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CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

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T. D. CRAWFORD

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JUDGES

OF THE

SUPREME COURT

DURING THE PERIOD OF THIS VOLUME.

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

Rule IV. as Amended—Oral Arguments.

Where counsel on either side desire to make an oral argument in any cause, they shall notify the court of such intention on or before the day set for its submission, on which day the cause shall be submitted if ready, but the argument shall not be heard until the court shall be ready to consider the cause and shall have given notice to counsel on both sides of the day on which it will hear the argument. Only two counsel will be heard for each party, and not more than one hour will be allowed to each side for argument, without special leave of the court granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side, at their discretion. Provided, always, that a fair opening of the case shall be made by the party having the opening and closing argument. The plaintiff in error, or appellant, shall be entitled to open and conclude the argument. But where there are cross-appeals, they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

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ERRATUM :

On page 205, last line, for "now claims" read *then claimed.*

CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

MILLER *v.* DAVIS.

Opinion delivered February 3, 1900.

1. HOMESTEAD—EXEMPTION.—Under the Constitution of 1868 (art. 12, § 3), as under the Constitution of 1874 (art. 9, § 3), the probate court had no jurisdiction to order the sale of a decedent's homestead for the payment of the ordinary debts of the estate. (Page 2.)
2. SAME—FIDUCIARY DEBTS.—Where a decedent died leaving a wife and infant children surviving him, a probate sale of his homestead to pay his debts generally is void, though the homestead would not have been exempt as to part of such debts, being of a fiduciary character. (Page 2.)
3. SAME—EJECTMENT—BURDEN OF PROOF.—In ejectment by minor heirs to recover the ancestral homestead, which had been sold by order of the probate court for the payment of the ancestor's debts, the burden is on the defendant, claiming under such probate sale, to show that all of the debts for which the homestead was sold were of a fiduciary nature. (Page 3.)

Appeal from Lawrence Circuit Court in Chancery, Western District.

RICHARD H. POWELL, Judge.

STATEMENT BY THE COURT.

This is an action by two of the children and minor heirs of A. J. Cravens, to recover a tract of land owned and occupied by him as a homestead at the time of his death, which occurred about 1870. After his death the land was, by order of the probate court, sold to pay debts of his estate, and the appellant, John Miller, Jr.,

claims under such sale. This sale was made during the minority of some of the children of Cravens. The circuit court held that the probate court had no right to sell the homestead of the minors, and that such sale was void. Judgment was therefore rendered in favor of plaintiffs.

P. H. Crenshaw, for appellant.

The homestead was not exempt from sale for debts of a fiduciary nature. Const. Ark. (1868) sec. 3, art. 12; 35 Ark. 24; 53 Ark. 303; 56 Ark. 555; 54 S. W. 210. The question of exemption is settled when the debt is created. 42 Ark. 385; 46 Ark. 43; 51 Ark. 84; 45 Ark. 108.

Phillips & Campbell, for appellee.

As there is no final order in this case, the appeal should be dismissed. Sand. & H. Dig. § 1016. On the death of one indebted for trust funds, the claim for such funds must be duly authenticated, allowed and paid, as other demands. 23 Ark. 604; 39 Ark. 577; 45 Ark. 299.

RIDDICK, J., (after stating the facts). It has been settled by repeated adjudications in this state that the probate court has no jurisdiction to order the sale of the homestead for the payment of the ordinary debts of the estate. This was the law under the constitution of 1868, as well as under our present constitution. *Bond* v. *Montgomery,* 56 Ark. 563; *Burgett* v. *Apperson,* 52 Ark. 213; *McCloy* v. *Trotter,* 47 Ark. 445; *Booth* v. *Goodwin,* 29 Ark. 633.

The homestead does not go to the administrator as one of the assets of the estate for the payment of debts, but, after the death of the owner thereof, passes to his widow and children, to be held by them exempt from the debts of the estate during the period provided by law. If, during this period, the probate court attempts to sell it for the payment of the debts of the estate, the sale, as a general rule, is void. To this rule there are exceptions, and one of them is that the homestead is not exempt from sale for debts due in a fiduciary capacity. *Gilbert* v. *Neely,* 35 Ark. 24. As to such debts, there is no homestead exemption. But, as the jurisdiction of the probate court to order the sale of the homestead is limited to exceptional cases when the debts for the payment of which the sale is ordered are of a certain kind, the burden in an action of ejectment rests on the party claiming the homestead land under such a sale to show that it was made for the payment of a privileged debt.

Anthony v. *Rice,* 110 Mo. 223. It is not enough to show that among the debts of the estate there were fiduciary or privileged debts for which the homestead might have been sold. It must appear from the record of the proceedings in the probate court or in some other legitimate way that the order for the sale of the homestead was in fact made for the purpose of paying such a debt. As probate judges in this state are not required to be learned in the law, the substance, rather than the form, of the record will be regarded, but there should be enough to show that the debt for which the homestead is ordered sold is one for the payment of which it is not exempt. *Howe* v. *McGivern,* 25 *Wis.* 525; *Daudt* v. *Harmon,* 16 Mo. App. 103; 1 Woerner, Administration, § 102.

Now, it appears from the testimony in this case that among the debts probated against the estate of Cravens were debts which he owed as guardian for funds in his hands belonging to his wards. But there does not seem to have been any petition filed or order made to sell the homestead for the special purpose of paying these fiduciary debts. So far as the record discloses, there was no finding or judgment of the probate or other court that Cravens owed debts as a trustee, and no order made for the sale of the homestead to pay such debts. The estate owed many debts besides these trust debts, and the homestead, with the other lands of the estate, was ordered sold to pay the debts of the estate generally. Although it was shown that a portion of the debts for which the homestead was sold was trust debts, the evidence did not show that the other debts for the payment of which the homestead was sold were debts for which the homestead was liable. It is true the administrator, Mr. Thornburgh, testified that "a large part of the indebtedness" of the estate was of a fiduciary character, and that the judgments against the estate on account of such debts "amounted to more than the available assets of the estate outside of the lands." Counsel for appellant, in their brief on motion to rehear, call attention to the claims which this witness said were fiduciary debts, and then proceed to say that "there is nothing in the transcript to show that any of the other claims were not fiduciary debts." But the amount of these claims, the nature of which, counsel say, is not shown in the transcript, is considerable. The total amount of the claims probated against the Cravens estate was something over $6,000. Now, even if we concede that the word "guardian," or other like word, which in some instances follows the name of the person to whom the claim belongs, as shown on the list of claims copied in the transcript,

proves that such debts were of a fiduciary character, yet all these debts, with those which Mr. Thornburgh said were of that kind, amount to only about $4,000, leaving, according to our computation, at least $2,000 of the claims probated against the estate of Cravens the nature of which is not shown. There is nothing to show that these last-mentioned claims were or were not fiduciary debts. In noticing this point counsel for appellant, in their brief on motion to rehear, say: "Whether the debts were all fiduciary or not, no one can possibly say from this transcript, but that was a question on which the probate court necessarily passed judgment; for, in the absence of proof of the fiduciary character of the debts, no order of sale could be made." The answer to this argument is, to repeat what we have before stated, that the homestead was not an asset in the hands of the administrator. The probate court had no jurisdiction to order it sold except for debts of a certain kind. The burden of proof to show that the court had jurisdiction to sell the homestead was on the defendant, who claimed it under the probate sale. He did not show this or show any adjudication of the questions presented here by the probate court. The evidence did not show that all the debts for the payment of which the land was sold were trust debts. Neither the petition for the sale nor the judgment of the probate court ordering the sale was introduced in evidence. We therefore do not know that the probate court ever undertook to determine that all of the debts probated were fiduciary debts, or that the homestead was ordered to be sold for the payment of fiduciary debts only. On the contrary, the administrator's report of sale and the agreed statement of facts tend, as we think, to show that the questions whether the land was a homestead and whether the debts were trust debts were not presented to or determined by the probate court, but that this land, which had been used as a homestead, and other lands of the estate were sold to pay the debts of the estate generally, without any reference to whether they were or were not fiduciary debts. In other words, so far as we can ascertain from the transcript, the probate court made no distinction between the homestead and other lands, but ordered all the land of the estate, including the homestead, sold to pay the debts probated against the estate, without regard to their nature. As a large portion of these debts are not shown to have been of a fiduciary nature, it does not appear that the homestead was liable for such debts, or that the probate court had any power to order it sold in that way. We are therefore

of the opinion that the circuit court correctly held that the sale was void.

We do not regard the case of *Huffstedler* v. *Kibler,* recently decided by this court (67 Ark. 239), as in conflict with our conclusion here, for the opinion in that case states that the trust debts "were substantially all that were probated against the estate," and the homestead was sold to pay those fiduciary debts. If this statement was correct, the judgment in that case was right; if not correct, there was a mistake of fact in that case, which does not affect the rule of law laid down.

Counsel for appellant contend that the evidence shows that Cravens left surviving him at least six children, and that therefore the two appellees are only entitled to two-sixths of the land, instead of the one-half interest for which they recovered judgment. But the answer of appellant admits that, at the commencement of the action, only four of the children were living, and we infer from statements in the answer that the other heirs died without issue.

On motion to rehear counsel for appellant have discussed the question as to whether the rights of plaintiffs were barred by limitation, and also the right of defendant to subrogation, but, as no reference to these questions was made in the original brief, so as to call for a decision of the court thereon, it is, under the rules, too late to insist on them now. We deem it unnecessary to consider them also for the reason that the cross complaint of defendant asking for subrogation was dismissed without prejudice, and he is free to assert the rights to which he is entitled on that ground in another proceeding. We are therefore of the opinion that the judgment of the circuit court should be affirmed, and it is so ordered.

HARCROW v. GARDINER.

Opinion delivered March 24, 1900.

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70 294

PUBLIC POLICY—ILLEGAL AGREEMENT.—The illegality of an agreement between two partners in forming the partnership that the business should be carried on in the name of one of the partners only in order to deceive the creditors of the other partner will not affect with illegality a note subsequently executed by the former partner to the latter in settlement of the partnership business.

Appeal from Pulaski Chancery Court.

THOMAS B. MARTIN, Chancellor.

STATEMENT BY THE COURT.

Action in equity upon the following note, and to enforce a vendor's lien upon the lands therein described.

"$9,000.00. LANARK, ARK., July 19, 1893.

"One day after date I promise to pay to the order of J. C. Harcrow the sum of nine thousand dollars for property, to-wit, two lots on 13th and Battery, in the city of Little Rock, one lot on 6th and Wolf streets, ten acres adjoining Valentine's addition, 80 acres known as the 'Gough place,' 60 acres known as 'W. H. Wheeler place,' 40 acres known as the 'Martindale place,' 40 acres known as the 'Turner place.'

[Signed] "E. HARCROW."

The defense set up was want of consideration, and further that the note was part of a scheme to defraud the creditors of J. C. Harcrow. The facts appear in the opinion. The chancellor found against the defendant, and gave judgment accordingly. From this judgment the defendant appealed.

F. T. Vaughan and *James H. Stevenson,* for appellant.

The evidence does not show that J. C. Harcrow ever advanced any money to appellant. The "release" offered in evidence was genuine, and the chancellor erred in his finding to the contrary. On the right of witnesses to testify as to genuineness of signature, upon comparison and by memory, see 7 La. 95; 30 N. J. Law, 387;

8 Ark. 155; 5 McLean, 186; Laws. Exp. Ev. 317; 11 Ala. 855; 5 Neb. 248; 3 Jones' Law, 310; 41 N. Y. Supp. 6; 82 N. Y. 52. The findings of the chancellor as to the facts being against the evidence, the case should be reversed. As to difference between chancery cases and jury trials in this respect, see: 34 Ark. 212; 31 Ark. 85; 41 Ark. 292; 42 Ark. 521; 15 Ark. 209; 23 Ark. 341; 43 Ark. 307. There could be no lien in favor of J. C. Harcrow, because:

(1) An express lien by parol would contravene the statute of frauds. 25 Miss. 88.

(2) No lien by subrogation could exist, because: (a) The elements of subrogation are wanting. 2 Beach, Eq. § 868; Bisph. Eq. 335; 13 Oh. 148; 14 Ill. 468; 25 Miss. 88; Perry, Trusts, § 238; 163 Pa. St. 609; 1 Am. & Eng. Dec. in Eq. 472, 505 *n.*; 2 Beach. Eq. § 801; Jones, Liens, §§ 73, 1067; 1 N. Y. 586; 18 Ark. 142; 10 Ark. 411; 4 Lea, 216; 10 Heisk. 522; 16 La. Ann. 292; 5 Rob. 204; 86 Pa. St. 409; 56 Pa. St. 76; 38 N. J. Eq. 105; 14 N. J. Eq. 235; 61 Ala. 108; 3 Ala. 302; 25 Ark. 133; 44 Ark. 504; 47 Ark. 118; 50 Ark. 109. The fraud in the original transaction precludes any subrogation. 2 Beach, Eq. § 819; 38 Ala. 625; 81 N. Y. 394; 4 Dill. 207; 33 Kan. 90; 117 Ill. 145; 53 Ark. 271; Sheld. Sub. §§ 42, 44; Harr. Sub. § 813; 94 N. Y. 82; 105 N. Y. 539.

(3) There never having been a sale of the property, J. C. Harcrow had no vendor's lien in his own right. 2 Jones, Liens, § 1066; 121 Ill. 191. If we assume that there was an advancement, the evidence shows strong badges of fraud on J. C. Harcrow's part. Bump, Fr. Con. §§ 46, 49, 51, 53, 63. There could be no resulting trust in favor of J. C. Harcrow because of the fraud on the creditors. 17 So. 185; 4 Barb. 425; 6 Oh. St. 52; 2 Dev. Eq. 497; 19 N. J. Eq. 546; 26 Ind. 319; 1 Beach, Tr. § 125, p. 155; 1 Beach, Eq. § 217, p. 244; 1 Perry, Tr. § 151, p. 181; 10 Am. & Eng. Enc. Law, 57, 58; 50 Mo. 572; 4 Halst. 891; 10 Am. & Eng. Enc. Law, 14. To raise such a trust there must have been an advancement of a definitely ascertained amount at the time of the purchase of the property and with the intention of raising such a trust. Tied. Eq. § 311; 1 Beach, Eq. 217, 219; 30 Ark. 230; 29 Ark. 612; 32 Miss. 190; 27 Ark. 89; 2 Paige, Ch. 217; 10 Am. & Eng. Enc. Law, 5, 8, 12, 13 and 14; 9 Ark. 529; 21 Md. 32. The evidence of these facts must be clear and convincing. Tied. Eq. Jur. § 311; 27 Ark. 89; 2 Paige, Ch. 217; 5 Johns. Ch. 18, 19; 1 Beach, Eq. § 224; 81 Va. 152; 15 Oh. 148; 19 Ia. 362; Perry, Tr. § 137; 19 N. J. Eq. 549; 44 Ark. 365; 114 Ill. 554; *id.* 636; 21 Md. 328; 10 Am. & Eng. Enc. Law,

23, §§ 11, 12, 13, 14, 16 and 17. The fraud bars recovery on the note. Equity refuses to grant relief to either party to an executory contract to defraud creditors. 26 Ark. 317; 52 Ark. 171; 10 Ark. 54; 11 Ark. 411; *ib.* 475; 19 Ark. 650, 659; 26 Ark. 316; 47 Ark. 301; Bump, Fr. Con. § 432; 11 Ill. 300; 50 Am. Dec. 460, 469 *n*; 29 Ill 524; 45 *id.* 23; 3 Mass. 378; 23 N. J. Eq. 60; 15 Am. Dec. 596, 600; 38 *id.* 578. No recovery can be had upon a note given as the consideration of a fraudulent transfer. 33 N. J. Law, 318; 20 Wend. 37; S. C. 4 Hill, 424; 9 Dana, 318; 21 Ill. 152; 10 Me. 71; 3 Paige, Ch. 154; 49 Mass. 269; 3 Dana, 540; 1 Oh. St. 262; 126 Ill. 525; 8 Cush. 525; 58 Barb. 390; Wait, Fr. Con. 395; 25 Mo. 165; 1 M. & W. 159-166; 2 Lans. 103; 10 Barb. 369; 34 S. W. 755; 65 Tex. 499; 65 Tex. 217. This principle extends to the personal representative of the fraudulent grantor. 19 Ark. 659; 4 Ark. 173; 13 Ark. 593; Bump, Fr. Con. § 433; 11 Ill. 300; S. C. 50 Am. Dec. 460, 469, note; 42 Am. Dec. 168. The statute of 1895 (Laws 1895, pp. 165-6) does not apply, so as to authorize the administrator to bring this suit, because that statute includes only transfers of realty. The statute, being in derogation of common law, will not be extended by implication. Suth. Stat. Const. § 400; 78 Ala. 111; 50 Miss. 517; 56 Barb. 51; 77 N. Y. 36; 3 Den. 220; 85 Ill. 197; 3 Barb. 341; 38 Miss. 118; Suth. Stat. Const. § 208; 44 Miss. 322; 21 N. Y. 148; 46 Me. 377; 4 W. Va. 383; 87 Pa. St. 253; 5 Mich. 98; 6 *ib.* 242; *ib.* 17; 20 Wend. 181; *ib.* 555; 20 Johns. 361; *ib.* 342; 3 Cow. 59; 5 Hill, 461; 1 Barb. 185; 6 Hill, 149; 7 *ib.* 431; 3 Den. 601; 3 N. Y. 396; 31 Mich. 431; 18 Ga. 333. Nor can the act be construed retrospectively. 11 Wis. 371; 39 Miss. 364; Suth. St. Const. §§ 463, 464; 6 Ark. 484, 493; 56 Ark. 485, 495; 1 N. Y. 129; S. C. 1 Den. 128; 6 Hill, 149; 33 Gratt. 677; 58 Barb. 176; Wade, Ret. Laws, 34-5-6; 7 Johns. 504; 17 Hun. 457; 46 Mich. 278; 20 *id.* 398; Sedg. St. Con. 160; Cooley, Con. Lim. 455; 26 Ark. 127; 15 Wis. 548; 1 Black, 459.

Z. T. Wood and *W. S. & F. L. McCain,* for appellee.

If J. C. Harcrow furnished the money to buy the land, he would be entitled to a lien without any express agreement. 40 Ark. 62. If the parties intended by the note that J. C. should have a lien, equity will effectuate that intention. 51 Ark. 433; 60 Ark. 598; 52 Ark. 441. The act of 1895 applies to authorize the administrator to sue. 58 Ark. 117; 43 Ark. 156; Sch. Ex. and Adm. § 320. A release must have a consideration. 31 Ark. 728; 33 Ark. 572; 40

Ark. 182. Re-delivery of the note was essential to make the release good as a gift. 2 Kent's Comm. 438; 60 Ark. 169.

RIDDICK, J., (after stating the facts). This is an action by the administrator of the estate of J. C. Harcrow against Elbert Harcrow to recover judgment upon a promissory note for the sum of nine thousand dollars, and to declare the same a lien upon the land described in the note.

The first contention of the defendant is that there was no consideration for the note. He states that his brother, J. C. Harcrow, during his last sickness was living with one Sallie Smith, a woman with whom he had sustained immoral relations, and by whom he had illegitimate children. His brother, so defendant testified, said to him that the woman was annoying him by insisting that he should make some provision for her and her children, and that, at the urgent request of his brother, and to appease the woman, this note was executed, under a promise that his brother would in a few days return the note. In a day or two afterwards he called upon his brother, and asked for the note. His brother requested the woman to get it, and give it to defendant, but it had been mislaid, and could not then be found; so, instead of returning the note, his brother executed to him a receipt in writing, stating that he had received payment of the note in full. This is his story, and there is much other evidence bearing on this point, but we need not discuss it. The questions as to whether this note was without consideration, and whether the receipt purporting to be signed by J. C. Harcrow was genuine or forged, were submitted to the chancellor, who found against the defendant, and we can by no means say that this finding is clearly against the weight of evidence. If defendant be injured by such finding there is little ground for sympathy, for by his own confession this note was executed as a part of a scheme to deceive a wronged and ignorant woman. If this be true, and he is compelled to pay the note, it is a case of one caught in his own trap. But we do not believe that any mistake was made. At the time this note was executed, J. C. Harcrow, besides these illegitimate children, had, living in the same county, a lawful wife and child. As this fact was well known, it is not apparent why the execution of this note to him should have been regarded by Sallie Smith as a provision for her or her children. It does not appear that the attempted return of the note, of which defendant testified, was kept secret from her, nor why the possession of it for only a brief time

would have tended in any way to shield the brother of defendant from her importunities. In fact, the whole story of the defendant in reference to the execution of the note and the written release seems to us unreasonable and improbable. It is in conflict with the facts stated in the amendment to his answer, in which he alleged that the land for which the note purports to have been executed was purchased by defendant and J. C. Harcrow jointly, and the title taken in the name of the defendant for the purpose of covering up the interest of J. C. Harcrow in such property and defrauding his creditors. After considering this amendment in connection with the other facts in proof, we have very little doubt about the correctness of the finding of the chancellor on this point, and it must stand.

The facts in this case, as we see them, can be briefly stated. About 1881 the defendant and his brother commenced the mercantile business together as partners at Lanark in this state. J. C. Harcrow had previously failed in business, and this new business venture was carried on in the name of the defendant, Elbert Harcrow. The capital they invested in it was no doubt small, but the business prospered, and after some years the firm had a surplus of money on hand. This money was from time to time invested in land for the benefit of the firm, and the title taken in the name of Elbert Harcrow, that, as before stated, being the name in which the business was carried on. In this way after some ten or twelve years the whole or nearly all of the firm's assets were converted into land. In 1893 J. C. Harcrow was stricken with consumption, and, knowing that the end of life was approaching, he sent for his brother, and they had some kind of a settlement of their partnership affairs, and the note upon which this action is based was given by the defendant to his brother for his share of the partnership assets, which, as before stated, consisted mainly, if not altogether, of land. The note on its face purports to have been executed for certain tracts of land therein described, they being, as we think, that portion of the firm's assets allotted to J. C. Harcrow in the settlement.

The contention is made that, under these facts, the action cannot be maintained, because, it is said, the property was conveyed to the defendant for the purpose of defrauding the creditors of J. C. Harcrow. The question as to whether one who sells property to another for the purpose of defrauding his creditors can maintain an action on a note given by the vendee for the purchase money has been much discussed by the courts of the different states. Quite a number of them hold that such actions cannot be maintained, and

that view has been approved by this court. *Payne* v. *Bruton,* 10 Ark. 53; *Nellis* v. *Clark,* 20 Wend. (N. Y.), 24; *Nellis* v. *Clark,* 4 Hill (N. Y.), 424; *Church* v. *Muir,* 33 N. J. Law, 318; *Davis* v. *Sittig,* 65 Texas, 499; *Norris* v. *Norris,* 9 Dana (Ky.), 317; note to *Whitworth* v. *Thomas,* 3 Am. St. Rep. 727.

On the other hand several of the ablest courts hold, under statutes similar to ours, that by the terms of the statute such contracts, though void as to creditors, are valid and binding between the parties. *Stillings* v. *Turner,* 153 Mass. 534; *Still* v. *Buzzell,* 60 Vt. 478; *Harvey* v. *Varney,* 98 Mass. 118; *Carpenter* v. *McClure,* 39 Vt. 9; *Dyer* v. *Homer,* 22 Pick (Mass.), 253; *Gary* v. *Jacobson,* 55 Miss. 204; *Butler v. Moore,* 73 Me. 151; *Davy* v. *Kelley,* 66 Wis. 452; *Winton* v. *Freeman,* 102 Pa. St. 366.

But, while the discussion of this question by the various courts furnishes an interesting chapter in the history of our jurisprudence, we do not see that it arises in this case. The ground upon which the courts which refuse to enforce such contracts base their decision is that such contracts are forbidden by law and illegal. But we are not asked in this suit to enforce an illegal contract. The note upon which this action is based was given by one partner to another in settlement of their partnership affairs. If we concede that when this partnership was first formed it was agreed that the business should be carried on in the name of the defendant in order to deceive the creditors of the other partner, that would be no defense here, for this is not an action upon the partnership agreement. The illegality, if any, consisted in such prior agreement, not in the partnership business, nor in the settlement between the parties by which they undertook to divide the partnership assets, and therefore it is no defense to the enforcement of the subsequent contract based on such settlement. This question was considered by the High Court of Chancery of England in the case of *Sharp* v. *Taylor.* The parties were British subjects and owners of a ship which, in violation of an act of parliament, they had registered in the United States in the name of a citizen of this country as an American vessel, in order to evade the registry laws of England. The plaintiff brought an action for an account, and the defendant among other defenses set up that the plaintiff's claim was in violation of law. But Lord Cottenham, after remarking that the plaintiff was not asking to enforce any agreement adverse to the act of parliament, nor seeking compensation for an illegal voyage, proceeded as follows: "Can one

of two partners possess himself of the property of the firm, and be permitted to retain it if he can show that in realizing it some provision or some act of parliament has been violated or neglected? The answer to this will be that the transaction alleged to be illegal is completed and closed, and will not be in any manner affected by what the court is asked to do between the parties." *Sharp* v. *Taylor,* 22 Eng. Ch. 801.

Though these words of the Lord Chancellor have been often quoted with approval by the courts of this country, including the Supreme Court of the United States, they have not escaped criticism, either here or in England. Sir George Jessel, speaking of this case in *Sykes* v. *Beadon,* 11 Ch. Div. 170, while not denying that the judgment of the Lord Chancellor was correct, criticised the language used as being broad enough to include illegal partnerships of all kinds. But this criticism of the Master of the Rolls does not weaken the case of *Sharp* v. *Taylor* as an authority for the position we take here, for the partnership between J. C. Harcrow and the defendant was not an illegal partnership.

If this partnership had been formed for the purpose of carrying on a gambling house, or for the sale of intoxicating liquors without a license, or for any other illegal and prohibited business, a very different question would be presented; for then the case would come within the rule asserted with so much force in *Sykes* v. *Beadon,* that courts will not interfere or assist in dividing the proceeds of an illegal business or transaction. The evidence shows nothing of the kind here. The partnership was formed for the purpose of keeping and carrying on a small country store, a business neither immoral nor illegal. And, although one member of the firm kept from the public his connection with the firm, remaining a secret or silent partner, that did not render the firm's business illegal, even if we admit that the object was to avoid an attachment by his creditors, for this was only an incident, and not the main purpose of the partnership. The cases cited below show, we think, that, had there been no settlement between the parties, and no note executed, the courts would have sustained an action against the defendant to compel him to account for the partnership assets in his hands. If this be so, there is no reason, when the partners themselves have made the settlement, why the note executed in pursuance of such settlement should not be enforced, nothing appearing to indicate mistake or unfairness in the settlement. *Sharp* v. *Taylor,* 22 Eng.

Chan. 801; *Brooks* v. *Martin*, 2 Wallace (U. S.), 70; *McBlair* v. *Gibbes*, 17 Howard (U. S.), 232; *Harvey* v. *Varney*, 98 Mass. 118; *Wilson* v. *Owen*, 30 Mich. 474; *Gilliam* v. *Brown*, 43 Miss. 641; 1 Bates on Part. § 122; 2 Pomeroy's Eq. (2 Ed.) and note to § 940.

There is another ground on which we think the contention of the defendant on this point must fail. The evidence, as we have stated, shows that J. C. Harcrow failed in business about 1880, but it was nine or ten years afterwards before the land was purchased by the firm. The defendant himself testified that the old debts against J. C. Harcrow were barred by limitation, and at the time of his death in 1893 he seems to have been comparatively free from debt. Whether there were valid and subsisting debts against him at the time the firm purchased this land, the evidence does not show. Even if we should adopt the view contended for by appellant, it seems that the evidence on this point is not sufficient; for, if defendant is to be allowed to retain land owned by his brother without paying for it, on the ground of fraud against third parties, such fraud should be clearly established, and, unless J. C. Harcrow owed debts at the time this land was purchased, no fraud is shown.

Our attention has been called to the act of 1895, passed after the commencement of this action, authorizing an administrator of a fraudulent grantor to bring suit to set aside the fraudulent conveyance, but, as we have concluded that this action can be maintained regardless of that act, we need not notice the discussion in reference to the same.

We have given due attention to the cases collated in the able brief filed by counsel for appellant, but we are unable to adopt their views as to the proper disposition of the case. Our conclusion is that the judgment of the chancellor is right, and it is therefore affirmed.

The CHIEF JUSTICE and WOOD, J., concur.

BATTLE, J., (dissenting). The facts in this case, as I understand them, are as follows: Sometime in 1880 or 1881, J. C. Harcrow was engaged in a mercantile business at Monticello, in this state, and his younger brother, Elbert Harcrow, was his clerk. Becoming much involved in debt, in fact insolvent, he conveyed all his property to his brother Elbert in order to defraud his creditors, who recovered many judgments against him on the indebtedness he was owing at the time of the fraudulent transfer, which have never been paid. Elbert continued the business ostensibly in his

own name and on his own account at Monticello for many years, and then removed to Lanark, in Bradley county, in this state, where he continued the same business, which he conducted at Monticello, on his own account. J. C. accompanied and remained with him for some time, but openly disclaimed any interest in the business or the capital invested in the same. In time J. C. left Elbert and the business at Lanark, and came to Little Rock. Elbert prospered in this business, and succeeded in thereby accumulating several thousand dollars. This money J. C., claiming no interest in it, but asserting that it was the property of his brother, and pretending to be the agent of his brother, invested in real estate, mostly in Little Rock, which he caused to be conveyed to Elbert. In the consummation of the fraudulent scheme, so successfully managed for many years, in the year 1893 the two brothers divided between themselves the property out of the benefits of which they had defrauded creditors by the conduct and management of business in the manner stated. The result of the division was the execution by Elbert to J. C. of the note sued on as J. C.'s part of the ill-gotten gains. The right of appellee to recover in this action depends upon the validity of this note. Was it valid?

By an act approved December 6, 1837, the general assembly of this state declared as follows: "Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or in goods and chattels, or things in action, or of any rents issuing therefrom, and every charge upon lands, goods or things in action, or upon the rents and profits thereof, and every bond, suit, judgment, decree or execution, made or contrived with the intent to hinder, delay or defraud creditors or other persons of their lawful actions, damages, forfeitures, debts or demands, as against creditors and purchasers prior and subsequent, shall be void." Sand & H. Dig. § 3472.

And by an act approved February 16, 1838, it enacted: "Every person who shall be a party to any conveyance or assignment of any real estate, or interest in any real estate, goods or chose in action, or any rents or profits issuing therefrom, or to any charge upon such estate, with intent to defraud any prior or subsequent purchaser, or to hinder, delay or defraud creditors or other persons, shall be deemed guilty of a misdemeanor, and on conviction shall be fined in any sum not less than five hundred dollars." *Id.* § 1577.

Under these and similar statutes all agree that contracts based

upon sales, transfers, conveyances or assignments of property made to defraud the creditors of one or both of the parties thereto are void as to such creditors, but as to the validity of such contracts between the parties there is a considerable contrariety of opinion. Many courts hold that such contracts are also void as to the parties to the same. *Nellis* v. *Clark,* 4 Hill, 424; *Nellis* v. *Clark,* 20 Wend. 24; *Collins* v. *Blantern,* 2 Wils. 341; *Smith* v. *Hubbs,* 10 Me. 71; *Niver* v. *Best,* 10 Barb. 369; *Norris* v. *Norris,* 9 Dana, 317; *Harvin* v. *Weeks,* 11 Rich. (S. C.), 601; *Church* v. *Muir,* 33 N. J. L. 318; *Merrick* v. *Butler,* 2 Lans. 103; *Powell* v. *Inman,* 82 Am. Dec. (N. C.) 426; *Ager* v. *Duncan,* 50 Cal. 325; *Walker* v. *McConnico,* 10 Yerg. 228; *McCausland* v. *Ralston,* 28 Am. Rep. (Nev.), 781; *Hamilton* v. *Scull,* 25 Mo. 165, 69 Am. Dec. 460; *Fenton* v. *Ham,* 35 Mo. 409; *Harwood* v. *Knapper,* 50 Mo. 456; *Goudy* v. *Gebhart,* 1 Ohio St. 262; *Rasher* v. *E. Detroit etc. Ry. Co.* 90 Mich. 413; *Bradford* v. *Beyer,* 17 Ohio St. 388; *Galpin* v. *Galpin,* 74 Iowa, 454; *Sweet* v. *Tinslar,* 52 Barb. 271; *Williams* v. *Clink,* 90 Mich. 297; *Cadogan* v. *Kennett,* 2 Cowp. 434; *Davis* v. *Sittig,* 65 Texas, 499; Bump on Fraudulent Conveyances (last Ed.), §§ 432, 434, 435 and 444, and cases cited. In this view the Supreme Court of this state concurred with these authorities in *Payne* v. *Bruton,* 10 Ark. 53. On the other hand, several courts under similar statutes hold that such contracts, though void as to creditors, are valid as to the parties. *Carpenter* v. *McClure,* 39 Vt. 9; *Findley* v. *Cooley,* 1 Blackf. 262; *Telford* v. *Adams,* 6 Watts, 429; *Sherk* v. *Endress,* 3 W. & S. 255; *Dyer* v. *Homer,* 22 Pick. 253; *Clemens* v. *Clemens,* 28 Wis. 637; *Harris* v. *Harris,* 26 Gratt. 737; *Dietrich* v. *Koch,* 35 Wis. 618; *Butler* v. *Moore,* 73 Me. 151; *Winton* v. *Freeman,* 102 Pa. St. 366; *Gary* v. *Jacobson,* 55 Miss. 204; *Hawes* v. *Loader,* Yelv. 197; *Bredon's Appeal,* 92 Pa. St. 246; and other cases cited in the opinion of the court. Some of the courts which take the latter view do so upon their statutes, which make such contracts void only as to the creditors whose right, debt, or duty is attempted to be avoided, holding that the word *only* used in the statutes is a word of limitation, confining the invalidating effect of the statute to such creditors. *Carpenter* v. *McClure,* 39 Vt. 12; *Dyer* v. *Homer,* 22 *Pick.* 253; *Hawes* v. *Loader,* Yelv. 197. But there is no such limitation in our statute. On the contrary, all sales, transfers, conveyances and assignments of any property made with the intent to defraud creditors is prohibited, and made a misdemeanor by statute

in this state, the penalty for which is a fine not less than $500. Sand. & H. Dig. § 1577. According to the general rule, no action will lie to enforce contracts made in consideration of sales, transfers, conveyances or assignments made in violation of such statutes, or to recover damages on account of the non-performance thereof, or for any relief based thereon. Under the statutes of this state, the former, in my opinion, is clearly the correct and more reasonable view.

It is said in the opinion of the court: "We are not asked in this suit to enforce an illegal contract. The note upon which this action is based was given by one partner to another in settlement of their partnership affairs. If we concede that when this partnership was first formed it was agreed that business should be carried on in the name of the defendant in order to deceive the creditors of the other partner, that would be no defense here, for this is not an action upon the partnership agreement. The illegality, if any, consisted in such prior agreement, not in the partnership business, nor in the settlement between the parties by which they undertook to divide the partnership assets, and therefore it is no defense to the enforcement of the subsequent contract based on such settlement."

This statement is erroneous for the following reasons:

First. Because it assumes that Elbert and J. C. Harcrow entered into an ordinary partnership for the purpose of doing a mercantile business.

Second. It assumes that the business was lawful, regardless of the purpose for which it was carried on; for it says "the illegality, if any, consisted in such prior agreement, not in the partnership business."

Third. Because it assumes that the consideration, purpose, or the object of the execution, of the note cannot be inquired into in this action; for the action is not based upon the agreement upon which the business was conducted, and because the illegality, if any, consisted in such agreement, and not in the partnership business. nor in the settlement by which the parties undertook to divide their partnership assets.

I will notice these errors in the order in which they are stated.

First. There was no partnership ostensibly formed between Elbert and J. C. Harcrow. The latter was engaged in a mercantile business at Monticello, became insolvent, and conveyed and assigned all his property used in such business to Elbert to defraud

his creditors. (These facts are conceded to be true by appellant and appellee.) After this Elbert carried on the business in his own name, and as his own. He removed to Lanark, and there continued the same business as he had at Monticello. As the assets employed in the business were converted into money, J. C., as the agent of Elbert, carried the money to Little Rock, and invested it in real estate, and took the title to the same in the name of Elbert, at the same time disclaiming any interest therein. Many years after this, when the end of his life was near, he induced his brother Elbert to execute the note sued on for the property which he had purchased, and to which he had taken the title in the name of Elbert, without any other consideration, describing it in the note. The facts and circumstances shown in the evidence clearly prove a scheme to defraud the creditors of J. C. by the sale to Elbert, by the conduct of the business in the name of Elbert, and by the purchase of the real estate. The execution of the note, under the circumstances, is virtually a confession by both parties of the fraud.

Second. A business, apart from its purpose or object, may be lawful, but if it be carried on for an unlawful purpose, or to hinder, delay, or defraud creditors, it is illegal. It is lawful to convey property, and for the grantee to use and hold it, but if it be conveyed and held to defraud the creditors of the grantor, it is illegal; and so it is as to any business or property.

Third. When a deed, note, or other contract is made for an illegal purpose, or its consideration is illegal, contrary to public policy, whatever may be stated in it, a defendant against whom it is sought to be enforced may show such purpose or consideration; and when shown the court will not enforce it. He can not be prevented by the form of the action in which it is sought to be enforced, or by the instrument sued on, from making such proof and defeating the action. *Roe* v. *Kiser,* 62 Ark. 92; *Martin* v. *Clarke,* 8 R. I. 389; *Dale* v. *Roosevelt,* 9 Cow. 307; *Wilson* v. *Haecker,* 85 Ill. 349; 1 Greenleaf, Evidence (16th Ed.), § 284; 2 Wharton, Evidence (3rd Ed.), § 935, and cases hereinafter cited.

But the court says in its opinion: "If we concede that when this partnership was first formed it was agreed that the business should be carried on in the name of the defendant in order to deceive the creditors of the other partner, that would be no defense here, for this is not an action upon the partnership agreement.

The illegality, if any, consisted in such prior agreement, not in the partnership business, nor in the settlement between the parties by which they undertook to divide the partnership assets." I dissent from this view of the law of the case. If the note sued on was executed without any new consideration, but was made in pursuance of the prior fraudulent agreement or undertaking of Elbert and J. C. Harcrow, or in furtherance of its object, or sprang out of it, it is void. A few decisions and quotations from opinions of courts will serve to make the truth of what I have said appear more clearly.

Armstrong v. *Toler*, 11 Wheat. 258, "was an action of assumpsit, brought by the defendant in error, Toler, against the plaintiff in error, Armstrong, to recover a sum of money paid by Toler on account of goods, the property of Armstrong and others, consigned to Toler, which had been seized and libelled in the district court of Maine in the year 1814, as having been imported contrary to law. The goods were shipped during the war with Great Britain, at St. Johns, in the province of New Brunswick, for Armstrong and other citizens and residents of the United States and consigned to Toler, also a domiciled citizen of the United States. The goods were delivered to the agent of the claimants on stipulation to abide the result of the suit, Toler becoming liable for the appraised value; and Armstrong's part of the goods were afterwards delivered to him, on his promise to pay Toler his proportion of any sum for which Toler might be liable, should the goods be condemned. The goods having been condemned, Toler paid their appraised value, and brought this action to recover back from Armstrong his proportion of the amount. At the trial of the cause, the defendant below resisted the demand, on the principle that the contract was void, as having been made on an illegal consideration."

The court held, "where a contract grows immediately out of, and is connected with, an illegal or immoral act, a court of justice will not lend its aid to enforce it. So, if the contract be in part only connected with the illegal consideration, and growing immediately out of it, though it be, in fact, a new contract, it is equally tainted by it. But if the promise be entirely disconnected with the illegal act, and is founded on a new consideration, it is not affected by the act, although it was known to the party to whom the promise was made, and although he was the contriver and conductor of the illegal act. Thus, where A., during a war, contrived a plan for importing goods on his own account from the

enemy's country, and goods were sent by B. by the same vessel; A., at the request of B., became surety for the payment of the duties on B.'s goods, and became responsible for the expenses on prosecution for the illegal importation of the goods, and was compelled to pay them. Held, that A. might maintain an action on the promise of B. to refund the money. But if the importation is the result of a scheme between the plaintiff and defendant, or if the plaintiff has any interest in the goods, or if they are consigned to him with his privity, in order that he may protect them for the owner, a promise to repay any advances made under such understanding or agreement (to pay duties and expenses of prosecution) is utterly void."

In *Niver* v. *Best,* 10 Barb. 369, land was sold by the owner to defraud his creditors, and afterwards the purchaser executed a note to the vendor for the land, and the court held that, though such note was given subsequently, yet if there was no new consideration for it, and it was made either in pursuance of the original fraudulent agreement, or in furtherance of its object, it was void; and cited *Armstrong* v. *Toler,* 11 Wheat. 258, to support its ruling.

Embrey v. *Jemison,* 131 U. S. 336, was an "action of debt to recover from the plaintiff in error, who was the defendant below, the amount of four negotiable notes executed by him, January 21, 1878, and payable at the office of E. S. Jemison & Company in the city of New York, to the order of Moody & Jemison, by whom they were endorsed, before maturity, to the plaintiff, Jemison." The following was, substantially, the history of the notes: In February or March, 1877, the defendant contracted with the firm of Moody & Jemison, brokers and commission merchants of the city of New York, and members of the Cotton Echange, to purchase for him through the plaintiff, one of that firm, "on a margin," in said Cotton Exchange, not actual cotton, but four thousand bales of "future delivery cotton," for May delivery, commonly called "futures," which he did. The purchase or delivery of actual cotton was never contemplated, either by the defendant or Moody & Jemison, and it was understood between them that the settlement on account of the cotton should be made by one party paying to the other the difference between the contract price and the market price of said cotton futures, according to the fluctuations in the market. Upon settlement between the defendant and Moody & Jemison, on account of moneys expended by the firm in the purchase of cotton futures for the defendant, the notes sued upon were executed for the balance due. The court held that such contract was illegal

and void; and that the original payee could not maintain an action upon the notes, the consideration of which was money advanced by him upon or in execution of a contract of wager, he being a party to such contract, or having directly participated in the making of it in the name or on behalf of one of the parties. Mr. Justice Harlan, delivering the opinion of the court, said: "Assuming the averments of the plea of wager to be true, it is clear that the plaintiff could not recover upon the original agreement without disclosing the fact that it was one that could not be enforced or made the basis of a judgment. He can not be permitted to withdraw attention from this feature of the transaction by the device of obtaining notes for the amount claimed under the illegal agreement; for they are not founded on any new or independent consideration, but are only written promises to pay that which the obligor had verbally agreed to pay. They do not, in any just sense, constitute a distinct or collateral contract based upon a valid consideration. Nor do they represent anything of value, in the hands of the defendant, which, in good conscience, belongs to the plaintiff or to his firm. Although the burden of proof is on the obligor to show the real consideration, the execution of the notes could not obliterate the substantial fact that they grew immediately out of, and are directly connected with, a wagering contract. They must, therefore, be regarded as tainted with the illegality of that contract, the benefits of which the plaintiff seeks to obtain by this suit. That the defendant executed the notes with full knowledge of all the facts is of no moment. The defense he makes is not allowed for his sake, but to maintain the policy of the law. *Coppell* v. *Hall*, 7 Wall. 542, 558."

