.

Texarkana & Fort Smith Ry. Co. *v.* Strayhan; appeal from Miller circuit court; Joel D. Conway, judge; appeal dismissed by consent, April 14, 1900; *per curiam.*

Bell *v.* Fields; appeal from Montgomery circuit court; Will P. Feazel, judge; dismissed for non-compliance with rule nine, April 16, 1900; *per curiam.*

Hardin *v.* Myar; appeal from Jefferson circuit court; John M. Elliott, judge; affirmed April 21, 1900; *per curiam.*

Burrough *v.* Henderson; appeal from Garland circuit court; Alexander M. Duffie, judge; reversed and remanded by consent, April 23, 1900; *per curiam.*

Thompson *v.* State; appeal from Little River circuit court; Will P. Feazel, judge; affirmed April 28, 1900; *per* Bunn, C. J.

St. Louis, I. M. & So. Ry. Co. *v.* Cole; appeal from Crawford circuit court; Jephtha H. Evans, judge; affirmed April 28, 1900; *per* Battle, J.

Meekin *v.* State; appeal from Prairie circuit court, Northern district; James E. Gatewood, special judge; affirmed April 28, 1900; *per* Wood, J.

Ford *v.* Venable; appeal from White circuit court; Jesse N. Cyport, special judge; dismissed for non-compliance with rule nine, April 30, 1900; *per curiam.*

Johnson *v.* Citizens B. & L. Ass'n; appeal from Garland chancery court; Leland Leatherman, chancellor; dismissed for non-compliance with rule nine, April 30, 1900; *per curiam.*

Raulston *v.* McLendon; appeal from Garland circuit court; Alexander M. Duffie, judge; affirmed May 5, 1900; *per* Battle, J.

Wilson *v.* National Farmers Bank; appeal from Monroe circuit court in chancery; James S. Thomas, judge; affirmed May 5, 1900; *per* Hughes, J.

St. Louis S. W. Ry. Co. *v.* Barrow; appeal from Greene circuit court; Felix G. Taylor, judge; affirmed May 5, 1900; *per* Wood, J.

Bonner *v.* Douglass; appeal from Lafayette circuit court; Charles W. Smith, judge; affirmed on motion of appellee, May 7, 1900; *per curiam.*

Chicot County *v.* Whithorn; appeal from Chicot circuit court; Marcus L. Hawkins, judge; affirmed on motion of appellee, May 7, 1900; *per curiam.*

Kansas City, P. & G. Ry. Co. *v.* Coogan; appeal from Polk circuit court; Will P. Feazel, judge; affirmed May 12, 1900; *per* Riddick, J.

Aslin *v.* State; appeal from Nevada circuit court; Joel D. Conway, judge; reversed on confession of error by attorney general, May 12, 1900; *per curiam.*

Schott *v.* Burgess; appeal from Jackson circuit court; Frederick D. Fulkerson, judge; affirmed for non-compliance with rule nine, May 14, 1900; *per curiam.*

Butler *v.* Redding; appeal from Pope circuit court; William S. Moose, judge; affirmed under rule 7, May 19, 1900; *per curiam.*

Goldman *v.* Burgess; appeal from Jackson circuit court; Frederick D. Fulkerson, judge; affirmed on motion of appellee, May 21, 1900; *per curiam.*

Hill *v.* Bowen; appeal from Jackson circuit court; Frederick D. Fulkerson, judge; dismissed for non-compliance with rule nine, May 21, 1900; *per curiam.*

Portis *v.* Sidway; appeal from Jefferson chancery court; John M. Elliott, chancellor; dismissed by consent, May 26, 1900; *per curiam.*

Portis *v.* Sidway; appeal from Jefferson chancery court; John M. Elliott, chancellor; dismissed by consent, May 26, 1900; *per curiam.*

Upton *v.* State; appeal from Washington circuit court; James M. Pittman, judge; affirmed for non-compliance with rule nine, May 28, 1900; *per curiam.*

Skaggs *v.* Skaggs; appeal from Randolph circuit court in chancery; John B. McCaleb, judge; dismissed for non-compliance with rule nine, June 4, 1900; *per curiam.*

Isbell *v.* Smith; appeal from White circuit court; Hance N. Hutton, judge; affirmed June 9, 1900; *per* Battle, J.

St. Louis, I. M. & S. Ry. Co. *v.* Rannels; appeal from Cross circuit court; Felix G. Taylor, judge; affirmed June 9, 1900; *per* Wood, J.

Stone *v.* Ponder; appeal from Howard circuit court in chancery; Will P. Feazel, judge; affirmed June 9, 1900; *per* Wood, J.