In *McMullen* v. *Hoffman*, 174 U. S. 639, the facts were substantially as follows: The city of Portland, in Oregon, proposing to receive bids for the construction of what was called the Bull Run pipe, Hoffman, of Portland, and McMullen, of San Francisco, agreed to put in separate bids for the same and, in the event it was awarded to either of them, to perform the contract and bear equally the expenses of the work and divide the profits, share and share alike. Both put in bids. Hoffman's bid was for $455,722 and McMullen's for $514,664. There were several other bids, but Hoffman's bid was the lowest of all. The contract was awarded to him. During all this time and until after the award they concealed the fact that they had united their interests, that they were acting in concert, and were to divide the profits. After the contract was

awarded, they entered into a contract in writing, having left out of it the illegal and objectionable part of the parol agreement, which (the written contract) is, in part, as follows: "This agreement made and entered into by and between Lee Hoffman, of Portland, Oregon, doing business under the name of Hoffman & Bates, party of the first part, and John McMullen, of San Francisco, California, party of the second part, witnesseth: That whereas said Hoffman and Bates have, with the assistance of said McMullen, at a recent bidding on the work of manufacturing and laying steel pipe from Mount Tabor to the head works of the Bull Run water system for Portland, submitted the lowest bid for said work, and expect to enter into a contract with the water committee of the city of Portland for doing such work, the contract having been awarded to said Hoffman and Bates on said bid. It is now hereby agreed that said Hoffman and said McMullen shall and will share in said contract equally, each to furnish and pay one-half of the expense of executing the same, and each to receive one-half of the profits or bear and pay one-half of the losses which shall result therefrom." Hoffman did the work and received the pay, and McMullen sued for his portion of the profits according to the contract. The court held "that this contract was illegal, not only as tending to lessen competition, but also because the parties had committed a fraud in combining their interests and concealing the same, and in submitting the different bids as if they were *bona fide,* and that the court will not lend its assistance in any way towards carrying out the terms of an illegal contract, nor will it or any court enforce any alleged rights directly springing from such contract."

The court said: "The complainant can not count only upon the contract of partnership as evidenced by the writing of March, 1893 (the above written contract). That writing evidenced only a portion of the agreement that had been made between these parties, the result being that, although their averment was in the first instance by parol, a portion of it was subsequently reduced to writing. The whole contract is none the less one and indivisible, just as much as if it had been put in writing. If it had, it would scarcely be argued that complainant might maintain an action by relying on that part of it which was valid and relating to the partnership between them, and that he might discard or omit to prove that which was illegal. If the complainant did not, the defendant could, prove the whole contract, as well the part lying in

parol as that which was reduced to writing, so that the court might, upon an inspection of the whole contract, determine therefrom its character. The unity of the contract is not severed or its meaning or effect in any degree altered by putting part of it in writing and leaving the rest in parol."

According to the rule stated and the cases cited in support of it, was the note sued on in this action valid? It is as follows: "$9,000.00. Lanark, Ark., July 10, 1893.

One day after date I promise to pay to the order of J. C. Harcrow the sum of nine thousand dollars for property, to-wit: Two lots on Fifteenth and Battery, in the city of Little Rock, one lot on Sixth and Wolf streets, ten acres adjoining Valentine's Addition, eighty acres known as the Gough place, sixty-nine acres known as the W. H. Wheeler place, forty acres known as the Martindale place, forty acres known as the Turner place.

(Signed) E. HARCROW."

The consideration, as shown by the note, was the purchase money for which property was sold by J. C. to Elbert Harcrow. But it was not. The property described in the note was sold and conveyed to Elbert, and was held by him in his own name. Why should he be converted into a purchaser, and a note given for purchase money, when no sale had in fact been made? Why should J. C. Harcrow be converted into a vendor, when he, as agent, purchased the property for Elbert, and disclaimed any interest in it? From the time J. C. became insolvent, and conveyed and assigned his property to Elbert to defraud his creditors, and Elbert took control of the business so transferred, he conducted it in his own name, and with the proceeds of the same purchased property, and held it as his own. In this manner, and in pursuance of a fraudulent scheme, he for many years conducted the business and acquired property without break or interruption until the note in question was executed. All this, the conveyance and assignment to Elbert by his brother and all that followed, constituted one and the same fraudulent scheme. Why was the note given? I see no reason, unless it was done in furtherance of the agreement or object of the undertaking by which the two brothers undertook to defraud the creditors of J. C. Harcrow. This fact was not obliterated by the execution of a note for the amount claimed under the illegal agreement; for it was not founded on any new or independent consideration. If the note had not been executed, upon what agreement or contract could J. C. Harcrow or

his representatives have in any manner claimed anything? I can see none, except the obligation assumed by Elbert whereby he confederated with his brother to defraud creditors and the acquisition of property in pursuance thereof. The execution of the note was the settlement of this fraudulent business, and, until it was validated by the judgment of this court, was void.

It is said in the opinion of this court that, "unless J. C. Harcrow owed debts at the time the land was purchased, no fraud is shown." As I understand the evidence, it was proved. But, be that as it may, I think it clearly appears that the land was purchased in pursuance of the illegal and immoral obligation which Elbert entered into at the time J. C. Harcrow conveyed his property to him at Monticello to defraud his creditors, and that it was in furtherance of this obligation the lands were purchased and the note was executed. All that was done in pursuance of this iniquitous undertaking was tainted by it and rendered illegal. Time alone will not purge it of its iniquity, as intimated in the opinion of the court, and courts will not aid J. C. Harcrow, or his representatives, in the enforcement of any executory part of his fraudulent scheme, but leave them "in the tangled web which he has assisted to weave to catch others."

I think that the decree of the chancery court should be reversed, and that the complaint in the action should be dismissed.

HUGHES, J. I concur in this opinion.

BUSTER *v.* MANN.

Opinion delivered April 7, 1900.

1. APPEAL IN CHANCERY—BILL OF EXCEPTIONS.—On appeal from a decree in chancery, evidence taken orally before the chancellor and preserved by a bill of exceptions that was not examined by appellees' counsel will not be rejected because of appellants' agreement that such evidence should be reduced to writing and submitted to appellees' counsel, and that, after being agreed to, it should be signed by the judge, if appellees' counsel was absent and could not be reached, and there was no other way of preserving the evidence. (Page 26.)

2. RECEIVER'S SETTLEMENT—PRACTICE.—On appeal from a decree overruling exceptions to a receiver's report of the sale of a sawmill and of a lot of timber, it was not error to refuse to charge one of the creditors with the difference between the price of lumber sold and the price such creditor had agreed to pay for it, no such question being presented by the pleadings. (Page 26.)

3. RECEIVERSHIP—PREFERRED DEBTS. A receiver who has advanced money to pay the expenses of the receivership will not be entitled to any preference over the creditors who have advanced money for the same purpose. (Page 27.)

4. SAME.—One employed by a receiver operating a sawmill as his assistant, not being a laborer, has no lien on the lumber manufactured, and is entitled to no preference over other creditors of the receiver. (Page 28.)

5. SAME.—Where a creditor holding a mortgage on a sawmill consented to the appointment of a receiver thereof, and to the operation of the mill by the receiver, such debts as were incurred by the receiver in the operation of the mill will take precedence over the mortgage debt. (Page 28.)

Appeal from Cleveland Circuit Court in Chancery.

MARCUS L. HAWKINS, Judge.

STATEMENT BY THE COURT.

E. W. Farrar, being the owner of saw and planing mills and land upon which they were located and other property used in operating the mill, gave to Mann, Moon & Company a mortgage upon the whole property to secure a debt of about $8,000. Farrar was also indebted to other persons, and on the 3d day of October, 1895, he made a general assignment, conveying to W. J. Bunn, as assignee, all his property, both real and personal, for the benefit of his creditors. The assignee took possession of the property, but the Dickinson Hardware Company and other unpreferred creditors brought suits against Farrar, and had attachments levied upon the property in the hands of the assignee. Thereupon J. E. Bryant and other preferred creditors commenced suit in equity against the Dickinson Hardware Company and the creditors who had attached, for the appointment of a receiver. They alleged that, in addition to the saw and planing mill plant, there was a large number of logs at the mill ready to be sawed, and that unless these logs were turned into lumber they would become damaged. For this and other reasons they asked for the appointment of a receiver

to take charge of the assets, with authority to operate the mills and convert the logs into lumber. The receiver was appointed, and directed to take charge of all the assets assigned, both real and personal, and to operate the mills and sell the lumber, the real estate being the land upon which the mills were situated. Mann, Moon & Company, whose debt, as before stated, was secured by a mortgage on the property, filed an intervening petition, and asked that their mortgage be foreclosed and the property sold. They also asked that a receiver be appointed to take possession of the property, to preserve and sell the same in such manner and on such terms as the court should direct. The receiver commenced to operate the mill, and soon afterwards, with the approval of the judge, made a contract with Mann, Moon & Company for the sale to them of the output of the mill.

In 1896, finding that, through fall in the price of lumber, the expense of operating the mill was greater than the profit, the receiver, at the request of Mann, Moon & Company, obtained an order for the sale of the land, mill, lumber and other property belonging to the mill plant. The property was sold, and the receiver afterwards filed his report, showing that the proceeds of the sale and other assets in his hands amounted to $5,263.94, while the receiver's debts incurred in operating the mill amounted to $8,721.64.

The appellant, E. R. Buster, a creditor of the receiver, came in and excepted to the report on several grounds, but his exceptions were overruled, the report confirmed, and a decree made distributing the assets. Buster appealed, and makes the following assignment of errors, to-wit: (1) The court erred in not charging up Mann, Moon & Company with the difference between their contract price for the lumber and the price it brought at the sale. (2) The court erred in allowing the receiver to pay W. S. Horton & Company in full without requiring Horton to take a *pro rata* with other creditors of the receiver. (3) The court erred in allowing the claim of Mann, Moon & Company for $1,705.69 against the receiver, and allowing it a *pro rata* out of the sale of the mill property. (4) The court erred in allowing the claim of R. K. Mann, a member of the firm of Mann, Moon & Company, for $143.49, and classing it as a labor claim, and preferring it to the claim of Buster. (5) The court erred in ordering the proceeds of the sale of the land to be paid by the receiver to Mann, Moon & Company on a

debt of Farrar to Mann, Moon & Company, when Buster, one of the various creditors, had not been paid in full.

W. S. Amis, for appellant.

The expenses incurred by a receiver with power to manage a business constitute liens on the property which take precedence over other obligations. Beach, Rec. § 307; 1 Wiltsie, Mortgage Foreclosures, 817.

Hill & Auten, for appellees.

The testimony of Buster and Bunn is not properly before this court. The record shows that the motion for new trial was not filed in time.

RIDDICK, J., (after stating the facts). This case comes before us on appeal from a decree overruling exceptions to a report of a receiver and distributing the assets in his hands. The questions arising on the exceptions were heard by the chancellor partly on evidence taken orally at the bar of the court, which was afterwards brought on record by a bill of exception. It is contended by appellee that this evidence should not be received, for it is said that it was taken orally under an agreement that it should be reduced to writing and submitted to the attorney for appellee, and, after being agreed to, should be signed by the judge, and treated as if taken in the form of depositions, and that this agreement was not complied with. The opposing side offer as an excuse for the failure to comply with the agreement that counsel of appellee, being absent, could not be reached, and their only means of preserving the evidence was by bill of exceptions. After considering the matter, we do not see that we would be justified in rejecting this evidence for the reasons given. In order to avoid such controversies, trial judges should always endeavor to give counsel for appellee the opportunity of inspecting the bill of exceptions before it is signed. About the material facts of the case before us there is, however, little dispute, and we will proceed to consider the different grounds of error assigned.

The first contention that the court erred in not charging Mann, Moon & Company with the difference between the price for which the lumber was sold by the receiver and that which they had contracted to pay for it must be overruled, for no such question was presented by the pleadings. We see no reason why Mann, Moon & Company should not have been compelled to comply with their

contract. They contracted to purchase the lumber manufactured by the receiver, and agreed that, upon termination of the contract by the court or judge, they would furnish orders for all stock on hand, and that, upon failure to furnish orders, they would, within sixty days from termination of the contract, pay full contract price for such lumber. The market price of lumber declined until it was worth much less than the price named in the contract. Thereupon Mann, Moon & Company induced the receiver to procure an order from the court to dispose of the lumber and other property in his hands at public sale. The receiver says that he obtained this order with the understanding with Mann, Moon & Company that the property would bring enough to pay the receiver's debts, and, as the balance would go to Mann, Moon & Company on their mortgage, he did not see that any one except that company was interested. But, this being so, the property should not have been sold or ordered to be sold at a price less than that which Mann, Moon & Company had agreed to pay. The contract between them and the receiver under which the mill had been operated was terminated by the order of the court, procured at the instance of Mann, Moon & Company, directing a sale of the property. If, when offered at public sale, no one offered to pay as much for the lumber as the contract price, the receiver should have held the lumber for Mann, Moon & Company, and demanded of them the contract price. But he did not do this. He sold the lumber for thirty-five hundred dollars less than the sum Mann, Moon & Company had agreed to pay for it. This sale was reported to the court, and approved without objection. The lumber thus passed into the hands of other parties, and no proceeding of any kind has been begun against Mann, Moon & Company to compel them to pay the loss sustained by their failure to purchase at the contract price. This is not an action against Mann, Moon & Company, but a settlement of the receiver, and we do not see that the court had in this proceeding any right to give judgment against Mann, Moon & Company. Before such a judgment can be rendered, there must be a petition or complaint filed, with opportunity for them to appear and defend, but we express no opinion as to whether it is now too late to commence such a proceeding. For the reasons stated, the first assignment of error can not be sustained.

The receiver had in his hands money which he held as assignee of W. S. Horton & Company. He used a portion of this money to pay expenses of operating the mill. The court allowed him

to deduct this sum from the funds in his hands arising from the sale of the property before paying anything to his other creditors. The contention is made that it was error in the court to allow the receiver this preference in the distribution of the fund. The receiver had, of course, no right to use the funds of Horton & Company in that way, and he afterwards repaid the money to that estate. This is not, therefore, the claim of Horton & Company. It is the claim of the receiver for money he has advanced to pay expenses. But Mann, Moon & Company also furnished him money to pay expenses of operating the mill, and the claim of the appellant, Buster, is for money and goods furnished for the same purpose. These parties, including the receiver, all acted under the belief that the assets were amply sufficient to pay all debts incurred in operating the mill. In this they were all mistaken, and we see no reason why one should be given a priority or preference over the others. It is, of course, true that the court should endeavor to protect its receiver for expenditures made in good faith and for the benefit of the property in his hands, but when his claim is of the same nature as those of other creditors, and the property is not sufficient to pay all, he is entitled to no preference.

The allowance for the service of R. K. Mann, who was employed by the receiver as an assistant, and which is the basis of the fourth assignment of error, was, we think, proper. But he was not a laborer, and had no lien upon the lumber manufactured, and was entitled to no preference over other creditors of the receiver.

The third and fifth assignments of error may be treated together. The claim of Mann, Moon & Company against the receiver, allowed by the court, consisted in part of money advanced by them to the receiver to pay current expenses. This portion of their claim stands, as before stated, on the same basis as the claim of appellant, Buster, and we need not discuss that further. The remainder of their claim was for timber cut by the receiver from the land of Farrar in his possession, and upon which Mann, Moon & Company held a mortgage. The claim that the value of this timber and the money arising from the sale of the land in the possession of the receiver should be applied first to the payment of the expenses of the receivership is resisted by Mann, Moon & Company, on the ground that the court had no power to set aside their mortgage lien upon the land in favor of expenses incurred by the receiver. We have no doubt that this contention would be sound if Mann,

Moon & Company had not consented to the appointment of the receiver, and to the operation of the mill by him. The order appointing the receiver directed that he take possession of all the assets of Farrar conveyed in the assignment, including mills, land upon which the mills were situated, and personal property. It directed him to operate the mills, and sell the output in the usual course of business and pay the expenses out of any funds that might come into his hands by virtue of the receivership. Mann, Moon & Company made no objection to this order, but on the contrary filed an intervention in which they also asked for the appointment of a receiver. They made a contract with the receiver by which they were to take the output of the mill, and expressly agreed in such contract not to press the foreclosure of their mortgage so long as the mill should pay expenses and one thousand dollars per month on their mortgage debt. One member of the firm was employed by the receiver to superintend and assist in operating the mill, and the mill was run, and these expenses incurred, under his direction and approval, until by his advice the mill was stopped, and an order procured to sell. The only valid reason for operating the mill that we can discover was to saw up logs already on the yard, and which were likely to become damaged, but the contract of the receiver with Mann, Moon & Company seems to have been based on the idea that there were no limits to the receiver's powers in this respect, and that he was authorized to conduct a general saw mill business by buying timber and selling the manufactured product. They had it in their power at all times, by the foreclosure of their mortgage, to have stopped the operation of the mill and the consequent expense. The other creditors of Farrar seem to have soon reached the conclusion that the mortgage of Mann, Moon & Company with the expenses of the receivership would consume all the assets. They made no objection while the receiver operated the mill and incurred the expenses under the advice and direction of a member of the firm of Mann, Moon & Company. No doubt, Mann, Moon & Company expected that the mill would more than pay expenses, and so it would have done had they paid for the lumber the price they agreed upon. But the market price of lumber declined. Mann, Moon & Company did not want it at the price they had agreed to pay, and it was sold at public sale for a small price, leaving the receiver heavily in debt to those who had furnished him money and supplies to operate the mill. It clearly appears, we think, that Mann, Moon & Company not only asked for the appointment of the

receiver, but consented and encouraged him in the operation of the mill by which the debts were incurred. They were practical sawmill men, and certainly did not suppose that a large sawmill plant could be operated without expense, and must have known that if the expenses exceeded the profits they would have to be paid out of the assets in the hands of the receiver, as the court had ordered. Under these circumstances, we think the debts of the receiver should be paid out of the assets in the hands of the receiver, before anything is paid on the debt of Mann, Moon & Company. In reaching this conclusion, we by no means approve of the order authorizing the operation of this mill. Courts are not required to operate sawmills, and the disastrous consequences that resulted from the operation of this mill by the receiver illustrates the evil and danger of such a proceeding. But the order was doubtless made because no one objected, and the creditor that consented has no right to complain at the expense thus necessarily entailed. We are, therefore, of the opinion that it is now too late for Mann, Moon & Company to object to the payment of these expenses incurred by the receiver with their consent and approval, and we hold that such expenses take precedence over their mortgage debt.

For the errors indicated, the judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

ROESCH v. JOHNSON.

Opinion delivered November 17, 1900.

LANDLORD AND TENANT—INSURANCE.—Where a lessor insured the leased premises against fire at his own expense and without any agreement to share the benefits thereof with the lessee, the latter can claim nothing by reason of any money received by the former on account of such insurance.

Appeal from Pulaski Circuit Court.

JOSEPH W. MARTIN, Judge.

STATEMENT BY THE COURT.

Roesch, the appellant, leased from Ratcliffe and Fred Hanger three lots and a building in Little Rock for ten years, and agreed to pay $150 rent for the last five years of the period of said lease. On November 1, 1897, Hanger assigned and conveyed to the appellee, as trustee, the rents and profits of his undivided one-half interest by a deed of trust executed to the appellee as trustee to be applied to the payment of the interest of the debt secured by said deed of trust and the fixed charges of the property thereby conveyed. This suit was brought to recover this rent, and resulted in a verdict and judgment for plaintiff for $525.

Ratcliffe insured his interest for $1,250, Fred Hanger his interest for $2,750, Roesch, the appellant, his interest in the building for $3,000. The building was destroyed partly by fire, and Roesch received on his policy $670, Hanger $635, and Ratcliffe $295, the loss having been adjusted on the basis of $1,600. Hanger states that he had paid premiums on his policy amounting to $756. Roesch's contention is that he is entitled to share in the insurance received by Ratcliffe and Hanger to make good his loss, which he swears was $1,800, and he offers to set-off the amount he claims to be due him by Hanger against the rents sued for herein. His motion for new trial having been overruled, he excepted and appealed to this court, saving all exceptions.

T. J. Oliphint and *M. M. Cohn,* for appellant.

No person should be allowed to bargain for an advantage to rise from the destruction of life or property. 17 N. Y. 432. Where a mortgagee insured at his own expense, and a loss occurred, the insurer, in making compensation, is entitled to an assignment of the rights of the insured. 55 N. Y. 346. Public policy forbids the taking or paying of premiums, without a corresponding risk. 8 Am. & Eng. Enc. Law (2 Ed.), 149. When the benefit and burden of covenants secure mutual rights, and each is necessary to the existence of the other, both must go together. 136 Pa. St. 654; 8 Gratt. (Va.), 353; 12 Am. & Eng. Enc. Law (2 Ed.), 1011; Chitty, Contract, p. 89. The act of the lessor will excuse performance of lessee's covenant. 8 Cow. 726; 1 Bibb, 379; 16 Ill. 511; 9 Ohio St. 341; 19 Pick. 453.

J. M. Moore, W. B. Smith and John Fletcher, for appellee.

The lessee is bound to pay rent, though the building is destroyed. 6 Mass. 67; 3 Johns. 46. Covenant which might and ought to have been expressed, if intended, will be implied. 7 Wall. 423. The appellant is not entitled to repairs, recoupment and damages. 3 Johns. 44; 72 Pa. St. 285. There was no covenant on the part of the lessor to rebuild. 72 Pa. St. 280. Courts can not relieve against hardships unless the same were induced by fraud or mistake. 1 Wash. Real Property, 565; 7 Wall. 424; 16 Mass. 239. There was no privity of estate between the parties, and neither had an interest in the policy of the other. Gear, Landlord and Tenant, § 100; 80 Ill. 532; 72 Pa. St. 285; 3 Pa. St. 444; 6 N. Y. 356; 22 Ala. 168; 9 Pa. St. 198; 1 Biddle, Ins. §§ 162-240; 31 Md. 302. Each policy was a separate contract. 2 Biddle, Ins. §§ 870-1-2. 4 Taunt. 380. In the absence of an agreement the mortgagor's and mortgagee's interests are separate. 2 May, Ins. § 449; 1 Biddle, Ins. 250. A loss paid to mortgagee will not satisfy the debt. 2 Wash. Real. Prop. 240. Tiedeman, Real Prop. § 327. The mortgagor has an insurable interest in the property which is insured, and not the debt. 2 May, Ins. §§ 424-449-456; 2 Biddle, Ins. § 1293; 7 Cush. 1. Set off cannot be pleaded. 27 Ark. 478; Gear, Landlord and Tenant, §§ 129-180; 4 Gray, 385; 6 Duer, 494; 65 N. C. 69; 51 Pa. St. 418; 4 Lea, 193; 81 Ill. 321; 25 Am. Rep. 282. This is the rule as to commercial paper. 36 Ark. 228; 179 Ill. 599; 50 Md. 95; Story, Promissory Notes, § 178; 29 Wis. 142. Such set offs are limited to the time of the assignment. 9 Ark. 505; 13 Ark. 531; 4 N. Y. 126; 6 Duer, 494.

T. J. Oliphint and *M. M. Cohn,* in reply.

The appellee took subject to all defenses of appellant, or which might accrue at any time prior to notice of assignment. 22 Am. & Eng. Enc. Law, 109; 2 Id. (2d Ed.), 1077; 3 Day, 364; 20 Conn. 73; 18 La. 414; 11 Md. 251; 25 Miss. 13; 16 Mo. 416; 64 N. Y. 159; 35 Atl. 136; 26 Vt. 198; 80 Va. 389; 2 Wyo. 71; 39 O. St. 600; 76 Pa. St. 78; 34 Mo. 99. The right of counterclaim relates to expenditures made by debtor after assignment. 8 Ala 206; 32 Barb. 300. And this applies as well to the breaches of covenant relating to real estate or other transactions. Gear, Landlord and Tenant, § 180, notes 11 and 12; 27 Ala. 471; 31 Ky. 464.

HUGHES, J., (after stating the facts). There is no doubt that Roesch, Ratcliffe, and Hanger each had an insurable interest in the property leased by Roesch from Ratcliffe and Hanger. It appears that each, on his own account and for his own benefit, took out a policy of insurance on the property, and that each paid the premiums on his policy. Hanger's policy was for $2,750, Ratcliffe's for $1,250, and Roesch's for $3,000. It appears from Roesch's testimony that it cost him $1,800 to repair the buildings, and it seems evident that his policy of insurance was ample to cover his loss, and, if he failed to make the insurance company pay the amount of his loss, we cannot well understand how he could hold others bound to do it. Roesch says Hanger and Ratcliffe agreed to pay him enough of the insurance received by them to cover his loss, with that received by Roesch, when the repairs on the building were completed; but Hanger denies this. Sidney J. Johnson, the plaintiff, as trustee, was the assignee of Hanger's interest in the policy of insurance held by him. He testifies that a short time after the assignment to him he notified Roesch of the assignment, and that any payment made by him to Hanger would be at his peril, and that Roesch never complained to him that Hanger was indebted to him on account of insurance until a short time before the institution of this suit. Roesch says he did not know the lessors had insurance on the building until the fire.

We think there is evidence to sustain the verdict, and that there was no error in the instruction given the jury by the court, as follows: "The jury are instructed that Fred Hanger had the right to insure the premises in question for his own benefit, and if he did so at his own expense, and without any agreement with said defendant Roesch that he, the said Roesch, should share in the benefits thereof, then the said Roesch can claim nothing by reason of any money which Fred Hanger received on account of such insurance, and the verdict should be for the plaintiff for the amount of rent from November 1, 1897, to October 1, 1898." The judgment is affirmed.

WOOD, J., absent.

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TOWELL v. ETTER.

Opinion delivered December 1, 1900.

1. ACCRETION—TAX SALE.—A purchase at commissioner's sale for delinquent levee taxes of a tract of land described as the southwest quarter of a certain section, containing 151 acres, will carry title to 35 acres of land which had previously been added to such land by accretion. (Page 38.)

2. TAX SALE—MISTAKE AS TO ACREAGE.—Where a tract of land is otherwise properly described in a levee tax assessment, a mistake as to the number of acres will not invalidate a commissioner's sale based upon such assessment. (Page 39.)

3. FORCIBLE ENTRY AND DETAINER—INSTRUCTION.—An instruction in an action of forcible entry and detainer that, "if the plaintiff had abandoned the land, and the defendant entered and took possession, then the plaintiff cannot recover in this suit, and you will find for the defendant," and that "an abandonment, for the purpose of this suit, would mean such acts as a man usually does when a field or portion of land becomes unprofitable to cultivate, and he removes the fence, or permits it to go to decay or to be thrown down and to waste," is incorrect where it ignores the question of actual possession of the land by the plaintiff at the time of defendant's entry, and also ignores the question of the use of actual force in making the entry. (Page 40.)

4. SAME.—One having title and right to possession of land may get possession peaceably, and defend his possession by force, if necessary; and, if he do so, he will not be guilty of forcible entry and detainer. (Page 40.)

Appeal from Crittenden Circuit Court.

FELIX G. TAYLOR, Judge.

STATEMENT BY THE COURT.

The appellee, Etter, brought this action of forcible entry and detainer against appellant Towell, who claimed to be a tenant of appellant Thompson, to recover possession of 35 acres of land, said to be accretion to southwest quarter of section 13, township 9 south, range 8 east, and claimed damages in the sum of $50. Thompson, being the real party in interest, was made defendant.

The evidence shows that Etter bought the land in controversy March 13, 1889, and had a house upon it, and had, through his tenants, occupied it since the spring of 1889 up to about the time of the entry by Towell, claiming the exclusive ownership thereof. Thompson, the landlord of Towell, claimed title and possession under a deed made to him on February 16, 1897, by J. L. Holloway, as commissioner in chancery of the Crittenden county circuit court, which deed shows that at a sale of lands for levee taxes of the St. Francis Levee District Thompson had bought the southwest quarter of section 13, township 9 north, range 8 east, containing 151 acres. It seems from the evidence that Etter had been keeping a tenant in the house on the premises nearly all the time. Sometimes there would be an interval between the going out of one tenant and the coming in of another, when the house would be unoccupied for a week or two. The house was not locked, and no one was occupying it when Towell entered. Thompson came to the house first, and put some chains in it, and locked or nailed it up. At the time the gates were closed, the fences unbroken, and the house shut up. This was about January 1, 1897. Towell, it appears, moved in about this time. Towell cultivated 10 or 12 acres of the land in 1897, and made 6 bales of cotton and about 100 bushels of corn. Thompson and Towell took possession without the consent of Etter or his son, who seems to have been in charge of the land at the time.

William M. Randolph, of Memphis, Tenn., for appellants.

Forcible entry and detainer and unlawful detainer cannot be joined in the same suit. 13 Ark. 448; 27 Ark. 46. The action depends on the statute. Sand. & H. Dig. § 3443. Force is the gist of the action. 38 Ark. 258; 41 Ark. 535; 40 Ark. 92; 10 Ark. 43. The defendant must have entered without consent, and the original entry and subsequent holding was with force. 18 Ark. 284; 18 Ark. 304; 27 Ark. 460; 41 Ark. 539. The whole case, both the law and the facts, should have been submitted to the jury. 27 Ark. 334; 20 Ark. 493; 25 Ark. 405-417; Cooley, Const. Lim. (6th Ed.) 392-397 and 564-567; Constitution of Ark. art. 7, § 23. The court should have told the jury what was possession and what was taking possession forcibly and without force, and left it to the jury to find the facts. 8 Ark. 83; 30 Ark. 380; 14 Ark. 530; 31 Ark. 699; 52 Ark. 45. The court should have given the first instruction asked by the defendants. 40 Ark.

192; 62 Ark. 588; 55 Ark. 360. The second and third instructions asked by the defendants should have been given. 7 Wall. 272; 168 U. S. 349. The land was an accretion to section 13, and became a part of it, and title was in the owner of section 13. 25 Ark. 120; 53 Ark. 316. The court should have told the jury the effect of the deeds and decrees referred to. 20 Ark. 583; 23 Ark. 205; 1 Gr. Evidence, §§ 49 and 277 and notes. The act creating the St. Francis Levee District provided for the levy and collection of taxes. Acts 1893, c. 19, p. 24; c. 75, p. 119; c. 100, p. 172; Acts 1895, c. 71, p. 88. These acts provided for a suit *in rem,* and a sale of the land proceeded against passed title to lands sold to purchaser. Acts 1893, c. 19, §§ 11-12-13, p. 31-2; Acts 1875, c. 71, p. 88, §§ 1 and 2; 51 S. W. Rep. 830. It was the duty of the court to decide that title of the land was in Thompson. 41 Ark. 535; 55 Ark. 360; 62 Ark. 588. The entry now allowed by law is a peaceable one. 4 Black. Com. p. 148; 41 Ill. 285; 132 Mass. 200. The party out of possession must use legal means to obtain possession. 119 U. S. 611.

C. W. Heiskell, for appellee.

Thompson entered the house without the knowledge and consent of plaintiff. 41 Ark. 535. This was a forcible entry on the part of Thompson. Sand. & H. Dig. 3443. Accretion could never have been made. 25 Ark. 120. Thompson's entry was forcible. 119 U. S. 611.

HUGHES, J., (after stating the facts.) Section 3443 of Sandels & Hill's Digest provides that "if any person shall enter into or upon any lands, tenements, or other possessions, and detain or hold the same without right or claim of title, * * * in such cases every person so offending shall be deemed guilty of a forcible entry and detainer within the meaning of this act." Were the defendants guilty under this statute and the proof in this case? The defendant Thompson had a deed as above set out for the southwest quarter of section 13, township 9 north, range 8 east, 151 acres only, and claimed that 35 acres in controversy were an accretion to the southwest quarter of section 13, and that when he bought at tax sale the said southwest quarter of 13, described in his deed as containing 151 acres, the said 35 acres as an accretion passed to him under his said deed to said southwest quarter of section 13. But this is not the law. At the time of his purchase of the southwest quarter of section 13, this accretion of 35 acres

had been formed, and was above the surface of the water, and susceptible of private ownership, and, according to authorities, the title to the same did not vest in or pass to him under his purchase of the southwest quarter of 13, which, as shown by the evidence, was after said accretion of 35 acres had merged from beneath the water, and had had a house built upon it, and part of it had been in cultivation. "As between vendor and vendee, the right to alluvion depends upon the condition of the land at the time of the transfer of the legal title. It includes future additions, but cannot be carried back by relation to the date of a title bond, under which the conveyance was made." Gould, Waters (3d Ed.) § 186. That is to the effect that a vendee is entitled to accretions to land made after his purchase, but not to those made before, unless the accretions are expressly conveyed. *Jones* v. *Johnson,* 18 How. (U. S.), 150.

In *Barre* v. *City of New Orleans,* 22 La. An. 612, the court held: "That to riparian proprietors belong the accretions which may, in progress of time, be formed by the sedimentary deposits of the stream along its shores, there is no question. In the sale of the riparian land the test as to whether the alluvion or batture, if any attached to it is conveyed with the land or not, has been definitely settled by repeated decisions of this court. If, at the time of the sale of riparian land, the alluvion attached has attained a sufficient elevation above the waters to be susceptible of private ownership, the alluvion does not pass with the land, unless so expressed."

So it appears that Thompson had no "right or claim of title to the alluvion of 35 acres accretion to the southwest quarter of section 13 by virtue of his purchase and the conveyance to him of said southwest quarter of section 13; for before said purchase and conveyance said accretion "had attained a sufficient elevation above the waters to be susceptible of private ownership," and had been sold and conveyed, and been partly in cultivation. The expression, "claim of title," should be construed to mean a claim having some appearance of legality, not a mere bare claim without the appearance or pretense of anything to base it upon.

It follows, therefore, that, under the statute above quoted, the appellant Thompson was guilty of forcible entry and detainer, and that the judgment of the circuit court was correct. Judgment affirmed.

ON REHEARING.

Opinion delivered May 18, 1901.

HUGHES, J. The facts in this case, as stated when the opinion was delivered which we are asked to reconsider, are as follows:

"The appellee, Etter, brought this suit of forcible entry and detainer against appellant Towell, to recover possession of 35 acres of land, said to be accretion to southwest quarter of section 13, township 9 south, range 8 east, and claimed damages in the sum of $50. Thompson, being the real party in interest, was made defendant. The evidence shows that Etter bought the land in controversy March 13, 1889, and had a house upon it, and had, through his tenants, occupied it since the spring of 1889, up to about the time of the entry by Towell, claiming the exclusive ownership thereof. Thompson, the landlord of Towell, claimed title and possession under a deed made to him on February 16, 1897, by J. L. Holloway, as commissioner in chancery of the Crittenden county circuit court, which deed shows that at a sale of lands for levee taxes of the St. Francis Levee District Thompson had bought the southwest quarter of section 13, township 9 north, range 8 east, containing 151 acres. It seems from the evidence that Etter had been keeping a tenant in the house on the premises nearly all the time. Sometimes there would be an interval between the going out of one tenant and the coming in of another, when the house would be unoccupied for a week or two. The house was not locked, and no one was occupying it when Towell entered. Thompson came to the house first, and put some chains in it, and locked or nailed it up. At the time the gates were closed, the fences unbroken, and the house shut up. This was about January 1, 1897. Towell, it appears, moved in about this time. * * * Thompson and Towell took possession without the consent of Etter or his son, who seems to have been in charge of the land at the time."

We said in the opinion in this case, in substance, that no right to the accretion of 35 acres to southwest quarter section 13 passed to Thompson by virtue of his deed to said southwest quarter of section 13, because the accretion had formed before his purchase, and was above the surface of the water and susceptible of private ownership, and that, "as between vendor and vendee, the right to alluvion depends on the condition of the land at the time of the transfer of the legal title;" that a vendee is entitled to ac-

cretions to land made after his purchase, but not to those made before, unless the accretions are expressly conveyed. To support this ruling, we relied mostly upon the case of *Barre* v. *City of New Orleans,* 22 La. An. 613, which is directly in point in support of the opinion. We said, therefore, that Thompson's deed was no color of title to the accretion, and that, under § 3443, Sandels & Hill's Digest, he was guilty of forcible entry and detainer. Part of that section reads as follows: "If any person shall enter into or upon any lands, tenements or other possessions, and detain or hold the same without right or claim of title, * * * in such cases every person so offending shall be deemed guilty of a forcible entry and detainer within the meaning of this act."

We find, upon further investigation, that in the case of the *East Omaha Land Co.* v. *Jeffries,* 40 Fed. Rep. 386, Judge Brewer, delivering the opinion of the court, first held substantially the doctrine laid down in the opinion delivered in the case at bar, but upon a motion for reconsideration he held differently, that is to say, that a conveyance by a vendor of his land, to which there is an accretion already formed at the time of the conveyance, carries the accretion thereto, unless reserved in the deed. He holds that where a water line is the boundary of a named lot, that line remains the boundary, no matter how it shifts, and a deed describing the lot by number or name conveys the land up to that shifting line, exactly as it does up to the fixed side lines. Upon appeal to the supreme court of the United States, this decision of the motion for reconsideration was affirmed, the court holding to the same doctrine laid down by Judge Brewer. *Jefferis* v. *East Omaha Land Co.,* 134 U. S. 178.

There seems to be no doubt that the 35 acres in controversy in this case were an accretion to southwest quarter of said section 13 bought for taxes by Thompson as aforesaid. While the land here is not described as a lot is in the case just quoted from, by name, but is described according to the section lines, yet we apprehend the same doctrine applies in this case as in that.

The fact that the deed to Thompson is for southwest quarter 13 , 151 acres, does not limit his purchase to that number of acres. Where land is otherwise properly described, and so designated as to lead the owner to a knowledge that it is his land, a mistake in the number of acres is immaterial. *Putnam* v. *Tyler,* 117 Pa. St. 570. This would not affect the validity of an assessment or sale upon such an assessment. While there seems to be a conflict in the

decisions upon the question whether accretion already formed passes to the vendee by the conveyance of the vendor of the land to which it had formed, we esteem it proper and right to approve the doctrine of *East Omaha Land Co.* v. *Jefferis,* as announced by the supreme court of the United States in 134 U. S. *supra,* and we adhere to that doctrine; and as to this the motion for reconsideration is sustained. While the result of the application of that doctrine in this case is not agreeable to the writer, courts cannot make decisions to relieve hardships. As it has been said, hard cases sometimes make shipwreck of the law.

There remains the question whether there was a forcible entry, as actual force is said to be the gist of the action of forcible entry and detainer. *Hall* v. *Trucks,* 38 Ark. 257. A peaceful entry, though unlawful, is not sufficient to sustain the action. *Anderson* v. *Mills,* 40 Ark. 192. According to the ruling herein made, Thompson had title to the accretion of 35 acres to southwest quarter of section 13 by virtue of his purchase of southwest quarter of 13 at tax sale. The evidence does not seem to show that he used force in making his entry, but this was a question of fact for the jury, under proper instructions by the court as to the law. The court in its instructions seems to have stated the law correctly, except in the latter clause of the third instruction. The instruction entire is as follows: "(3.) If the plaintiff had abandoned the land, and the defendant entered and took possession, then the plaintiff cannot recover in this suit, and you will find for the defendant. An abandonment, for the purpose of this suit, would mean such acts as a man usually does when a field or portion of land becomes unprofitable to cultivate, and he removes the fence, or permits it to go to decay, or to be thrown down and to waste." This is evidently incorrect. It ignores the question of actual possession of the land by the plaintiff at the time of the appellant's entry, and also ignores the question of the use of actual force in making the entry. In *Winn* v. *State,* 55 Ark., 360, we held that "where a landlord, entitled to re-enter for condition broken, took possession peaceably in the absence of the tenants from the premises, he has the right to protect his possession by force, if necessary, as well against former tenants as any one else proposing to take possession without right." This is to the effect that one having title and right to possession may get possession peaceably and defend his possession by force, if necessary, and if he do so he will not be guilty of forcible entry and detainer.

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

BUNN, C. J., (dissenting). It will not be controverted that up to the time of the tax sale the appellee, Etter, was the owner of the accretions involved in this suit, by reason of his being the owner of the fractional quarter section against which they were formed; nor that, according to the original government surveys, the patent issued to the enterer by the government, the assessment list, the delinquent list, the notice of tax sale, and the deed made in pursuance of the sale, the description given was uniformly the fractional southwest quarter of section 13, containing 151 acres, and nothing more, except the number of the township and range.

Nor is it necessary, for the purposes of the decision of this case, to controvert the doctrine that a deed must be construed most strongly against the grantor, and to conclude from that that a grantor has conveyed by implication more than is actually described in the deed, for the argument is supported in this case only by one or more decisions, whose application may well be called in question, as the descriptive words in the deeds therein referred to give not the least intimation of the shape or quantity of the lands involved, but they are only designated by arbitrary names, as, for instance, "Lot No. 4," "Lot No. 34," and so forth, which may contain one acre or a hundred acres, and which may be square, a triangle or a circle.

The authorities are by no means agreed as to the rule, even in case of voluntary conveyences. In Louisiana, for instance, where, for local reasons, the subject has been the more closely studied, and from time immemorial, of any other locality of this country, it is held that the quantity of land conveyed is exactly that named in the deed, regardless of the changes that may have occurred in the way of accretions. *Barre* v. *City of New Orleans*, 22 La. An. 612. But, whatever may be the rule as to voluntary conveyances, I think the rule applicable to tax sales can be but one way. Section 6499, Sand. & H. Dig., reads thus: "Every assessor on or before the second Monday in September, in the year eighteen hundred and eighty seven, and every second year thereafter, shall make and deliver to the clerk of the county court a report in tabular form contained in a book to be furnished him by such clerk of the county court, the amount and value of real property subject to be listed for taxation in the county, and the amount and description of all

lands belonging to the United States and to the state of Arkansas; also all other lots, parcels or tracts of lands exempt from taxation, which return shall contain, etc." And then follows the first and second subdivisions of the section, the latter concluding with the tabular form referred to, in which appear the names of owners, the parts of sections, and sections, and townships, and ranges, and valuation, each in its appropriate column. It conclusively appears from this statute that one of the essential things to be stated in this assessment list is the amount or quantity of land in each tract, and this is always expressed in acres under our system. In construing a statute substantially the same as ours, the supreme court of Ohio, in *Perkins* v. *Dibble*, 10 Ohio, 433, 36 Am. Dec. 97, held that a tax deed was void where the number of acres was not named in the assessment list. It is evident that, if the deed was void where the quantity of land was not named in the assessment list, it would be void as to all land except the quantity named in such list, for the naming of the quantity is an essential thing, as fixing the extent of the forfeiture and conveyance thereunder.

Again, under our revenue system, as a circumstance going still further to show the necessity of naming in the list, and all papers founded thereon, the number of acres assessed, sold and conveyed, the collector is required to offer each tract on the list delinquent for the non-payment of the taxes, and to strike off the same to the bidder who will pay the taxes, penalty and costs assessed against the same for the least quantity of the land, and this least quantity is to be laid off in the northeast corner of the tract as so many acres, for that is the way the bids must run. It may be safely said that no valid tax deed exists unless the number of acres conveyed is named therein. If the quantity is thus so essential, the parties to a deed must necessarily be bound by the quantity named.

In making his assessments, the assessor is required to ascertain the quantity of any tract of land, as well as other facts connected with the description and location of the land, and the statute furnishes him with ample facilities to accomplish this purpose. It is not his function to determine the effect and result of accretions. He acts upon existing facts, and not upon mere conclusions of law. The facts are that the fractional quarter section contained when surveyed 151 acres. An addition made to it by accretion should be valued; and, if it should be valued, it follows that it

should be measured, or it cannot be sold for the non-payment of taxes, for a tax sale carries no more than what is assessed.

I think, therefore, that the motion for a rehearing should be overruled, and the decree of affirmance be permitted to stand.

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CARROLL COUNTY BANK v. RHODES.

Opinion delivered December 15, 1900.

1. BANK—APPROPRIATION OF TRUST FUNDS.—Where a county collector deposited in a bank money collected for the state, and drew a check to pay a debt due by him to the bank, and the bank knew that the money belonged to the state, it will be liable to the state for the money so appropriated. (Page 47.)
2. SUBROGATION—SURETIES.—The sureties of a county collector who have paid to the State the amount of money misapplied by the collector to the payment of a debt due by him to a bank will be subrogated to the state's right of recourse against such bank. (Page 48.)

Appeal from Carroll Circuit Court in Chancery, Eastern District.

EDWARD S. MCDANIEL, Judge.

Rose, Hemingway & Rose and *O. W. Watkins,* for appellant.

One who claims the right of subrogation must be governed by the maxim, *sic utere tuo ut alienum non laedas.* Sheldon, Sub. § 4. 3 Pom. Eq. Jur. note 1, § 1419 (2d Ed.); 49 Minn. 386; S. C. 32 Am. St. 566. A banker cannot excuse disobedience of a customer's order by setting up that he knew or had reason to believe that the customer's order was given in promotion of an unlawful purpose. 2 Morse, Banking (3d Ed.) § 317; 56 Ark. 508; 76 N. C. 482. The check was negotiable, and the law imposed upon the bank the duty of paying it; and the bank did not participate in the misapplication of the funds. 2 Morse, Banking (3d Ed.) 431; 126 Mo. 82; 122 Mo. 332; 45 N. Y. 735. In order to establish usury the agreement to charge more than ten per cent. must exist at the time the money is loaned. 63 Ark. 225, 230; 81 N. Y. 293. No subsequent agreement will bar the right to recover the

amount loaned. 55 Ark. 143; Tyler, Usury, 126; Perley, Interest, 210; 56 Ark. 334; Webb, Usury, §§ 307, 142. To constitute usury the sum must be paid by the borrower to the lender. A payment by a third person would not constitute usury. Perley, Interest, 203; 25 Hun, 490; 37 N. Y. 356. The directors of a corporation have absolute control of its affairs. Sand. & H. Dig., § 1330; 51 Ark. 554. There was no usury, and if the bank had to pay out the money it received, the court should have rendered judgment against Bobo and other parties made defendants in the cross bill. 53 Ark. 271; 63 Ark. 385; 56 N. Y. 214; 64 N. Y. 294; 55 Ark. 143; 57 Ark. 550. If the money with which Bobo & Maples paid the notes was public money, and they had no right to use the same, the bank has a right to judgment against them on the original notes. 1 Greenleaf, Ev. § 522; 3 Am. Dec. 446; 55 Ark. 143.

J. V. Walker, for appellees.

He who comes into equity must come with clean hands.. 1 Pom. Eq. Jur. §§ 397-399. One who has participated in a violation of law cannot be permitted to assert any right founded upon or growing out of an illegal transaction. 2 Beach, Cont. § 1618, and note 1; 17 L. C. P. 646; 1 Wallace (U. S.) 518, 17 L. C. P. 269; 18 L. C. P. 255; 5 Howard (U. S.) 353; 14 Howard, 70; 20 Curtis, 40. If parties be *in pari delicto,* they will be left where they have placed themselves. 2 Beach, Cont. § 1779; 17 Am. Dec. 427; 44 Am. Dec. 718. He that hath committed iniquity shall not have equity. 47 Ark. 311. The proof established usury. Const. Ark. art. 19, § 13; Sand & H. Dig., § 5085; 55 Ark. 143.

Crump & Seawel, for appellees.

That which the bank ought by proper diligence to have known may be presumed to have been known. 18 Cent. L. J. 89; 104 U. S. 54; 84 Ind. 119. The bank having knowledge that the funds were public, the sureties who paid the indebtedness to the state are subrogated to all the rights and remedies which the state previously possessed. 104 U. S. 54; 100 N. Y. 31; 52 N. Y. 1; 123 N. Y. 272; Sand. & H. Dig., §§ 1715, 1849, 1850. The relation of debtor and creditor does not apply when the act of depositing is a misapplication of the fund. 124 N. Y. 324; 100 N. Y. 31. The state having the right to follow the funds deposited by Maples, the appellees would be subrogated to its rights and remedies. 53 Ark. 303; Bisp. Eq. 335. The bank and Maples were *particepes criminis* and

joint tort feasors. L. R. 3 H. L. 14. The court had the right to render judgment against some and for other of the plaintiffs. Sand. & H. Dig., § 5852.

BATTLE, J. On the 15th day of October, 1897, J. L. Rhodes and 47 others instituted a suit in equity against A. P. Maples, N. C. Charles, J. P. Fancher, D. H. Seitz, M. L. Coxsey, and the Carroll County Bank, all of whom, except the bank and Maples, had signed the bond of Maples as sureties. H. I. Seidel and W. R. Boyd, two other sureties on the bond, were not made parties, Seidel being insolvent and Boyd having died since the signing of the bond, leaving no estate.

Plaintiffs alleged in their complaint that the defendant, Maples, was duly elected sheriff of Carroll county, in this state, at the general election held in September, 1896; that he was duly commissioned as such sheriff, and afterwards qualified and entered upon the duties of such office; that he (Maples), plaintiffs, Seidel, Boyd, and the defendants, Charles, Fancher, Seitz and Coxsey, on the 15th day of October, 1896, executed a bond to the state of Arkansas in the sum of $52,700, conditioned that he would faithfully perform the duties of collector for the county aforesaid, and well and truly pay over all moneys collected by virtue of his said office, according to law; that he (Maples) afterwards collected in Carroll county, for the year 1896, taxes for the state of Arkansas amounting to $6,983.90, and failed and refused to pay the same to the state, as the law and the conditions of his bond required him to do; that afterwards, on the 24th of August, 1897, the auditor of the state issued a warrant of distress against him and the sureties on his bond, and placed it in the hands of a constable of Carroll county, who collected of plaintiffs many sums of money, which are set out in their complaint. They further allege that the Carroll County Bank was a corporation duly organized under the laws of Arkansas; that Maples, at various times, while he was collecting taxes in 1897 for the past year, deposited the moneys so collected by him with the bank to his individual credit; and that the bank at the time well knew that the moneys so collected were taxes due the state. They asked that an account be taken of the amounts so deposited, and that they be subrogated to the rights of the state, and severally have judgment against the bank for the amounts respectively paid by them, or in proportion thereto.

On the 25th day of February, 1898, the bank filed its answer and cross-complaint. It admitted the election of Maples and the execution of the bond set out in the plaintiffs' complaint; that Maples had failed to pay a large amount of money collected by him as taxes for the state, as required by his bond; that the warrant of distress issued; and that the constable under it collected the amount set forth in the complaint. It admitted that Maples during the year 1896 deposited large sums of money with it, amounting in the aggregate to $7,000, but denied that the sums so deposited arose from the collection of taxes due the state of Arkansas, or that any part of the sums so deposited were sums which had been assessed against it for taxes of 1896; but alleged that Maples was indebted to it for an amount exceeding the taxes assessed against it for that year, and that he delivered to it a tax receipt for which the bank gave him credit on his personal account. It denied that it knew, or had any knowledge, that any money deposited with it during the year 1896 was money collected for the state of Arkansas for taxes. It alleged that the money was deposited by Maples in his individual capacity, and drawn out by him in the ordinary and usual course of business upon his checks; that it was at no time advised by said collector or anyone else that the money deposited by him, or the money drawn out of the bank by him upon his checks, was money he had collected as taxes. And it made many other allegations unnecessary to mention in this opinion.

After hearing the evidence adduced by all parties, the court found that there was no equity in the complaint as to plaintiffs A. S. Bobo, Len Nunnally, John A. Bridgford and W. H. Linzy, and dismissed it as to them; and further found as follows: "That the said A. P. Maples was the duly authorized collector of Carroll county, Arkansas, and that parties mentioned in the complaint as such are the sureties on his bond as such collector; that in the year 1897 he collected the taxes for said Carroll county for the year 1896, and that he deposited the money, or a great portion thereof, in the defendant bank; that the bank knew at the time it was revenue collected by him for the state of Arkansas; that the said A. P. Maples failed to account for and pay to the state of Arkansas, of the revenue so collected, the following amount, $6,983.90, and that the same was paid by his said sureties as follows: [Here the names of the sureties and the amount paid by each one are stated]; that the defendant bank retained, of said money so deposited, in payment of indebtedness due it the sum of $3,785, which said sum should have been ap-

plied to the payment of the revenue to the state of Arkansas;" and "that the state had a lien on said funds, and that his sureties who paid said collector's shortage to the state of Arkansas are entitled to be subrogated to the rights of the state of Arkansas to said sum in proportion to the amount so paid by said sureties as hereinbefore set forth." And the court decreed that certain plaintiffs (naming them) recover of the Carroll County Bank the sum of $2,651, and that the same be distributed among them in proportion to the amounts paid by them as sureties; and the bank appealed.

No disposition was made, so far as the record in this court shows, of the cross complaint.

The evidence sustained the findings of the court as to the facts, unless it fails to do so as to the amount paid by the sureties and the sum appropriated by the bank to the payment of the debts owing to it by Maples, and in that respect we find no error prejudicial to the appellant.

Appellant contends that one of the debts paid out of the moneys collected by Maples as taxes for the state was a debt which A. S. Bobo owed to it, and was paid on a check drawn on it in his favor by Maples, and that it is not bound to refund the money used in paying it. But the facts, as we understand them, are as follows: On the 12th day of August, 1896, the bank loaned to Maples, for the purpose of enabling him to make good the sum which he was owing for taxes collected in 1896 for the year 1895, the amount of $2,500. Bobo executed and delivered to the bank his note for this amount, and deposited it with Carroll county warrants as security. The money loaned was placed by the bank to the credit of Maples, who was to repay it. Bobo was to pay the note in the event Maples did not. On the 28th of April, 1897, Bobo delivered to the bank a check, drawn on it by Maples in his (Bobo's) favor, for $2,670, to pay the $2,500 so loaned and interest thereon. The check was paid by the bank appropriating the moneys collected as taxes for the state, and deposited with it by the collector, Maples. The debt paid was in fact Maples' and Bobo's note, and county warrants were held as security for the same. Under these circumstances the appropriation of the money to the payment of the check was fraudulent and void, and the bank is still bound for the money so used.

"When money is placed as a general deposit in a bank, it is no longer the property of the depositor, but immediately becomes the money of the bank. The depositor becomes the creditor of

the bank, and the bank his debtor; and the bank is bound by an implied contract to honor the checks of the depositor to the extent of his deposit. When his checks are drawn in proper form, the bank is bound to honor them. It cannot excuse a refusal to pay them by showing that it had reason to believe that the checks were given for an unlawful purpose, or that other persons had liens or claims on the money deposited." But there is an exception to this rule. If the banker has notice that the fund does not belong to the depositor, and the check is drawn to pay a debt due the bank, then the banker would be affected with a knowledge of the unlawful intent, and would be in duty bound to dishonor the check, and, if he did not do so, would be a participant in the profits of the fraud, and liable to the owner of the fund for all moneys appropriated to its payment. *Boone County Bank* v. *Byrum,* 68 Ark. 71, 56 S. W. Rep. 532; *Bank of Greensboro* v. *Clapp,* 76 N. C. 482; *Central National Bank* v. *Conn. Mut. Life Ins. Co.* 104 U. S. 54; *Commercial Bank v. Jones,* 18 Texas, 811; 1 Morse, Banks and Banking (3d Ed.) § 317.

The plaintiffs are entitled to be subrogated to the rights of the state to the fund appropriated to the payment of the debts owing to it by the collector, Maples, to the extent of the moneys paid by them as sureties. *Boone County Bank* v. *Byrum,* 68 Ark. 71, 56 S. W. Rep. 532.

Decree affirmed.

HUGHES, J., absent.

EX PARTE MORTON.

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Opinion delivered December 22, 1900.

1. JUDGMENT OF COUNTY COURT—APPEAL.—Under Sand. & H. Dig., § 1270, providing that "when appeals [from judgments of the county court] are prosecuted in the circuit court or supreme court, the judge of the county court shall defend the same," the county judge may appeal from a judgment of the circuit court reversing an order of the county court refusing to make an order prohibiting the sale of liquor within three miles of a designated place, though neither the county nor the county judge was a party to the proceedings in the circuit court. (Page 51.)

2. LIQUORS—THREE-MILE LAW—PARTIES.—On appeal to the circuit court from an order of the county court refusing to make an order prohibiting the sale of liquor within three miles of a designated place, it was not an error to refuse to make the county a party. (Page 51.)

3. APPEALS—WAIVER OF AFFIDAVIT.—Where a county judge, entitled to defend an order made by him on appeal, failed to move the circuit court to dismiss the appeal for want of an affidavit, it is too late to make the objection in the supreme court. (Page 51.)

4. SAME—FINAL ORDER.—An indorsement of the words, "Ignored entirely," on a petition for an order prohibiting the sale of intoxicating liquors within a certain territory will be treated as a final order refusing the petition. (Page 51.)

5. SAME—NECESSITY OF ENTRY OF JUDGMENT.—Under Sand. & H. Dig., § 1264, providing that "appeals shall be granted from all final orders and judgments of the county court at any time within six months after the rendition of the same," it is not essential that the judgment be entered of record before an appeal is taken. (Page 51.)

6. SAME—FAILURE TO RECORD JUDGMENT—WAIVER.—The objection that an appeal to the circuit from the county court was taken before the judgment appealed from was entered of record is waived by failure to object in the circuit court. (Page 52.)

Appeal from Cleburne Circuit Court.

E. G. MITCHELL, Judge.

STATEMENT BY THE COURT.

S. J. Morton and other adult inhabitants residing within three miles of the Heber High School building, on the 1st January, 1900, filed a petition asking the county court of Cleburne county to make an order prohibiting the sale of intoxicating liquors within three miles of said school house. The county judge made the following indorsement on the petition: "Ignored entirely." P. C. Menees, County Judge, January 1, 1900." Thereupon the petitioners prayed an appeal to the circuit court. The petition came on for hearing before the circuit court, and the prayer of the petition was granted, and an order made forbidding the sale of intoxicating liquors within the territory named. The record then recites that thereupon the county judge of the county asked that the county be made a party, which request the circuit court refused. To

which refusal the county excepted, and prayed an appeal to the supreme court, which was granted.

J. M. Brice, for appellant.

The county should have been a party, and the application for same should be made to the county judge. Sand. & H. Dig. § 1270; 60 Ark. 516. The county judge is the judge of the interests of the county. 43 Ark. 361. "Ignored entirely," written on the back of the petition by the county judge, is not a final appealable order. 26 Ark. 468; 36 Ark. 200; 19 S. W. 571; 12 Am. & Eng. Enc. Law (1st Ed.), 63; 2 Am. & Eng. Enc. Pl. & Pr. 72; 34 Ark. 117. If there is a judgment, the same must be entered of record as a prerequisite to an appeal. 61 Miss. 228; 24 Ala. 284; 81 Mo. 455; 57 Ark. 585. The petitioner's remedy was by *mandamus.* 17 S. W. 249; 43 Ark. 62. The circuit court had no jurisdiction of the case, as no affidavit for an appeal was made. Sand. & H. Dig. § 1264; 51 Ark. 344; 65 Ark. 419; 19 Ark. 647; 10 Ark. 308; 11 Ark. 665.

Marshall & Coffman, for appellants.

28 Ark. 478 and 52 Ark. 99 have no application here. Sec. 1270, Sand. & H. Dig., applies to appeals to the supreme court. 60 Ark. 516; 30 Ark. 478; 53 Ark. 287. Supersedeas should be granted in behalf of the county as an independent proceeding. 55 Ark. 200; 52 *ib.* 213; 45 *ib.* 219; 9 Cent. Dic. 1802; 3 Ark. 532; 1 Ark. 201; 3 *ib.* 63; 3 *ib.* 532; 5 *ib.* 390, 405, 563; 12 *ib.* 84, 87; 10 *ib.* 197; 41 *ib.* 601; 6 *ib.* 280. The county should have been a party. 51 Ark. 159; 40 L. R. A. 417; 2 Cent. Dig. Col. 2651. The statement of the clerk cannot be used to contradict the record. 5 Ark. 478; 31 *ib.* 725; 9 *ib.* 375; 24 *ib.* 142. Appeal lies only from final order. 12 Ark. 670; 26 Ib. 468; § 1264, Sand. & H. Dig.; 55 Am. Dec. 783; 2 Cent. Dig. Col. 1187, 1413. Filing paper and transcript necessary to give jurisdiction. 5 Ark. 474; 9 *ib.* 469; 11 *ib.* 639, 665; 16 *ib.* 485; 24 *ib.* 282. The order of the county court should have been spread upon the record. 40 Ark. 290; 53 Ark. 238.

RIDDICK, J., (after stating the facts). We are of the opinion that the county judge had the right to appeal from the order of the circuit court rendered in this case. Our statute provides that when appeals from the orders and judgments of a county court are prosecuted in the circuit or supreme court, the judge of the county

court shall defend the same. Sand. & H. Dig., § 1270. This, as heretofore decided, includes the right to take an appeal. *Ouachita County* v. *Rolland,* 60 Ark. 516, 31 S. W. 144. Nor do we think it was necessary that either the county or the county judge should be made a party to the proceedings in the circuit court, in order to exercise this right. The circuit judge did not err in refusing to make the county a party, but the county judge still had the right to appeal by virtue of the statute, and the motion to dismiss the appeal must therefore be overruled.

The first contention on the appeal is that the circuit court had no jurisdiction of the case, for the reason that the county court did not make any order in the case that could be appealed from, and also for the reason that the record does not show that any affidavit for appeal was filed.

As to the affidavit, we said that the county judge had the right to defend his order on the appeal to the circuit court, without being formally made a party to the proceeding. As he failed to move the circuit court to dismiss the appeal for want of an affidavit, it is too late to make the objection in this court. *Crenshaw* v. *Bradley,* 52 Ark. 318; *James* v. *Dyer,* 31 *ib.* 489; *Wilson* v. *Dean,* 10 *ib.* 309.

It seems to me somewhat doubtful as to whether the county judge made a final order in the case. He endorsed on the petition the words, "Ignored entirely." The ordinary meaning of these words would be that he refused to take notice of it or to consider it, but a different meaning is sometimes given the word "ignore" in law. One meaning of this word, as defined in Webster's dictionary, is to throw out or reject as false or ungrounded, as is said of a bill rejected by the grand jury. We have concluded that this is the sense in which it was used by the county judge. He, in other words, refused the prayer of petitioners, and rejected the petition.

But it is said that if he rejected the petition the order was never placed of record, and the appeal to the circuit court was premature. Our statute provides that appeals shall be granted to the circuit court from all final orders and judgments of the county court at any time within six months after rendition of the same. Sand. & H. Dig. § 1264. A distinction is made between the rendition of the judgment and its entry, and it is not absolutely essential, under this statute, that the judgment should be entered of record before an appeal is taken. *Little River County* v. *Joyner,*

57 Ark. 185; *Gray* v. *Palmer,* 28 Cal. 416; *Peck* v. *Courtis,* 31 Cal. 208; *Anderson* v. *Mitchell,* 58 Ind. 592. The order of the county court should have been placed of record, but, no objection having been made on this ground in the circuit court, it is too late to make such objection now.

The evidence before the circuit court on the hearing not having been brought up, and, finding no error, the judgment is affirmed.

HANGER *v.* IVES.

Opinion delivered January 19, 1901.

ATTACHMENT—AMENDMENT.—An affidavit for a general attachment will not be treated on appeal as amended to conform to proof of an existing ground for specific attachment. (Page 55.)

Appeal from Pulaski Circuit Court.

JOSEPH W. MARTIN, Judge.

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

One may grant either the fee or merely an easement in regard to quarry privileges. 2 Washb. Real Prop. 400, 403; 1 *id.* 19; 3 *id.* 416-7. Conveyance of quarry rights is not a sale of stone, since it carries with it also the right of ingress and egress for quarrying. Attachment is a proceeding in derogation of common law, and the statute is to be strictly construed. Wap. Att. § 23. A writ of general attachment cannot issue without proper affidavit stating grounds of attachment. 30 Ark. 361; 28 Ark. 469; Drake, Attach. §§ 115, 116.

Marshall & Coffman, for appellee.

The sale of the right to quarry the stone conveyed only an easement. 2 B. & A. 724, 738; 15 Am. & Eng. Enc. Law. 509; 2 Wall. Jr. 81; 49 Pa. St. 341; 29 *id.* 241; 57 *id.* 446; 81 Va. 764; 72 Pa. St. 173; 53 Pa. St. 229, 243; 55 Pa. St. 16, 504; 61 Pa. St. 39; 18 L. R. A. 491; 3 S. C. 168; 63 Ark. 10. The affidavit could be amended at any time, and, if not expressly amended, would have been considered as amended to conform to the proof.

55 Ark. 329; 4 U. S. App. 603; 47 Ark. 31; 62 Ark. 171; 63 Ark. 157; S. C. 35 L. R. A. 765, 766; 31 *Id.* 422; 61 Am. Dec. 124.

BUNN, C. J. This is a suit by Charles Ives against Fred Hanger for $800, the price of 10,000 cubic yards of stone, instituted and tried in the second division of the Pulaski circuit court on the 21st day of September, 1898. Judgment for the plaintiff in the sum of $350, and the defendant appealed.

The suit grows out of the following state of facts: On the 3d day of November, 1892, the plaintiff, Ives, being the owner of the fractional northeast quarter of section 1, township 2, north of range 14 west, executed to one F. J. H. Rickon a deed conveying to him all the quarry rights in and to said fractional quarter section, which rights consisted of the exclusive right to quarry and remove from said land all stone in or on the same, with the right of egress and ingress. The consideration for said sale was a small amount paid in cash, and the further sum of eight (8) cents per cubic yard, to be paid for all rock taken from said lands. Subsequently, on the 14th day of August, 1894, the defendant, Fred Hanger, purchased said quarry rights upon the same terms from Rickon. Claiming that Hanger, beginning from about the 1st December, 1896, had up to the time of the institution of this suit taken out 10,000 cubic yards of stone, plaintiff brought the suit to recover the price of the same, no part of which he claimed had ever been paid.

In his answer and counterclaim, the defendant denied that he was indebted to plaintiff as claimed, and denied that he had taken out 10,000 cubic yards of stone in the time named, and that he was indebted to the plaintiff for the same. He admitted that he had taken out about 6,000 cubic yards of rock, but denied that plaintiff was entitled to a royalty of eight cents per cubic yard for said rock, under the terms of the contract or the deed set out in his complaint, and by way of counterclaim defendant alleged that plaintiff, on the 25th day of March, 1896, without filing the affidavit required by law, instituted an attachment proceeding against him, before William Gardner, a justice of the peace for Roland township, Pulaski county, for the sum of $64, which he claimed to be owing and due from defendant to him, for the price of 800 cubic yards of stone, at the contract price, which he claimed defendant removed from said land up to that time, and had not paid for, the same being a portion of the

stone sued for in this action. The defendant alleges further that plaintiff caused said justice of the peace to issue and place in the hands of the constable of said township an order of attachment, and caused the same to be executed by said constable by levying the same upon a quantity of quarried stone which defendant had got out and loaded on barges in the Arkansas river moored at a convenient place to said lands and quarry; that the plaintiff with the constable warned and threatened defendant's hands and employees then engaged not to further prosecute the work of quarrying and removing stone therefrom, and thus prevented defendant from quarrying and removing the stone from said quarry; that the levying of said order of attachment, and the conduct and acts of plaintiff in relation thereto, and in connection therewith, caused the work of defendant in getting out and removing and loading stone on boats as aforesaid to be suspended, demoralized the defendant's laborers, and caused them to abandon the work, and prevented his free egress and ingress from or to said lands for the purpose of carrying out his contract; and that said attachment was unlawfully issued. Then follows a statement of defendant's contract with the United States government, which he was prevented from fulfilling, except at great and ruinous costs, by reason of the levy of said attachment and the demoralization of his laborers as aforesaid.

There was no affidavit for the attachment issued, nor was there any bond given as the law requires. The order of attachment was in form that used for a general attachment.

On the trial of this cause, the defendant asked the following to be given, which the court refused to give:

"1. The jury are instructed: If you find from the evidence that the affidavit by the plaintiff, at the time he procured an attachment from Walter Gardner, justice of the peace, against the defendant, was insufficient in this, that it did not state a ground for an attachment, or if you find no attachment bond was filed as required by law, then said attachment proceeding was wrongfully instituted, and any levy made by the constable thereunder was a wrongful and unauthorized levy."

On its own motion, the court gave the following: "Now, under this section (section 4728 of the digest) if Hanger owed Ives for stone quarried out and ready for delivery, and here the burden is on Ives, it was personal property in the hands of the vendee, Hanger, and on which plaintiff Ives had a right, if he still owed for

it, to sue out an attachment before a justice of the peace and have the same levied on this particular property, and on this proceeding no bond is required to be filed. And if you find from the evidence that Hanger owed Ives for the stone, and if you further find that, in suing out such attachment process and having it levied upon this rock, Ives substantially complied with the statute, there would be no liability to Hanger merely by reason of any informality in such process."

The attachment sued out before the justice of the peace was in form a general attachment. At least, we must so conclude since the order issued by the justice of the peace was that of a general attachment, and it ran against all of the property of the defendant in the county, subject to execution. Plaintiff, Ives, was informed of the dissolution of the attachment beforehand, and never appeared in the justice of the peace court on the return day, or at any time, and sought to amend or change the proceeding in any manner, but seemed to have acquiesced in the dissolution of the attachment, on the ground upon which he had learned that it had been dissolved, that is, because, the title to real estate being involved, the justice of the peace had no jurisdiction of the cause. The order of attachment, its levy and the attendant circumstances constituted the injury from which the defendant, in his counterclaim, claims that he suffered damages. The said instruction given on the court's own motion is a mere construction of the section of the digest referred to therein, and, abstractly considered, and in a proper case, would be sound, but the real contention of the defendant is that plaintiff in said attachment proceeding had not in any material sense complied with the law, and his contention is sustained by the facts, if considered either as a general attachment, or if we consider it as a vendor's attachment which the plaintiff might have had a right to claim at the time. There was also no compliance with the statute which provides for an attachment without bond on personal property for the purchase money. In such proceeding an affidavit must be filed, setting forth the specific property, and its value, etc., and the order must direct the sheriff to take and hold the property subject to the further order of the court.

But the trial court evidently proceeded on the theory that the affidavit in attachment might be considered amended to suit the evidence, and the trial might thus proceed. On this question this court said in *Blass* v. *Lee,* 55 Ark. 332 (referring to the dif-

ferent grounds of attachment named in the statute regulating general attachments): "This was itself a ground of attachment. But it was separate and distinct from that stated in the plaintiff's affidavit, and did not authorize the court to sustain the attachment, unless the affidavit had been amended so as to embrace it. The statute expressly provides that the affidavit may be amended so as to embrace any grounds that exist up to the final judgment upon the attachment. But it also provides that if the amendment 'embrace new grounds not existing at the time of suing out the original attachment, and the attachment shall be sustained on such new grounds only, the lien shall exist on the property levied upon from the filing of the same.' This language seems to indicate that the statute does not authorize the court to sustain an attachment upon any ground not presented by the original affidavit or by an amendment thereto. In this case there was no offer to amend, and it cannot be said that the court erred in not directing the amendment upon its own motion. It is not contended that the original ground of attachment was treated as amended on the trial, and to so regard it here would be to determine the appeal on an issue not made in the court below. It follows that the judgment discharging the attachment should be affirmed.

The rule by which courts are permitted to render judgments on implied amendment has really no justification, except on the theory that all parties have treated the original assignment of cause of action as amended by the introduction of testimony in support of the amendment on the one hand, the same to be done on the other without objection. If the evidence is closed, and for the first time the doctrine is relied upon in instructions to the jury, there is generally a surprise to the party who has not directed his evidence to this point, and the doctrine therefore should be invoked with caution, if at all.

There were peculiar circumstances in *Blass* v. *Lee*, as we have seen, which made the rule inapplicable, and yet that was an implied amendment, which might well have been actually made under the same statute that authorized the action and the attachment therein. The peculiarity of the case at bar is that there is nothing but the order of the justice of the peace's attachment to indicate to us the nature of his proceeding. The cause had been dismissed, and the order of attachment consequently dissolved by the justice, on a ground deemed sufficient by him, and no amendment or change

of the proceeding was ever at any time offered to be made, or any renewal of the controversy ever in any manner made before him.

In the trial of the case at bar, the instructions of the court, to which we have made reference, were tantamount to saying to the jury that the justice of the peace in the attachment suit should have treated the affidavit as amended, and proceeded accordingly. There was nothing for the justice to amend to, there had been no affidavit upon which the order of attachment was founded. The levy of the writ and the manner of doing it had done the injury complained of, and we cannot give our assent to an extension of the rule of implied amendments so as to act upon such in a different court and in an independent proceeding, for the reason, if none other, that we have no power to control the judicial discretion of that other court, and say that it should have done the one thing or the other different from the showing of the record, and because, under such circumstances, we cannot know that the plaintiff himself, under the circumstances existing at the time of the pendency of the former proceeding, could have or would have made the amendment, had he been called upon to do so, for such amendment involved different facts from those shown in that record.

The judgment is therefore reversed, and the cause remanded.

HANCE v. HOLIMAN.

Opinion delivered January 19, 1901.

NOTES—MORTGAGE—LIMITATION.—Where notes were surrendered to their maker upon his executing a mortgage to secure the same indebtedness, and there was no agreement that the mortgage should be a satisfaction of the debt, or that the surrender of the notes should discharge the original obligation to pay them, the mortgage is evidence of an extension of the time of payment, and upon default in payment the original notes are revived, so that an action to foreclose the mortgage would not be barred until an action upon the original notes would be. (Page 61.)

Appeal from Grant Circuit Court in Chancery.

ALEXANDER M. DUFFIE, Judge.

STATEMENT BY THE COURT.

This is the second appearance of this case in this court. It was brought here before by appellee, and was decided in his favor October 19, 1895, *Holiman* v. *Hance,* 61 Ark. 115. The former appeal was from the decision of the Grant circuit court sustaining a general demurrer to the answer of appellee. The suit was brought to foreclose a mortgage executed January 5, 1883. The original complaint alleged, in substance, that plaintiff was the administrator of the estate of Nancy Hance; that defendants, on the 5th day of January, 1883, executed to the said Nancy Hance their mortgage on the northeast quarter of section 15, township 4 south, range 14 west, in Grant county, to secure an indebtedness of $594; that said mortgage was duly recorded; that there had been paid on said mortgage, and credited thereon, the following sums: December 29, 1883, $4.20; December 16, 1884, $80; December 14, 1885, $130, and October 20, 1887, $75, leaving a balance due and unpaid on said mortgage the sum of $665.85 with legal interest. The prayer was to foreclose the mortgage and sell the land to satisfy same. The mortgage was made an exhibit to the complaint, and was as follows:

"This indenture, made and entered into on this the 5th day of January, A. D. 1883, between Elijah Holiman and Nancy Holiman, his wife, of the county of Grant and state of Arkansas, of the first part, and Mrs. Nancy Hance, of the state of Arkansas and Grant county, of the second part, witnesseth: That the said parties of the first part, for and in consideration of the sum of five hundred and ninety-four dollars ($594), the receipt whereof is hereby acknowledged, do grant, bargain, sell, and convey, and by these presents do grant, bargain, sell, and convey, unto the second party, her heirs, executors, or administrators, forever, the following lands lying in the state of Arkansas and Grant county, to-wit, the northeast quarter of section 15, township 4 south, of range 14 west, containing 160 acres, more or less, together with all and singular the hereditaments and appurtenances thereunto belonging. And I, Nancy Holiman, wife of the said Elijah Holiman, for and in consideration of the said sum of money, do release and relinquish unto the second party all my right of dower in and to said lands. To have and to hold the said granted premises unto the said party of the second part, her heirs and assigns, to her and their only proper use, conditioned, however, that if the first party should

pay or cause to be paid to the second party $594, with ten per cent. interest per annum on the same, twenty-four months from date, then this mortgage to be void; otherwise, to remain in full force and effect. In witness whereof the parties to these presents have hereunto set our hands and seals the day and year first above written. Elijah Holiman [Seal], Nancy C. Holiman [Seal]." Said mortgage was properly acknowledged and duly recorded.

The defendants answered and alleged that the mortgage was executed to secure an account due twenty-four months after January 5, 1883, and that the same was barred by the statute of limitations; and as a further defense the answer set up that the land conveyed in the mortgage was the homestead of defendants, and that the mortgage was not effectual to convey the same.

The plaintiff filed a general demurrer to the answer, which was sustained, and, the defendants declining to plead further, decree was entered against them for the amount due on the mortgage, and the same was declared a lien on the land, which was ordered sold to satisfy said decree.

From the decree of the court sustaining the demurrer to the answer and foreclosing the mortgage the defendants appealed, and the decision of the lower court was reversed, and the case remanded.

After the mandate of this court was filed in the court below, the said demurrer was overruled as directed by this court. The plaintiff, thereupon, by leave of the court, filed an amendment to the complaint, as follows: "Comes the plaintiff, and by way of amendment to his complaint filed herein states that on the 5th day of January, 1883, the defendant Elijah Holiman was indebted to the said Nancy Hance in the sum of $594, which was evidenced by two promissory notes then past due, and, the said defendant not being able to pay the same, but desiring further time, it was agreed between him and the said Nancy Hance that he should have further time in which to pay said indebtedness upon his giving security for the payment thereof; that thereupon, and pursuant to said agreement, the said notes evidencing said indebtedness were surrendered up, and in consideration thereof and as a substitute therefor, the defendant Elijah Holiman and his wife, the said Nancy C. Holiman, made, executed, and delivered to the said Nancy Hance the mortgage sued on herein; that said mortgage was so given and accepted as the contract and evidence of indebtedness between the said Nancy Hance and the said Elijah Holiman in lieu of the said notes, which were surrendered to the said Holiman as afore-

said. Wherefore plaintiff prays as in his original complaint and for all other proper relief." The case was then tried upon the complaint, amendments and exhibits thereto, the answer of defendants, and the depositions on file as part of the record of the case as follows:

Elijah Holiman introduced by the plaintiff, testified as follows: "I am 63 years old, and reside in Grant county. I am one of the defendants." Here the original mortgage sued on, as copied above, was exhibited to witness, and he said: "I signed and executed this mortgage in favor of Nancy Hance. The consideration for the mortgage was two notes—one in favor of William Hance, the husband of Nancy Hance, given for borrowed money also. At the time this mortgage was executed, the notes were surrendered to me, and I executed said mortgage in lieu of said notes. The notes that were surrendered to me at the time I executed the mortgage were made two or three years prior to the execution of said mortgage. I paid a part of the money for which the said notes were given to the St. Louis, Iron Mountain and Southern Railway Company on the purchase money for the land included in said mortgage." The mortgage was made exhibit to Elijah Holiman's deposition.

S. R. Cobb, introduced by the plaintiff, testified as follows: "I am 52 years of age. I wrote the mortgage introduced in evidence in this case and made exhibit to Elijah Holiman's depositions. I was a justice of the peace of De Kalb township, Grant county, at the time, and took the acknowledgment of Elijah Holiman and his wife to said mortgage. The consideration of said mortgage was a note or notes in favor of William or Nancy Hance for money borrowed. The mortgage was to take place of the notes, and to secure the amount due on them. That was the understanding of the parties at the time the mortgage was executed."

The foregoing was all the evidence in the case. The court found in favor of defendants on their plea of the statute of limitations, and rendered a decree accordingly. The plaintiff thereupon appealed to this court.

E. H. Vance and *Wood & Henderson,* for appellant.

The action was not barred. The contract evidencing the debt being under seal, the ten years statute of limitation applied. 32 Ark. 410; 43 Ark. 468; 44 Ark. 101. The acknowledgment of the indebtedness in the mortgage implied a promise to pay as a

part of the instrument. Bish. Cont. § 121; 8 Wall. 288; 107 Ind. 94; 10 Wend. 675; 48 N. J. Eq. 51; 24 Ark. 191; 36 Ark. 293; 15 Am. & Eng. Enc. Law (2d Ed.), 1110. The act of March 31, 1887, did not apply to existing mortgages. 95 U. S. 628; 104 U. S. 668; 26 Sup. Ct. Rep. (Lawy. Ed.), 886; 64 Ark. 317.

HUGHES, J., (after stating the facts). When this case on a former appeal was reversed and remanded for a new trial, an amendment to the complaint was made, as set out in the foregoing statement of facts, upon which amendment arises the question to be determined now. This question was not involved nor raised or considered on the former appeal. It is this: Did the execution of the mortgage for the security of the debt, as above set out, and the surrender thereupon of the notes evidencing the debt, have the effect to satisfy the debt or discharge the obligation to pay it?

There was no agreement that the mortgage was to be a satisfaction of the debt, or that the surrender of the original notes was to discharge the original obligation to pay them. In fact, the mortgage was given to secure payment of the debt, and was not the substitution of the obligation of another person to pay it. According to the weight of the adjudicated cases on this question, the original obligation was not discharged, nor the debt paid, by the renewal of the obligation, and the surrender thereon of the original notes evidencing the debt. It was only an evidence of an extension of the time of payment. There was no payment. Upon failure to pay according to the renewed obligation, the original notes were revived and restored, and were enforcible, unless there was an express agreement or understanding that the mortgage was to be in satisfaction of the notes, or unless the obligation or undertaking of a third party was taken for or in lieu of the notes of debtor. In the case of *Olcott* v. *Rathbone,* 5 Wend. 490, it is said: "Where the cashier of a bank, on a note holden by the bank falling due, accepted a check of a third person for a part of the amount and a new note for the balance, and delivered up the old note, on the check being dishonored, the action might be maintained on the original note against the maker to recover the amount of the check, and the bare fact of delivering up the old note was not evidence that the check and new note were received in payment."

In 2 Daniel, Negotiable Instruments, § 1266a, it is said that "the delivery or surrender to the maker of the old note, upon its being renewed, does not in itself raise a presumption of its ex-

tinguishment by the new, it being considered as a conditional surrender, and that its obligation is restored and revived if the new note be not duly paid;" citing *Olcott* v. *Rathbone,* 5 Wend. 490; *Jager Iron Co.* v. *Walker,* 76 N. Y. 522, and the other New York cases on this point; and *First Nat. Bank.* v. *Case,* 63 Wis. 506, and *Jansen* v. *Grimshaw,* 125 Ill. 468. In *Jager Iron Works* v. *Walker,* Judge Folger pertinently said: "Until the promise is in fact redeemed, there is no payment." The proof on the trial of this cause was that the debt was not fully paid, and that payments had been made on the notes which prevented the bar of the statute of limitations, and that this action was not barred at the time of the institution of this action. There was no evidence that the land mortgaged was a homestead.

The judgment is reversed, and the cause is remanded, with directions to render judgment for the amount yet due on the debt in favor of the plaintiff and for foreclosure of the mortgage for its payment.

LANIGAN v. NORTH.

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Opinion delivered January 19, 1901.

1. CORPORATION—LIABILITY OF STOCKHOLDER FOR DEBTS.—The California statute which provides that "each stockholder of a corporation is individually and personally liable for such proportion of its debts and liability as the amount of stock or shares owned by him bears to the whole subscribed capital stock or shares of the corporation" (Cal. Civ. Code, § 322) creates a liability which is enforceable in the courts of this state, at law as well as in equity. (Page 65.)

2. SAME—LIABILITY OF STOCKHOLDER'S ESTATE.—Under the California statute making the stockholders of a corporation liable for a proportionate part of the corporation's debts, the estate of one who died owning stock in a corporation will be liable for its proportionate part of debts created by the corporation after such stockholder's death. (Page 65.)

3. SAME—ASSIGNMENT OF CLAIMS.—The assignment of claims against a corporation for the purpose of collection merely, if valid in the state where made, will entitle the assignee to bring an action thereon in his own name in this state. (Page 66.)

4. EVIDENCE—FOREIGN STATUTES.—A statute of another state cannot be proved from a volume which does not purport to be published by the authority of that state. (Page 67.)

5. ADMINISTRATION—AUTHENTICATION OF CLAIM.—Under Sand. & H. Dig., § 114, regulating the method of authenticating claims against estates, an affidavit by a person other than the claimant will not be sufficient unless it states that the affiant is acquainted with the facts sworn to, or has made diligent inquiry, etc. (Page 68.)

6. SAME.—Claims against an estate in favor of a corporation must be authenticated by the affidavit of the cashier or treasurer of such corporation, and not by the affidavit of the president. (Page 68.)

Appeal from Sebastian Circuit Court.

EDGAR E. BRYANT, Judge.

STATEMENT BY THE COURT.

The City Bank of Los Angeles, California, a corporation organized under the laws of California, became insolvent, and suspended business on the 19th of June, 1893, and is still insolvent. Thomas Lanigan of Fort Smith, Arkansas, now deceased, became a stockholder in the bank at the time of its organization. He at that time held 200 shares of the capital stock, of the par value of $20,000, and when the bank suspended his estate was still the owner of fifty shares of the stock of the par value of five thousand dollars. The bank was indebted to many persons among whom was the plaintiff, George M. North. Certain other creditors assigned their claims against the bank to North, under promise from him that he would account to them for the sums collected, less costs of collection. These claims were presented by North to the executrix of the estate of Lanigan in this state. The claims were disallowed, and notice of presentation to the probate court was waived by the executrix. The probate court rejected the claims, but on an appeal to the circuit court judgment was rendered in favor of the plaintiff, North, from which judgment the executrix of the estate appealed to this court.

Hill & Brizzolara, for appellant.

The California statutory liability of stockholders (see Civil Code of Cal. § 322) is not enforceable here. 148 N. Y. 9, 16, 17, citing 74 Pa. St. 52; 3 Daly, 288; 56 Pa. St. 19; 1 Brown (Pa.), 231; 34 Hun, 192; 1 Johns. 95; 34 Barb. 333; 146 U. S. 657; 96

N. Y. 248; 99 N. Y. 433; 140 N. Y. 230; 138 N. Y. 209. See also 154 Mass. 203; 144 Mass. 341; 161 Ill. 497, 507-8; 24 U. S. App. 607; 109 U. S. 371; 120 U. S. 747; 83 Fed. 288; 86 Fed. 45; 7 Oh. St. 341; 56 N. H. 114; 51 Pac. 243; 40 Atl. 341 (R. I.); 166 Mass. 414; 15 Gray, 221; 4 Allen, 233; 134 Mass, 590; 34 Ark. 323. The claims sued on, having arisen since the death of the shareholder, were not provable against his estate. 61 Mo. 540; 83 Va. 81; S. C. 1 S. E. 599; 11 Gratt. 302; 21 Cal. 24; Woern. Am. Law Adm. 347. The claims were not properly authenticated and presented. Sand. & H. Dig. §§ 113, 118. Foreign laws are facts to be proven. 11 Ark. 157; 2 Cranch, 236-7. The court erred in allowing "Deering's California Code" to be introduced as evidence of the law of California, it not being a compilation published by state authority. 14 Ark. 141; 17 Ark. 154; 20 Ark. 592; 33 Ark. 645; 43 Ark. 209; 14 How. 400.