Dun *v.* Cole; appeal from Polk circuit court; Will P. Feazel, judge; affirmed for non-compliance with rule nine, June 9, 1900; *per curiam.*

Scudder-Gale Groc. Co. *v.* Brown; appeal from Clay circuit court; Felix G. Taylor, judge; affirmed June 16, 1900; *per* Bunn, C. J.

Moore *v.* McCloy; appeal from Cleveland circuit court; W. T. Wooldridge, special judge; affirmed June 16, 1900; *per* Battle, J.

St. Louis, S. W. Ry. Co. *v.* Snider; appeal from Columbia circuit court; Charles W. Smith, judge; affirmed June 16, 1900; *per* Battle, J.

Little Bay Lumber Co. *v.* Jones; appeal from Calhoun circuit court; Charles W. Smith, judge; affirmed June 16, 1900; *per* Hughes, J.

Sutton *v.* State; appeal from White circuit court; Hance N. Hutton, judge; affirmed June 16, 1900; *per* Hughes, J.

Williams *v.* Hill; appeal from Lincoln circuit court, Varner district; A. B. Grace, judge; affirmed under rule seven, June 23, 1900; *per curiam.*

Lankford *v.* Kelley; appeal from Sebastian circuit court in chancery, Fort Smith district; Edgar E. Bryant, judge; affirmed June 23, 1900; *per* Bunn, C. J.

Moore *v.* Stephens; appeal from Faulkner chancery court; Thomas B. Martin, judge; affirmed June 23, 1900; *per* Wood, J.

Houston, Hargis & Co. *v.* Lesser Cotton Co; appeal from Pulaski circuit court; Joseph W. Martin, judge; affirmed under rule seven, June 30, 1900; *per curiam.*

St. Louis, I. M. & S. Ry. Co. *v.* Chastain; appeal from Jackson circuit

court; Frederick D. Fulkerson, judge; appeal dismissed by consent, June 30, 1900; *per curiam.*

Carlisle *v.* McLaughlin; appeal from Searcy circuit court; E. G. Mitchell, judge; affirmed as a delay case, July 16, 1900; *per curiam.*

Kent *v.* State; appeal from Sebastian circuit court; Styles T. Rowe, judge; appeal dismissed and forfeiture on bond, July 16, 1900; *per curiam.*

Worthen *v.* Little Rock; appeal from Pulaski circuit court; Joseph W. Martin, judge; affirmed by consent, July 16, 1900; *per curiam.*

James *v.* State; appeal from Sharp circuit court; John B. McCaleb, judge; affirmed July 21, 1900; *per curiam.*

Grimes *v.* Prest & McHugh; appeal from Jackson circuit court in chancery; Richard H. Powell, judge; affirmed October 13, 1900; *per* Hughes, J.

Rousa *v.* Tankersley *et al.*; appeal from Jefferson chancery court; James F. Robinson, chancellor; affirmed October 20, 1900; *per* Battle, J.

Jonesboro, Lake City & Eastern Ry. Co. *v.* Newton, *et al.*; appeal from Clay circuit court; Felix G. Taylor, judge; affirmed October 20, 1900; *per* Hughes, J.

Walters *v.* State; appeal from Clark circuit court; Joel D. Conway, judge; reversed on confession of error by attorney general, October 27, 1900; *per curiam.*

Riegler & Branch *v.* Mantler; appeal from Pulaski circuit court; Robert J. Lea, judge; affirmed on motion, October 27, 1900; *per curiam.*

Auten, Receiver, *v.* Boatmen's Bank; appeal from Pulaski circuit court; Joseph W. Martin, judge; appeal dismissed by consent, October 29, 1900; *per curiam.*

Auten, Receiver, *v.* State Bank of St. Louis; appeal from Pulaski circuit court; Joseph W. Martin, judge; appeal dismissed by consent, October 29, 1900; *per curiam.*

Auten, Receiver, *v.* Old National Bank; appeal from Pulaski chancery court; Joseph W. Martin, judge; appeal dismissed by consent, October 29, 1900; *per curiam.*

Brennan *v.* Helena Levee District; appeal from Phillips chancery court; H. N. Hutton, judge; dismissed for non-compliance with rule nine; *per curiam.*

Dalton *v.* Clark; appeal from Randolph circuit court; Edgar E. Bryant, judge; affirmed November 3, 1900; *per* Bunn, C. J.

Kizer *v.* Cluck; appeal from Madison chancery court; E. S. McDaniel, judge; affirmed November 3, 1900; *per* Hughes, J.