T. W. M. Boone, for appellees.

The California statute is not penal, but simply declares that the liability it imposes is part of the contract of stock subscribers, and that the corporators are not sureties for the corporation, but principal debtors as to its liabilities. 14 Cal. 265; 34 Cal. 503; 39 Cal. 674; 59 Cal. 107; 64 Cal. 117; 8 Cal. 696; 121 U. S. 43; 109 U. S. 371; 82 Cal. 653. The liability is enforceable in other states. 1 Cook, Corp. 419. This court will give the law the same interpretation as is given it by the California courts. 22 Ark. 125. With respect to this liability, the stockholder's estate is the owner of the stock. Cal. Code, § 322. That the liability can be enforced against the estate of a deceased stockholder, see: 1 Cook, Corp. § 248, p. 479n.; 67 Cal. 121; 121 U. S. 55; 109 U. S. 371; 19 Btalchf. 359; 35 Ark. 93; 56 Ark. 474; 91 Cal. 548. The objection that no copy of the claims was presented to the executrix cannot be raised here for the first time. 14 Ark. 471; 29 Ark. 243; 19 Ark. 224; 20 Ark. 424; 20 Ark. 45. The laws of California were properly proved. 1 Greenleaf, Ev. § 489.

RIDDICK, J., (after stating the facts.) This is an action under a statute of California by a creditor of an insolvent bank of that state against the estate of a stockholder of the bank who at the time of his death was a citizen of Arkansas. The action is founded in part on a debt due by the bank to the plaintiff, North, and also upon claims against the bank assigned to the plaintiff by certain other creditors of the bank.

The first contention made here is that the liability of a stockholder under the California statute should not be enforced in this state. The statute in question provides "that each stockholder of a corporation is individually and personally liable for such proportion of its debts and liabilities as the amount of stock or shares owned by him bears to the whole subscribed capital stock or shares of the corporation, and for a like proportion only of each debt or claim against the corporation. Any creditor of the corporation may institute joint or several actions against any of its stockholders for the proportion of his claim, payable by each, and in such action the court must ascertain the proportion of the claim or debt for which each defendant is liable, and a several judgment must be rendered against each, in conformity therewith," etc. Civil Code of California, § 322. The Supreme Court of California has decided that under this statute the individual corporator "does not occupy the position of surety, but that of principal debtor. His responsibility commences with that of the corporation, and continues during the existence of the indebtedness." "It has frequently been decided," says that court, "that members of a corporation who are answerable personally for the corporate debts and liabilities stand in the same position in relation to the creditors of the corporation as if they were conducting their business as a common partnership." *Mokelumne Hill etc., Co.* v. *Woodbury,* 14 Cal., 265; *Hyman* v. *Coleman,* 82 Cal., 653. It is not a penalty which the statute imposes upon the stockholder, but a debt which he assumes with the bank, and which can be enforced in the courts of this state. *Nebraska National Bank* v. *Walsh,* 68 Ark. 433.

Nor do we think that it is necessary that this liability of the stockholder should be enforced in a court of equity. The statute definitely fixes the proportion of each debt or claim for which the stockholder is liable. He is liable for such proportion "of each debt or claim against the corporation" as the amount of stock owned by him bears to the whole subscribed capital stock of the corporation. The liability of the stockholder on any debt of the corporation is thus fixed by the statute with absolute precision, and there is no necessity to go into a court of equity. We are therefore of opinion that this contention of the appellant must be overruled.

The next contention is that these claims are based on transactions had with the bank after the death of Lanigan, and that

for this reason the probate court had no jurisdiction to determine them, and they could not be proved against his estate. But by becoming a stockholder in the bank Lanigan obligated himself to pay the proportion of its debts imposed on him by the statute. He died while still owning the stock, and while this obligation on his part was still in force. When afterwards the bank contracted the debt sued on, his estate became bound for its proportional part of the debt. On this question I have myself felt some doubt, but conclude with the other judges that these claims were provable against the estate of Lanigan. See Sand. & H. Dig. § 110.

Again, it is said that the accounts against the bank were not assignable under our statute, and that the assignors should have been made parties. But these debts were contracted by the bank in California, and were assigned to the plaintiff in that state. It was shown that such claims were assignable under the laws of that state. If they were assigned in that state, the assignment vested the ownership in the assignee, and he could bring an action in his own name, either there or here. We look to the law of California in order to determine the effect of an assignment made in that state, and the effect of the assignments there was, as before stated, to vest the legal title to these choses in action in the plaintiff, North. Being the owner of the legal title, he was under our statute, as well as that of California, the real party in interest, and could bring this suit in his own name. For whenever by the *lex loci contractus* the assignment passes the legal title, the holder of such legal title may sue in his own name in whatever forum he may bring his suit. *Levy* v. *Levy*, 78 Pa. St. 507, 21 Am. Rep. 35; Story on Conflict of Laws (8th Ed.), § 354, p. 501; Minor's Conflict of Laws, 393, 510.

This ruling does not conflict with the decision in *St. Louis, Iron Mountain & Southern Railway Co.* v. *Camden Bank*, 47 Ark. 541, as counsel for appellant contends, for the account upon which the suit was brought in that case was assignable in this state. It was not assignable under our law, and came within the provision of our statute providing that "where the assignment of a thing in action is not authorized by statute, the assignor must be made a party." Sand. & H. Dig. § 5624. The reason that underlies this provision of the statute is obvious, for, when the assignment of a chose in action is not authorized by statute, the assignment does not pass the legal title, and the assignor, being still in law the owner, should be made a party. But neither the

statute nor its reason applies here, for the accounts sued on were assigned in California, where both parties to the assignment lived, and where the assignment was authorized by statute. The effect of that assignment being to vest the legal title in the assignee, we think, as before stated, that he could bring the suit in his own name there or elsewhere. The assignments are absolute, and transfer the accounts to the assignee without reservation of any right in the assignors, and it is not material here to consider whether they were made for collection or for some other purpose, as in either event the assignee, being the owner of the legal title, has the right to sue and collect the money. "Most of the courts," says Bliss in his work on Code Pleading, "have held that where negotiable paper has been endorsed, or other choses in action have been assigned, it does not concern the defendant for what purpose the transfer has been made, and, in an action by the transferee, he cannot, unless he has some defense, or holds some claim against the real owner, object that the suit is not in the name of the real party in interest. It is sufficient for him that the holder has a right to receive the money—that he will be protected from any other demand founded on the same claim." Bliss, Code Plead. § 51; *Meeker* v. *Claghorn,* 44 N. Y. 349; *Allen* v. *Brown,* 44 N. Y. 229.

The last contention of counsel for appellant is that the statute of California applicable to this case was not properly proved. We have proceeded thus far on the assumption that this statute was established by competent evidence, in order to dispose of questions which arise in the case, and we will now consider the point raised as to proof of the statute. The plaintiff offered to prove the statute by introducing a volume entitled, "The Codes and Statutes of Calofornia, compiled by F. P. Deering, of the San Francisco bar, and published by Bancroft-Whitney & Co." This work does not purport to be an official publication of the laws of California, though the evidence shows that it is generally accepted by the courts and members of the legal profession in California as containing a correct exposition of the statutes of that state. No doubt, this opinion of the profession is correct, but courts do not take judicial notice of foreign laws. They must be proved.* And the rule established in this state is that the statute of another state must be proved by the statute itself, or an authenticated copy

* By an act approved April 11, 1901, it is provided that "the courts of this state shall take judicial notice of the laws of other states." [Reporter.]

thereof, or by a book published under the official authority of that state. *McNeil* v. *Arnold,* 17 Ark. 154; *Dixon* v. *Thatcher,* 14 Ark. 141. The book introduced here was not published under the official authority of the state, and for this reason we must hold that the circuit court erred in admitting it as evidence of the law of California.

In addition to other points noticed, two of the claims upon which this action is founded were not authenticated as required by law. The affidavit attached to the claim of the Union Lime Company, a partnership, was made by F. O. Wyman, who does not show that he was a member of the firm, or that he was acquainted with the facts sworn to. The claim of the Los Angeles Lime Company, a corporation, was authenticated by the president of the company, when the statute requires that the affidavit of authentication be made by the cashier or treasurer. Sand. & H. Dig. §§ 114, 116. These claims should, under the requirements of the statute, be dismissed. The other claims appear to be authenticated as required by the statute.

For the reasons stated the judgment is reversed, and cause remanded for a new trial.

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AHERN v. BOARD OF IMPROVEMENT DISTRICT NO. 3 OF TEXARKANA.

Opinion delivered February 9, 1901.

1. IMPROVEMENT DISTRICTS—TAXATION OF CHURCH PROPERTY.—Under Sand. & H. Dig., § 5324, providing for the creation of improvement districts upon presentation of a petition of a majority in value of the owners of real property within such districts, church property, though exempt from general taxation, and therefore not appearing as valued on the county assessor's list, is liable for local improvement assessments, and extraneous proof of its value is admissible. (Page 72.)

2. SAME—ASSESSMENT OF IMPROVEMENTS.—In determining whether a majority in value of the land owners within a proposed improvement district have petitioned for the improvement, such improvements upon the land as have been made since the last assessment and before the filing of the petition should be included. (Page 72.)

3. SAME—ASSESSMENT OF RAILWAY SPUR TRACK.—A railway spur track which runs along one of the streets in an improvement district, and which is shown to have been assessed by the state board of assessors, should not be considered in determining whether a majority in value of the land owners have petitioned for the improvement, if it does not appear whether such spur track is assessable as real estate or not, nor whether it would be benefited by the contemplated improvement. (Page 73.)

4. SAME—ASSESSMENT OF WATER PIPES—RIGHT OF WAY.—The underground right of way along the streets of the water pipes of a water company, and the easement for maintaining in the ground the poles of telegraph and electric light companies, and the right of way of their overhead wires, which are assessable as personal property, were properly excluded in determining the value of the real property in a proposed improvement district. (Page 73.)

5. SAME—ASSESSMENT OF PUBLIC PROPERTY.—Public property, not being assessable, should be excluded in determining the value of the real property in an improvement district. (Page 73.)

6. SAME—POWER OF EXECUTOR TO SIGN PETITION.—An executor, though clothed with the power to sell the lands of his testator, has no power to bind the heirs by signing a petition for an improvement district which will embrace such lands. (Page 74.)

7. SAME—DOWER LANDS.—A widow, being the life tenant merely of dower lands, is not authorized to sign for such lands in a petition for an improvement district. (Page 74.)

8. SAME—LAND HELD IN COMMON.—Where land owned by two tenants in common was signed for by one of them only in the petition for an improvement district, the value of one-half of the land only should be counted in the petitioners' list. (Page 74.)

9. SAME—RIGHT OF MORTGAGOR TO SIGN.—A mortgagor, after foreclosure but before the period of redemption has expired, has a right to sign for the mortgaged land in a petition for an improvement district. (Page 74.)

10. SAME—RIGHT OF VENDOR TO SIGN.—Property sold before presentation of a petition for an improvement district and signed for by the vendor should be included in the petitioners' list where the vendee had knowledge thereof at the time of his purchase. (Page 74.)

11. SAME—RIGHT OF VENDEE TO SIGN.—It was proper to include in the list of petitioners for an improvement district a vendee of land who was in possession, and had done all that he was required to do, although his deed was not delivered to him until after the petition was filed. (Page 74.)

12. SAME—ASSESSMENT OF HOMESTEAD.—Const. 1874, art. 9, § 3, provides that homesteads shall not be subject to the lien of any judgment or decree except for the purchase money, for specific liens, or for taxes. Art. 19, § 27, provides that nothing in the constitution shall be so construed as to prohibit the general assembly from authorizing assessments on real property for local improvements. *Held*, that a homestead is not exempt from the lien for assessments for local improvements. (Page 75.)

13. SAME—IRREGULARITIES—WAIVER.—Irregularities in the proceedings of the board of benefit assessments and of the city council subsequent to the passage of the ordinance creating an improvement disrict, not going to the foundation principles on which the district was organized, are waived unless objected to within twenty days after the date of publication of such ordinance, as required by Sand. & H. Dig., § 5336. (Page 76.)

14. SAME—MODE OF ASSESSMENT.—An assessment for local improvements in proportion to benefits is not prohibited by Const. 1874, art. 19, § 27, providing that such assessments shall be "*ad valorem* and uniform;" and it is within the discretion of the legislature to require such assessments to be made according to the value of the real estate affected or according to the value of the benefits added by the improvements. (Page 76.)

Appeal from Miller Circuit Court.

JOEL D. CONWAY, Judge.

Oscar D. Scott, for appellants.

The requirement of Sand. & H. Dig. § 5337, requiring the court to obtain and use a copy of the last assessment of the property, was mandatory. 30 Ark. 609, 612; Cf. 14 Am. & Eng. Enc. Law, 249; 67 Ark. 30; 40 Cal. 255; 50 N. Y. 502. The proper assessment list was conclusive evidence of the values of the property when the council came to decide whether the petition was signed by a majority in value of the property holders. Sand. & H. Dig. § 5367; 45 Ark. 400. The assessment was not "*ad valorem* and uniform" as required by art. xix, § 27 of the constitution. While, by art xxi, § 5 of the constitution, church property is exempt from general taxation, it is not exempt from local improvement assessments. Cooley, Taxa. 146; 2 Dill. Mun. Corp. § 777; 2 Desty, Taxa. p. 248; 11 Johns. 80; 1 Harr. 104; 8 Bush, 508; 116 Mass. 181; 6 R. I. 235; 7 Md. 517; 24 Mo. 20; 2 Ore. 155; 86 Ill. 336; 36 Ind. 338; 42 Oh. St. 128; 35 N. J. 157; 4 La. Ann. 1; 84 N. Y. 121; 22 Pa. St. 496. "Taxes," as spoken of in the constitution, are general taxes, and do not include local assess-

ments. 21 Ark. 40; 65 Ark. 496. The assessment was void for want of uniformity. 10 Am. & Eng. Enc. Law, 296; 48 Ark. 251; 32 Ark. 31; 21 Am. Rep. 677; S. C. 51 Cal. 15; 48 Ark. 383. The street railway track, gas and water mains, etc., were taxable as real estate, and should have been included. 2 Dill. Mun. Corp. § 789; 44 N. E. 375; 52 N. E. 501; 46 N. E. 437; 50 Ga. 620; 38 Conn. 422; 45 Oh. St. 98; 32 Cal. 412. The assessment was not *ad valorem.* 9 Heisk. 349; 34 Ill. 203; 42 Ark. 152, 162; 172 U. S. 269. A frontage or area assessment would not be permitted. 14th Amend. Const. U. S.; 172 U. S. 269; 91 Fed. 37; 94 Fed. 361; 100 Fed. 538. It was error to assess homestead property. 31 S. W. 52; *cf.* 61 Ark. 26; 55 Ark. 369; 47 Ark. 445.

Williams & Arnold and *J. D. Cook,* for appellees.

Extraneous evidence of values was admissible. 50 Ark. 116. If the assessment of any one's property was too large, he should have made a tender of the proper amount. 92 U. S. 575, 617; Cooley, Taxa. 537, 538, 541; 24 Ark. 459. The rule in Texas as to exemption of homesteads is peculiar to that state, and grows out of its peculiar constitutional provisions. Const. Texas, art. 16, § 50. The homesteads were properly included. The gas and water mains were not liable to this assessment, for the reason that there would accrue to them no benefit corresponding to the amount which they would have to pay, if any at all. 172 U. S. 269; 52 Ark. 107; 55 S. W. 955.

BUNN, C. J. This is a suit in equity, under the statute, brought to foreclose assessment liens, and enforce the collection of the delinquent assessments against certain owners of real estate in the district. The chancellor decreed for plaintiffs on the complaint, answer, and testimony in the case, and defendants appealed.

In May, 1899, upon the petition of ten resident owners of real property in the proposed district, the city council of the city of Texarkana, in this state, organized said Improvement District No. 3, and within the time required by law the clerk of the said city council caused the organization ordinance to be published as required by law, and due proof was made of the same. Within three months from the publication of said ordinance, to-wit, on the 8th day of August, 1899, what purported to be a majority in value of the real property owners in the district filed their petition before the council, under section 5324 of Sand. & H. Dig., and the

city council on the same day passed an ordinance as provided in said section. At the same time the council appointed commissioners to assess the benefits to accrue to the real property in the district by reason of the contemplated improvements under the act approved May 8, 1899, amendatory of sections 5333, 5334 and 5335 of Sand. & H. Dig., who afterwards reported such assessment. A board of improvement was at the same time appointed under section 5324, and this board proceeded to form plans for the improvement, and to do other things required by section 5329.

The principal objection—an objection which includes several others numbered in the abstracts and briefs in the case—is that a majority in value of real property owners in the district did not really sign the petition required by section 5324. To specify the irregularities covered by this objection, the defendants say: First, that all the real property in the district was not included in the ordinance passed on the petition; and, secondly, that much of the property going to make up the majority in value was signed for by persons not competent to do so. The petition was on the valuation made by the county assessor, as appeared from his assessment list, made in 1897, for the taxes of 1898 and 1899, which was at the time the last list on file in the clerk's office. The real fact is that the county assessor had made his assessment for the taxes of 1900 and 1901 in July, the month before, but the same had not been returned and caused to be filed in the county clerk's office at the time the petition was filed, and, of course, not when the same was signed by the petitioners, and was not filed until in September following. This state of things has created some confusion in the record.

The defendants contend that, in order to ascertain the majority in value of the property in the district, all the assessable property should have been included, and that all of said property was not included—for instance, the real property of churches, which they show to have been of the value of $2,800. Church property is exempt from general taxation, and therefore does not appear as valued on the county assessor's list. By a decided weight of authority, however, although exempt from general taxes, church property is liable for local improvement assessments. The contention of the defendants is therefore sustained, and in such case extraneous proof of value is properly made. For a similar reason, the plaintiffs contend that improvements made upon real property in the district since the last county assessment, and before the filing of the petition, ought to be included; and they allege and

show that such improvements had been made within said time, upon the property of the signers of said petition, of the value of $24,650. Under this head the defendants allege that there was a spur track of the St. Louis, Iron Mountain and Southern Railway Company, which ran on one of the streets in the district for a distance of 1,000 feet, and that the track and right of way of the said railroad was valued by the state board of assessors at the rate of $2,000 per mile. It is not shown by what title or tenure this right of way was held by the railroad company, whether by lease, easement or license; and we therefore cannot say that it is real property of the company, as owner, in the purview of the law, nor whether or not it is assessable as such. The statement as to the assessment by state railroad board throws no light on the question, as we cannot ascertain from it that this spur track was included in that assessment, or was intended to be included; and finally it is not shown that this property would be benefited by the contemplated improvements.

The same and more may be said as to the contention in favor of including the underground right of way along the street of the water pipes of the water works company, and the easement in the ground in which the poles of the Postal Telegraph and Electric Light Companies are set up, and the right of way of the overhead wires, all of which seems to have been assessed on the county assessment as personal property at the power house outside the district. These were properly excluded, under the showing made.

Public property is not assessable, and was properly excluded.

The valuation of the real property in the district according to the county assessor's books, was as follows:

For 1898	$570,310	
Add to this the church property	2,800	
Improvements	24,650	
Total	597,760	
Majority	298,880	
For 1899		$606,607
Church Property		2,800
Total		609,407
Majority		304,703½

In the matter of the property of J. F. Smith's estate, signed for by the executor, W. A. Williams: In *Rector* v. *Board of Improvement,* 50 Ark. 116, this court held that an administrator is not competent to sign such a petition, so as to bind the heirs. A majority of the judges cannot see any distinction between the power of an administrator and an executor, although clothed with a power of sale as was the executor in this case. This property was valued at $6,600, for 1898 and $6,600 for 1899, and should be deducted from the petitioners' list.

The property of the estate of G. W. Tyson was signed for by his widow. The statute does not confer this right upon a tenant for life, and she is not the owner, in contemplation of the statute, except as a life tenant. *Mayor, etc., of Baltimore* v. *Boyd,* 64 Md. 10, 20 Atl. 1028. This property was valued at $4,500, both for 1898 and 1899, and should be deducted from the petitioners' list.

In the matter of the property of S. M. and J. O. Hardin, valued at $1,200 in both assessments, and only signed for by one of them, one-half should be deducted from the petitioners' list—it appearing that they were tenants in common—leaving $600.

The same may be said as to the property of G. J. and F. M. Hollis, valued at $650 in both years, leaving $325 to be deducted. The $800 against J. P. Kline is to be deducted by consent.

The case of E. F. Friedell, whose property was valued for 1898 at $3,650, and $4,000 for 1899: He was a mortgagor. Foreclosure proceedings had been begun, and had progressed to a decree, but the mortgagor was still allowed to redeem at a future day. He was the owner, in the meaning of the law.

F. H. Eubanks had purchased from Turner Bros. before the presentation of the petition, but Turner Bros. had signed the petition before they sold to Eubanks, of which signing the latter had knowledge when he purchased, and he is bound by the lien. This property was valued in both assessments at $4,200.

R. R. Gaines sold his property, valued in both assessments at $4,000, to Offenhauser; the petition having been signed by the latter for the property. The sale had been complete from Gaines to Offenhauser, and the latter put in possession. Everything had been done by the vendee that he was required to do, and he could have compelled specific performance. In fact, the deed, for reasons of Gaines alone, was delayed, but was delivered on 12th August. Offenhauser was a proper signer for this property.

On the other hand, J. H. Mullins was a signer, but his property was not counted with the petition. It was valued at $1,400, and should have been so counted. The other objections under this head do not seem to be insisted upon.

According to the council's estimate, the property of the signers was valued at $294,900. Taking from this the Smith and Tyson estates, $10,600, leaves $284,300, and adding to this the $24,650 improvements and the $1,400, value of Mullins' property, $26,050, we have the value of the property of the signers, $310,050—$925, Hollis & Hardin property, leaving $309,025, which is in excess of majority, according to assessment of 1898, of $10,145, and of the assessment of 1899 of $4,322.

It is contended by the defendants that the homestead is exempt from this assessment lien by section 3, art. 9, of the constitution of the state, which reads as follows: "The homestead of any resident of this state, who is married or the head of a family, shall not be subject to the lien of any judgment or decree of any court, or to sale under execution or other process thereon, except such as may be rendered for the purchase money, or for specific liens, laborers' or mechanics' liens for improving the same, or for taxes etc." These assessments, though differing in some respects from taxes for general purposes, are yet authorized under the taxing power. If so, so far as the mere exercise of power is concerned, the same rule applies as in cases of taxes. Besides, section 27, art. 19, of the constitution, under which improvement districts are formed and their assessments levied and collected, reads thus: "Nothing in this constitution shall be so construed as to prohibit the general assembly from authorizing assessments on real property for local improvements in towns and cities under such regulations as may be prescribed by law, to be based upon the consent of a majority in value of the property holders owning property adjoining the locality to be affected. But such assessment shall be *ad valorem* and uniform."

After this much is said as the last section in the body of the constitution, it is not conceivable how we should be able to construe any other clause or section of that instrument so as to render nugatory and of no effect the provision therein contained; for, unless the real property of the district is bound for the expenses of the desired improvement, none could be made. This is the more apparent when it is known that in towns and cities a great portion, if not the most, of the occupied lots are

occupied as homesteads. At all events, eliminate the homesteads in any town or city from the list of property bound for these assessments, and no district of important extent could be formed.

There is a suggestion of a possible conflict between the particular provision of our state constitution and the fourteenth amendment of the constitution of the United States, as construed in *Norwood* v. *Baker*, 172 U. S. 269.* There was certainly some conflict between our original act authorizing the organization of improvement districts and the said fourteenth amendment as construed. But this was thought to be cured by our amendatory act approved May 8, 1899. To some of us, however, there still remains a conflict, or, rather, I should say, room for a conflict, accordingly as the benefit assessments under said amendatory act may be made according to the one method or the other. But a majority of us see no conflict as the law now is. In the proceedings at bar the assessments seem to have been both according to the value of the property and also according to the assessed benefits; for the benefits were assessed by the rate of percentage on the assessed value of the property itself, resulting so as to comply with the provision of both constitutions as we see it. Therefore, for the purposes of determining this case, we need not discuss that point further. But, for the benefit of districts hereafter to be formed, some of us may take occasion to express an opinion on the subject before this decision goes to the publisher.

Some question is raised as to the proceeding of the board of benefit assessments and the city council, subsequent to the ordinance passed upon the petition of the majority in value of the property owners, which we will say, by way of parenthesis, was duly published, so far as we can determine from the record. But we have settled the fundamental or jurisdictional questions involved, and as to mere irregularities, not going to the foundation principles upon which the district was organized, the objections were not made within the twenty days, and the defendants are therefore barred by the statute.

Let the decree be affirmed.

RIDDICK, J. I concur in the opinion of the chief justice, but on one of the constitutional questions involved I can go further,

* See, however, the case of *French* v. *Barber Asphalt Paving Company*, 181 U. S. 324, decided since the opinion of the court herein, which seems to modify the case of *Norwood* v. *Baker*, *supra*. [Reporter.]

and say that I see nothing in our constitution that necessarily prohibits an assessment in proportion to benefits. The section of the constitution which counsel for appellant contends forbids such an assessment is as follows: "Nothing in this constitution shall be so construed as to prohibit the general assembly from authorizing assessments on real property for local improvements in towns and cities under such regulations as may be prescribed by law, to be based upon the consent of a majority in value of the property holders owning property adjoining the locality affected; but such assessments shall be *ad valorem* and uniform." Const. 1874, art. 19, § 27.

It is said that an assessment levied upon the real property of the improvement district in proportion to the benefit that each lot or tract receives from the improvement is not an *ad valorem* assessment, and is therefore prohibited by the last clause of the section above quoted, which requires that such assessments shall be "*ad valorem* and uniform." But it seems to me that an assessment upon real property in proportion to the benefit it receives from an improvement is still an *ad valorem* assessment. It is, of course, not an assessment according to the full value of the lot or tract improved, but it is an assessment according to the value of the benefit which it receives. Not the value of the whole lot, but the value that is added to it by the improvement, is assessed. The benefit which each lot, tract, or piece of real estate in the improvement district receives is assessed according to its value, and therefore the assessment is an *ad valorem* assessment; that is, an assessment according to valuation, as distinguished from an assessment according to frontage or area of lot.

Again, it is said that the framers of the constitution by the clause above quoted meant an assessment according to the value of the whole lot or tract, and not an assessment according to the value of the benefit it receives from the improvement. It may be that they did not have in mind an assessment in proportion to benefits. We are not able to tell whether they did or not. But their intention must be found in the language of the constitution itself, and, as this language does not exclude or forbid an assessment in proportion to the value of the benefits, we should presume that there was no intention to forbid such an assessment. It has often been decided that the only sound principle upon which assessments for local improvements can stand is that the property assessed is specially and peculiarly benefited by the improvement. *Norwood* v. *Baker*, 172 U. S. 269; Dillon on Mun. Corp. (4th Ed.),

§ 761. If this be the basis upon which such assessments rest, then the most equitable method of apportioning the burden among the property holders of the district is by an assessment in proportion to benefits. Theoretically speaking, there can be no doubt of this; for, if a number of property holders are required to pay for a public improvement on the principle that their property receives a special benefit therefrom, the payment should be made by each in proportion to the benefit he receives. It would be neither right or just to require one property owner to pay the full value of the benefit he receives from the improvement, while his neighbor is required to pay only a third or a fourth of the benefit he receives. But this inequality may result unless the assessment is made in proportion to the benefits received. And this furnishes another reason for believing that it was not intended to prohibit an assessment of that kind, for the obvious purpose of the prohibitory clause under consideration was to forbid, not equitable, but arbitrary and unjust methods of assessment. The intention was to prohibit assessments from being made in proportion to the frontage or size of the lot or tract; for, as the size or frontage of the lot bears no certain relation either to its value or the amount of the benefit it will receive from an improvement, an assessment made in such an arbitrary method must often result in great injustice. Assessments of that kind had, at the time our constitution was adopted, often been condemned as arbitrary and unjust, and for this reason they were forbidden by the requirement that assessments should be "*ad valorem* and uniform." As the purpose was to prohibit arbitrary and unjust assessments, we should not expect to find a prohibition against so equitable and just a method of assessments as one made in proportion to the benefits received. The language used does not to my mind necessarily carry such a meaning, and to put such a construction upon it would it seems to me be a perversion of the meaning intended to be conveyed. I am therefore of the opinion that, under our constitution, it is within the discretion of the legislature to require that these assessments be made according to the whole value of the land in the improvement district, or according to the value of the benefit added by the improvement. For practical purposes, one of these methods of assessments may be as good as the other, and it is for the legisislature to determine which shall be applied.

HUGHES and WOOD, JJ., concurred in the opinion of RIDDICK, J.

POWELL v. MASSEY-HERNDON SHOE COMPANY.

Opinion delivered February 2, 1901.

SHERIFF—FAILURE TO RETURN EXECUTION—WAIVER.—Where an execution was returned by the sheriff after the return day, and subsequently the judgment on which it was issued was satisfied, the execution plaintiff cannot maintain an action against the sheriff for failure to return the execution within the prescribed time, as the acceptance of payment waived any cause of action growing out of such failure.

Appeal from Madison Circuit Court.

EDWARD S. MCDANIEL, Judge.

Action instituted September 27, 1897, by Massey-Herndon Shoe Company and another against J. T. Powell, sheriff of Madison county. The complaint alleged that on June 25, 1896, an execution issued from the supreme court of Arkansas on a judgment obtained by plaintiff against D. B. Elliott and another; that the execution was returnable within 60 days, and was placed in the hands of defendant as sheriff, but was not returned by him until August 27, 1896.

In defense it was shown that on September 16, 1896, plaintiffs obtained from the Madison circuit court in chancery a decree ordering the sale, for the purpose of satisfying the above judgment, of certain land which had belonged to D. B. Elliott, and had been sold to R. P. & A. L. Robinson, and R. P. Robinson, to prevent the sale, paid to plaintiff's attorney, W. L. Stuckey, an amount sufficient to pay the judgment. It was further shown that this action was not instituted for the benefit of the plaintiffs, Robinson testifying that he was to get the amount collected from defendant Powell, less the amount agreed to be paid the attorneys for collecting the same.

The following instructions were asked by the defendant, and refused by the court:

"5. I charge you that if you find from the preponderance of the evidence that the plaintiffs are only claiming the balance that is due on the original claim against D. B. Elliott *et al.*, and you further find that said amount has been paid to the attorney of the plaintiffs, then you will find the issues for the defendant.

"6. I charge you that if you find from the preponderance of the testimony that since the failure of the defendant to return said execution, the plaintiffs, or their attorney, has received the full amount of the debts specified in the execution, then you will find for the defendant."

"7. I charge you that if you find from the preponderance of the evidence that the money specified in said execution has been paid to the plaintiffs, or their attorney, and that this suit is being prosecuted for the benefit of A. L. & R. P. Robinson, and that they are to receive the benefit of the same, then you will find the issues for the defendant."

Judgment was for the plaintiffs, and defendant has appealed.

L. W. Gregg, for appellant.

The action should have been dismissed, for the reason that there was no showing of authority in the attorneys who prosecuted same to do so. 1 Ark. 99; 10 Ark. 18; 28 Ark. 95. Appellee's right of action was not assignable. Black, Judg. § 942; 37 Am. Dec. 739; 19 Tex. 111; 7 Ark. 344; 22 Am. & Eng. Enc. Law, 554 *n* 2; Murfree, Sher. § 958.

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

The presumption that the attorneys were regularly employed is not overcome by any evidence in this case. 32 Mo. App. 90; Hempst. 209; 1 Ark. 99. The cause of action was assignable. 24 Hun, 205; 58 Ark. 593.

WOOD, J. It appears that R. P. Robinson paid to W. L. Stuckey, the attorney for appellees, an amount of money sufficient to pay off the claims of appellees against D. B. Elliott *et al.* The payment to their attorney was a payment to them. Having received an amount sufficient to satisfy their judgment, they no longer had any cause of action against the sheriff. Accepting the money after a failure to return the execution was tantamount to a waiver of the cause of action growing out of such failure. They were no longer parties aggrieved by such failure. Section 3108, Sand. & H. Dig., does not contemplate that parties shall receive full satisfaction of their judgments and still pursue the sheriff for damages.

By an arrangement between Stuckey and Robinson, the suit was really instituted for their own benefit, to reimburse Robinson, and to secure certain attorneys their fees. Plaintiffs had no benefi-

cial interest in the suit. If their right of action were assignable, there is no pretense that they had assigned same. The fifth, sixth and seventh requests for instructions stated the law applicable to the facts, and should have been granted.

For the error indicated, the judgment is reversed, and judgment is entered here in favor of appellant for costs.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILROAD COMPANY v. LEWIS.

Opinion delivered February 16, 1901.

1. RAILROADS—PUTTING OFF PASSENGERS BEYOND STATION.—In an action against a railway company for putting a passenger off at a place beyond her destination, it was error to instruct the jury that if plaintiff paid her fare the defendant could not put her off at a place other than a usual stopping place, as the statute which forbids railroads to eject passengers at places other than usual stopping places applies only to the ejection of passengers for non-payment of fares. (Page 84.)
2. SAME.—Where a passenger train was stopped at a passenger's destination a sufficient time to permit the passenger to get off, and she failed to do so, she cannot recover damages because she was put off a short distance beyond her destination and not at a usual stopping place. (Page 84.)

Appeal from Faulkner Circuit Court.

GEORGE M. CHAPLINE, Judge.

STATEMENT BY THE COURT.

This action was brought by Theresa Lewis against the St. Louis, Iron Mountain & Southern Railway Company. Plaintiff alleged in her complaint that she was, on the 9th day of June, 1898, a passenger on one of defendant's trains, which was going from Little Rock to Palarm, a station on its road; that on the arrival of the train at Palarm the defendant wrongfully and negligently failed to permit her to get off, but carried her past the station for a distance of one-half mile, and there wrongfully, forcibly and

violently ejected her; that the place where she was put off was not a regular station or stopping place; that in putting her off the conductor was rude, coarse, rough and oppressive; that he laid his hands forcibly upon her, and pushed and threw her from the train, to her great injury; that she was "greatly mortified and humiliated, greatly hurt in body, greatly agonized in mind, and was forced, on a hot and sultry day, to walk and carry her baggage back to the station of Palarm." And she asked for judgment for $3,000.

The defendant answered, and denied all the allegations made in the complaint.

The issues joined were tried by a jury. In the trial the plaintiff testified, substantially, as follows: On the morning of June 9, 1898, a hot, clear summer day, she, with her daughter, a girl about eleven years old, several bundles and two valises, boarded defendant's train at Little Rock for the station of Palarm, twenty eight miles away. In due time the train arrived at Palarm, but failed to stop, and she failed to get off. The bell cord was pulled by some one, and the train stopped about a quarter of a mile from the station. The conductor came to her, and asked why she did not get off, and she replied that he did not give her time. The conductor then said: "Get off!" She asked if they were going back to the station with her. He said: "No; get off here." He then caught her roughly, and said: "Get off right here." He placed his hands on her shoulder, and hurt her. She was shocked and humiliated. She walked to the door and alighted at a place "just like it was at the depot." She walked to the depot, and from there to the Arkansas river, a distance of three-quarters of a mile, and from there she was taken home in a buggy. She was compelled to stop to rest three or four times on her way to the river. When she reached home, she went to bed, "and was laid up for a week or more."

Many witnesses testified that the train stopped at Palarm a sufficient length of time for plaintiff and other passengers to get off; and there was evidence adduced, tending to show that she was not mistreated, insulted, or injured by any one on the train.

Among many instructions given, the court instructed the jury, over the objections of the defendant, as follows:

"If you believe from the evidence that plaintiff entered the passenger train of defendant at Little Rock, and paid her fare to Palarm, a station on defendant's line of railroad, then defend-

ant could not put plaintiff off the train at a place other than a station where passengers are accustomed to get on and off trains of defendant; and if defendant caused plaintiff to leave the train at a place other than the station where passengers are accustomed to get on and off defendant's trains, then you will find for plaintiff, no matter whether the train was stopped at the station a sufficient time to have permitted plaintiff to have left the train or not."

"If you find for the plaintiff, then you will assess her damages at such sum as will fairly compensate her for all injury received by her, for physical pain and suffering, and for any insult or rudeness that may have been offered to her by the conductor or other agent of the defendant. And if you further find that defendant did not stop its train at a standstill at the station to permit plaintiff to leave the car in safety, and she was carried past the station, and compelled to leave the car at a place other than the station, then, in fixing the amount of damages, you may take into consideration also the lacerated feelings and wounded sensibilities and shock of mind that plaintiff may have suffered, if you find from the evidence she suffered any therefrom.

"And the court cannot instruct you in dollars and cents as to the amount of damages, if you should find for the plaintiff, but the amount is left to the fair determination of the jury."

The jury returned a verdict in favor of the plaintiff for $400; and the defendant appealed.

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

The evidence fails to sustain the verdict. Recoveries by passengers carried beyond their destination should be limited to *compensatory* damages, and must not include merely consequential injuries. 61 Ind. 22; 71 Ill. 391; 40 Mass. 375; 4 Lans. 147; 6 Am. & Eng. R. Cas. 341; 86 N. Y. 408; 6 Am. & Eng. R. Cas. 345; 11 *id.* 135; 6 *id.* 344, 348. In this case nothing beyond nominal damages was recoverable. 11 Am & Eng. R. Cas. 134. Mental suffering, independent of bodily injury, is not an element of legal damages. 64 Ark. 533, 545; 65 Ark. 117, 183; 168 Mass. 288; 71 Me. 227; S. C. 36 Am. Rep. 303; 86 Tex. 412; 62 Tel. 313; 113 Ill. 148; S. C. 8 L. R. A. 765; 1 Cush. 452; 85 Pa. St. 293; 12 U. S. App. 381; 55 Fed. 950; 20 L. R. A. 582; 65 Tex. 274; 66 Tex. 603; 62 Tex. 380; 86 N. Y. 306; 89 N. Y. 627; 125 N. Y. 299; 63 Tex. 660; 61 Tex. 346; 25 Am. & Eng. R. Cas. 451; 54 *id.* 107. The

court erred in its charge as to the measure of damages. 23 L. R. A. 774; 35 *id.* 512; 14 *id.* 666; 34 *id.* 781; 86 Tex. 412. The court erred in giving the second instruction for plaintiff.

J. H. Harrod and *Sam Frauenthal,* for appellee.

BATTLE, J., (after stating the facts). In telling the jury that, if the appellant paid her fare to Palarm, the "defendant could not put her off the train at a place other than a station where passengers are accustomed to get on and off trains of defendant," the circuit court committed an error. It is only in cases where a passenger refuses to pay fare that the statutes require a railroad company to put him off of the train at a usual stopping place. Sand. & H. Dig. § 6192. Beyond this the common-law right to put him off without reference to stations is left unimpaired. *Hobbs* v. *Texas & Pacific Ry. Co.,* 49 Ark. 357. In this case the passenger (appellee) was not put off because she had failed to pay fare. She paid her fare, and was put off a short distance beyond her destination because she failed to get off at that place. She did not want to travel further, but asked if she could not be taken back to Palarm. There was no demand for additional fare and refusal to pay it.

The latter part of the instruction, in which the court told the jury that "if defendant caused plaintiff to leave the train at a place other than the station where passengers are accustomed to get on and off defendant's trains, then you will find for plaintiff, no matter whether the train was stopped at the station a sufficient time to have permitted plaintiff to have left the train or not," is also erroneous. If the train was stopped at the station of Palarm a sufficient length of time for appellee to get off, and she failed to do so, then the appellant was guilty of no wrong in stopping where it did, and in a respectful manner causing her to leave the train. In doing so it was in the exercise of its right, and was not liable for damages. It was not bound to take her back to the station of Palarm for the purpose of giving her another opportunity to leave the train. For the purpose of avoiding collisions, and of orderly and regular transportation, and of serving the public to the best advantage, trains should run on schedule time. The conveying passengers back to stations at which they should have left the train and failed to get off may in some instances defeat this purpose, and lead to disastrous consequences. A rule or regulation requiring railroad companies to do so would

not only be unjust, but would be unwise and against the interest of the public.

Much is said in appellant's brief about the right to recover damages on account of mental anguish, distress, or suffering, which was not the result of a physical injury. The court has expressed its opinion upon this subject in *Peay* v. *Western Union Telegraph Co.,* 64 Ark. 538; *Hot Springs Railroad Co.* v. *Deloney,* 65 Ark. 177, and *Texarkana & Fort Smith Railway Co.* v. *Anderson,* 67 Ark. 123, 129. We deem it unnecessary to add to what we have already said.

Reversed and remanded for a new trial.

LANGE *v.* BURKE.

Opinion delivered February 16, 1901.

CORPORATIONS—IDENTITY.—The facts that two corporations are practically under the control of the same persons, who are the owners of a large majority of the stock, that the two corporations have intimate business relations, and that they employ the same bookkeeper, each corporation paying one-half of his salary, do not prove that the two corporations are in fact one and the same; and, on the insolvency of the two corporations, a claim of one of the corporations against the other will not, upon proof of the above facts, be postponed until other creditors of the latter corporation are paid.

Appeal from Phillips Chancery Court.

EDWARD D. ROBERTSON, Chancellor.

J. C. Hawthorne, for appellant.

The appellants are estopped by their dealings with the two corporations to allege their identity. 6 Thompson, Corp. p. 376, § 518; 1 S. W. 319; S. C. 47 Ark. 269; 91 U. S. 56; 95 U. S. 665; 12 Ark. 769; 68 N. W. 863. The evidence shows the separate existence of the two corporations. If the one corporation owned the other as a branch, it would be only by virtue of charter power to do so, and the burden is on the one alleging this fact. 13 Pet. 519; 4 How. 16; 14 Pet. 122; 3 Head, 337; 92 Tenn. 115; 18

L. R. A. 252; 29 Cent. Law J. 9; 20 S. W. 427; 175 Ill. 125. In the absence of such authority, the contract should not be ratified so as to bind the corporation. 58 U. S. App. 674; S. C. 30 C. C. A. 409; 86 Fed. 742.

Jno. J. and *E. C. Hornor,* for appellee.

Under the evidence adduced it is plain that the corporations were identical. Appellee is in no position to allege that the ownership of one corporation by the other was *ultra vires.* The plea will not be tolerated when its results will be inequitable. 110 N. Y. 531; 12 S. W. 1054; 23 How. 400; 62 N. Y. 69; 51 N. W. 642; 137 N. Y. 417; 26 Ark. 663; 7 Thompson, Corp. § 8314; also 5 Thompson, Corp. § 6015.

BATTLE, J. On the fifth day of February, 1897, the United States One Stave Barrel Company, and three other corporations filed a complaint, in the Phillips circuit court, against the Kaiser Lumber Company, which for convenience we shall call the Lumber Company. They allege that the defendant is a corporation, organized and doing business under the laws of the state of Arkansas; that it was largely indebted to each of them, and was, on the 27th of January, 1897, insolvent, a part of its commercial paper having gone to protest, and it having conveyed all its property to a trustee to secure a large indebtedness alleged to be owing to the Standard Eagle Box & Lumber Company. They asked that the affairs of the defendant be closed up; that a receiver be appointed to take charge of its property; and that its creditors be required to present their claims to the receiver within ninety days, or be barred from participating in its assets; and that its property be sold to pay its debts.

On the 8th of February, 1897, R. C. Burke was appointed such receiver. On the 10th of April, 1897, Berthold Lange, as trustee for the creditors of the Standard Eagle Box & Lumber Company, a corporation organized under the laws of Missouri, which for convenience we will call the Box Company, filed a petition in the proceeding instituted by the plaintiffs, and alleged that the defendant was indebted to him as such trustee in various sums, amounting in the aggregate to the sum of $57,067.72, and asked for judgment in his favor as such trustee for said indebtedness, and that the receiver be required to pay the same out of the assets of the defendant, or such a proportionate part as may be

paid to other creditors. On the same day he presented his claim to the receiver, who referred it to the court.

After hearing the evidence adduced by all parties, the court found that the Lumber Company was a branch of the Box Company, and was incorporated as the Kaiser Lumber Company for convenience only; that the former was indebted to the latter in the sum of $53,508.83, and that the latter was not entitled to recover anything until the creditors of the former are paid, and postponed its collection until that time; and the trustee appealed.

The appellant complains of the action of the circuit court because it found that the Lumber Company was a branch of the Box Company, and postponed the payment of his claim until all the other creditors of the Lumber Company are paid. Is this complaint well founded?

The two companies are separate corporations. One was organized under the laws of Missouri, and the other under the laws of Arkansas. The Box Company was created sometime before the Lumber Company was organized. They were organized for different purposes—one for the manufacture of lumber, and the other for another purpose not clearly shown by the evidence.

In 1894 the Box Company decided to make an effort to lease a certain mill at Helena, in this state, and saw their own cottonwood, gum, oak, and cypress lumber, and thereby save a large amount of money. Its president and treasurer were appointed a committee to negotiate with the owner and ascertain what terms could be made. The president, A. J. Kaiser, and the Consolidated Box Company, of Kansas City, succeeded in obtaining an option to purchase the mill of the Schutte Lumber Company at Helena, Ark., and the action of the president was approved by the board of directors of his company. The option was permitted to expire without a purchase. Subsequently Kaiser, the president, and C. W. Ohrndorf, the treasurer of the Box Company, consummated a trade whereby their company became the purchaser of the mill of the Schutte Lumber Company at Helena. They went to the office of the attorney of the vendor to have the property sold transferred to the Box Company, and also to secure the payment of the notes evidencing the deferred payments; the sale having been partly on a credit. When they reached there, they stated to the attorney the terms of the trade, and he decided that it would be best to vest the title in a representative of the Box Company, and that he could afterwards transfer it to the company. This was done

because the Box Company was a foreign corporation, and because, if the title was in it, there would be delay and difficulty in obtaining a mortgage securing the deferred payments. The result of the advice of the attorney was that the title to the property was vested in Kaiser, and the Box Company advanced to him $2,000 to make the cash payment, and Kaiser was charged by the Box Company with this amount. The Kaiser Lumber Company was then organized under the laws of this state, and the property was transferred to it, and the $2,000 were charged against it.

At the time the Lumber Company was organized, R. J. Kaiser, C. W. Ohrndorf, E. L. Lange, and Charles Schutte, were its shareholders, and R. J. Kaiser, C. W. Ohrndorf, L. K. Loy, Gus Gunlach, and Louis Schilling were the stockholders of the Box Company. R. J. Kaiser, C. W. Ohrndorf and E. L. Lange constituted the board of directors of the former company, and R. J. Kaiser, C. W. Ohrndorf, and L. K. Loy composed the directory of the latter; and Kaiser was president of both. Ohrndorf and Kaiser owned a majority of the stock in each of the two companies.

The Box Company never claimed the mill Kaiser purchased of the Schutte Lumber Company. By agreement nearly all the lumber manufactured by the Lumber Company was shipped to and taken by the Box Company, and paid for by it according to the market value thereof. On the 25th of August, 1896, the former was indebted to the latter in a large sum of money on account of advances made on lumber. On that day the latter instructed its president, Kaiser, "to go to Helena, Ark., and have about 3,000,000 feet of lumber marked and set aside for" its use, and to cause "the same to be shipped in at the rate of from two to four cars per day until enough lumber" was "shipped to liquidate all indebtedness." On the 10th of October following the former executed to the latter its notes for the larger portion of its indebtedness. From the organization of the Lumber Company, and so long as the Box Company thereafter continued in business, the two companies kept accounts of their dealings with each other as separate and distinct organizations, and they continued to deal with each other as separate organizations until the former became indebted to the latter in the sum of $53,508.83, as found by the circuit court.

Insolvency was the end of the business career of both companies. On the 27th of January, 1897, the Box Company conveyed all its property to the appellant in trust to secure its creditors; and on the 5th of February following creditors of the Lumber Com-

pany instituted proceedings against it for the winding up of its affairs. On the 8th of the same month a receiver was appointed to take possession of its assets. The controversy in this proceeding is between these representatives of the creditors of the two corporations. The trustee presented his claim against the estate in the hands of the receiver, and was denied the right to participate in the assets of the Lumber Company to the detriment of its other creditors.

The receiver contends that the Box Company and Lumber Company are "in truth and in fact one and the same being, the latter being the offspring of the former, organized in this state for the benefit of the parent company; and that the mill at Helena was owned by the former, was purchased for its benefit, and whatever was owing for advances by the former to the latter was an indebtedness due to itself from itself; and that it would, therefore, be inequitable to apply the assets in his hands to the payment of this debt until other creditors of the Lumber Company are satisfied."

If the contention of the receiver be correct, the action at bar is without foundation. It was based upon the theory that the Lumber Company was an independent organization, and that the mill purchased at Helena was its property. If the contention is true, the assets held by the Lumber Company are the property of the Box Company; and the latter is liable to the alleged creditors of the former for their claims.

In supporting his contention the receiver lays much stress upon the fact that the two corporations were practically under the control of the same persons, Kaiser and Ohrndorf being directors and officers, and the owners of the large majority of the stock, in each company. But this fact does not prove that the two companies were in fact one corporation, and that the trustee, the appellant, was not a creditor of the Lumber Company. A corporation is an artificial being, separate and distinct from its agents, officers, and stockholders. Its dealings with another corporation, although it may be composed in part of persons who own the majority of the stock in each company, and may be managed by the same officers, if they be in good faith and free from fraud, stand upon the same basis, and affect it and the other corporation in the same manner and to the same extent, that they would if each had been composed of different stockholders and controlled by different officers. In such cases, however, the utmost good faith as to the minority of the stockholders is required. The owners of such majority cannot,

as directors or otherwise, lawfully manage the affairs of one of the corporations in the interest of the other to the detriment of the former, because in their control and management of the corporations, in respect to the minority of each company, they stand in much the same attitude that the directors maintain to all the stockholders; and they are required to exercise the same good faith as to creditors as is required of stockholders of a corporation dealing with another in which they have no stock. *Farmers' Loan & Trust Co.* v. *New York & N. R. Co.*, 150 N. Y. 410, 430; 2 Cook, Corporations (4th Ed.), § 662.

In the case before us the evidence shows that the two companies were independent organizations; that they dealt with each other as such; and that the mill at Helena never was claimed by any party other than the Lumber Company, after its organization. It fails to show that the Lumber Company was managed in the interest of the Box Company, but does show that both companies became insolvent about the same time. It shows that the Box Company purchased the product of the Lumber Company, and paid for it its market value. If either company was managed for the benefit of the other, the result shows that it was the Box Company; for their business relations closed with the Lumber Company largely indebted to the Box Company for advances made on lumber to be manufactured.

As evidence to show that the Lumber Company was managed for the benefit of the Box Company, the receiver in this case says that Kaiser reported to the Box Company that the mill at Helena was working well, and would soon ship lumber daily. This was natural and right. At that time the Lumber Company was indebted to the Box Company, and the latter company intended to purchase its lumber from the former. He also says that the books of the former company were actually kept in St. Louis, and that, too, by a bookkeeper, one-half of whose salary was paid by the latter. If so, he was furnished with the information by the former company which enabled him to do so, and he rendered the latter service at the same time. He further says that the account upon which the transaction between the two companies were recorded by the former company, was headed "Standard Eagle Box Company —Kaiser Lumber Company." This proves nothing. The account following shows that they were dealing with each other as separate companies.

After a careful consideration of all the evidence, our conclusion is that so much of the decree of the court below as postpones the payment of appellant's claim until all other claims are paid should be reversed, and that he should be allowed to participate proportionately with other creditors of the Lumber Company in the distribution of its assets; and it is so ordered.

QUATTLEBAUM v. TRIPLETT.

Opinion delivered February 16, 1901.

ADMINISTRATION — VESTING ESTATE IN CHILDREN. — Sand. & H. Dig., §§ 3 and 4, provide for the vesting of a decedent's personal estate in his widow and children if it does not exceed $300 in value, and that if it does not exceed $800 in value they may retain the amount of $300 therefrom, and that "when any person shall die, leaving children but no widow, the court shall, upon application made to him for said children, appoint appraisers and cause to be made appraisement of the personal property of the estate for the purpose of the vestment of such property," etc. *Held*, that the language of the act indicates that it was intended for the protection of minor and not adult children. (Page 93.)

Appeal from Jefferson Circuit Court.

ANTONIO B. GRACE, Judge.

STATEMENT BY THE COURT.

This suit arose in the probate court of Jefferson county on the petition of S. Galligan, then guardian of Walter A. Rainey, a minor son of W. D. Rainey, deceased, to have vested in said minor $300 of the personal property of deceased, petition alleging the personal estate to be of less value than $800, and that no widow survived, but that deceased Rainey left as heirs said minor and Sallie Rainey, who has intermarried with Lee M. Quattlebaum, and her brother, Wright H. Rainey, both of whom were of full age. The prayer of the petition being that the court appoint appraisers of the personal estate, etc., and that the court then make an order vesting in Galligan, as guardian of said minor the sum of $300 or

personal property of that value for the support and education of said minor.

Lee M. Quattlebaum, as administrator of the estate of W. D. Rainey, deceased, and Wilsie Rainey Quattlebaum, a daughter of W. D. Rainey, deceased, who in the petition is called Sallie W., resisted the prayer of the petition, on the ground that said deceased left surviving him three children, who under the law were entitled to share and share alike in said personal estate. The probate court at the hearing held that the personal estate was of less value than $800, and that the administrator, Quattlebaum, pay over to the guardian of the minor the sum of $300.

From this order administrator Quattlebaum and Wilsie Rainey Quattlebaum appealed. In the circuit court the cause was tried by the court sitting as a jury, who entered substantially the same judgment as the probate court.

The cause was tried upon agreed statement of facts, that is, that the petition filed by Galligan, guardian, be accepted as the facts, and also that Lee M. Quattlebaum is the administrator of W. D. Rainey, deceased. At the hearing appellants prayed the court to declare the law as follows: "(1.) That under the law all of the children of W. D. Rainey, deceased, are entitled to an equal share of his estate, that is, to share and share alike therein. (2.) That the word "children," as set out in sections 3 and 4 of Sandels & Hill's Digest of the statute laws of Arkansas, means the issue or heirs of the body of the father or mother, regardless of age. (3.) In this case, Wilsie Rainey Quattlebaum, being a daughter and one of the children of W. D. Rainey, deceased, is entitled under the law to share in the personal estate set out in the petition equally with said minor Walter A. Rainey and said Wright H. Rainey. (4.) That the prayer of the petition is refused."

The court refused to declare the law as above requested, and appellants at the time excepted. Thereupon the court found the facts to be as set out in petition, and that Sallie W. and Wilsie Rainey Quattlebaum are one and the same person, and declared the law to be that petitioner, as guardian of Walter A. Rainey, is entitled to have set apart out of the personal estate of Rainey, deceased, $300 for support, maintenance and education of said ward. To this declaration of the law appellants at the time excepted. The court then directed the entry of the judgment set forth in the transcript.

Appellants filed a motion for a new trial, which was by the court overruled, and appellants excepted.

Austin & Taylor, for appellants.

The word "children," as used in the act of 1887, is not restricted to *minor* children. 5 Am. & Eng. Enc. Law (2d Ed.), 1084; 3 Pa. Dist. Rep. 758; 20 Phila. 117; 20 Kans. 903. The act should be given its plain meaning. Endl. Interp. Stat. §§ 788. The act of 1887 repealed that of 1885. 27 Ark. 419; 10 Ark. 588; 43 Ark. 427; 29 Ark. 225, 227.

White & Altheimer, for appellee.

The act of 1887 did not repeal that of 1885. Repeals by implication are not favored. 24 Ark. 479; 28 Ark. 325; 53 Ark. 417; 29 Ark. 225-237; 34 Ark. 499; 53 Ark. 339; 48 Ark. 159; 56 Ark. 45-47; 54 Ark. 237; 41 Ark. 149; 45 Ark. 90, 92; 50 Ark. 132; 51 Ark. 559; 60 Ark. 61. Adult heirs have no right to the assets of an estate until debts are paid. 25 Ark. 499; 27 Ark. 445; 47 Ark. 225; 51 Ark. 78. The statute of 1887 applies to *minor* children, as distinguished from others.

HUGHES, J., (after stating the facts.) The question presented for adjudication is, whether the word "children" used in sections 3 and 4 of Sandels & Hill's Digest shall be construed to mean minor children, or whether it includes the children of the parents, regardless of age.

The sections referred to are as follows:

"Sec. 3. When any person shall die, leaving a widow and children, or widow or children, and it shall be made to appear to the court that the personal estate of such deceased person does not exceed in value the sum of three hundred dollars, the court shall make an order vesting such personal property absolutely in the widow and children, or widow or children, as the case may be; and in all cases where the personal estate does not exceed in value the sum of eight hundred dollars, the widow or children, as the case may be, may retain the amount of three hundred dollars out of such personal property at cash price.

"Sec. 4. When any person shall die, leaving children but no widow, the court shall, upon application made to him for said children, appoint appraisers, and cause to be made appraisement of the personal property of the estate for the purpose of the vestment of such property, as provided by section 3."

These sections were enacted in 1887 (See Acts 1887, p. 207), and the last section of the act provides "that all acts and parts

of acts in conflict with the provisions of this act be and the same are hereby repealed," etc.

The act approved April 1, 1885, reads as follows: "Sec. 1. When any man shall die leaving minor children and no widow, and his estate shall not be above the value of three hundred dollars ($300), his entire estate shall vest in his minor children for their support and education, and the probate court shall not be required to appoint an administrator on such estate. Provided, further, that such minor children shall be entitled to retain the sum of three hundred dollars ($300) out of such estate, regardless of the valuation of said estate, for their support and education, and it shall be the duty of the probate court to order said sum of three hundred dollars ($300) paid over for the benefit of said minor children." Acts of 1885, p. 192.

It would be an unwarranted belief that the legislature intended by the act of 1887 to give the property or effects of a decedent to his adult children, leaving nothing for the creditors. The language of the act indicates that it was intended for the protection of minor children, in this: Section 4. "When any person shall die, leaving children but no widow, the court shall, upon application made to him for said children, appoint appraisers, and cause to be made appraisement of the personal property for the purpose of the vestment of such property, as provided by section 3." If the intention of the act was that the property was to be vested in adults, why would the legislature have provided that upon an application made to him for the children, the judge might make the order for the appraisement, which seems to indicate that the application to be made was for those not competent to make it for themselves. It is an indication that the general assembly in the use of the word "children" meant minor children. It seems evident that this legislation was intended to protect the widow and helpless children of a deceased father. "There is a distinction to be observed in the use of the word 'child' in statutes passed for the protection of children, and its use in the law of descents and distribution. In the former case 'child' means a person of tender years, without regard to parentage, while in the law of wills and intestacy age has nothing to do with the question, and parentage everything. 1 Rapalje & Lawrence, Law Dictionary, p. 204.

We are of the opinion that the judgment of the circuit court is correct, and it is therefore affirmed.

TURMAN v. SANFORD.

Opinion delivered February 16, 1901.

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1. CONVEYANCE—AFTER-ACQUIRED TITLE.—If the interest of a mortgagee of land be such an estate as will inure to the benefit of a former grantee of such mortgagee, under the statute providing that if any person shall convey any real estate, and shall not have the legal estate therein, but shall afterwards acquire the same, such after-acquired estate, legal or equitable, shall immediately pass to the grantee (Sand. & H. Dig., § 699), the conditional interest of such grantee will be extinguished by payment to the mortgagee of the debt secured, made by the mortgagor without notice of the mortgagee's prior conveyance. (Page 96.)

2. SAME—RECORD AS NOTICE.—The record of a conveyance by a mortgagee of his interest in the mortgaged land will not be constructive notice to the mortgagor, since he does not hold under the mortgagee; and this is true, although the form of the mortgage was a deed absolute from the mortgagor to the mortgagee with title bond retained by the mortgagor. (Page 99.)

Appeal from Scott Circuit Court.

JNO. B. MCCALEB, Judge.

STATEMENT BY THE COURT.

William B. Turman was on the 28th day of August, 1882, the owner of the tract of land in controversy. On that day J. C. Gilbreath, without having any title, mortgaged it to A. D. Peace. Afterwards on the 11th day of August, 1884, Turman conveyed the same land to Gilbreath, and received back from Gilbreath a bond for title. The conveyance from Turman to Gilbreath, though in the form of an absolute deed, was in fact a mortgage, and was afterwards so declared in a litigation between Turman and the administrator of Gilbreath. Afterwards Peace brought suit, and foreclosed his mortgage against Gilbreath, Turman not being a party to the action. At the foreclosure sale Thomas N. Sanford purchased the land. The sale was confirmed, and a deed made to Sanford. Afterwards in a litigation between Turman and the administrator of Gilbreath it was adjudged that the mortgage from Turman to Gilbreath was satisfied, and the land declared to belong

to Turman. Sanford was not a party to this litigation, and afterwards brought this action of ejectment to recover the land from Turman. The circuit court held that the conveyance of Turman to Gilbreath inured to the benefit of Peace, the mortgagee of Gilbreath, and that Sanford by his purchase at the foreclosure sale became the owner and entitled to the possession of the land. Judgment was therefore entered in his favor for the recovery of the land, from which judgment Turman appealed.

Hill & Brizzolara, for appellant.

The after-acquired title of Gilbreath did not inure to Peace. The words "grant, bargain and sell" in Sand. & H. Dig. § 696, do not operate as a covenant of warranty to convey after-acquired title. 18 Mo. 531; 39 Mo. 536, 566; 47 Ark. 111. There was nothing in the mortgage to Peace sufficient to carry the after-acquired title. 3 Washb. Real Prop. (5th Ed.), * 466. For the common-law rule as to after-acquired title, see: Coke, Litt. §§ 265, 265 *a;* 2 Ping. Real Prop. § 1210; 11 How. 297; 3 Washb. Real Prop. * 473, 479. The estoppel upon which the doctrine is based does not operate against strangers. 3 Washb. Real Prop. * 473, 479; 11 How. 297; Jones, Mort. § 683; Tied. Real Prop. § 858; 2 Ping. Real Prop. § 1214; 59 Ark. 299. The after-acquired title can inure to the grantee only when the grantor subsequently acquires it in the same capacity in which he conveyed it. 2 Ping. Real Prop. § 1210. Ordinarily the purchase at foreclosure takes only the title held by the mortgagor at the time of execution of the mortgage. Wiltsie, Mortg. Forec. § 577. If after-acquired title is to be affected, it must be alleged in pleading. 2 Jones, Mortg. § 1581; 2 Ping. Mortg. § 1978. The foreclosure purchaser took title *pendente lite* and subject to equities of appellants. 12 Ark. 421; 16 Ark. 175; 15 Ark. 344; 31 Ark. 491; 57 Ark. 569; 36 Ark. 217; 57 Ark. 97; 29 Ark. 357; 30 Ark. 249.

H. C. Mechem and *F. A. Youmans,* for appellee.

The legal estate, under a mortgage, passes to the mortgagee. 43 Ark. 504. That carries with it the right of possession, at all events, after forfeiture. 30 Ark. 520; 1 Jones, Mortg. § 15. Under Sand. & H. Dig., § 699, the after-acquired title of the mortgagee passed to his previous grantee. 47 Ark. 111; 63 Ark. 569.

RIDDICK, J., (after stating the facts). The questions presented by this appeal are: Did the mortgage from Turman to

Gilbreath inure to the benefit of Gilbreath's mortgagee, Peace? And did Sanford, by purchasing at the Peace foreclosure sale, succeed to the rights of Peace, and become entitled to the possession of the land? The statute upon which Sanford bases his right to recover is as follows: "If any person shall convey any real estate by deed purporting to convey the same in fee simple absolute, or any less estate, and shall not at the time of such conveyance have the legal estate in such lands, but shall afterward acquire the same, the legal or equitable estate afterward acquired shall immediately pass to the grantee, and such conveyance shall be as valid as if such legal or equitable estate had been in the grantor at the time of the conveyance." Sand. & H. Dig. § 699. Under this statute if Gilbreath had, subsequent to the execution of his mortgage to Peace, acquired title in his own right to the land mortgaged, it would, by virtue of the statute, have inured to the benefit of his mortgagee. *Kline* v. *Ragland*, 47 Ark. 111. But he only secured a mortgage upon it; for, though the deed obtained from Turman was absolute in form, it is admitted that it was executed to secure a debt, and was in law a mortgage, and must be treated as such. And there is room for doubt whether the interest in mortgaged land acquired by the mortgagee by virtue of the mortgage before foreclosure is such an estate as will by the statute pass to a grantee to whom he has conveyed the land prior to his mortgage. For the mortgagee before the foreclosure is neither at law nor in equity the real owner of the land. The legal title, it is true, passes to him by the mortgage, but he holds it for the protection of his debt, and for that purpose only. If he takes possession before foreclosure, he must account to the mortgagor for rents and profits, and so soon as his debt is paid his rights in the land cease. He has before foreclosure no such estate in the land as can be attached for his debts or levied upon and sold under execution. If he dies, his widow has no right of dower in it as real estate. His interest as mortgagee does not descend to his heir, but passes to his personal representative as personal assets. On the other hand, all the usual incidents of ownership belong to the mortgagor in possession of the mortgaged land before foreclosure. His interest therein can be attached for his debts or levied upon and sold under execution. He can maintain an action of ejectment for the land against a stranger, and the mortgage cannot be set up as a defense. In case of death his interest therein passes not to his administrator as per-

sonalty, but descends as real estate to his heir, and his widow is entitled to dower in it as in other real property. Thus, while, for the purpose of protecting the mortgage debt, the mortgagee, as between himself and the mortgagor, is considered the owner of the land, for other purposes and between other parties not holding under the mortgage the mortgagor is the owner. The interest of the mortgagor is considered and treated as real estate, while that of the mortgagee is only a personal asset. *Terry* v. *Rosell,* 32 Ark. 478; *Miles* v. *Shepard,* 30 Conn. 98; 1 Jones, Mort. (5th Ed.), §§ 11, 15, 664, 698, 699, 703; 3 Pomeroy's Equity, §§ 1186, 1187.

There are other objections to the contention that the interest of a mortgagee will pass under this statute. The statute only purports to pass real estate, but, if only the legal title in the mortgagee passed, it would be worthless, for the legal title can be used by the mortgagee only to collect his debt, and without the debt it would avail nothing. On the other hand, if we adopt the contention that the statute operates as an assignment of the mortgage debt as well, the effect might be to pass something of more value than the land, for lands are sometimes mortgaged for more than their value, and in such a case if the mortgagor is solvent the debt is of more value than the land mortgaged.

For these reasons, we feel inclined to the opinion that Gilbreath by the mortgage from Turman did not acquire such an estate as would pass under this statute to his mortgagee, Peace. But, conceding that the interest he acquired as mortgagee from Turman did pass by the statute, it would still be liable to be defeated by the payment of the debt from Turman to Gilbreath. If Peace wished to prevent this, and to subject the interest acquired by Gilbreath under the Turman mortgage to his debt, he should, before payment was made, have given Turman notice of his claim, and in his proceedings to foreclose should have made Turman a party, and set out in his complaint this after-acquired mortgage of Gilbreath, and asked to have it subjected to his claim. But he did not do this. He neither gave notice to Turman of his claim, nor made him a party to his foreclosure suit.

Turman paid off his debt to Gilbreath, and there is nothing in the record to show that he had any notice either of the mortgage to Peace or of the claim against his land based on that mortgage until after he had discharged his debt to Gilbreath. The record of the mortgage from Gilbreath to Peace was not notice to Turman,

for he was not holding under Gilbreath, and there was no reason why he should search the records to discover conveyances made by Gilbreath. It is sometimes said that the record of a deed is notice to all the world, but it is more accurate to say that it is notice only to those claiming title under the same grantor. They are the persons for whose benefit the registration is required, and whose duty it is to take notice of it, such as subsequent purchasers and mortgagees dealing with the title in the line of which the recorded deed stands. *Maul* v. *Rider*, 59 Pa. St. 167, 171; 2 Devlin, Deeds (2d Ed.), §§ 712, 713.

The record is not notice to outside parties having no connection with the title of which the recorded deed is a part, and the record of the Peace mortgage was not notice to Turman; for, as before stated, he does not hold under Gilbreath, and there is nothing else in the record to show that he had notice. Under these circumstances a payment by Turman of his debt to Gilbreath secured by the mortgage left no beneficial interest in Gilbreath for the statute to act upon. The statute in reference to the grantor's after-acquired title was enacted to prevent fraud and effect justice, but under the circumstances here it would be neither right or just to compel Turman to pay his mortgage debt a second time to one who had given him no notice of his claim until after the payment of the debt.

For these reasons we think the plaintiff, under the facts stated in the record, cannot recover. The judgment is therefore reversed, and the cause remanded for new trial.

BUNN, C. J., dissents.

McWILLIAMS v. BONNER.

Opinion delivered February 23, 1901.

TAX SALE—VALIDITY.—A tax sale on August 2, 1869, for the taxes of 1868 is not void on its face as being on a date later than the law authorized, though it may be shown by extraneous evidence that such was the fact.

Boehm v. Porter, 54 Ark., 665, distinguished.

Appeal from Arkansas Circuit Court.

JAMES S. THOMAS, Judge.

Geo. C. Lewis, for appellant.

The case of *Boehm v. Porter,* 54 Ark. 665, is not applicable. Appellee should succeed, if at all, by the strength of his own title, and not by the weakness of or irregularities in his adversary's. 64 Ark. 547; Sand. & H. Dig. § 6625; Newell, Eject. 527; 54 Ia. 333; 46 Ia. 595; 52 Cal. 487; 20 S. E. 215; 19 S. E. 417; 3 Gilm. 160; 23 S. E. 968; 32 N. W. 314; 26 N. W. 314; 15 N. W. 568; 29 N. W. 451; 70 N. W. 99; 70 N. W. 618.

James A. Gibson and *John F. Park,* for appellee.

The tax sale was void. 54 Ark. 665; 33 Ark. 748; 53 Ark. 204. The confirmation decree cannot be attacked collaterally. 21 Ark. 364.

BUNN, C. J. This is a suit in ejectment by appellant against appellee, in the Arkansas county circuit court, for the recovery of the northeast quarter of section 26, township 4 south, of range 2 west, in Arkansas county.

The plaintiff's claim of title is founded upon a clerk's tax deed, executed and acknowledged on the 28th day of September, 1897, in which it is recited, among other things, that at a tax sale of lands for the taxes of 1868, made on the 2d of August, 1869, one Thomas J. Davidson became the purchaser of said land for the taxes, penalty and cost assessed against it, he being the best bidder for the least portion of the same, bidding for the whole tract, said sale having been commenced on the first Monday in August in said year 1869, and received his certificate of purchase accordingly, which he afterwards assigned and transferred to plaintiff, McWilliams. Plaintiff also alleged that he had paid the taxes on said land every year from 1868 to 1890, inclusive, and for the year 1895; that defendant was in wrongful possession. Wherefore he prayed judgment for the recovery of the land, and for damages, and in the alternative for his outlay in paying said taxes and the purchase money, etc.

The defendant answered, denying the validity of plaintiff's said deed, alleging that a sale on the said 2d day of August, 1869, was null and void, and setting up title in himself by reason of his purchase at a subsequent tax sale, to-wit, in 1892, for the taxes of 1891, and a confirmation of the same. With his answer defendant files his exceptions to the plaintiff's said deed, as follows, to-wit: (1) Because there was no law authorizing the levy of taxes for the year 1868 on said land; (2) because there was no law author-

izing the levy of taxes in the year 1869 for the taxes of 1868 on said land; (3) because there was no law authorizing the sale of said lands on the 2d of August, 1869; (4) because of the sale of said land on the 2d day of August, 1869, for the taxes of 1868, was without warrant or authority of law, and was void *ab initio.*

The general revenue act of July 23, 1868, provided for the assessment and collection of the taxes for that year. The act of February 19, 1869, provided for extending the time for the taxing officers to make up their lists, give notice, and make sales after said lists were adjusted by the court. There does not seem to be any serious contention that these statutes did not authorize the levy of taxes for the year 1868. The real contention raised by the exceptions to plaintiff's deed is that the same shows on its face that the sale in pursuance of which it was made was made on the 2d day of August, 1869, and that this court in the case of *Boehm* v. *Porter,* 54 Ark. 665, held that tax sales made on that day were null and void. In that case it was an issue of fact whether the sale made on that day was legal, and after taking testimony the court held that it was not a legal sale. The act of February 19, 1869, contained provisions which rendered it impossible to determine as a matter of law what was the proper day for tax sales, and, in order to determine that question, evidence extraneous the recitals of the tax deed was necessary. That evidence was taken, and upon it the court in that case based its findings and judgment. In the case at bar the issue is one of law, made by an exception to the deed, and the question is, is or is not the deed good on its face? If it is, the exception should have been overruled, and, if not, it should have been sustained. The deed is good on its face. The findings of facts in another case and judgment thereon does not preclude further inquiry into the facts in this case. Whether or not the 2d of August was the proper day is still a matter of some calculation, based upon extraneous evidence, and the case should have been permitted to progress to a settlement of the issues of fact made by the complaint and answer, since it does not seem to be admitted by the defendant that the 2d of August was not the proper day for the sale.

Reversed and remanded, with directions to overrule the exceptions and proceed to trial on the complaint and answer and evidence.

BATTLE, J., absent.

MOORE v. IRBY.

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Opinion delivered February 23, 1901.

1. TAX SALE—MINOR'S RIGHT OF REDEMPTION—VESTED RIGHT.—Where the law in force at the date of a tax forfeiture gave to the infant owner a right to redeem until two years after he should come of age, such right cannot be divested by a subsequent act of the legislature. (Page 103.)

2. SAME—RIGHT OF MINOR TO REDEEM.—Sand. & H. Dig., § 4641, as amended by act approved March 7, 1895, does not cut off a minor's right to redeem lands sold to the state for taxes in cases where the state has disposed of them, but provides the manner in which proceedings shall be had before the commissioner of state lands while the lands still belong to the state. (Page 103.)

Appeal from Desha Chancery Court, Watson District.

JAS. F. ROBINSON, Chancellor.

J. W. Dickinson, for appellant.

Minors have a right to redeem. Sand. & H. Dig. § 4596. Chancery is the proper forum. *Id.* § 1115; 52 Ark. 143; 41 Ark. 59; 43 Ark. 296. A sale of land by tax purchaser does not displace the right to redeem. 56 Ark. 551; 43 Ark. 296; 41 Ark. 59.

F. M. Rogers, for appellee.

BUNN, C. J. This is a petition by the appellant, as next friend of a minor, to the Watson district of the Desha chancery court, to redeem the lands therein named (tendering all taxes, penalties and costs) from a forfeiture for the non-payment of the taxes of 1889, and sale made thereunder to the state, and to remove cloud upon title. Demurrer was interposed by the defendant, Albert Z. Irby, to the complaint, and this demurrer was sustained, and, on failure of plaintiff to plead over or amend, the complaint was dismissed for want of equity, and the plaintiff appealed to this court. Mrs. Bettie Irby, mother of said minor, Stephen W. Irby, and also of Annie M. Perkins, a daughter by another husband, died intestate on the 21st day of November, 1881, seized and possessed of the lands in controversy, and leaving surviving her the said children, as her only heirs at law. Annie M. Perkins died intestate in 1894, not hav-

ing arrived at her majority, and without issue, and Stephen W. Irby became the sole owner of said lands by inheritance from his mother. The plaintiff, Mattie E. Moore, a sister of Bettie Irby, after the latter's death, took charge of and reared said children, both then of tender years, and continued to pay the taxes on said lands for them until 1889, when for want of means she was unable to do so further, and thus for the non-payment of the taxes of 1889 said lands were forfeited to the state, and were so certified by the clerk of said county. The general assembly passed an act, which was approved on the 14th April, 1893, organizing the Red Fork Levee District, and therein donated the lands in the district which had been previously forfeited for the non-payment of taxes, and the lands in controversy were included in this list. Subsequently the Red Fork levee board sold the land to Albert Z. Irby, the defendant in this case, and it is charged in the complaint that he is the uncle of Stephen W. Irby, and had full knowledge of all the facts, and that the lands belonged to his nephew.

The only question in the case is the right of the minor to redeem the land. Section 6615 of Sand. & H. Dig., which is a section of the act of 1883 under which were the forfeiture and sale of the lands in controversy, provides that "all lands, town or city lots, or parts thereof, which may hereafter be sold for taxes at delinquent sale, under the laws of this state, may be redeemed at any time within two years from and after the sale thereof, and all lands, city or town lots, belonging to insane persons, minors or persons in confinement, and which have been or may hereafter be sold for taxes may be redeemed within two years from and after the expiration of such disability." It appears from this that, notwithstanding the lands had been certified to the state, the minor's right to redeem continued until two years after he should come of age. The right of redemption in minors is reiterated in section 4596 of Sand. & H. Dig., in the chapter devoted to the disposition and management of state lands; the only restriction in that chapter being section 4601, which says its provisions shall not apply to town or city lots that have been disposed of by the state. The state acquired its right to the land subject to the minor's right to redeem under the law in force at the time, and this right of the minor could not be divested by any subsequent act of the legislature.

But the defendant contends that section 4641 of Sand. & H. Dig., as amended by act approved March 7, 1895, cuts off the right of redemption, where the state has disposed of the land. That

section, as amended, does not declare that the right of redemption ceases when the state has disposed of the land, but, in connection with sections following, only provides the manner in which proceedings for redemption shall be had before the commissioner of state lands, while the lands still belong to the state. It does in no way affect rights already fixed by law as to the right itself and the title. The amendment contained in the act of 1895, of section 4641 of Sand. & H. Dig., does make this change, and none other, to-wit, that, while the original law (section 4641) restricts the right of redemption to the owner, the amendatory act extends the right to the owner's heirs and assigns.

The decree is reversed, and the cause remanded, with directions to overrule the demurrer to the petition, and to enter a decree in accordance with this opinion.

BATTLE, J., absent.

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

Opinion delivered February 23, 1901.

1. RAILROAD—WRONGFUL APPROPRIATION OF LAND—REMEDY OF OWNER.—Where a railroad company wrongfully appropriated for its use land within the limits of its right of way as defined by the statute, the owner cannot recover in ejectment, the remedy of an action for damages provided by the statute (Sand. & H. Dig., § 2734) being exclusive. (Page 106.)

2. SAME—POWER TO CONDEMN.—Whether land appropriated by a railroad company within the limits of its right of way was necessary to the proper use and operation of its road is a matter to be determined by the railroad company. (Page 108.)

3. SAME—APPROPRIATION OF EXCESS—REMEDY.—Where a railroad company wrongfully appropriates land for its right of way more than six rods in width, as authorized by Sand. & H. Dig., § 6175, the owner can recover the excess in ejectment. (Page 108.)

Appeal from Johnson Circuit Court.

WILLIAM L. MOOSE, Judge.

STATEMENT BY THE COURT.

On the 8th day of August, 1898, appellant filed his complaint in the Johnson circuit court against appellee, alleging, in substance, that he is the owner and entitled to the possession of land twenty-five feet in width on each side of the right of way of the Little Rock & Fort Smith Railroad, passing through the southeast quarter of the northeast quarter, section 7, township 9 north, range 23 west, of which appellees are in the wrongful and unlawful possession, and prays a recovery of said lands and damages, and states in the complaint his chain of title. At the May term of this court, 1899, a trial was had without answer, it being agreed and understood that the same might be filed after the trial, the purport of it being at the time stated; and now, it not having been filed and not appearing in the transcript, it is agreed that it may be filed here, and treated as a part of the transcript. This answer says that the strips of land sought to be recovered are a portion of its right of way in Johnson county, Arkansas, and that appellees have been using said strips of land as a portion of its right of way for more than twenty years; and that early in the year 1893, at a time when appellees were enclosing their right of way through that portion of Johnson county where these lands and other contiguous lands lie, they enclosed these two strips of land as a portion of their right of way; and that since that time appellees have maintained these strips of land, along with other lands, as a portion of its right of way; that said strips are absolutely necessary to the complete and successful operation of its line of road, and are necessary to give them the right of way authorized by the statutes of the state; and that they knew of no adverse claim of appellant to said strips until the suit was brought. The answer further says appellant is prohibited from maintaining his action in ejectment to recover these lands by the laws of this state. On the trial A. M. McKennon testified as follows: "I am the plaintiff in this action, and the owner of the land for the recovery of which this action is brought. I bought the same from E. T. McConnell on the 31st day of March, 1893. The lands lie near the railroad track, and were enclosed by defendant some time during the month of June, 1893. The railroad company's right of way through the forty-acre tract of which this land is a part is only fifty feet in width, the land sued for being two tracts or parcels lying adjoining said right of way on either side, each tract being twenty-five feet in width. The for-

mer owners of the land had cultivated up to defendant's right of way. While owned by E. T. McConnell, who was defendant's land agent, he cultivated it up to a ditch at the foot of the dump of the roadbed. The right of way of defendant along the track is 100 feet on the lands adjoining the tract in controversy, and when defendant fenced in the road the fence was made the same distance from the track on my land that it was where defendant had a 100 foot right of way; and this is the only use to which the land in controversy has been put by defendant. The rental value of this land is four dollars per acre per year. Estimating the damages in this way, I have been damaged in the sum of eighteen dollars for the last three years, there being an acre and a little more than a half of the land." He then read his title deeds. This was all the evidence in the cause.

The court, upon motion of appellee, instructed the jury to find a verdict for it, to which appellant at the time excepted. After verdict appellant filed his motion for new trial, setting up as ground that the verdict is contrary to law, contrary to the evidence, and that the court erred in instructing the jury to find for the defendant, which motion the court overruled, and appellant excepted, prayed an appeal to the supreme court, which was granted, and subsequently filed bill of exceptions, time having been given him; and now, since his case is here, the foregoing is a correct statement of it.

J. E. Cravens, for appellant.

Appellee, having already condemned land for its right of way, is bound by its election. 23 Am. & Eng. R. Cas. 72.

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

Since the passage of the act of April 11, 1893, ejectment will not lie for the recovery of land appropriated for a right of way by a railroad company. *Cf.* 31 Ark. 508. Under the law of this state, appellant is estopped to maintain ejectment for this portion of defendant's right of way, even though ejectment were a proper remedy. 51 Ark. 265; 51 Ark. 500.

HUGHES, J., (after stating the facts.) It seems that the appellee, the railroad company, without seeking to purchase or have the land in controversy condemned for the purpose of enlarging its right of way, wrongfully, and without pursuing the method prescribed by the statute to obtain this land as an addition to its

right of way, entered upon it, and enclosed it with a fence, and thus appropriated it to the use of the railroad company as a part of its right of way. The appellant might have prevented this action, upon the part of the railroad by suing out an injunction, as the law provides that "private property shall not be taken, appropriated, or damaged for public use, without just compensation therefor made." Sec. 22, art. 2, of the Constitution of 1874. *Organ* v. *M. & L. R. R. Co.* 57 Ark. 255. The statute provides (subdivision 3, section 6175, Sandels & Hill's Digest) that the railroad company shall have power "to purchase, and by voluntary grants and donations receive and take, and by its officers, engineers, surveyors and agents enter upon and take possession of and hold and use, such lands and real estate and other property as may be necessary for the construction and maintenance of its roadbed and stations and other accommodations necessary to accomplish the object for which the corporation is created; but not until the compensation to be made therefor, as agreed upon by the parties, or ascertained as hereinafter provided, be paid to the owner or owners thereof, or deposited as hereinafter directed, unless the consent of such owner be given to enter into possession." It is not contended that the statute was complied with. But if the railroad had taken and appropriated what it needed for its right of way, within the limits of the statute fixing the right of way at six rods (subdivision 4, section 6175, Sandels & Hill's Digest) could ejectment be maintained for the land taken and appropriated to use for its right of way? We think the question is settled by the statute. Section 2734 (act approved April 11, 1893): "Whenever any corporation authorized by law to appropriate private property for its use shall have entered upon and appropriated any property, real or personal, the owner of such property shall have the right to bring an action against such corporation in the circuit court of the county in which said property is situated for damages for such appropriation at any time before an action at law or in equity for the recovery of the property so taken, or compensation therefor, would be barred by the statutes of limitations." We understand that when property is taken by a railroad company within the limits of its right of way as defined by the statute, and appropriated for its use and its right of way, it becomes such, and cannot be recovered in ejectment, though the owner may recover damages under the above statute; and the remedy provided by the statute is exclusive. *Cairo & Fulton Railroad Co.* v *Tur-*

ner, 31 Ark. 494. This property was fenced as part of the right of way of the railroad 10th of June, 1893, and this suit was brought the 8th of August, 1898. So it seems that between these dates, a period of over 5 years, no action was taken to restrain the railroad company from the use of this land, which they had appropriated for their right of way.

Whether this land so taken and appropriated by the company was necessary to the proper use and operation of their road was a matter to be determined by the company, as we understand—within the limits of the right of way, six rods wide, as defined by the statute. *Croley* v. *St. L. & S. W. Ry. Co.,* 56 S. W. Rep. 615; *Railway Co.* v. *Petty,* 57 Ark. 359.

We think the above quoted section of the statute (2734), in connection with sections 2735 and 2736, pretty clearly shows that in such a case as this the remedy of the appellee is a suit for damages, and not ejectment for the land. Section 2735 is as follows: "The measure of recovery in such action shall be the same as that governing proceedings by corporations for the condemnation of property." Section 2736. "Proceedings instituted under this act shall be governed by the rules of pleading and practice prescribed for the government of proceedings in the circuit court. The defendant shall have the right to bring in all parties having or claiming an interest in the property in controversy, and the court shall make the proper orders of the distribution of the compensation recovered in the action among such parties as may be entitled thereto, and shall include in the judgment in said proceedings an order condemning said property for the public use to which it may have been appropriated." But it appears in this case that the railroad company took one foot over six rods of the land they enclosed and appropriated. This was one foot more than they were authorized by the statute to take, the width of their right of way being defined by the statute as six rods, or ninety-nine feet.

For this reason the judgment in this case is reversed, and the cause is remanded for further proceedings.

BATTLE, J., dissents.

BURGAUER v. PARKER.

Opinion delivered February 23, 1901.

HOMESTEAD—OCCUPATION AFTER JUDGMENT.—Occupation of a lot as a homestead by a judgment debtor after the judgment was obtained, and before its lien had expired, will not relieve it from such lien. So held where the debtor acquired the land on a partition of his ancestor's estate, made after the judgment was rendered against him, although at the time of the partition he claimed the land as his homestead, and within a reasonable time thereafter occupied it as such.

Appeal from Garland Chancery Court.

LELAND LEATHERMAN, Chancellor.

STATEMENT BY THE COURT.