Whitley *v.* Halpern; appeal from Monroe chancery court; James S. Thomas, judge; affirmed November 3, 1900; *per* Hughes, J.

Texarkana & Fort Smith Ry. Co. *v.* Roland; appeal from Little River circuit court; Will P. Feazel, judge; appeal dismissed November 5, 1900; *per curiam.*

Border City Ice & Coal Co. *v.* Board Improvement Sewer District No. 1; appeal from Sebastian chancery court; H. C. Mechem, special judge; dismissed for non-compliance with rule nine, November 5, 1900; *per curiam.*

St. Louis S. W. Ry. Co. *v.* Ross; appeal from Greene circuit court; Felix G. Taylor, judge; affirmed November 17, 1900; *per* Hughes, J.

Lane *v.* Lane & Reeves; appeal from Lawrence circuit court; R. H. Powell, judge; affirmed November 17, 1900; *per* Wood, J.

Kenney *v.* Arkansas Bldg. & L. Ass'n; appeal from Pope chancery court; W. L. Moose, judge; affirmed on motion, November 24, 1900; *per curiam.*

Brower *v.* State; appeal from Polk circuit court; James D. Shaver, special judge; affirmed for non-compliance with rule nine; *per curiam.*

State *v.* Mhoon; appeal from Washington circuit court; James M. Pittman, judge; dismissed on motion of attorney general, November 26, 1900; *per curiam.*

State *v.* Cruduff; appeal from Washington circuit court; James M. Pittman, judge; dismissed on motion of attorney general, November 26, 1900; *per curiam.*

State *v.* Jackson; appeal from White circuit court; H. N. Hutton, judge; dismissed on motion of attorney general, November 26, 1900; *per curiam.*

Crowder *v.* State; appeal from White circuit court; H. N. Hutton, judge; affirmed for non-compliance with rule nine, November 26, 1900; *per curiam.*

Highsmith *v.* State; appeal from White circuit court; H. N. Hutton, judge; affirmed for non-compliance with rule nine, November 26, 1900; *per curiam.*

Sypert *v.* State; appeal from Howard circuit court; Will P. Feazel, judge; affirmed November 26, 1900; *per curiam.*

W. F. Taylor & Co. *v.* I. N. Grantham & Co.; appeal from Crittenden chancery court; E. D. Robertson, chancellor; affirmed December 1, 1900; *per* Bunn, C. J.

Hudson River Lumber Co. *v.* Head; appeal from Little River circuit court; W. P. Feazel, judge; dismissed by consent, December 3, 1900; *per curiam.*

Hudson River Lumber Co. *v.* Head; appeal from Little River circuit court; Will P. Feazel, judge; dismissed by consent December 3, 1900; *per curiam.*

Ozark Land Co. *v.* Lane Bodley Co.; appeal from Greene circuit court; S. R. Simpson, special judge; affirmed December 8, 1900; *per* Hughes, J.

Kilpatrick *v.* Vance; appeal from Hot Spring chancery court; L. Leatherman, chancellor; affirmed December 8, 1900; *per* Wood, J.

McNutt *v.* Robbins & Bro. appeal from Cleburne circuit court in chancery; P. R. Andrews, special judge; affirmed December 15, 1900; *per* Battle, J.

State *v.* Boyles; appeal from Sebastian circuit court; S. T. Rowe, judge; affirmed December 22, 1900; *per* Bunn, C. J.

Citizens' Bank *v.* Mickelberry & Blankenship; appeal from Clark circuit court in chancery; Joel D. Conway, judge; affirmed December 22, 1900; *per* Hughes, J.

Fitzpatrick *v.* State; appeal from Arkansas circuit court; J. N. Cypert, judge; affirmed December 22, 1900; *per* Riddick, J.

Clem *v.* State; appeal from Crawford circuit court; Jephtha H. Evans, judge; reversed December 22, 1900; *per* Riddick, J.

Blasdel *v.* Avery; appeal from Garland circuit court; A. M. Duffie, judge; dismissed by consent, December 22, 1900; *per curiam.*

Pulaski Turnpike Co. *v.* Mills; appeal from Pulaski circuit court; Joseph

W. Martin, judge; dismissed for non-compliance with rule nine, December 24, 1900; *per curiam.*

Weedman *v.* Robinson; appeal from Monroe circuit court; George M. Chapline, judge; dismissed for non-compliance with rule nine, December 24, 1900; *per curiam.*

Kansas City, P. & G. Ry. Co. *v.* Watt; appeal from Polk circuit court; Will P. Feazel, judge; affirmed January 3, 1901; *per* Riddick, J.

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