The appellant, E. Burgauer, on January 25, 1896, obtained a judgment and decree against D. F. and Laura J. Parker, in the Garland chancery court, for the sum of $4,301.07, and for the sale of certain lands (if the judgment should not be paid in four months) which had been conveyed by the said defendants to Chas. D. Greaves, as trustee, for the benefit of Burgauer, by their deed of trust bearing date April 28, 1894, which deed secured an original debt of $5,000 and interest at ten per cent., payable semi-annually. The judgment was not personal against Laura J., wife of D. F. Parker, and was to be satisfied, as to her, out of the lands ordered sold by the decree. It was a personal judgment against D. F. Parker. The lands having been sold, the commissioner of the court on April 15, 1897, entered a "credit on the within judgment and decree of the sum of $3,907.65, being the amount received by me as such commissioner, less the costs herein and taxes accrued up to date of sale of said lands, the purchase price being $4,000 and the costs herein $43.60, and taxes $48.75."

Prior to November 1, 1897, an execution issued on this judgment against D. F. Parker for the deficiency. The sheriff made levy on part of lot 8, block 105, in the city of Hot Springs; parts of lots 4 and 6 in block 96; and part of lot 12, block 105; and the same were advertised for sale on November 22, 1897. Prior to the day of sale

Parker filed his claim for a homestead, and the clerk issued a supersedeas. On November 22, 1897, the lots, other than part of lot 8, block 105, were sold by the sheriff, but the proceeds of sale were not sufficient to satisfy the execution, and on the same day Burgauer filed in the chancery court his response to the claim of Parker for exemptions and homestead. The response to the claim of Parker for homestead denied that he was the owner of the lot so as to enable him to claim it as a homestead; denied that he could lawfully claim it as a homestead; denied that he could lawfully claim it as exempt from sale under art. 9 of the constitution; stated that the lien of his judgment rendered on January 25, 1896, was superior to the claim of homestead, and that, on the date of the rendition of the judgment, the lot had not been impressed with the character of a homestead by Parker or any of his family, and on said date he made claim of other lands for his homestead. Prayer that Parker be denied the right of homestead, and that the lands be sold under the execution as directed, etc.

The property in controversy was owned by M. D. Parker, mother of appellee, who died March 13, 1895. By her will this lot and other lands were devised to appellee, M. J. Rice, and M. F. Parker, to be divided equally. This particular lot was occupied by J. E. Parker, husband of the testatrix, and his daughter, Mrs. Rice, until his death, November 18, 1895, and Mrs. Rice continued her residence there until January, 1896. It was leased by the appellee, as executor of his mother's will, to J. W. Brock, from January, 1896, for more than five months. After this it was leased to G. E. Evans until December 20, 1896. It was leased to S. W. Vaughan from March or April, 1897, to the time appellee moved there in September, 1897. For several years prior to the time appellee moved to this property, he had been living at No. 1014 Central avenue, in Hot Springs, in block 96. He was living there at the time of his mother's death. The title was in his wife's name. He had charge of all property devised by his mother's will until the time of the sale by the probate court to pay debts or the partition between the heirs. In September, 1897, by agreement among the devisees under the will, the unsold lands were appraised, and a partition deed was executed by them on September 27, 1897, by which appellee received conveyance of the lands in controversy. Soon thereafter he moved on the lands. "I entered into possession at once after the execution of the deed of partition, and I entered with the intention, and so stated at the

time, of a homestead." "It was understood by the heirs at the time of the partition deed, and I so stated, that I had taken it for the express purpose of a homestead at its appraised value, and I never had or enjoyed any of the lands of my father or mother up to that time as a homestead."

The chancellor made the following findings of fact: That E. Burgauer, the plaintiff herein, recovered judgment against defendant, D. F. Parker, on January 25, 1896, for the sum of ——— dollars, and a decree was also rendered in his favor, foreclosing a deed of trust given to secure the indebtedness sued upon, which property embraced in said deed of trust was sold under order of the court to satisfy such decree and failed to bring the full amount of the same; that an execution was issued for the amount remaining due, which was levied upon the property in question, to-wit, part of lot 8, in block 105, in the city of Hot Springs, Garland county, Arkansas, and upon one or two other lots. The court finds that the mother of D. F. Parker died on March 14, 1895, and his father died November 18, 1895, and that his mother and father had lived on the property now claimed as a homestead by said D. F. Parker up to the time of their death, and for many years prior thereto; that his mother, Margaret Parker, died possessed of said lot and other property in the city of Hot Springs, which was devised under the will of said Margaret D. Parker to the said son, D. F. Parker, and to others who obtained said property by such devise at her death as tenants in common, each holding his or her undivided interest or share until partitioned. The court also finds that the said property was partitioned among the heirs of said Margaret Parker, and each owner was conveyed his or her proportional part by a deed of date September 27, 1897; that said D. F. Parker obtained and was deeded for his part or interest in his mother's estate the said lot (part of lot 8, in block 105), which he claims as a homestead herein, and other real property; and that he at the time determined to claim it (said lot 8) as his homestead, and in a few days thereafter moved on and occupied it as such; that said deed of partition was placed on record before the levy of the execution herein, and that said D. F. Parker occupied and claimed it as a homestead at the time of said levy; that E. Burgauer, the plaintiff, insists that the lien of the judgment and decree rendered in this court on January 25, 1896, is superior to the homestead of the defendant, D. F. Parker, in the land claimed, and that at said time Parker made claim of other land for a homestead.

And the court finds from the evidence of said Parker that the place or places lived on by him for several years prior to his living on said lot 8 were not claimed by him as a homestead. The court also finds as a matter of fact that the said D. F. Parker has been a resident of the state and the head of a family for several years prior to and at all times since the rendition of the judgment and the decree herein, and that he has not claimed a homestead in any real property at any time since the rendition of said judgment and decree, except in the property in question; that the cash value of the homestead claimed herein is $2,500. Also the following declarations of law: "(1.) The court concludes, as a matter of law, that a resident of the state and the head of a family, who has no other homestead, and who acquires real property by descent or devise under the last will and testament of a parent (and not by purchase), as tenant in common with other heirs or devisees of same parent or ancestor, shall be entitled to a homestead in the portion of such real property allotted and deeded to him as his share or portion under a partition of the entire property among the owners thereof, provided he claims at the time of the partition a homestead in the part so set apart and deeded to him, and also occupies it as such in a reasonable time thereafter, as against the lien of a judgment or decree rendered against him after the property has descended to him and before partition, and against the lien of an execution issued on such judgment and levied on the property claimed as a homestead after the same had been set apart and deeded to such judgment debtor after a partition among the owners, and after the same had been claimed and occupied as a homestead by such judgment debtor. (2.) That, in order for said D. F. Parker to claim and hold a homestead in the real property acquired from his mother by devise in common with other of her children and devisees, it was not necessary for him to enter upon any portion of such real property before the judgment was rendered in favor of said Burgauer against him; that he had a reasonable time after the partition of the property among the heirs and devisees to claim a homestead in a portion of the same set apart to him under the partition, and to move on and occupy the same as a homestead; and the court is of the opinion that he did move on the said property claimed by him as a homestead within a reasonable time after the same was set apart to him under the partition among the heirs and devisees of his mother, and that his right of homestead in it is superior to the lien of the judgment of the said

Burgauer, which was rendered after the death of the mother of said D. F. Parker, and prior to the partition of the property, and also superior to the lien of the execution which was issued on such judgment, and which was levied on the property in question after said D. F. Parker had occupied it as a homestead. It is, therefore, considered, ordered, and adjudged and decreed by the court that the said D. F. Parker is entitled to a homestead in the part of said lot 8, block 105, claimed and occupied by him as such, as against the said judgment and execution lien of said Burgauer; that the motion to quash the supersedeas be overruled, and that the said D. F. Parker have and recover of and from the said Burgauer all his costs herein expended; to which findings, rulings, judgment and decree of the court the said Burgauer excepts, and prays an appeal to the supreme court, which is granted.

Greaves & Martin, for appellant.

The court erred in deciding that appellee was entitled to a homestead in the land in controversy. 56 Ark. 621. *Cf.* 43 Ark. 107. There was no such occupancy as is requisite to fixing the homestead character upon lands. 33 Ark. 399; 42 Ark. 175; 46 Ark. 43; 51 Ark. 84; 63 Ark. 299.

J. M. Harrell and *Cockrill & Cockrill,* for appellee.

The decree of foreclosure did not authorize a personal decree against appellee for the alleged deficiency. 1 Black, Judg. §§ 42, 411. The decree for whatever deficiency might exist carried no lien until after sale and the ascertainment of the deficiency. 25 N. J. Eq. 104; Nash, Code, Pl. 726; 55 Ark. 307; 75 N. W. 581; 39 N. Y. S. 437; 66 Ill. App. 529. On homestead question see 49 S. W. 434; 50 S. W. 270.

HUGHES, J., (after stating the facts.) We are of the opinion that there is error in the decree of the chancery court in this case, for which it must be reversed. As the judgment in favor of the appellant was rendered before the lot in controversy was occupied as a homestead, and execution on the judgment was levied upon the property before the lien of the judgment had expired, it was subject to be sold to satisfy the same. The occupation of it subsequent to the rendition of the judgment, an execution upon which had been levied upon it before the judgment lien had expired, did not relieve it from the lien, though the occupation was prior to

the levy of the execution. *Simpson* v. *Biffle*, 63 Ark. 299; *Reynolds* v. *Tenant*, 51 Ark. 84.

The decree is reversed and remanded, with directions to quash the supersedeas.

BATTLE, J., absent.

YOUNG v. GAUT.

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Opinion delivered February 23, 1901.

1. BILL OF EXCEPTIONS—SUFFICIENCY.—Where the evidence was taken by a stenographer by agreement of counsel, and a transcript thereof was approved by the court as a correct bill of exceptions, and ordered filed, and was deposited with the clerk within ninety days, such transcript is a sufficient bill of exceptions. (Page 117.)
2. SAME—SUFFICIENCY OF FILING.—The fact that a bill of exceptions lacks the clerk's file mark is not conclusive evidence that it was not filed, where it was delivered to the clerk in apt time for the purpose of being filed. (Page 118.)
3. COUNTERCLAIM—FAILURE TO REPLY—WAIVER.—Plaintiff's failure to reply to a counterclaim pleaded by defendant is waived by the latter's failure to move for a judgment in the circuit court. (Page 118.)
4. CONTRACT—LIQUIDATED DAMAGES.—Where a contract stipulated that a building should be completed by a certain day, with a forfeit of $5 a day as "liquidated damages" for each day's delay thereafter, and there was unnecessary and unwarranted delay in completing the contract, it was error to disallow such liquidated damages. (Page 118.)

Appeal from Washington Circuit Court in Chancery.

EDWARD S. MCDANIEL, Judge.

STATEMENT BY THE COURT.

On the 5th day of April, 1898, the appellees, Gaut & Cardwell and the Phillips-Deaver-Johnson Lumber Company, filed their complaint in the Washington circuit court against the appellant, Mrs. S. J. Young, alleging that on August 10, 1897, Gaut & Cardwell had entered into an agreement with Mrs. S. J. Young, in writing, to build for her a dwelling on lot No. 3, in block No. 1, city,

in accordance with certain plans and specifications prepared by one H. I. Goddard, at and for the sum and price of $1,785; that they had complied fully with the terms of their said written contract in all essential particulars, "except where otherwise directed or prevented by the defendant." Gaut & Cardwell allege extra work and labor performed to the value of $198.05, and Phillips-Deaver-Johnson Lumber Company allege that they have, "at the request and with the knowledge of the said Gaut & Cardwell and the said Mrs. S. J. Young," furnished material, etc., and paid money to the amount of $1,359.91; and plaintiffs allege a total expenditure of $2,254.91, and admit payment to the extent of $892.50. And plaintiffs ask for a judgment against the defendant in the sum of $1,362.41, and that same be declared a lien upon the said lot and building. And plaintiffs file as exhibits copies of the contract, bond and accounts stated. On May 10, 1898, the defendant (appellant) filed her answer and cross-complaint, admitting the execution of the contract and the accepting of the bond, but denying that the plaintiffs, Gaut & Cardwell, "or any one for them," had complied with the contract as alleged; denied that said building had been completed according to contract, or accepted by the supervising architect, H. I. Goddard, or by defendant; specifically alleges non-compliance with the contract on the part of the plaintiffs, and denies any indebtedness whatsoever. And for cross-complaint the defendant (appellant) alleged the making of the contract with Gaut & Cardwell, and that she accepted a bond executed by said Gaut & Cardwell, with said Phillips-Deaver-Johnson Lumber Company as surety, in the sum of $2,000, conditioned for the faithful performance of said contract; alleges that said Phillips-Deaver-Johnson Lumber Company "acted throughout as parties in interest as contractors, and have assumed authority at all times as contractors, and that they have assumed to be, and have held themselves out as being, the real parties in interest, as contractors as well as sureties;" that, by the express terms of the contract, said building was to be completed by December 1, 1897, with a forfeit of $5 a day "as liquidated damages" for each day thereafter, and that she is entitled to the sum of eight hundred dollars for a delay of 160 days. Defendant alleges that she obtained possession of the house "by legal process," on the 5th day of April, 1898, having made demand, under art. 7 of the contract, for possession on March 21, 1898, and possession having been refused by plaintiffs, to her special damage in the sum of $100. Admits $34.50 of plaintiff's

bill for extras, and denies $173.35. Alleges certain specific deficiencies, amounting to $310.67½. Denies the right of the firm of Phillips-Deaver-Johnson Lumber Company to file and enforce a lien against said premises, for the reason that they are "in truth and in fact parties contractors as well as sureties;" and alleges special damages for said wrongful filing in the sum of $200. Denies that said Phillips-Deaver-Johnson Lumber Company were ever requested to furnish any lumber and material, or pay any money, as alleged in complaint; but alleges that whatever lumber and material they furnished or money that they paid was furnished or paid "at their own instance and request as parties contractors as well as sureties." Defendant alleges a total damage of $1,410.67½, and asks a judgment therefor and for her costs. There was no reply made to the said answer and cross-complaint.

After much testimony on both sides was heard by the court, the chancellor made substantially the following finding of facts and decree: That Gaut & Cardwell, as contractors, with Phillips-Deaver-Johnson Lumber Company, as surety, had contracted with the defendant (appellant) to build a house as per contract, plans and specifications introduced in evidence, and to complete same by December 1, 1897, at and for the sum and price of $1,785. Finds that the contract and bond were executed on August 10, 1897, and that the building was to be completed according to the said contract and the plans, drawings and specifications made by H. I. Goddard, architect. "That said building was not tendered as completed, by said Gaut & Cardwell, contractors, until March 21, 1898, and that at said time said dwelling was not completed according to contract in all particulars." The court then gives the defendant (appellant) possession, with costs; her separate suit for possession having been consolidated with this action. The court then allows the contractors $100 for extra work, which, with contract price, made a total of $1,885. The defendant (appellant) was "entitled to a credit or offset of $150 for damages in delay and work," which, with the $892.50 previously paid, made a total credit of $1,042.50, and that "she now stands indebted to said contractors, Gaut & Cardwell, in the sum of $842.50, as balance in full of amount due from her under said contract." The court further finds that four parties are lien creditors, their claims aggregating $148.33. Directs defendant (appellant) to pay said liens out of the balance due on contract price, and to pay the residue unto Phillips-Deaver-Johnson Lumber Company. That

Gaut & Cardwell are indebted unto Phillips-Deaver-Johnson Lumber Company in the sum of $1,359.91, and that, after receiving the said sum of $694.17 from Mrs. Young, appellant, it is entitled to a judgment against Gaut & Cardwell for $665.74. The balance, $842.50, due from Mrs. Young (appellant) is declared a lien on the building in controversy. That $100 of same may be paid by conveying the certain lot of land referred to in contract. The plaintiffs (appellees) to pay all the costs in the suit for possession; otherwise, each party pays his own costs, and the court costs are divided.

Whereupon the defendant (appellant) offered her bill of exceptions, and prayed an appeal to the supreme court, which appeal was by the court granted.

E. B. Wall, for appellant.

Parties may, in advance, stipulate, by way of liquidated damages, the amount to be paid by the party who is guilty of breach of contract. 14 Ark. 315, 328. Courts of equity will not relieve against stipulations as to liquidated damages. 14 Ark. 319; 56 Ark. 384; 54 Ark. 340; 57 Ark. 169. The court erred in not decreeing to appellants the damages stipulated for in the contract.

J. V. Walker, for appellees.

The court properly relieved appellees against damages for all delay beyond 30 days. The evidence was conflicting, but it sustains the chancellor's finding; and the decree should be affirmed. 24 Ark. 431; 41 Ark. 294.

HUGHES, J., (after stating the facts.) The plaintiff's attorney contends that there is no bill of exceptions, and that there is no showing in the record that what purports to be a bill of exceptions was ever filed. The evidence appears to have been taken by a stenographer in the presence of the court by agreement of counsel, and to have been deposited with the papers and recognized by the court as the evidence in the case, and a part of the bill of exceptions, whereupon the court made the following order: "And now comes said defendant, Mrs. S. J. Young, and presents to the judge of said court this her bill of exceptions, comprising all the evidence introduced in this cause, which is signed, sealed and made a part of the record herein, this the 25th day of July, 1898. E. S. McDaniel, Judge." This bill of exceptions transcribed by the stenographer, as to the evidence, as per agreement, as we understand,

was approved and ordered filed by the court, and was deposited with the clerk within 90 days; and while the record is awkwardly presented in the transcript, we think it sufficiently identifies and shows the evidence, and that it was filed in apt time.

When it was delivered to the clerk within time, the omission of the filing mark would not be evidence that it was not filed, if it was delivered for the purpose of being filed. *Case* v. *Hargadine,* 43 Ark. 148.

There was no reply to the defendant's counter-claim, and counsel for defendant contends that, by reason of the fact that his counter-claim was not answered, the appellant should have had judgment. But it does not appear that the appellant moved for judgment because of the failure to answer her counter-claim. Wherefore she cannot take advantage of it here. By failing to move for judgment for the want of answer, and by going into trial, she must be held to have treated the issues as made. *Gibbs* v. *Dickson,* 33 Ark. 107; *Winters* v. *Fain,* 47 Ark. 496.

As there is conflict in the testimony as to the character of and deficiency in the work, we will not disturb the finding and decree in this behalf. But we think the evidence, by a decided preponderance, tends to show an unnecessary and unwarranted delay in completing the building according to contract, and that by the use of proper diligence the contractors could have completed the building within the time they contracted to do it. It is true, there were some alterations in the plans, and in some of the materials to be used in the building, which were provided for in the contract; yet no additional time was asked, or seems to have been contemplated, by reason of these alterations, which were inconsiderable, and need not have caused any delay beyond the time fixed and agreed upon for the completion of the building. The contract was entered into on August 10, 1897, and the house, was, according to its stipulations, to be completed by December the 1st, 1897, with a forfeiture of $5 a day as "liquidated damages," for each day's delay thereafter. The appellant got possession of the house on the 7th of April, 1898, and it was not then completed in all particulars, as found by the court. There was, therefore, a delay in completing the house in 128 days after December the 1st, 1897, for which, in our judgment, the appellant was entitled to an allowance of $5 per day as liquidated damages—in aggregate $640. It may be that appellees made a hard bargain, and built the house for less than it was worth; but, if this be true, we cannot change

their contract, nor can we relieve them of the consequences of their failure to comply with it. "While courts of equity afford relief against penalties, they will not relieve against liquidated damages." *Williams* v. *Green,* 14 Ark. 315; *Lincoln* v. *Little Rock Granite Co.,* 56 Ark. 405.

The decree is affirmed, save as to this item of liquidated damages that should have been allowed the appellant; but as to this the judgment is reversed and remanded, with directions to the court below to modify the decree in accordance with this opinion.

GRAHAM *v.* W. W. DICKINSON HARDWARE COMPANY.

Opinion delivered February 23, 1901.

COMMISSIONER'S SALE—SUFFICIENCY OF PAYMENT.—The purchasers of land at a commissioner's sale paid the purchase price to the commissioner, and the court approved the sale, but the commissioner, without the purchasers' authority, withheld the money from the judgment creditor in order to induce the latter to make the purchasers a warranty deed. The commissioner died without having paid the money to the creditor. *Held,* that the purchasers were not liable to repay the money to the creditor. (Page 121.)

Appeal from Jackson Circuit Court in Chancery.

RICHARD H. POWELL, Judge.

STATEMENT BY THE COURT.

The W. W. Dickinson Hardware Company of Little Rock, being the owner of 160 acres of land in Jackson county, sold it to one Lippman. Lippman paid $250 in cash, and gave note for $230, the balance of purchase price, and the Hardware Company executed and delivered to him a bond for title. When the note fell due, it was not paid, and the Hardware Company placed it in the hands of J. M. Rose, an attorney of Little Rock, for collection. Mr. Rose had in his office a young man by the name of B. D. Streett, who was manager of the J. M. Rose Collection Company. His name, with that of J. M. Rose, was signed to the complaint filed in the case. After the suit was brought, Streett, who seems to have had charge of the matter, wrote to J. M. Stayton, an attorney of

Newport, Jackson county, where the suit was pending, asking him to look after the case and take a decree. Stayton did as requested, and, no defense being made, a judgment was rendered against defendant for the amount of the note, the land ordered sold, and Streett was made commissioner to carry the decree into effect. The land was afterwards sold under decree, Stayton acting for Streett in his absence, and Graham Brothers, the appellants here, purchased at the sale. The sale was made on a credit of three months, but the purchasers of their own will paid cash. Being asked by the purchasers whether other creditors of Lippman could redeem, Stayton informed them that they could, but Stayton, being of the opinion that a deed from the Hardware Company would prevent redemption, told the purchasers that he would have the Hardware Company execute a warranty deed to them. Stayton thereupon sent the money to the commissioner, Streett, at Little Rock, and asked him to execute deed as commissioner, and also to have the Hardware Company to execute deed. The Hardware Company refused to execute a deed, but the sale was on the 19th of July, 1897, duly reported to the court, in which report it was stated that the purchase price had been paid in full, and the report was confirmed, and the commissioner ordered to execute a deed, which was done, and, after being approved by the court, the deed was delivered to the purchasers. Several days after this order confirming the sale and approving the deed was made, Stayton was informed through letter from Streett that the Hardware Company had refused to execute a deed as requested, and further that he, Streett, had not paid over the money to the company, and that he wished to hear further from him about the matter. Stayton on the 22d of July, 1897, wrote in reply, telling Streett not to pay over the money to the Hardware Company unless it would execute a deed; and Streett, in obedience to this letter, withheld the money, without informing either Rose or the Hardware Company that the money had been paid to him, but leaving them under the impression that, as the land was sold on a credit of three months, the price had not been paid. The matter rested in this way until about the 1st of September, when Streett was taken sick and died, without having paid the money. The Hardware Company never received its money, and afterwards, on the 15th of January, 1898, filed a motion in the Jackson chancery court to compel the purchasers to pay the amount of their bid. The purchasers answered that they had already paid. After hearing the evidence, the court found in favor

of the Hardware Company, and made an order that the purchasers pay their bid within ten days, and in default of such payment that the land be resold. From this order Graham Brothers appealed.

Morris M. Cohn, for appellants.

By becoming purchasers at the commissioner's sale appellants became parties to the suit. 36 Ark. 605; 129 U. S. 73; 136 U. S. 89, 95; 152 U. S. 594. Appellants were not bound to see to the application of the purchase money made by the commissioner. 91 U. S. 638; 19 How. 116. Nor are they liable for his acts, he being the officer of the court, and acting for the court. 44 Ark. 322; 23 Ind. 553; 53 Ind. 57; 52 La. 97, 102; 58 N. Y. 61; 19 Fed. 477; 5 Th. Corp. § 7148. The presumption is in favor of an attorney's authority and act, when he has done so. 158 Ill. 237; 41 N. E. 1118. In case there is doubt, the authority of the attorney will be presumed. 24 La. An. 237. The attorney of a party has authority to press a decree to payment. 11 Ark. 212; 21 Ark. 396; 39 Ark. 50, 53. Appellee was bound by the employment of Stayton. 13 Tex. 532; 10 Vt. 68; 49 Tenn. (2 Heisk.) 360. And by Streett's acts as clerk, if he was only a clerk. 142 Mass. 56; 7 N. E. 39; 63 La. 436; 19 N. W. 307; 40 Atl. 734.

Chas. T. Coleman, for appellee.

The payment to Streett, being conditional merely, was never a payment to appellee. 18 Am. & Eng. Enc. Law, 150.

RIDDICK, J., (after stating the facts). The sale of the land in this case, being made by an agent of the commissioner, and not by the commissioner in person, was in that respect irregular, but it was confirmed by the court, and its validity is not questioned in this proceeding. The contention here is that the purchase money was not paid, but it is not denied that it was paid to the agent of the commissioner who conducted the sale, and he in turn paid it to the commissioner. The commissioner reported to the court that the land had been sold and the purchase price paid as well, and on this theory the sale was confirmed. It is said, though, that Stayton directed the commissioner to withhold the money from the plaintiff company unless it would execute a deed, and that the company rightfully declined to accept the money on such condition, and that the payment was therefore not binding on the company. But this sale was not made by the company, but by a commissioner of the

court. The purchasers did not undertake to pay the Hardware Company. They undertook to pay to the commissioner, and were absolved by a payment to him and a confirmation by the court. It may be conceded that, if the purchasers had directed the commissioner to withhold the money from the company until it made a deed, and if this act of theirs had resulted in the loss of the money, they would have been responsible. The chancellor probably based his decree on a finding that Stayton was acting for the purchasers in making his request that the commissioner withhold the money; but, while Stayton in so doing no doubt intended to favor the purchasers, there is nothing to show that he was authorized by the purchasers to take such a step and make such a request, or that they had any notice of his acts in this regard until long after the death of Streett and the loss of the money. The only persons who testified on this point were Stayton and Graham; and both of them testify positively that the money was paid by the Grahams immediately, and that they imposed no conditions whatever upon the commissioner, nor authorized Stayton to impose any. Stayton testified that when the purchasers, after the money had been paid, inquired if the land could be redeemed, the idea occurred to him that a warranty deed from the Hardware Company would prevent redemption, and that he then, of his own motion, and without any demand or even suggestion from the purchasers, gratuitously told them that the company would make such a deed, he thinking that the company could have no objection. Afterwards, feeling probably under some moral obligation to make good his promise, but without being in any way authorized by the purchasers, and without informing them of his acts, he undertook to procure such a deed.

While some of the statements in the letters of Stayton to Streett, which were read in evidence, might, in the absence of any explanation, raise, as against him, the inference that he was in this matter acting for the Grahams, still these letters are not evidence against the Grahams. The letters may contradict Stayton, but they do not affect the Grahams, when all the evidence shows that they had given Stayton no authority to act for them. Stayton in his testimony gives what would appear to be a frank explanation of these letters, and of his motives in writing them, but we need not notice it; for, if his conduct in that regard resulted in loss to the Hardware Company, it furnishes no reason for imposing the loss on the Grahams, he having, as before stated, no authority to act as their agent, and, if we take his testimony, no intention of

doing so. The Hardware Company is undoubtedly out money which it should have, but we are of the opinion that the evidence does not justify a recovery from the Grahams. For this reason, the judgment is reversed, and the case dismissed.

BROWN v. ENNIS.

Opinion delivered March 2, 1901.

HOMESTEAD—EXEMPTION—PURCHASE MONEY.—The fact that a note given for a part of the purchase money of land was used by the vendor to pay a note which the vendor had executed for a horse did not change the consideration for which the land note was given, nor render the land exempt, as the vendee's homestead, from liability for its payment.

Appeal from Scott Circuit Court.

STYLES T. ROWE, Judge.

Leming & Hon, for appellants.

If appellants' claim is for purchase money, it is immaterial whether or not he has a lien, and the land is subject to execution therefor. Const. Ark., art. 9, § 3; 62 Ark. 398. Appellants' claim was for purchase money. 32 Ark. 258; 37 Ill. 438; 62 Ark. 398; 66 Ark. 367; *id.* 442.

G. S. Evans, for appellees.

Appellant had no lien. 25 Ark. 129.

BATTLE, J. Is the land constituting the homestead of W. H. Ennis and Martha Ennis exempt from sale under the execution issued upon the judgment recovered by S. C. Brown against W. H. Ennis?

The constitution of this state ordains: "The homestead of any resident of this state who is married or the head of a family shall not be subject to the lien of any judgment, or decree of any court, or to sale under execution, or other process thereon, *except such as may be rendered for the purchase money,* or for specific liens," etc. Constitution, art. 9, § 3.

In *Acruman* v. *Barnes,* 66 Ark. 442, it was held that "money borrowed for the purpose of buying a home, and so used, is pur-

chase money, within the exception to article 9, § 3, of the constitution of 1874, exempting homesteads; and in case of the destruction of the residence by fire the borrower cannot hold the insurance money due on a policy taken by him for his own benefit exempt from seizure on process of garnishment or execution for the debt due the lender."

In *Farnsworth* v. *Hoover,* 66 Ark. 367, the facts, in part, are as follows: On August 23, 1890, one Daily and wife owned a certain tract of land, and executed a mortgage thereon to secure a note given by them to the Lombard Investment Company for a $500 loan. On November 12, 1892, Daily and wife sold the land to one Donaldson for $1,800, "subject to the $500 mortgage in favor of the Lombard Investment Company." On December 21, 1892, Donaldson executed a mortgage on the property to Hoover & Bro. for $726, subject to the Lombard mortgage. In April, 1893, A. Farnsworth purchased the land from Donaldson for $2,000, paying $800 in cash, and executing his note for $1,200. In the summer of 1894, Donaldson, learning that Farnsworth would be unable to pay his note at maturity, assisted him in negotiating a contract with Hoover & Bro., to which Donaldson and Farnsworth were parties. By this contract Hoover & Bro. undertook to purchase the Lombard mortgage. Donaldson and wife were to execute a warranty deed to Farnsworth, and surrender his note for the $1,200; and Farnsworth was to execute his notes to Hoover & Bro. for the aggregate amount due on the Donaldson and Lombard mortgages. Hoover & Bro. purchased the Lombard mortgage. In December, 1894, Farnsworth executed his notes to Hoover & Bro. for the amount due on the mortgages. Donaldson and wife conveyed the land to Farnsworth, and Farnsworth and wife executed a mortgage to secure Farnsworth's notes. Mrs. Farnsworth did not join her husband in the granting clause of the mortgage, nor did she release her homestead in the body of the mortgage, nor did she acknowledge the execution of the same, and in the acknowledgment release and relinquish her homestead rights in the land. At the time she and her husband executed the mortgage, they resided on the land as their homestead. Afterwards an action was brought by Hoover & Bro. against Farnsworth and wife to foreclose the mortgage, and the defendants pleaded, among other things, that it was void because the wife did not join in the execution of the mortgage; and the question arose, this being true, was not the mortgage nevertheless valid, it being given to secure the purchase money for which the land mortgaged

was sold? In discussing this question, the court said. "The court found that the mortgage from Farnsworth and wife was invalid. Sand. & H. Dig. § 3713, provides: 'No conveyance, mortgage or other instrument affecting the homestead of any married man shall be of any validity, except for taxes, laborers' and mechanics' liens, and the purchase money, unless his wife joins in the execution of such instrument, and acknowledges the same.' The contract between Donaldson, Farnsworth and Hoover & Bro., by which Donaldson and wife were to execute a warranty deed to Farnsworth, and Farnsworth was to execute his notes to Hoover & Bro., as set forth in the statement of facts, however circuitous the method, was tantamount to an advancement by Hoover & Bro. to Farnsworth of the purchase money to the amount of these mortgages. For, according to the agreement, it was only by paying off these mortgages that Farnsworth was to get his warranty deed from Donaldson to the land. The execution of the mortgage from Farnsworth to W. G. Hoover & Bro. to secure the amount of these mortgages, simultaneously with the execution of the deed from Donaldson to Farnsworth, was in reality nothing more nor less, in effect, than a mortgage to secure the purchase money. It was, in legal effect, the same as if Hoover & Bro. had taken the deed to themselves from Donaldson, and then conveyed the land to Farnsworth, and taken a mortgage back to secure the amount of the Donaldson and Lombard mortgages, which represented the purchase price Farnsworth was to pay for the land."

In the case before us W. H. Ennis executed his note, payable to S. C. Brown, for $85 of the $500 which he agreed to pay one Bodiford for the land he (Ennis) purchased from Bodiford. This note was received by Brown in payment of a note which Bodiford had executed to him for a horse. The fact that the note of Ennis was used to pay a note which was given for a horse did not change its consideration. If it did, how were the $85 which Ennis agreed to pay for the land satisfied? The $85 were set apart for the payment of the Bodiford indebtedness to Brown, and were appropriated to that purpose by Ennis executing his note to Brown for that amount. Eighty-five dollars of the purchase money for the land have never been paid. Bodiford caused it to be transferred to Brown to pay his indebtedness, and Brown is seeking to collect it by selling the land under execution. He is entitled to do so. The land, although it is the homestead of Ennis and his wife, is not exempt. *Boone County Bank* v. *Hensley,* 62 Ark. 398.

So much of the decree of the circuit court as directs the clerk to issue a supersedeas is reversed, and the cause is remanded, with instructions to the court to modify its decree in accordance with this opinion.

MARREE v. INGLE.

Opinion delivered March 2, 1901.

SURETY—DISCHARGE.—A surety upon a building contractor's bond is not discharged *in toto* by the fact that the obligee paid off the contractor one day earlier than was stipulated in the contract, but only to the extent that the surety was injured. Thus, where the obligee one day earlier than stipulated settled with the contractor and paid him $222.95, and subsequently was compelled to pay $449.75 to discharge a material man's lien on the building, for which the contractor was liable, he will be entitled to recover on the contractor's bond to the extent that the latter sum exceeds the former. (Page 128.)

Appeal from Sebastian Circuit Court.

STYLES T. ROWE, Judge.

STATEMENT BY THE COURT.

DeWitt Bros., contractors, entered into a contract with appellant by which they agreed to furnish all material, labor, etc., and build a cottage for appellant in Fort Smith, Ark., for the sum of $1,000, to be paid in five installments; the last payment of $333.34 to be paid when the building was completed, and after the expiration of ten days from such completion, and when the drawing and specifications had been returned to D. C. Wurtz, architect. The contract provided that the building was to be completed on or before June 30, 1898, under a penalty of $5 a day after that date until completed. Appellees executed their bond to appellant in the sum of $1,000, conditioned for the faithful performance of said contract by DeWitt Bros. DeWitt Bros. constructed the cottage, and were paid the contract price; the last payment being made on July 9, 1898. Sometime after the completion of the cottage, and after appellant had paid DeWitt Bros. the $1,000, the Van Buren Lumber Company filed a lien on the cottage for lumber and other material furnished

by said company to DeWitt Bros., and used by them in the construction of said cottage, brought suit to foreclose the lien, obtained a decree, and were proceeding to subject the cottage to the satisfaction of the lien amounting with costs to $449.75, when appellant, to save the cottage from sale, executed a stay bond, and suspended the execution of the decree. He thereupon brought this suit against the appellees as sureties on said bond for said sum of $449.47.

One of the defenses set up by appellees was that they were discharged as sureties on said bond because appellant had deviated from the contract in making the last payment to DeWitt Bros. before it was due and payable by the terms of said contract, and that appellees had been discharged by acts of appellant and the contractor in derogation of contract. Another defense set up by the appellees was that appellant as owner of the cottage had paid over money to the contractor before all laborers and mechanics employed on same and all material furnishers had been paid for work done or material furnished in building said cottage as required by section 18 of Mechanics' Lien Law, Acts of 1895, page 225.

Appellant was the only witness. He testified that he made the last payment on July 9, 1898, which was Saturday. That prior to that date he had advertised in the Fort Smith News-Record for all persons who had bills for labor or material against the cottage to present them to him by July 9, 1898. That on Saturday, July 9, 1898, he and DeWitt Bros. had a settlement, and in this settlement appellant assumed the payment of certain small bills that had been presented to him in answer to his advertisement, amounting to the sum of $140.45, and for the balance that they found to be due DeWitt Bros. he gave his check in the sum of $222.95. That at the time they were making this settlement DeWitt Bros. told appellant that they owed the Van Buren Lumber Company for material used in the cottage $90, and that when appellant paid them they would go over and pay that bill. That the said check for $222.95 is dated July 9, 1898, and was given by appellant to DeWitt Bros. on that date in payment of balance due them under the contract. The small bills, aggregating $140.45, that appellant had assumed to pay were paid by him on July 13, 1898. Appellant testified that the cottage was completed on June 30 or July 1, 1898; was not positive which of these days it was, but that it was one or the other. Possession was delivered to him on July 9, 1898.

At the close of appellant's testimony, the court stated that, upon the evidence of plaintiff showing that he had, in less than ten days after the completion of the house, settled with DeWitt Bros, and paid them the full amount of balance due under the contract (less certain outstanding bills which he agreed to pay), defendants were discharged from liability, and gave a peremptory instruction to the jury to return the verdict for defendants.

F. W. Jamison, for appellant.

The making of the last payment before the time specified in the contract did not discharge the surety, the departure being immaterial. 77 N. W. 737; 64 U. S. 578; 65 Ark. 550; 52 Minn. 101; Brandt, Sur. & Guar. 345; 46 N. W. 1021; 36 Minn. 439; 49 Cal. 131. At most, the sureties would be released to only the extent of the premature payment. Brandt, Sur. & Guar. § 373; 12 So. 544; 23 N. E. 1095; 56 Pac. 641. The payment by appellant did not violate the act of April 20, 1895. *Cf.* 73 N. W. 524.

Mechem & Bryant, for appellees.

Settlement and payment of the balance due before the time permitted by the contract discharged the sureties wholly. *Cf.* 56 Pac. 41; 23 N. E. 1092; 77 N. W. 737. See 81 N. W. 882; 31 N. W. 861; 28 S. E. 147; 6 C. B. (N. S.), 550; 2 Keene, 638; 49 Cal. 131; 10 Mo. App. 595; 25 Fed. Cas. 671. *Cf.* also 14 Nev. W. 293; 11 S. W. 608; 65 Tex. 258. The sureties were discharged by appellant paying the creditors money when labor and material put into the house remained unpaid for. See "Mechanics' Lien Law," 1895, § 18; 1 Rob. 212.

HUGHES, J., (after stating the facts). It is settled in this court, as well as elsewhere, that a material or substantial change in a contract releases sureties in a bond given to secure the performance of the contract. *O'Neal* v. *Kelley,* 65 Ark. 550.

In *Benjamin* v. *Hilliard,* 23 How. 165, it is said, in reference to the release of sureties by alteration of a contract, that "there must be another contract substituted for the original contract, or some alteration in a point so material as in effect to make a new contract." Was there an alteration in the contract in the case at bar? The only deviation from it was that the proprietor paid the contractors one day before the last payment should have been made according to the contract. The building had been com-

pleted, and there were $333.34 due to be paid on the contract the day after it was paid to the contractors. Upon settlement the proprietor assumed several bills for materials that had not been paid, amounting to $140.45, thus leaving a balance due of $192.89, which was paid to the contractors while there was outstanding the unpaid bill of $445.75 for materials that had been furnished for the erection of the building for which the material man was entitled to have a lien declared upon the building. It follows therefore that the sureties were injured only to the extent that they were deprived by the premature payment of the $192.89 that should have been paid upon the lumber bill for $449.75. This amount the proprietor should have held as a security or protection *pro tanto* to them against liability upon their bond. The principle is that "when by the act of the creditor the surety has been deprived of the benefit of a fund for the payment of a debt, and the contract by which the surety is bound is not changed, he is only discharged to the extent that he is injured as in such case. It is the fact that he is injured that entitled him to a discharge." *Foster* v. *Gaston,* 23 N. E. 1095; *Cochran* v. *Baker,* 56 Pac. Rep. 641; *Pickard* v. *Shantz,* 12 So. Rep. 544. There was no alteration of the contract in this case. This construction is in accord with reason and justice, and is supported by the decisions.

We are of the opinion that it was optional with the proprietor to pay the contractor while there were claims for material and labor unpaid, and that this did not change the contract. "Nor were the sureties released by the fact that plaintiffs failed to retain money to pay liens that might be filed, although authorized by the contract to do so. One of the purposes of the bond was to relieve plaintiff from looking after such claims."

The court erred in instructing the jury peremptorily to return a verdict for the defendants.

The judgment is reversed, and the cause is remanded for further proceedings not inconsistent herewith.

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

Opinion delivered March 9, 1901.

1. RAILROAD—ACCIDENT AT CROSSING—NEGLIGENCE OF ENGINEER.—In an action against a railroad company for damages caused by defendant company's negligence in blowing a whistle and allowing steam to escape from its engine at a highway crossing, whereby plaintiff's horse was frightened, and plaintiff injured, it was error to instruct that defendant's liability would depend upon whether there were circumstances within the knowledge of defendant's engineer which admonished him of plaintiff's danger, (1) because the instruction ignores the statutory duty of the railroad company to keep a lookout for travellers at highway crossings, and to exercise reasonable care to avoid injuring them; and (2) because the test of negligence is not what the engineer in charge did or knew, but what a reasonably prudent engineer would have known and done under the same circumstances. (Page 132.)

2. SAME—INSTRUCTION.—In case of a traveler injured at a highway crossing, it was error to instruct the jury that defendant's employees "were not bound to take notice of the mere presence of the plaintiff and his horse in close proximity to the railway," as it is the duty of a railroad to exercise reasonable and ordinary care to observe travelers about to cross at a highway crossing. (Page 133.)

3. SAME—ABSTRACT INSTRUCTION.—An instruction that "mere proof that the train employees unnecessarily blowed the whistle or let off steam in close proximity to a team of horses does not necessarily establish negligence," not being predicated upon the facts in evidence, should not have been given. (Page 134)

Appeal from Nevada Circuit Court.

JOEL D. CONWAY, Judge.

L. A. Byrne, for appellant.

Appellee was bound to the exercise of all the measures and means of precaution which the highest prudence could suggest and which was in its power to employ. 101 Mo. 36; 98 Mo. 50; 8 Am. & Eng. R. Cas. 280; 65 Mo. 22; 58 N. Y. 451; 91 Ky. 434; 29 Md. 252; 26 Atl. 937. The fourth instruction for appellee was erroneous as a proposition of law. 2 Th. Neg. 1235-6; Cooley,

Torts, 668, 671; 60 Ark. 409; 8 Am. & Eng. R. Cas. 262; *id.* 280; 11 Am. & Eng. R. Cas. (N. S.), 70; 40 Minn. 544; 73 Ga. 810; 53 Fed. 219. It was error to give it for the further reason that it was abstract. 14 Ark. 530; 31 Ark. 684, 699; 37 Ark. 591; 13 Am. & Eng. R. Cas. (N. S.), 469. The sixth instruction for appellee was also erroneous. 34 Mo. App. 57; 125 Ill. 127; 39 Ill. App. 67; 47 Ill. 298; 88 Ill. 431; 60 Ga. 492; 88 Pa. St. 405.

Dodge & Johnson, for appellee.

To constitute negligence on the part of the engineer, there must have been circumstances within his knowledge, admonishing him that injury will probably result if the act is done. 75 Tex. 19; 32 N. E. 209; 55 Me. 438; 42 Ill. App. 469. There is no error in the fourth instruction. 5 Am. & Eng. R. Cas. (N. S.), 192; 57 N. W. 545; 39 S. W. 415; 78 Pa. St. 219. No negligence was shown. 104 Ind. 526; 85 Wis. 570; 7 Ind. App. 179; 42 Ill. App. 469; 56 S. W. 1; 130 N. Y. 631; 91 Ala. 382; 51 Cal. 605; 55 Me. 208; 114 Mass. 358; 59 Minn. 458.

WOOD, J. This suit was brought by Inabnett to recover damages for personal injuries alleged to have been caused by the negligence of the railway company in blowing the whistle and in allowing steam to escape from the steam cocks of its engine while plaintiff in his buggy upon the highway was approaching the public crossing in the city of Texarkana. It is alleged that the unnecessary blowing of the whistle greatly frightened plaintiff's horse, and that, while he was endeavoring to calm same, plaintiff observed an engineer on the engine nearest to him, and saw that the engineer was apprised of plaintiff's danger, but, without regard to plaintiff's safety, the engineer in a grossly careless manner opened the steam cocks of his engine, and began to move the same, which caused the plaintiff's horse to take greater affright, and caused him to suddenly turn from the highway, and to spring down a deep enbankment, whereby plaintiff, in an attempt to extricate himself from the danger of the situation, was thrown from the buggy, and seriously hurt, etc.

The answer denies all material allegations, and sets up contributory negligence. Without giving the evidence in detail, it is sufficient, for the purpose of this opinion, to state that there was proof on the part of the plaintiff which tended to support the allegations of his complaint. The jury might have found from plaintiff's testimony that the agents of the defendant knew, or could

have known by the exercise of ordinary care and prudence, that the blowing of the whistle, and especially the escaping of steam from the steam cocks of the engine, under the circumstances detailed by the plaintiff, were well calculated to frighten plaintiff's horse, and to endanger plaintiff and cause the injury of which he complains. There was evidence also to justify the verdict. Were the jury properly instructed?

The court gave on behalf of the defendant the following among other instructions: "(3). The jury are instructed that negligence is not to be imputed to the railway company merely from the blowing of a whistle, or causing steam to emit from an engine, even though the same may occasion fright to a horse or horses, unless the same was done under circumstances that made the act an imprudent and improper one upon that occasion, and the jury would have no right to impute negligence to an engineer under such circumstances, unless there were circumstances in his knowledge at the time admonishing him that injury would probably result if the act was done; and in this case, unless the jury find from the testimony that at the time of the accident in question there was something in the circumstances of the plaintiff's presence upon the track, or in the conduct of the horse, as seen by the engineer, which would have admonished him in time to have prevented it, or that giving of signals or permitting the steam to emit from his engine was likely to cause the horse to frighten, then he would not be guilty of negligence, even if you find such facts. (4). The court instructs the jury that mere proof that the train employees unnecessarily blowed the whistle or let off steam in close proximity to a team of horses does not necessarily establish negligence. (8). The court instructs the jury, in determining the question of the negligence of defendant's servants, they should take into consideration all of the facts and circumstances, that defendant's servants and engineers were not bound to take notice of the mere presence of plaintiff and his horse in close proximity to the railway, nor that that fact would raise a presumption that the horse would become frightened at the use of steam, but there must have been something at the time in the conduct and actions of the animal which indicated to the engineer that such results would probably follow before he could be charged with negligence."

The third and eighth ignored the rule which enjoins upon railroads a high degree of care for the protection and safety of travelers upon the highway at and in proximity to public crossings.

in cities. It is their positive duty to keep a lookout for such travelers, and to use every reasonable precaution consistent with the proper operation and management of their trains to avoid injuring them. There might not be any circumstances in the knowledge of the engineer, admonishing him that injury would probably result from the unnecessary blowing of a whistle or escaping of steam. Yet such circumstances might exist, and the engineer's ignorance of them be on account of his wilful or negligent failure to do what the law requires; *i. e.,* to keep a lookout for them, and then to do whatever reasonable prudence would dictate to avoid injury to travelers. *Hilz* v. *Mo. Pac. Ry. Co.,* 101 Mo. 36; *Frick* v. *St. Louis, etc., R. Co.,* 8 Am. & Eng. R. Cas. 280; *Weber* v. *Ry. Co.,* 58 N. Y. 451-62.

Nor does the law gauge the standard of negligence by what the engineer in charge in any particular case did or knew. It is broader and more reasonable than that. Negligence is determined in cases of this kind by what any reasonably prudent and careful engineer would or should have known and done under the circumstances in proof. Both the third and eighth convey the idea that, unless there was something in the circumstances of the plaintiff's presence upon the track, or in the conduct of the horse "as seen by the engineer," which would have admonished him of plaintiff's danger, then he was not negligent in doing acts complained of. This, too, regardless of whether he had exercised that prudence which any reasonably careful man would have exercised to become acquainted with the circumstances. In this respect the instructions were radically wrong, and wholly inconsistent with the instructions which the court had given at the instance of plaintiff, and which correctly stated the law. *Ry. Co.* v. *Lewis,* 60 Ark. 409.

Furthermore, the eighth instruction declares that the employees of the railroad "were not bound to take notice of the mere presence of the plaintiff and his horse in close proximity to the railway." This was well calculated to mislead. The duty of railroads is to exercise reasonable and ordinary care to observe travelers about to cross the railroad upon the highway. Here the travelers have a right to be, and they must be expected to be constantly passing. They are "ever present," so to speak, and the railroad employees must exercise that diligence which the law requires to observe them. "The care and skill, to be reasonable," it is said, "must be proportioned to the danger and multiplied chances of injury." 3 Elliott, Railroads, 1156, and authorities

cited. It is generally for the jury to determine whether such care has been exercised.

The fourth, to say the least of it, was not predicated upon the facts in evidence, and was therefore abstract, and should not have been given. Taken in connection with others, however, it may not have been prejudicial.

For the error in giving the third and eighth instructions for appellee, the judgment is reversed, and the cause is remanded for a new trial.

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ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY *v.* CRABTREE.

Opinion delivered March 9, 1901.

1. INSTRUCTION—SPECIFIC AND GENERAL.—It is error to refuse to give a specific instruction correctly and clearly applying the law to the facts of the case, even though the law is in a general way covered by the charge given, unless it appears that no prejudice resulted from the refusal. (Page 136.)

2. RAILROAD—HIGHWAY CROSSING—DUTY TO LOOK AND LISTEN.—In an action to recover damages caused by the failure of the engineer of a train to give the statutory signals at a highway crossing, there was evidence that defendant was approaching defendant's track and looking for a train expected from the south when a train approached suddenly from the north without warning, and that if plaintiff had looked to the north he would have seen the approaching train. The court instructed the jury that it was plaintiff's duty to "look out and listen for approaching trains," but refused to instruct that it was his duty to "look up and down the track" while approaching the crossing. *Held*, error. (Page 139.)

3. INSTRUCTION—WHEN REFUSAL ERRONEOUS.—A reversal must follow the refusal of a proper instruction, unless it appears that no injury resulted. (Page 139.)

4. RAILROAD SIGNALS AT HIGHWAY CROSSING.—The mere fact that a place on a railroad track eighty rods from a highway crossing is around the point of a hill does not show that a whistle sounded there could not have been heard at the crossing, nor justify a failure to give the statutory signals. (Page 139.)

Appeal from Crawford Circuit Court.

JEPHTHA H. EVANS, Judge.

STATEMENT BY THE COURT.

Plaintiff's team, frightened by a train, ran over him, and broke his arm. He sued for damages.

On the trial the presiding judge refused to give the following instructions asked by defendant: "(8) It is the duty of one approaching a railroad track to look up and down the track as long as he approaches. If the railroad was crooked, or through cuts and timber where the track cannot be seen for a great distance, it is incumbent on him to use the greater degree of caution, and to look as far as he can see; and, if from failure to do so he is injured, he cannot recover. (9) If the plaintiff saw, or by the exercise of reasonable care could have seen, the approaching train in time to have avoided injury to himself by the exercise of reasonable care, and did not do so, then he cannot recover." The court in his charge to the jury told the jury that plaintiff must himself exercise ordinary care. And further said on that point: "Now, then, the law requires, on the part of every party who is about to pass from one side of a railroad to another at a crossing, that he shall look and listen for approaching trains. His failure to do so would be negligence on his part, and if his failure to do so proximately causes injury, or contributes to his injury, he could not recover."

There was a verdict and judgment in favor of plaintiff for the sum of $1,350, and the railroad company appealed.

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

The statutory requirement as to ringing the bell and sounding the whistle eighty rods from the crossing applies only to "grade" crossings, when there is a possibility of collision. Sand. & H. Dig. § 6196; 126 Ill. 416, 425; 114 Mass. 350; 110 Mass. 222; 56 Conn. 444. Ordinary care is all that a railroad company owes to one who is simply near its track. 135 Ill. 491; 32 Ill. App. 339; 47 Ill. App. 384; 10 Lea, 103; 29 Kans. 166. Appellee should have looked in *both* directions before attempting to cross the track. 36 Am. & Eng. R. Cas. 149; 45 *id.* 188; 45 N. W. 821; 27 Mo. App. 202; 24 N. Y. 430; 41 N. Y. 296; 45 N. Y. 660; 58 N. Y. 451; 41 Ia. 227; 38 Fed. 813; 72 Ill. 567; 11 S. W. 127. Appellee was guilty of contributory negligence in failing to look for the train. 54 Ark. 431-4; 56 Ark. 457-9; 61 Fed. 591; 62 Ark. 156; 32 Am. & Eng. R. Cas. 127; 23 *id.* 274; 20 S. W. 57; 95 U. S. 697-702; 114 U. S. 615; 102 Pa. St. 425; 49 Pa. St. 60; 11 Am. &

Eng. R. Cas. (N. S.), 90; 19 Am. & Eng. R. Cas. 376; 10 *id.* (N. S.), 511-515; 11 *id.* 81; 41 Am. & Eng. R. Cas. 574; 35 *id.* 352; 75 N. Y. 273; 106 N. Y. 396; 77 Me. 85; 47 Mich. 401; 74 Wis. 514; 54 Fed. 301; 96 Mich. 327.

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

Section 6196, Sand. & H. Dig. applies to crossings above grade as well as on or below grade. 25 Barb. 199; S. C. 13 N. Y. 78. There being no exception or proviso in the statute as to crossings over trestles, etc., none can be made. 46 Ark. 302; 57 Ark. 614. Independent of any statute, due care required the ringing of the bell. 59 Pa. St. 265; 7 L. R. A. 316; 75 Ill. App. 592; 53 Ark. 201. Signals at crossing must be given, as well to protect persons on the highway from danger from frightened teams as to prevent actual collision. 113 Mass. 366; 28 L. R. A. 824; 17 L. R. A. 254; 113 Mass. 370. Failure to comply with the statute was negligence. 2 Wood, Railways, 1319; Bish. Non-Cont. Law, § 445; 39 S. W. 1112; 33 S. W. 146; 36 S. W. 793; 64 N. Y. 535; 23 Am. & Eng. R. Cas. 282.

RIDDICK, J., (after stating the facts). This is an action for damages alleged to have been caused by the failure of the engineer of a railroad train to give the statutory signals for crossings. The plaintiff, with a yoke of oxen and wagon, was approaching and about to cross defendant's railway at a public crossing when, as he states, the train approached suddenly and without warning, and frightened the oxen, and injured him. The evidence tends to show that plaintiff was on the lookout for trains, but he was expecting a train from the south, which was about due, when the train that caused the injury came from the north. The railway lay directly ahead of plaintiff as he approached, and it crossed the road on which he was traveling at right angles, upon a trestle ten or fifteen feet above the road. There was evidence showing that, had plaintiff looked to the north, he could have seen the train as it came through a cut in a hill some four hundred feet before it reached the trestle, and that from the cut to the trestle the train was in plain view of plaintiff, had he looked in that direction. Plaintiff stated that he was keeping a careful lookout, but did not see the train until the engine was on the trestle. Under this state of facts the presiding judge was asked by the defendant company to instruct the jury that it was the duty of the plaintiff "to look up and down the track" while approaching the crossing. He refused

to give this instruction, but told the jury that the law requires of one about to cross a railroad that he shall "look out and listen for approaching trains." The charge given by the learned judge contains a very clear and accurate statement of the law as far as it goes, though stated in rather general terms, but, as there seems no doubt from the evidence that plaintiff did look and listen for trains, while there is conflict in the evidence as to whether he looked for a train from the north, or kept any lookout in that direction, from which the train causing the injury came, we think instructions numbered eight and nine asked by defendant, and which are set out in the statement of facts, should have been given. It is true that plaintiff says he looked both ways, but, as he did not see the train until it reached the trestle, when, according to the evidence, he might by looking have seen it over four hundred feet before it reached that point, we think the question as to whether he exercised ordinary care in keeping a lookout in that direction should have been directly submitted to the jury. A lawyer would, of course, understand that the charge of the judge was intended to convey the idea that the traveler about to cross a railroad track must look for trains from both directions, and must continue on his guard until the danger is passed, but jurors are not usually learned in the law. They may have concluded in this case that plaintiff discharged the duty to look and listen by looking only in the direction from which he was expecting a train to come, or by looking and listening at only one time. We do not say that they did take this view of the law, but they might have done it under instructions which did not explicitly tell them that it was his duty to look in both directions, and to continue on his guard until the track was passed. When the circuit judge was asked to make the law clear to the jury on this point by telling them that one approaching a railroad track should "look up and down the track as long as he approaches," we think he should have done so. But counsel for plaintiff say that we should presume that the attorney for the company, in presenting the case to the jury, argued that the instruction that one about to cross a railway track "should look and listen for approaching trains" meant that he should look north as well as south. We are willing to indulge in this presumption, for we have no doubt that this argument as to the meaning of the instruction was made by the attorney for the defendant company. In other words, the trial judge having refused to explicitly instruct the jury on this point, the only resource left to the company was to

rely upon a statement of the law made to the jury by its attorney. But jurors are not required to take the law from counsel, and it was putting an undue burden upon the defendant company to compel it to rely upon convincing the jury as to the proper view of the law by an argument of its attorney. If the sympathies of the jury happened to be with the other side, that might be difficult to do, and might be too heavy a task even for the most gifted attorney. It is a burden that the law does not impose, for it is the duty of the judge to instruct, and each party has the right to have the jury instructed, upon the law of the case clearly and pointedly, so as to leave no ground for misapprehension or mistake. It is therefore error for the trial judge to refuse to give a specific instruction correctly and clearly applying the law to the facts of the case, even though the law is in a general way covered by the charge given, unless the court can see that no prejudice resulted from such refusal. *Muldowney* v. *Illinois Cent. R. Co.* 32 Iowa, 181; *Haines* v. *R. Co.* 41 Iowa, 227; *Manuel* v. *Chicago R. Co.*, 56 Iowa, 655; *Parkhill* v. *Brighton,* 61 Iowa, 103; *Gerdine* v. *State,* 64 Miss. 798; 11 Enc. Pl. & Pr. 298, 299.

Nor does the fact that the jury were men of intelligence change the rule. We know that men of high intelligence are often unlearned in the law, and have difficulty in applying it unless it is made plain to them by the judge. But if every member of the jury was as learned in the law as the judge himself, still they would not be judges of the law, and each party would still have the right to demand that the law be so stated to them that there would be no chance for them to evade or get around it. The charge should exclude questions of law, and leave only questions of fact for the jury.

Of course, there are cases when the refusal to give specific instructions may not be error, but it is often necessary to give them in order that there may be no question about the jury understanding the law. Suppose, for instance, a man approaching a railroad crossing in a wagon stops his team some distance away, and listens for trains, and looks carefully up and down the track, and then, having satisfied himself that the way is safe pulls his hat over his eyes to avoid the sunlight, or hoists his umbrella in front of him to keep off the rain, and allows his team to go without looking or listening again. If he is struck and injured by a train at the crossing, which he might have seen had be continued on his guard, it would not be sufficient on a trial for the injury for the judge to say

generally that it is the duty of one about to cross a railroad to look and listen for trains, but he should go farther and explain that this means that the traveler should continue on his guard and continue to use his eyes and ears until the track and danger is passed. If he should refuse to thus instruct when requested, it seems clear that it would in such a case be error, for it would be a refusal to state the law on the point upon which the case turned.

Now, this case turned, not on the question whether the plaintiff looked and listened for trains, for he did look and listen, but on whether he looked for and continued on his guard against trains from the north, or in the direction from which the train causing the injury came, and the trial judge should have explicitly told the jury the consequences of a failure to look for trains from that direction, and his refusal to do so when asked was error. As we cannot say that this error did not result to the injury of the defendant, it follows that, under former decisions of this court, we must assume that it was prejudicial; for the law does not require that it should affirmatively appear that injury resulted from such an error in order to reverse, but, on the contrary, when the question is properly brought up for review, a reversal must follow the refusal of a proper instruction, unless it affirmatively appears that no injury resulted. *Magness* v. *State*, 67 Ark. 594, 604.

On the other questions presented, we agree with the rulings of the trial judge. It may be true that a failure to sound the whistle at a place from which it could not have been heard by plaintiff was a matter of which he had no right to complain, but the mere fact that a place eighty rods from the crossing was around the point of a hill does not show that a whistle sounded there could not have been heard at the crossing, and did not justify the failure to give the signals required by the statute. While the evidence may be sufficient to sustain the verdict, which does not appear to be excessive, yet for the error in refusing instructions above noticed the judgment is reversed, and a new trial granted.

WOOD, J., dissents.

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KLEIN v. GERMAN NATIONAL BANK.

Opinion delivered March 9, 1901.

1. CHANGE OF VENUE—WHO ENTITLED TO.—Under Sand. & H. Dig., §§ 7379, 7382, providing that "any party to a civil action" may obtain an order for a change of venue therein, and directing that, upon a change of venue being ordered in a civil action, the papers in the case "shall be transmitted to the clerk of the court to which the venue is changed," where there were several defendants, and one of them refused to join in an application for a change of venue, the petition was properly denied. (Page 143.)

2. NOTE—ALTERATION—PRESUMPTION.—The fact that a note sued on appears on its face to have been altered raises no presumption against its validity, nor does it cast upon the plaintiff the burden of showing whether the alterations were made before or after its execution. (Page 144.)

3. BURDEN OF PROOF—WHEN NOT SHIFTED.—The introduction in evidence of an altered note sued on, without explanation of apparent alterations, on proof merely of the makers' signatures, though sufficient, in the absence of rebutting evidence, to make out the plaintiff's case, does not shift the burden of proof to the defendant. (Page 144.)

4. APPEAL—INVITED ERROR.—Appellant cannot complain of an error in instructions asked by his opponent if the same error was repeated in instructions asked by himself. (Page 145.)

5. ACCOMMODATION PAPER—DEFENCE.—Where a president of a corporation, in his official capacity, executed a note payable to himself individually, and indorsed the note to a bank, which took it in good faith, the fact that notice of the payee's lack of authority to bind the corporation by his signature appeared on the face of the note, though a good defense to the corporation, does not release accommodation makers who, with notice of such lack of authority, signed the note in order to give it currency. (Page 145.)

6. SAME—DIVERSION OF PROCEEDS.—Parties who, for the accommodation of a corporation, signed a note payable to its president are not released from liability to an indorsee because the payee of the note deposited it with the indorsee as collateral to secure a note executed by the payee to the indorsee, nor because the payee subsequently diverted the proceeds so obtained. (Page 146.)

7. SAME.—Where a note executed for the accommodation of a corporation was made payable to its president, the fact that a bank advancing money on the note placed the amount to the president's credit does not show that the bank was responsible for the president's diversion of the proceeds. (Page 147.)

Appeal from Pulaski Circuit Court.

JOSEPH W. MARTIN, Judge.

STATEMENT BY THE COURT.

The German Bank brought suit on the following note:

"$15,000.00 Little Rock, Ark., May 28, 1895.

Sixty days after date, for value received, we promise to pay to the order of Ed Hogaboom fifteen thousand dollars, at the German National Bank in Little Rock, Ark., with interest at 10 per cent. per annum from maturity until paid. The makers and indorsers of this note hereby severally waive presentment for payment, notice of non-payment, and protest.

THE PARK HOTEL COMPANY,
ED HOGABOOM, President.

Attest:
E. F. KLEIN, Secretary.

[Seal Park Hotel Co.]

ED HOGABOOM,
E. F. KLEIN,
C. C. GREENWAY,
M. A. EISELE."

This note was made on a printed form for a note used by the Citizens' Bank of Little Rock, but it appeared from the face of the note that the printed words "The Citizens' Bank" were stricken out, and the name of Ed. Hogaboom inserted as payee. The printed words "at their office" were also stricken out, and the words "at the German National Bank" substituted, as the place of payment.

The complaint alleged that the note had, for a valuable consideration, been transferred and indorsed before maturity by Hogaboom to the bank.

Hogaboom filed no answer. The hotel denied that it executed the note. The defendants Klein, Greenway and Eisele alleged in their answer that they signed the note as sureties for the accommodation of the Park Hotel Company only, and for the sole purpose of enabling that company to negotiate it and use the proceeds thereof; that Hogaboom wrongfully transferred the note to the bank as collateral security for the payment of his individual note to the bank for the sum of ten thousand dollars, and that of this

the bank had notice. This answer was filed on the 10th of April, 1897. Afterwards on the 24th of March, 1898, they filed an amendment to their answer, setting up that the defendants had, for the accommodation of the Hotel Company, executed the note to the Citizens' Bank payable at the office of said bank, and that afterwards, without their knowledge or consent, the note had been altered, so as to make it payable to Ed Hogaboom at the office of the German Bank. Three of the defendants filed an application for a change of venue, which the court overruled because the Hotel Company, another defendant, refused to join in the application. There was a judgment against Hogaboom for want of an answer. The presiding judge directed a verdict in favor of the Hotel Company, on the ground that it did not authorize the execution of the note or receive the proceeds thereof. The jury found in favor of the plaintiffs against the other defendants for the sum of $8,082.50, and also found specially, in answer to an interrogatory propounded by the court, that the alterations on the note were made before the execution and delivery of the note to Hogaboom.

Judgment was rendered accordingly, and the defendants Klein, Eisele and Greenway appealed.

Greaves & Martin, Wood & Henderson and *Rose, Hemingway & Rose,* for appellants.

It was error to deny the motion for a change of venue. Sand. & H. Dig., § 7379; 32 Fed. 418; 35 *id.* 853; Ind. Code, § 207; 70 Ind. 157; 18 Oh. St. 497; 6 G. & J. 16; 97 Cal. 637; 32 Pac. 711; 49 S. W. 837. It was error to allow the introduction of the note until the alterations were explained. 27 Ark. 101; 1 Greenleaf, Ev. 564; 3 Rand. Comm. Pap. § 1785; 2 Dan. Neg. Inst. 1417. The bank's knowledge of the character of the paper bars recovery by it against the sureties. 31 Ark. 657; 5 Wend. 566; 1 Dan. Neg. Inst. 790; 2 Rand. Comm. Pap. § 476; 10 Wend. 170; 23 Barb. 18; 50 N. Y. 531; 4 Barb. 304; 21 Abb. N. Cas. 151; 29 Wis. 209; 2 Am. Rep. 554; 28 Ala. 606; Byles, Bills, 125; 1 Brandt, Sur. & Guar. § 115; 16 B. Mon. 201; 16 Pick. 574; Jones, Pledges, § 105; Colebrooke, Coll. Sec. § 76; 10 Wend. 316. Appellants are not estopped. 53 Ark. 196; 36 Ark. 97; 15 Ark. 55; 22 Ark. 489; 43 Ark. 21; 51 Ark. 61.

Ratcliffe & Fletcher, for appellee.

The motion for change of venue was properly overruled. 1 Stew. 218; 6 Wend. 508; 19 Wend. 700; 1 How. Pr. 156; 2 How.

Pr. 77; 32 Wis. 63; 40 Wis. 28; 48 Wis. 198; 54 N. W. 330; 14 Bush, 616; 120 Ind. 422; 30 S. W. 558; 62 Cal. 311; 18 Oh. St. 497; 63 Ark. 538; 1 Fed. 367. The time and circumstances of the alteration are merely facts to be considered and passed on by the jury, and can have no effect on the burden of proof. 1 Gr. Ev. § 564; 11 Conn. 531; 7 Barb. 565; 6 Ired. 161; 4 Sneed, 56. The presumption is that the changes in the printed form were made to suit the makers of the note. 2 Dan. Neg. Inst. § 1419; 32 Cal. 83, 89; 35 Ia. 507. If it had been shown that the erasures were made after the note was signed *without the consent* of the makers, then the burden would have devolved upon the appellee to explain, but not before. 75 Fed. 925; 2 Dan. Neg. Inst. § 1421; 35 Ark. 146, 154. The question was a proper one for the jury. 63 Mo. 61; 10 Mo. 349-350; 48 Ind. 460; 2 R. I. 345; 114 N. Y. 135. Appellants are estopped to deny their liability. 39 Ark. 47; 9 Mass. 1; 40 N. Y. 456; 6 Leigh, 230; 2 Dan. Neg. Inst. § 1113; 12 L. R. A. 434; *s. c.* 26 Pac. 299; 14 Cent. L. J. 414. The lack of authority of a corporation to execute a note is no defense for a surety. 62 Ark. 388. The knowledge of the bank as to the character of the undertaking of the accommodation makers is no defense. 29 N. J. Law, 521; 42 *id.* 177; 40 Md. 561-2; 34 Ind. 251; 17 Johns. 176; 4 Cowen, 567; 5 Wend. 66; 37 Vt. 534; 33 Vt. 633; 2 Paige, 509; 1 Hill, 513; 23 Hun, 372; 59 How. Pr. 118; 2 Sandf. 115; 35 Vt. 281; 137 Mass. 303; 14 B. Mon. 351; 53 Ind. 438; 1 Duv. 13; 16 Ga. 651; 1 Dan. Neg. Inst. § 793; 69 Fed. 532; 65 Ark. 207.

RIDDICK, J., (after stating the facts). This is an action on a promissory note by the German Bank of Little Rock against the Park Hotel Company of Hot Springs and certain other parties residing there, who had joined in executing the note, and several questions are presented by the appeal.

On the question as to whether three of the defendants had the right to take a change of venue over the objection of another defendant who refused to join in such application, we are of the opinion that they did not have such right. Our statute (Sand. & H. Dig. §7382) directs that, upon a change of venue being ordered in a civil action, the papers in the case "shall be transmitted to the clerk of the court to which the venue is changed," thus showing that it was not intended that one defendant to a civil action should have the right to sever his case from the others, and take a change of venue, without removing the case as to all the defendants. There

is no reason why the wishes of one defendant as to a change of venue should be given preference over others, and when defendants properly joined in an action against them differ as to the expediency of a change of venue, and some of them refuse to join in the application, it is not error for the court to overrule the application. The words in the statute "any party to a civil action" may obtain a change of venue (Sand. & H. Dig. § 7379) do not mean that any individual defendant may obtain such order; but these words refer to the defendants as a class, and include all on that side. To be entitled to the change of venue, they must all join in or favor the application, with the exception, perhaps, of mere nominal or formal defendants having no real interest in that side. *Wolcott* v. *Wolcott,* 32 Wis. 63; *Levy* v. *Martin,* 48 *ib.* 198; *Whitaker* v. *Reynolds,* 14 *Bush (Ky.),* 616; *Peters* v. *Banta,* 120 Ind. 422.

The next contention is that the court erred in permitting the note to be read in evidence without first requiring the alterations apparent on its face to be explained. It is said that this threw the burden of proof upon the defendants. But we do not concur in this contention. The burden of proof is on the plaintiff to make out his case, and to do this he must, of course, show that the defendants executed the note sued on; but, when he shows that the signatures to the instrument are those of the defendants, he has the right to introduce the instrument in evidence, and, if there be no further evidence, he has made out a case sufficient to go to the jury. "The view best supported by reason, and the one to which the authorities seem tending, is that the mere fact of an interlineation or erasure appearing in an instrument does not *per se* raise any presumption either for or against the validity of the writing; and the question when, by whom, and with what intent an alteration was made is one of fact, to be submitted to the jury upon the whole evidence." 2 Am. & Eng. Enc. Law (2d. Ed.), 274; *Gist* v. *Gans,* 30 Ark. 285; *Simpson* v. *Davis,* 119 Mass. 269; *Wilson* v. *Hayes,* 40 Minn. 531, 12 Am. St. Rep. 754; *Willett* v. *Shepard,* 34 Mich. 106; *Stayner* v. *Joyce,* 120 Ind. 99.

This is in substance the rule already declared by this court. *Gist* v. *Gans, supra.*

The introduction of the note, and proof of the signatures thereto, did not shift the burden of proof, or put it upon the defendants, though, in the absence of rebutting evidence, this might have been sufficient to make out plaintiff's case. But in some of the instructions given at the request of plaintiff it seems to be assumed that

the burden was on the defendants to show that the alterations were made after the execution of the note, yet the same thing can be said of those given on the request of the defendants. The presiding judge did not tell the jury, and was not asked to tell them, directly upon whom the burden of proof rested, but stated that it was for them to determine from all the evidence, including the appearance of the note, whether or not the same was altered after its execution by defendants." It is not contended that the judge committed any error in giving instructions on this point, but if he did it was error invited by the defendants as well as the plaintiff, and of which they have no right to complain. *Standard Life Co.* v. *Schmaltz,* 66 Ark. 588; Elliott, Appellate Pro. § 626.

It is next said that Hogaboom had no authority to execute the note for the Hotel Company, and that, as it was made payable to his own order, this was notice to every one of his want of authority. Quoting the language of Lord Denman, counsel say the note "bears its death wound on its face." It must be conceded that, as Hogaboom had no authority to execute notes for the Hotel Company, the bank was not in the position of an innocent purchaser. But the evidence, we think, clearly shows that it acted in good faith, and took the note relying on the statements of Hogaboom that he did have authority, and trusting also to the signatures of the other defendants to the note, two of whom were officers in the Hotel Company; one being secretary, and the other director. The Hotel Company, it is true, was not bound by the statements of Hogaboom, nor by the fact that the other defendants had signed the note; and the circuit judge therefore properly directed a verdict in its favor, but this did not release the sureties. There was nothing in the character of this contract forbidden by law. The Hotel Company could have executed such a note, had it chosen to do so, and the mere fact that the party assuming to act for it had no authority does not release the sureties. These sureties had the same notice of the want of authority on the part of Hogaboom that the banks had. Indeed, their opportunities for knowing the extent of Hogaboom's authority were much superior to those of the bank. As before stated, one was secretary, another a director, of the Hotel Company, and all of them lived in the city where the company and its hotel were located. When they executed the note to Hogaboom, and made it payable in Little Rock, the purpose was to enable him to obtain money on it, and they must have known that any

party to lending money on it had the right, as against them, to rely upon their signatures, and believe that the note was valid. The very object they had in view in signing the note was to give it currency, and, when that purpose has been carried out, and the money obtained, they cannot escape liability by showing that what they in effect represented to be true was not true. Defendants say that they relied upon the statements of Hogaboom that he had authority to execute the note for the Hotel Company. If so, they can look to Hogaboom. But the bank relied not only on the statements of Hogaboom, but upon the signatures defendants placed on the note expressly to give it value, and it has the right to hold not only Hogaboom but defendants liable for money loaned on their faith and credit. *Maledon* v. *Leflore*, 62 Ark. 388; 2 Daniel, Neg. Inst. § 1306 *a*; 2 Randolph, Com. Paper, § 915.

Again, it is said that the bank knew that the note was executed for the accommodation of the Hotel Company, and yet permitted Hogaboom to divert it from its proper purpose. But, though the bank knew that the money was wanted for the Hotel Company, the money was payable to Hogaboom individually. The note on its face shows that the intention of the makers was that the money should be paid to him. While the bank refused to loan the full amount of the note, it offered to loan ten thousand dollars for the benefit of the Hotel Company. Hogaboom, assuming to act for the company, accepted the offer, gave his own note for the amount, and transferred the note sued on as collateral security to the bank. As this note was made payable to Hogaboom, and delivered to him to negotiate and raise money upon, we are of the opinion it was immaterial whether he obtained the money by a sale of the note or a deposit of the same as collateral. In either case there was no diversion of the note, for he obtained the money for the benefit of the Hotel Company, and accomplished the purpose for which the note was executed. The bank had no notice of his intention to divert the funds to a wrongful purpose, and was not responsible for such misappropriation. The defendants, having trusted Hogaboom with a note payable to his own order, upon which to raise money, must, as we said in a recent case, be held to have trusted him to make a proper application of the proceeds. *Evans* v. *Speer Hardware Co.*, 65 Ark. 213; *Duncan* v. *Gilbert*, 29 N. J. Law, 521; *Jackson* v. *First National Bank*, 42 N. J. Law, 177; *Maitland* v. *Citizens' Bank*, 40 Md. 561; *Proctor* v. *Whitcomb*, 137 Mass. 303.

Nor is it a matter of any moment that, instead of paying Hogaboom money in hand, the bank, at his request, gave him credit for it on the books of the bank. This was, in effect, the same thing as a payment. He at that time owed the bank nothing. It was understood that the money was to be used at once, and it was drawn out, nine thousand of it on the same day, and the remainder two days afterwards.

There are other points raised, but we deem it unnecessary to discuss them. The evidence as to the alteration of the note was conflicting, but it was sufficient to sustain the finding of the jury. The conduct of the defendants themselves seems rather inconsistent with their own contention on this point. Although they say that this note was executed to the Citizens' Bank, yet, when it was presented for payment by the German Bank, they expressed no surprise, and gave no intimation to the bank that it had been altered.

It was about a year and a half afterwards, and a year after suit had been brought, and nearly a year after the filing of their original answer, before by an amendment thereto the defendants first notified plaintiff of their contention that the note had been altered. For this reason, it is not strange that the jury felt disinclined to credit their statements on that point. While it seems to us that the preponderance of evidence on this question of alteration was in favor of the defendant, still we are clearly of the opinion that, under the circumstances in proof, it was a question for the jury, and their finding must stand.

This case has been well argued by able counsel, but the sum of it is that these defendants were induced by the president of a Hotel Company to become sureties on a note which he claimed to have power to execute for the company. The company, when sued on the note, successfully disputed his authority, and he proved to be insolvent, and they are now bound for the payment of the note. It may be a hardship, but, as between them and the bank, from whom the money was obtained on their note, it seems to us that the bank has the best of the argument. On the whole case, we think that the judgment was right, and it is therefore affirmed.

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BELL v. STATE.

Opinion delivered March 16, 1901.

HOMICIDE—EVIDENCE—THREATS.—Where there was no eye witness to a homicide, and defendant's testimony tended to show that he acted on the defensive, it is competent to prove previous threats made by deceased against defendant's life, as tending to prove who was the probable aggressor.

Appeal from Desha Circuit Court.

ANTONIO B. GRACE, Judge.

X. O. Pindall and *Roy D. Campbell,* for appellant.

The third instruction asked by appellant should have been given. 16 Ark. 568. It was error to refuse the seventh instruction asked by appellant. Uncommunicated threats are admissible as tending to show who was the aggressor, when self-defense is set up. 55 Ark. 593, 604; Whart. Cr. Ev. § 775; 93 U. S. 465; 34 Ark. 473; 47 Ark. 187; 29 Ark. 249; 9 Am. & Eng. Enc. Law, 675; 34 Ark. 720; 49 Ala. 370; 9 Ind. 322; 53 Ia. 310; 24 Ia. 570; 63 N. Car. 1. When an assault is so fierce as to make it apparently as dangerous for the person assaulted to retreat as to stand, he may stand and defend himself. 49 Ark. 543; 29 Oh. St. 187. The court erred in excluding evidence of previous attempts and threats by deceased. 43 Ark. 100; 1 Gr. Ev. §§ 108, 111; Whart. Cr. Ev. §§ 262-270; 1 Bish. Cr. Proc. 1083-1087; 20 Ark. 216; 22 Ark. 354; 29 Ark. 248; 29 Ark. 232; 55 Ark. 593, 604. It was error to refuse to allow defendant to prove his good character. 28 Ark. 155; 34 Ark. 720; 11 Oh. St. 114; 3 Gr. Ev. § 25; 1 Bish. Cr. Proc. 1962-3; Underhill, Cr. Ev. § 327; Whart. Cr. Ev. § 60; 132 Ind. 317.

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

The court properly excluded the evidence as to character, threats and previous attempts. 43 Ark. 99; 29 Ark. 261; 1 McClain, Cr. Law, § 307. Some overt act of the deceased must be proved before evidence of communicated threats can be introduced. 21 Fla. 738; 38 La. Ann. 20. The same rule applies to evidence

of the character of deceased. 100 Ala. 4; 84 Ala. 1; 45 La. Ann. 1326, 842. The good character of defendant is admissible only when the fact of the killing or the criminal intent are in doubt. 31 Tex. App. 573; 102 Ind. 502; 61 Ia. 580; 102 Ind. 317; 31 N. E. 536; 51 Ill. 231.

BUNN, C. J. This is an indictment for murder in the first degree, upon which the defendant was tried and convicted in the Watson district of the Desha circuit court, at its August term, 1900, and verdict pronounced accordingly, and defendant appeals.

The motion for new trial, which was overruled by the court, contains eleven assignments of error, but it is only necessary to consider such as pertain to the exclusion of threats against the defendant on the part of the deceased, and her conduct of deadly violence against him on one or more occasions a little time before the killing. The defendant and the deceased—husband and wife—had not been living together in harmony for sometime, and at the time of the killing the deceased had left the defendant, and was living with her mother. On the morning of that day the defendant, as he states in his testimony, went to the mother-in-law's house, to have a talk with the deceased about their domestic affairs and for the purpose of reconciliation. When he reached the house, the deceased, the mother and one Ben Davis were present. The latter two soon after left, leaving the deceased and the defendant alone, except for the presence of their nine-months' old baby. When thus alone the rencounter between the two took place, resulting in the death of the wife at the hands of the husband. The defendant, in his testimony, says that without warning the deceased went out of the house, procured an ax, and returned through the only open door in the house, and began the assault on him with the ax, and that, having no way of escape, what he did was purely to save his own life. He was the only living witness to the killing, and the question is, who was the aggressor? The defendant offered to prove previous threats by the deceased against his life and instances of deadly assaults by her upon him; but this testimony the court excluded, and he excepted.

In *Palmore* v. *State,* 29 Ark. 248, this court said: "Threats, as well as the character of the deceased [evidence of which last also was excluded in this case], are admissible when they tend to explain or palliate the conduct of the accused. They are circumstantial facts which are a part of the *res gestae* whenever they are suf-

ficiently connected with the acts and conduct of the parties as to cast light on that darkest of all subjects, the motives of the human heart." The same rule is approved in *People* v. *Arnold,* 15 Cal. 476 (see *Holler* v. *State,* 37 Ind. 57; *King* v. *State,* 55 Ark. 604; *Brown* v. *State,* 55 Ark. 593), and in *People* v. *Alivire,* 55 Cal. 263, the rule is maintained, even when the threats have not been communicated to the defendant before the killing. The rule appears to be that, to determine in such case who was the probable aggressor, any testimony, otherwise unobjectionable, is admissible; otherwise, it would be impossible to solve the question where, as in this case, no other testimony could be had.

This is all that is necessary to consider now. The judgment is reversed, and the cause remanded for new trial.

BATTLE, J., not participating.

KANSAS CITY, PITTSBURG & GULF RAILROAD COMPANY *v.* BARNETT.

Opinion delivered March 16, 1901.

1. CARRIER—LIABILITY FOR ESCAPE OF LIVE STOCK—DELIVERY.—In an action against a carrier for the escape of cattle from its stock pen, in which they had been placed for shipment, where it was a question whether defendant had accepted the cattle for shipment or not, it was error to charge the jury that defendant's liability as carrier began when the cattle were put into its pen for shipment. (Page 156.)

2. DELAY IN SHIPMENT—DAMAGES.—An instruction that where cattle were delivered to a carrier for transportation, and they were not delivered to their destination within a reasonable time, the damage recoverable, if they have fallen in market value, is the difference between their value when they should have been delivered and their value when they were in fact delivered, is erroneous where, by a previous instruction, the court had misdirected the jury as to the time when the liability of the carrier began. (Page 158.)

3. CARRIER—ESCAPE OF LIVE STOCK—DAMAGES.—In an action against a carrier for permitting the escape of cattle from its stock pen, an instruction that if the jury found for plaintiff they should allow the necessary expense incurred in gathering said stock and in

holding them preparatory to reshipment, with compensation for money expended in their collection, is erroneous in so far as it might have led the jury to allow anything on account of plaintiff's expenses incurred in going to a distant city to negotiate with defendant's agent about recovery of the stock or for expenses in holding the cattle longer than was reasonably necessary, after recovery, before shipment. (Page 159.)

Appeal from Little River Circuit Court.

WILL P. FEAZEL, Judge.

Read & McDonough, for appellant.

The mere delivery of cattle into the stock pens of a railroad company does not fix upon it the liability of a common carrier. 1 S. W. 446; S. C. 27 Am. & Eng. R. Cas. 49; 42 Ark. 200; 60 Ark. 338; 26 S. W. 312. To hold the company for loss or injury of goods tendered for carriage, in addition to a delivery to the shipper, there must be shown an actual or implied *acceptance* for immediate shipment. Hutch. Carr. § 82; 5 Am. & Eng. Enc. Law (2d Ed.), 181. As to distinction between mere *receiving* and *acceptance,* see: Hutch. Carr. § 82; Tied. Sales, § 114. As to difference between railroad company's liability as a common carrier and as a warehouseman, see: 59 Ark. 317; 46 Ark. 222; 60 Ark. 375; 42 Ark. 200. Appellee's recovery is barred by his own failure to comply with his contract by loading the cattle. 56 Ark. 429; 50 Ark. 397; 46 Ark. 243. The court erred in its instruction as to the measure of damages. Appellee should have done all in his power to lessen the damages. Hutch. Carr. § 773. It was error to refuse the first instruction asked by appellant. Hutch. Carr. § 94; 56 Ark. 288; 42 Ark. 200; Hutch. Carr. § 82.

Oscar D. Scott and *F. H. Taylor,* for appellee.

BATTLE, J. R. L. Barnett brought this action against the Kansas City, Pittsburg & Gulf Railroad Company to recover damages on account of the loss and escape of, and injuries to, cattle delivered to and received by the defendant for transporation over its line of railroad. Plaintiff states his cause of action as follows: "On the 29th day of March, 1898, the plaintiff was the owner of 104 head of cattle, which he had gathered at Wilton, in Little River county, in the state of Arkansas, on the defendant's line of railway, for the purpose of shipping them to Bonham, Texas, to be delivered and placed on the market at said last-mentioned place by the

30th day of March, 1898. That said Wilton was then and is now a station kept up and maintained by the defendant on its said line of railroad, where it receives cattle and freight generally for shipment, and that on said first-mentioned date the plaintiff applied to defendant at said station for cars and transportation over its said road for the purpose of shipping his cattle over the defendant's road to Texarkana, Texas, and from there to Bonham, Texas, over another road; and said defendant company, through its authorized agent, contracted and agreed with plaintiff to receive and ship his cattle as desired by him, and directed the plaintiff to deliver said cattle in its stock pen at said station, which stock pen it had erected, and did then maintain, for the purpose of receiving cattle and other stock for shipment. That plaintiff then and there delivered all of said cattle in said pen to the defendant, and that defendant did then and there receive said cattle for the purpose of transporting the same for him to Texarkana, and on to Bonham, Texas. That said defendant company had carelessly and negligently permitted said pens to become out of repair, and that the fence around the same was weak and partly rotten, and said company had negligently and carelessly failed to keep the same in repair and strong, and in good condition suitable for holding stock while in said pen, of all of which said company had full knowledge. That after said defendant company had received from the plaintiff all of his said cattle, and while it had them in said pen and in its possession for shipment, it carelessly and negligently permitted all of said cattle to escape from said pen, and from its possession, by reason of the unfitness of said pen to hold cattle, and by reason of its negligence in leaving the gates of said pen unfastened; and, by reason of said carelessness and negligence on the part of the defendant, said cattle scattered out over the country, off and away from said station and beyond the reach and control of the plaintiff; and that the defendant negligently, carelessly and wilfully failed and refused to regather said cattle, or any part of them. That, by reason of the escape of said cattle, plaintiff was compelled to pay out the sum of two hundred and thirty dollars ($230) to have them regathered and fed during the time they were being regathered and delivered at Wilton station for the purpose of shipping the same. That plaintiff was and has been unable to find and regather five (5) head of said cattle that escaped from said stock pen, and the escape of the said five (5) head of cattle was a total loss to the plaintiff; and that they were

worth upon the market at said station of Wilton the sum of $67, three head being grown cows and being worth fifteen dollars ($15) per head, and two (2) head, being yearlings, worth eleven dollars ($11); that he recovered ninety-nine (99) head of said cattle that escaped from said stock pen, and that while they were out they became gaunt and fell off in flesh, by reason of not having any feed, and being scattered out in a country where there was not sufficient range at that time to keep them up; and said cattle were bruised and otherwise injured by reason of said escape; and that when recovered they were in such bad condition generally as to considerably decrease their value upon the market from what it was before the escape, which amounted to $2.50 per head less in value than what they were just before said escape, aggregating a damage to said cattle of $247.50. That, by reason of the escape of said cattle as aforesaid, the plaintiff was delayed sixteen days in delivering said cattle at Bonham, Texas, and that during that time the market price on cattle decreased, and by reason thereof plaintiff received $4 per head for said cattle less than he would have received for them had they not been permitted to escape from defendant's pen at Wilton, Arkansas, and had they been shipped at the time and on the terms agreed upon by the defendant and delivered at Bonham, Texas, in as good condition as they were when they were delivered to the defendant for shipment; which item of damage to plaintiff, by reason of the decrease in value of said cattle upon the market, aggregating the sum of two hundred and thirty-two dollars ($232). That when said cattle escaped the plaintiff, R. L. Barnett, devoted sixteen days of his time in looking after the recovery of said cattle, and lost said time from his other business, which said time was reasonably worth the sum of eighty dollars ($80), and that he paid out his railroad fare and necessary expense in looking after the recovery of said cattle after their escape the sum of twenty dollars ($20), by reason of which he was damaged in the aggregate sum of one hundred dollars ($100)."

The defendant answered, and denied the allegations in the complaint. The issues thus found were tried by a jury, and a verdict was rendered in favor of the plaintiff for the sum of $845 and six per cent. interest thereon from the first day of April, 1898; and judgment was rendered upon this verdict for $844.40; and the defendant appealed.

R. L. Barnett, the plaintiff, testified, substantially, as follows: On the 29th of March, 1898, at Little River county, in this state, he purchased from Gus Palmer 104 head of cattle, consisting of cows, yearlings, and one bull. The stock were delivered on the day of the purchase, between 2 and 4 o'clock in the evening, at Wilton, a station on defendant's railroad, in this state, in the pens of the defendant, which were made in the manner pens for loading and unloading cattle on and off trains are ordinarily constructed. As soon as the cattle were delivered in the pen, he saw the agent of the railroad about their shipment, and told him that he had put 104 head of cattle in the pens to be shipped to Bonham, Texas, and asked him about what time the railroad company would pull the cattle out, and the agent replied that he did not know. There was no agreement between the plaintiff and the agent about loading the cattle. The agent said he would do so. (It is usual and the rule for railroad companies to put cattle on their trains.) About sundown the plaintiff put twelve of the cattle on the cars provided by the defendant for that purpose. He delayed putting the remainder in the cars "because putting them into the cars jammed them around and would damage them." He applied to the agent the second time to know when the cattle would be hauled away, and he said he thought it would be about 10 o'clock that night, and later in the night said it would be sometime. Finally the agent advised the plaintiff to go to bed and promised, if he would do so, to wake him up when the train came and the cattle were put on the cars. About 12 o'clock in the night the agent came and woke him up, and told him that his cattle were out and gone. The next morning plaintiff found all the cattle, except those in the cars and the bull, were gone. They had made their escape by breaking the fence of the pen near the gate. After this he went to Texarkana, and saw Mr. Snooks, an agent of the railroad company, and the company refused to collect the cattle for him. He then employed Goolsby, Goldsmith and Gardner, who knew the cattle, to do so, and they found and collected 99 head. While they were doing so, he carried on negotiations with Mr. Snooks, which continued three or four days. He then returned to Wilton. He spent $20 in railroad fare and other traveling expenses on account of the temporary loss of the cattle. All the cattle, except two, were finally recovered, and returned to Wilton on the 14th of April, 1898, and were on that day shipped to Bonham, Texas; plaintiff having paid the expense of putting them on

the cars, because there were no pens at Wilton to hold them. When the cattle were recovered, they were in bad condition on account of the loss of flesh. They were worth at Bonham, Texas, on the 29th of March, 1898, $14 and $18.50. The freight on two cars of cattle from Wilton to Bonham was $63.40. Plaintiff held the cattle until July, 1898, when he sold them for $9 and $10. They were worth that in Bonham on the 14th of April, 1898. The two which were lost were worth $14, less the freight. Plaintiff paid for the finding and collecting and return to Wilton of those which were recovered $230.

Goolsby testified that the pens of the railroad at Wilton were "ordinary pens for penning and loading cattle into railroad cars;" that the plaintiff agreed to pay "$2 a head for getting up the cattle;" that they were worth $1.50 or $1.75 less per head on the 14th of April, 1898, than they were on the 29th of March preceding.

S. T. Gordon testified: "The cattle pens of the railroad at Wilton were in bad condition on the 29th of March, 1898. The main posts were rotten, and the planks were nailed on from the outside."

Gardner testified: "We gathered ninety-nine head, including the twelve that remained on the cars. I cannot tell how many cattle we found on each day. We kept the cattle three or four days before we delivered them on the cars."

Goldsmith testified: "We fed the cattle nine or ten days." "On the fifth day after these cattle got out, we had up over two-thirds of them."

Harry Dunkerton testified: There was no contract made between him, as agent of the Kansas City, Pittsburg & Gulf Railroad Company, and the plaintiff. He wanted two cars. Witness had them placed convenient for him to load with cattle. He said he wanted to ship his cattle somewhere in Texas. Plaintiff was to load the cars. The defendant refused to execute a bill of lading for the cattle before they were put on the cars, and to receive them in the pens.

Upon this testimony, at the request of the plaintiff, over the objection of the defendant, the court instructed the jury as follows:

1. "The court instructs the jury that if they believe from the evidence in this case that the defendant, Kansas City, Pittsburg & Gulf Railroad Company, is a railroad corporation and a common carrier for hire, and that said defendant received into its

stock pen at Wilton the cattle mentioned in plaintiff's complaint, of the plaintiff, for the purpose of shipping the same over its line of road to Texarkana or to any other point, the liability of the defendant for the safe keeping of and damages to said cattle began when said cattle were put into its said stock pen at Wilton for shipment, and received by the defendant, provided the defendant or its agent knew that said cattle were put therein for the purpose of shipping same over its line of railroad, and to render defendant liable it is not necessary that a bill of lading for said cattle should have been signed by defendant.

2. "The jury are instructed that where cattle have been delivered to a common carrier for transportation, and they are not delivered to their destination within a reasonable time, the damages recoverable on account of the delay, if the cattle of the particular kind shipped have fallen in market value during the delay, is the difference between the value of the cattle at the time and place they should have been delivered and their value when they were in fact delivered, with six per cent. interest, after deducting the cost of transportation; the value at the time when they were in fact delivered being computed at the place of destination. So, in this case, if you find from the preponderance of evidence that plaintiff delivered to defendant the cattle named in the complaint, to be by defendant transported from Wilton to Bonham, Texas, and that said cattle were not delivered at their destination in a reasonable time after such delivery, and that cattle of the particular kind shipped had fallen in market value during the delay, and your verdict is for plaintiff, the measure of damages on account of such delay is the difference between the market value of the cattle so delivered to defendant at Bonham, Texas, at the time they should have been delivered and their value at Bonham, Texas, when they were in fact delivered, with interest from date of the delivery at the rate of six per cent. per annum.

3. "If you find for the plaintiff, in estimating his damages you may include in your verdict the necessary expense incurred by the plaintiff, if any be proved, in gathering said stock and in holding them preparatory to reshipment, including a reasonable compensation to plaintiff for time lost and money expended by him, if any be proved, in and about the collection and shipment of said cattle, which was necessary."

Are these instructions correct? In the absence of a contract limiting the liability of a common carrier, he is liable for all losses

except those caused by the act of God, by the public enemy, by the inherent defect, quality or vice of the thing carried, by the seizure of goods or chattels in his hands under legal process, or by some act or omission of the owner of the goods. When he undertakes to carry live stock, he is liable as an insurer to the same extent as when engaged in the transportation of general merchandise, except as to injuries caused by the animals themselves, and to each other—losses that are caused by their inherent vices and propensities. He cannot, however, be considered as having assumed this liability until the goods or live stock have been delivered to and accepted by him for immediate transportation in the usual course of business. *Little Rock & Fort Smith Railway Company* v. *Hunter,* 42 Ark. 203.

In *Railway Company* v. *Murphy,* 60 Ark. 338, it is said: "When the shipper surrenders the entire custody of his goods to the carrier for immediate transportation, and the carrier so accepts them, *eo instanti* the liability of the common carrier commences. When this occurs, the delivery is complete, and it matters not how long, or for what cause, the carrier may delay putting the goods *in transitu*; if a loss is sustained, not occasioned by the act of God or the public enemy, the carrier is responsible. But, on the contrary, as there is no divided duty of safe keeping, and no apportionment, in the event of loss, between the owner and the carrier, the surrender of control over the goods by the shipper must be such as to give the carrier the unqualified right to put at once *in itinere,* and the carrier must have received them for that purpose. So that, when goods are delivered to the carrier that are not yet ready for shipment, awaiting further orders from the owner, or the happening of some contingency or compliance with some condition before they are ready to be moved, the liability of the carrier in the meanwhile can be no greater than that of an ordinary depositary or bailee."

In the first instruction given by the court at the instance of the plaintiff the court ignored the question of fact presented by the evidence. One witness testified that the cattle were not delivered to or received by the defendant for immediate transportation; that the plaintiff was to load the cars with the cattle; and that the defendant refused to receive the cattle for shipment until they were on the cars. The court, nevertheless, told the jury, "the liability of the defendant for the safe keeping of and damages to said cattle began when said cattle were put into its said stock

pen at Wilton for shipment, and received by the defendant, provided the defendant, or its agent, knew that said cattle were put therein for the purpose of shipping same over its line of railroad." In instructing as to the tests of the liability of the defendant as a common carrier, and what would be sufficient to render it liable as such, it withheld from the consideration of the jury the evidence to the effect that, although the cattle were received in the pens for the purpose of shipment, the plaintiff was to put them on the cars, and that until that was done the defendant refused to undertake to ship them. The instruction was calculated to convey the idea, and may have done so, that the defendant became liable to the plaintiff as a common carrier when it ascertained that the cattle were put in the pens for the purpose of shipment, regardless of the evidence that it refused to accept the cattle for shipment until the plaintiff loaded the cars with them according to agreement. The instruction is clearly erroneous, and should not have been given.

The second instruction given to the jury at the instance of the plaintiff is based upon the first, and to be understood must be read and construed in connection with it. After telling the jury when the liability of the defendant as a common carrier for the safe keeping of, and damages to, the cattle began, it told them that if they found from the preponderance of the evidence that plaintiff delivered to defendant the cattle named in the complaint, to be by defendant transported from Wilton to Bonham, Texas, and that said cattle were not delivered at their destination in a reasonable time after such delivery, and that cattle of the particular kind shipped had fallen in market value during the delay, and your verdict is for plaintiff, the measure of damages on account of such delay is the difference between the market value of the cattle so delivered to defendant at Bonham, Texas, at the time they should have been delivered, and their value at Bonham, Texas, when they were in fact delivered, with interest from date of the delivery at the rate of six per cent. per annum. This reasonably meant that, if the cattle were delivered and received in a way to render the defendant liable according to the first instruction, the defendant was liable for their depreciation in value if they were not delivered in a reasonable time after such delivery. Under the first instruction the jury might have found, and probably did, that the duty to ship arose on the 29th of March, 1898, when the cattle were first placed in the pens; and under the second in-

struction were authorized to find that the defendant was liable for the depreciation in value because the cattle were not delivered at their destination within a reasonable time after that date, when, under a correct instruction, they could and might have found, under the evidence, that the cattle were not delivered and received for transportation until the 14th of April, 1898, and were delivered at their place of destination within a reasonable time thereafter. The second instruction was affected with the vice of the first, and in that connection should not have been given.

The third instruction given at the instance of the plaintiff is likewise erroneous. He was not entitled to recover anything on account of expenses incurred in going from Wilton to Texarkana and returning, and for time spent in negotiating with Mr. Snooks, or for expenses in holding the cattle longer than was reasonably necessary, after their recovery, preparatory to shipment. Under the third instruction the jury may have included such expenses in the amount of the damages for which they returned a verdict. It should not have been given.

In confining what we have said to the liability of the defendant as a common carrier, we do not mean to make the impression that it was not liable in any other way.

Reversed and remanded for a new trial.

WOOD, J., did not participate.

SCHOOL DISTRICT NO. 49 of FAULKNER COUNTY *v.* ADAMS.

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Opinion delivered March 16, 1901.

SCHOOL BOARD—LEGALITY OF SPECIAL MEETING.—Two of the members of a school board cannot bind the district by entering into a contract for the employment of a teacher at a special meeting of which the third member had no notice, though he was present, if he declined to participate in the meeting.

Appeal from Faulkner Circuit Court.

GEO. M. CHAPLINE, Judge.

Suit by R. F. Adams against school district No. 49 of Faulkner county. From a judgment in plaintiff's favor defendant appealed. The facts are stated by the court as follows:

This is a suit by the plaintiff, R. F. Adams, against school district No. 49, Faulkner county, to recover three months' wages as teacher at $25 per month. To sustain his suit, plaintiff introduced as evidence his contract with said district. He also testified that he held a certificate to teach in the public schools. He says he went on the 4th of July to teach the school, and Reeves and Firestone, two of the directors, refused to let him in the house because Miss Harris was teaching. He says the contract was signed on the 23d of May, but some time before that Kuykendall and Wilson had spoken to him about the school, and he told them he would teach the school, and on the 23d of May they brought the contract signed by Kuykendall and Wilson, which was in accordance with their previous agreement, and he executed it early in the morning. He was always ready and willing to comply with contract.

T. S. Wilson, a witness for plaintiff, testified that on the third Saturday in May, 1898, Wm. Firestone was elected school director for district No. 49, to take the place of A. F. Kuykendall, whose time expired, and on Monday morning next he and Kuykendall, in accordance with an agreement previously made between him and Kuykendall, went to J. J. R. Reeves' house. Kuykendall got there before witness. Reeves and Kuykendall were at Reeves' barn when witness got there. Witness says they told Reeves they came to have a school meeting and elect a teacher. Reeves said he would have nothing to do with it, and refused to act with them. Witness suggested R. F. Adams be elected as teacher, and Kuykendall agreed to it. "We had the contract already made out, and he and I signed it, and Reeves said he would have nothing to do with it. We had not given Reeves any notice of this meeting." Witness and Kuykendall "had the Adams contract in our hands for several days before that. We had promised him the school." Witness sent his children to Miss Emma Harris. Witness had been elected director at a special school meeting some time before that. Don't know know whether any notice of such election had been given or not. We kept no record nor minutes of the meeting at which time we made the contract."

A. F. Kuykendall, for plaintiff, testified the same in substance as Wilson, and the plaintiff here closed his testimony.

J. J. R. Reeves, sworn as a witness for defendant, says: I was a director of school district No. 49, Faulkner county. My term expired May, 1899. At the election, 1898, Wm. Firestone was elected in place of A. F. Kuykendall, director. On Sunday I said to T. E. Wilson, who was acting as director, to come over at 2 o'clock next day to the school house, and let's have a meeting, as Wm. Firestone would be sworn in as a director. And on Monday morning, between daylight and sun up, Kuykendall came to my house, and said he wanted some potato slips, and he and I walked out to my barn, and in a very few minutes T. S. Wilson came up to the barn. Then one of them said, "Let's have a school meeting," and I said I would have nothing to do with it. One of them said, "I move that Adams be elected for teacher, and the other agreed to it; and they asked me to sign the contract, which they seemed to have had prepared. I refused, and I went off, and Wilson said to me, 'You can go on with your meeting this evening as you please; I will not be there;' and they left. Some time that forenoon Wm. Firestone was sworn in as a director, and at 2 o'clock p. m. we had a meeting, and selected Miss Emma Harris to teach a three months' school, which she taught, and for which she was paid by the district. Mr. T. S. Wilson was elected school director of district No. 49 some few months before this, not at a regular school meeting, but at a special election. There were no written notices of said election put up in the district, nor was there any notice of such election by the directors, or either of them, at any time; nevertheless he acted as such director after this election. (At this point the court announced that he would hold that it made no difference, for the purpose of this case, how T. S. Wilson was elected; if he was acting as a director, and recognized as such, that would be sufficient to bind the directors. To which ruling of the court and announcement defendant's counsel excepted to at the time.) We gave no written notice to Mr. Wilson, the other director, of the meeting we had at 2 o'clock, and Mr. Wilson was not present at that meeting. Mr. Firestone was qualified after Mr. Kuykendall and Mr. Wilson were at my house on the 23d of May in the morning. I took no part in the meeting at my barn as aforesaid on the morning of May 23, and had no written or verbal notice of an intended meeting until Wilson and Kuykendall came up in the manner stated. I neither voluntarily participated nor met with them.

G. W. Bruce, for appellant.

The alleged school meeting was illegal for want of proper notice. 52 Ark. 511.

Sam Frauenthal, for appellee.

The consent of two directors was sufficient to the contract. 52 Ark. 516. The authority of Wilson to act as director cannot be collaterally questioned. 32 Ark. 666; 55 Ark. 83; 21 Am. & Eng. Enc. Law, 757. An exception in gross is bad if any one of the matters excepted to be not error. 59 Ark. 312; 59 Ark. 370; 60 Ark. 250.

HUGHES, J., (after stating the facts). It was competent for two of the three school directors, being a majority of the board of directors, if all were present and participating in the meeting, or had had written notice of the time, place and purpose of the meeting, as required by law, to make a legal contract to employ a teacher, by which the school district would be bound; but without such notice, or the voluntary presence of all the members of the board, no legal contract could be made. Where a party, a member of the board, had no notice of the time, place and purpose of the meeting, and two members of the board went to his residence, and while he was present for some other purpose, and not for the purpose of a meeting of the board of school directors, and protested against their action as a board, as in this case, the two could make no legal contract to bind the district. "The corporate authority must be exercised by the proper body." This was a called meeting, and notice was indispensable, unless waived by the presence of all the directors and their participation, to the legality of its action to bind the district.

At a regular meeting for the transaction of ordinary business, the time and place for which is fixed by law, all must take notice of the meeting, and if a majority act at such meeting, and one be absent and not participating, the action, within the scope of the powers of the board, will bind the school district. This question was fully considered in *Burns* v. *Thompson,* 64 Ark. 489, and this case is within the ruling in that, to which we adhere.

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

BATTLE, J., did not participate.

ALLEN-WEST COMMISSION COMPANY *v.* BROWN.

Opinion delivered March 23, 1901.

MORTGAGE—RECITAL OF PRIOR LIEN—ESTOPPEL.—A mortgage recited in its warranty clause that a part of the land had been conveyed to J. in trust to secure a debt, and that another portion had been conveyed to B. in trust to secure other indebtedness, but that the reference to the former mortgage was not intended to estop the mortgagees from contesting the validity of that mortgage, and that the only object of the recital was to give notice to the mortgagees of the existence of said deeds. *Held*, that, the only object of the recital being to protect the mortgagors in their warranty, the mortgagees could take advantage of the fact that either of the prior mortgages was defectively acknowledged.

Appeal from St. Francis Chancery Court.

EDWARD D. ROBERTSON, Chancellor.

Foreclosure proceeding by James P. Brown, trustee, and another against the Allen-West Commission Company and others. From a decree for plaintiffs, the company has appealed.

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

A mortgage constitutes no lien upon the mortgaged property, as against strangers, unless it has been acknowledged and recorded as required by the act. 9 Ark. 112. *Cf.* 42 Ark. 140.

Norton & Prewitt, for appellee.

The appellants took with notice, and under an implied agreement not to resist the prior mortgage; hence they are bound. 59 Ark. 280. *Cf.* 23 Atl. 999.

BUNN, C. J. This is a bill in equity in the fifth chancery district, comprising Lee and St. Francis counties, to foreclose a mortgage or deed of trust executed by W. S. Brooks and wife, on the 23d day of May, 1894, to James P. Brown, as trustee, to secure a note of $1,030 given by them to Mrs. Lou M. Latham, of the same date, bearing interest at the rate of ten per cent. per annum from date until paid, and due May 23, 1895, which, with accrued interest, less credits, amounted to the sum of $1,030, the said credits

being equal to the interest. On a portion of the lands mentioned in the complaint, it is alleged in defendant's answer that Brooks and wife had executed a deed of trust to M. H. Johnson to secure their note to one Norman H. Thompson, which was the subject of litigation in the United States district court, of the Helena district. This is the only explanation we have of the reference to the Johnson trust deed. The complaint alleged some mistake of description in the first-named deed of trust, which plaintiffs asked to be corrected. The plaintiffs in their complaint further state that the Allen-West Commission Company, subsequent to the execution of said first deed of trust, to-wit, on the 15th November, 1894, took from Brooks and wife another mortgage or deed of trust on the same land, except the northeast quarter of southwest quarter of section 22, township 4 north, range 1 west, to secure the payment of a note of $4,689.40; and that on the 10th March, 1897, the said Brooks and wife, by warranty and absolute deed, conveyed said lands in said deed of trust named to Allen-West Commission Company for and in consideration of the cancellation and surrender of their said note and security, which were done.

In their answer the defendants say that, while their said deed of trust from Brooks and wife, in point of time, was junior to the deed of trust sought to be foreclosed, yet that the latter deed of trust was for the wife's lands, and that she only acknowledged the relinquishment of her dower right in the same, and that the record of the same was no notice to the defendants of the mortgage or deed of trust sought to be foreclosed, and that their deed from Brooks and wife gave them an indefeasible title to the lands involved. But the mortgage or deed of trust to Allen-West Commission Company (in which James P. Brown was trustee also) contained the following provision, explanatory of the warranty clause therein, to-wit: "And the parties of the first part covenant and agree with the parties of the second and third parts, Brooks and wife, with Brown, trustee, and Allen-West Commission Company, their heirs, assigns and successors, that no part of said real estate is mortgaged, held in trust, or in any wise incumbered, except that a part thereof is conveyed in trust to one M. H. Johnson, as trustee, and a part thereof is conveyed to the said James P. Brown, as trustee, to secure certain indebtedness set out and described in said conveyances, which are duly recorded in the office of the recorder of deeds and mortgages for said Lee county; the one to said Johnson being so recorded in book 12,

page 547 and 554, of the records of said recorder's office, and the one to said Brown being so recorded in record book 18 on page 22 of the records of said office. But this reference to said Johnson's deed of trust is not intended to, and shall not have the effect of, in any way estopping the parties of the second and third parts, of this deed, or in any way interfering with them, in contesting the validity of said Johnson's trust deed, if they, or either of them, hereafter so desire. The only object of said exceptions as to incumbrances in this warranty clause being to give notice to said second and third parties of the existence of said Johnson and Brown trust deed. And the said parties of the first part covenant and agree with the said second and third parties that they have a good, lawful, and perfect right to sell and convey said lands as herein before set out, with the exceptions as aforesaid, and that they will, and their heirs, executors, administrators and assigns shall, forever warrant and defend the title to said lands to said grantee, his heirs and successors in this trust, against the lawful claims of all persons whatsoever."

Sometime after the execution and delivery of this trust deed, Brooks and wife satisfied the same by executing to Allen-West Commission Company the absolute deed to the lands therein described, about which there is no special contention here.

In their statement contained in the transcript on page 16, the plaintiffs say: "As an argument arising on this clause (or provision), we contend that the care taken to provide that the Allen-West Commission Company should not be estopped to assail the trust deed to Johnson, and the failure of any such provision as to the trust deed to James P. Brown, indicate that there was no intention that the Allen-West Commission Company should ever claim, except as subject to the trust deed in favor of Brown, in which Mrs. Latham is beneficiary." On the contrary, the defendants, in their corresponding statement, say that "they deny there is any limitation of their right to contest the Latham deed of trust by virtue of the recital mentioned in the brief of attorneys for plaintiffs, because they say that said recital says in express terms 'that the only object of said exception as to incumbrances in this warranty clause being to give notice to said second and third parties of the existence of said Johnson and Brown trust deeds;' and, furthermore, because the grantors in said Brown trust deed could not thus limit the legal rights of the grantees." These extracts define the only essential issue in this case. Being properly construed,

does the provision in the Allen-West deed of trust give security to the Latham deed of trust, notwithstanding its defective acknowledgement by Mrs. Brooks, and consequently its ineffectiveness as a record as against third parties?

It is not contended that the rule in *Main* v. *Alexander,* 9 Ark. 112, is not still the rule in this state; but it is, in effect, contended by the plaintiffs that a recital in a mortgage, junior in point of time, of the existence of a prior mortgage is notice to the mortgagee of the junior mortgage of the existence of the prior mortgage. That all depends, of course, upon whether or not the recital is a condition upon which, as part of the consideration, the mortgage junior in point of time is executed and accepted. In the recital referred to the mortgagors state by way of covenant and agreement with the other parties that no part of said real estate is mortgaged, held in trust, or otherwise incumbered, except that one part is conveyed to James P. Brown as trustee to secure an indebtedness, and another portion to M. H. Johnson as trustee to secure another indebtedness, both of which conveyances are of record. The recital is: "But this reference to said Johnson trust deed is not intended to, and shall not have the effect of, in any way estopping the parties of the second and third parts, or in any way interfering with them in contesting the validity of said Johnson trust deed, if they or either of them hereafter so desire."

It is contended by the plaintiffs that there is no immunity extended by the mortgagors, Brooks and wife, to the mortgagee, Allen-West Commission Company, and its trustee, by which, notwithstanding they are thus notified of the existence of the Johnson mortgage, nevertheless they may contest the validity of the latter mortgage, if they think proper to do so, and, in granting this immunity to the mortgagee as to the Johnson mortgage, by implication they withhold it from it as against the Latham mortgage. Now, it is plain that the only object the mortgagors had in making this recital was to protect themselves in their warranty; that, whatever the mortgagee might choose to do in the premises, they, the mortgagors, by giving this timely notice and warning of prior incumbrances, would not be bound on their warranty if the mortgagee should be unsuccessful in contesting this prior incumbrance, or might fail to contest them at all. And so it is not a question of the mortgagors granting privileges and immunities to contest prior mortgages at all; for, unless affirmatively prohibited by the instrument under which he claims or otherwise, the mort-

gagee can contest all conflicting claims. But it contains this recital of the condition: "The only object of said exceptions as to incumbrances in this warranty clause being to give notice to said second and third parties of the existence of said Johnson and Brown trust deed." There was no duty nor obligation imposed upon the mortgagee or trustee with reference to either of the prior mortgages. What follows shows clearly that the mortgagor's warranty was not intended to cover the prior incumbrances named. If the mortgagee elected to contest the validity of these prior mortgages, and could show them invalid, all well and good; but if it failed in making such showing, and lost, it was debarred from seeking relief on the warranty. And if it failed to contest at all, the same result should follow.

There was no record notice to the Allen-West Commission Company, at the time it took the mortgage and its subsequent deed, that the lands of Mrs. Brooks had been previously mortgaged to secure the Latham debt; the Latham mortgage being improperly on record.

Reversed, and the bill dismissed.

WOOD and RIDDICK, JJ., not participating.

STATE v. HELM.

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72 534
69 167
77 423

Opinion delivered March 23, 1901.

1. INSANITY—ORAL PLEA.—Under Sand. & H. Dig., § 2286, providing that one convicted of crime may show that he is insane as reason why judgment should not be pronounced, and that if the court believe there is reasonable ground for believing him insane the question shall be determined by a jury, the insanity of accused may be shown without formal plea. (Page 171.)

2. INSTRUCTION—TEST OF INSANITY.—In a proceeding to determine whether one convicted of crime is insane, an instruction that if the jury find that defendant is so afflicted with mental disease that, when informed by the court of the nature of the indictment, his plea, and the verdict of conviction thereon, and of the consequences thereof, he would not *intelligently comprehend* such matters, they would be authorized to find him insane, is incorrect as calculated

to induce the jury to believe that he should be possessed of more intelligence at the time judgment is pronounced than is necessary. (Page 171.)

Appeal from Independence Circuit Court.

FREDERIC D. FULKERSON, Judge.

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

When arraigned, if the accused has reason enough to appreciate his peril, and comprehend his condition with reference to the proceedings pending, he may be tried, though not entirely sane. 23 Ark. 34; 47 Am. Dec. 216; 16 Am. & Eng. Enc. Law, 622. The instruction of the court as to the degree of mental capacity required was erroneous. 3 Wh. & Beck. Med. Jur. 176-7.

BATTLE, J. P. B. Helm was indicted, in the Independence circuit court, for the crime of forgery and uttering a forged instrument. He waived arraignment, and pleaded not guilty. The jury who were impaneled to try him found him guilty of forgery, and left his punishment to the court, who assessed the same at two years' imprisonment in the state penitentiary. In due time he was brought before the court to hear the judgment, and, being informed of the nature of the indictment against him, his plea to the same, and the verdict of the jury, the punishment assessed, and the effect and consequences thereof, and being asked by the court if he had any legal cause to show why judgment should not be pronounced against him, he said, by his counsel, he was insane. After inquiring into his mental condition, the court ordered a jury to be impaneled to determine whether he be insane, which was done, and they, after hearing the evidence adduced before them, found him to be insane; and the court ordered that he be confined in the lunatic asylum "until discharged therefrom as well," and that he be then confined in the jail of Independence county until, in the opinion of the court, he is sane, when judgment will be pronounced against him; and the state appealed.

The following was, substantially, the testimony before the jury: Dr. Kennerly testified: "That defendant had been addicted to the morphine habit for the last five years; that morphine has different effects upon different persons. Its excessive use is detrimental, affects the digestion, assimilation and later the brain. That morphine has demoralized defendant's mental and physical

condition. He had examined defendant two or three weeks ago, and again about an hour or two ago."

Q. "I'll ask you whether or not, in your opinion, from your examination and your knowledge of this man, P. B. Helm, whether he has sufficient mental capacity to rationally comprehend his own condition with reference to the proceedings here in court? A. As compared to a rational man, he has not. He has no conception, as a rational and sane man would."

Q. "Then in your opinion he does not rationally comprehend his own condition with reference to these proceedings? A. As a rational man, no, sir."

"The last stage of the morphine habit is dementia. Defendant has not reached that stage; has not lost his understanding; has memory, reason and will, and is able to exercise those faculties to some extent. Have talked to defendant to-day in reference to this action, and he knew what I was talking about."

Q. "If the court should call the defendant up now and inform him of the nature of the indictment which he was tried on, and of the verdict of guilty against him, and then explain the effect and consequences of that verdict, in your opinion, would he understand the explanation of the court? A. I think he would, but he could not appreciate the extent of it, as a well-balanced brain would."

"I take the ordinary human being as the standard of a well-balanced brain. It is a rare thing to find a perfectly balanced brain.

Q. (By the court.) "Has he sufficient mental capacity to intelligently comprehend and intelligently reason and intelligently understand what is going on now? A. No, sir."

Dr. Dorr testified: "Examined defendant in 1895 or 1896, and also within the last month. He has used morphine to the extent that his nervous system is impaired. From my knowledge of defendant and examination of him, in my opinion, defendant has not sufficient mental capacity to rationally comprehend his own condition with reference to the present proceedings as a sane man would."

"From examination of defendant, think defendant knows something of what is going on now. He understands what is said; has use of the senses; has the power of perception to a certain extent. If the court should bring defendant up now, and explain the nature of the indictment, he would understand that explanation

in a way, but don't think he would understand it as a sane person, taking the average human being as the standard of a sane person. If the court explained to the defendant the nature of the indictment, that he had been tried by a jury and found guilty on the charge, and the nature and effect of the judgment, defendant would have some understanding of it.

Q. (By the court.) "In your opinion, from your knowledge and examination of the defendant, has he sufficient mental capacity to intelligently comprehend what is going on now with reference to this proceeding? A. I do not think he does, to the extent of a sane person."

John A. Hinkle testified that he was sheriff, and brought defendant back from Neosho, Mo. Had conversation with defendant yesterday, and defendant understood all that was said to him.

Upon this testimony the court, over the objections of the state, instructed the jury as follows:

No. 1. "Gentlemen of the jury, this is an inquiry as to the sanity or insanity of P. B. Helm. You are instructed that if you find, from a preponderance of the evidence in this case, that the defendant is now so afflicted with mental disease that when informed by the court of the nature of the indictment, his plea and the verdict of conviction thereon, and of the effect and consequences thereof, he would not intelligently understand, intelligently reason and intelligently comprehend such matters, you would be authorized to find him insane; on the other hand, unless you believe, by a preponderance of the evidence, that he is so afflicted by mental disease, when informed by the court of the indictment, the plea, the effect of a conviction thereon, and the consequences thereof, he would not intelligently understand, intelligently reason or intelligently comprehend the matters, you would be authorized to find him sane."

Were the proceedings of the court in accordance with law, and was the jury correctly instructed?

The statutes of this state provide as follows: "When the defendant appears for judgment, he must be informed by the court of the nature of the indictment, his plea, and the verdict thereon, if any, and he must be asked if he has any legal cause to show why judgment should not be pronounced against him. He may show for cause against the judgment any sufficient ground for a new trial, or for arrest of judgment. He may also show that he is insane. If the court is of opinion that there is reasonable ground

for believing he is insane, the question of his insanity shall be determined by a jury of twelve qualified jurors, to be summoned and impaneled as directed by the court. If the jury do not find him insane, judgment shall be pronounced. If they find him insane, he must be kept in confinement, either in the county jail or lunatic asylum, until, in the opinion of the court, he becomes sane, when judgment shall be pronounced." Sand. & H. Dig., §§ 2284-2286.

These statutes do not require that insanity shall be shown by any formal plea; and we can see no good reason why it may not, and think it may, be adequately shown orally. *State* v. *Reed,* 41 La. An. 581, 583; *State* v. *Peacock,* 50 N. J. Law, 34. Upon it being shown, it is the duty of the court to inquire into the truth of the allegation, and, if it finds that there is reasonable grounds for believing it, to order a jury to be impaneled to determine the question. The manner and extent of the injury are left to the sound discretion of the court. The record fails to show any error committed by the court in the submission of the question to a jury.

Did the court instruct the jury correctly?

In *Freeman* v. *People,* 4 Denio, 19, Justice Beardsley, in delivering the opinion of the court, said: "The statute declares that 'no insane person can be tried, sentenced to any punishment, or punished for any crime or offence, while he continues in that state.' (2 R. S. 697, § 2.) This, although new as a legislative enactment in this state (3 *id.* 832), was not introductory of a new rule, for it is in strict conformity with the common law on the subject. 'If a man,' says Sir William Blackstone, 'in his sound memory commits a capital offence, and before arraignment for it he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defense? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of non-sane memory, execution shall be stayed, for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution. Indeed,' it is added, 'in the bloody reign of Henry the Eighth, a statute was made which enacted that if a person, being *compos mentis,* should commit high treason, and after fall into

madness, he might be tried in his absence, and should suffer death, as if he were of perfect memory. But this savage and inhuman law was repealed by the statute of 1 and 2 Ph. and M. c. 10. For, as is observed by Sir Edward Coke, 'the execution of an offender is for example, *ut poena ad paucos, metus ad omnes perveneat;* but so it is not when a madman is executed, but should be a miserable spectacle, both against law, and of extreme inhumanity and cruelty, and can be no example to others.' 4 Bl. Com. 24. The true reason why an insane person should not be tried is that he is disabled by an act of God to make a just defense if he have one. As is said in 4 Harg. State Trials, 205, 'there may be circumstances lying in his private knowledge, which would prove his innocency, of which he can have no advantage, because not known to the persons who shall take upon them his defense.' The most distinguished writers on criminal jurisprudence concur in these humane views, and all agree that no person, in a state of insanity, should ever be put upon his trial for an alleged crime, or be made to suffer the judgment of the law. A madman cannot make a rational defense, and as to punishment *furiosus solo furore punitur.* 1 Hale, P. C. 34, 35; 4 Bl. Com. 395-6; 1 Ch. C. L. (Ed. 1841), p. 761; 1 Russ. on C. (Ed. 1845), p. 14; Shelf. on Lunacy, 467-8; Stock. on Non-Com. 35-6."

Again he says: "The statute, before cited, is emphatic that no insane person can be tried. In its terms the prohibition is broad enough to reach every possible state of insanity, so that, if the words are to be taken literally, no person while laboring under insanity in any form, however partial and limited it may be, can be put upon his trial. But this the legislature could not have intended; for, although a person totally bereft of reason cannot be a fit subject for trial and punishment, it by no means follows that one whose insanity is limited to one particular object or conceit, his mind in other respects being free from disease, can justly claim the like exemption. This clause of the statute should receive a reasonable interpretation, avoiding on the one hand what would tend to give impunity to crime, and on the other seeking to attain the humane object of the legislature in its enactment. The common law, equally with this statute, forbids the trial of any person in a state of insanity. This is clearly shown by authorities which have been referred to, and which also show the reason for the rule, to-wit, the incapacity of one who is insane to make a rational defense. The statute is in affirmance of this common law

principle, and the reason on which the rule rests furnishes a key to what must have been the intention of the legislature. If, therefore, a person arraigned for a crime is capable of understanding the nature and object of the proceedings going on against him; if he rightly comprehends his own condition in reference to such proceedings, and can conduct his defense in a rational manner, he is, for the purpose of being tried, to be deemed sane, although on some other subjects his mind may be deranged or unsound. This, as it seems to me, is the true meaning of the statute; and such is the construction put by the English courts on a similar clause in an act of parliament."

The intention of the statutes of this state and of New York is the same. What was said of the New York statute in *Freeman* v. *People* can be truthfully said of the statute of this state. The statutes of both states, so far as they severally extend, are enactments of the common-law rule which forbids the trial of any person, or the pronouncement of judgment against him, while he is in a state of insanity. The reason of the rule for prohibiting the trial while he is insane is the incapacity of one who is insane to make a rational defense, and for prohibiting the pronouncement of judgment against him while he is insane is, if sane, he might be able to show cause why judgment should not be pronounced against him, but, being insane, though having a sufficient cause, he might not make it known. The statute being an affirmance of the common-law rule, the reason on which the rule rests furnishes a key to what must have been the intention of the legislature in adopting it. We therefore, conclude and decide that, if a person convicted of a crime is by reason of a disease of the mind unable to understand the nature of the indictment upon which he was convicted, his plea thereto, and the verdict thereon, when explained to him by the court, and is unable to comprehend his own condition in reference to such proceeding, and by reason thereof might not make known to the court or the attorneys in charge of his defense the facts within his knowledge, if any, which would show that judgment should not be pronounced against him, he is, as to the pronouncing of such judgment, to be deemed insane, within the meaning of the statute. Ignorance of the law is not competent or sufficient to show such incapacity. The requirement of the statute which makes it the duty of the court to inform him of the nature of the indictment, his plea, and the verdict sustains this view. This information could not sub-

serve its purpose, and the giving of it would be a useless formality, if he is insane to the extent he must be to come within the meaning of the statute as we have indicated; but, if not insane to such extent, it would accomplish its purpose, and he would be competent to hear the judgment of the court pronounced against him.

The instruction given to the jury by the court is ambiguous, and is not in full accord with this opinion. It authorized the jury to find the defendant insane, if they found from the preponderance of the evidence that he could not "intelligently reason." Under the evidence adduced it was reasonably calculated to induce the jury to believe that he should be possessed of more intelligence and mental capacity at the time judgment is pronounced against him, as a prerequisite to such proceeding, than is necessary; and it should not have been given.

The judgment of the court upon the verdict of the jury as to the sanity of the prisoner is, therefore, set aside; and the circuit court is directed to pronounce judgment against him upon the verdict finding him guilty of forgery, unless in the opinion of the court there is reasonable ground for believing he is insane, and, in that event, to proceed according to this opinion.

ST. FRANCIS ELECTRIC LIGHT COMPANY *v.* ELECTRIC SUPPLY COMPANY.

Opinion delivered March 23, 1901.

ACTION—ASSIGNMENT—PARTIES.—The stock of a corporation was purchased, and a new corporation formed. A note given by the stockholders of the new company was retained by the attorney of the new company as indemnity against any loss it might sustain in contemplated litigation with a third company which had previously obtained a judgment against the old company, the latter having a claim against the judgment creditor which it was agreed that the new company should sue on, and whatever sum the new company should recover against the judgment creditor in excess of the judgment against the old company should go to the stockholders of the old company. *Held*, that the new company had an interest in the suit prosecuted on such claim, and was entitled to bring it in its own name, without making the stockholders of the old company parties.

Appeal from St. Francis Circuit Court.

HANCE N. HUTTON, Judge.

STATEMENT BY THE COURT.

The appellant brought this action against the appellee for damages for failing to erect an electric light plant according to contract. Upon motion of the appellee the action was dismissed on the ground that the plaintiff had no interest in the controversy, and from this judgment it appealed.

It appears that the Electric Light Company had bought the stock of its predecessor, bearing the same name, and reorganized by election of a board of directors, and other necessary officers. The Electric Supply Company, it seems, had a claim against the Electric Light Company, and had obtained a judgment against it before the sale and reorganization of the Electric Light Company. When the present stockholders bought the property, they gave several notes for deferred payments. One of these notes for $500 was deposited with Mr. Gatling, the attorney for the incoming stockholders, to be held by him as indemnity for his clients, the new company, against any loss the company might sustain in contemplated litigation with the Eletcric Supply Company. It seems that the Electric Light Company, before sale to the present stockholders, had a demand against the Electric Supply Company, which it contended was a set-off or counterclaim against the claim of the Electric Supply Company against it, which it had offered to interpose in the suit of the Electric Supply Company against it, which was stricken out and not permitted by the court. This is the same demand upon which this action is based. It was agreed and understood, between the old and new stockholders of the Electric Light Company at the time of the sale of the Electric Light Plant, that, to protect the company against the claim of the Electric Supply Company against it, the $500 note was deposited with Gatling, and that whatever amount the company might recover against the Electric Supply Company in excess of the demand of the latter against the Electric Light Company should belong and go to the stockholders of the Electric Light Company before the sale. It is shown that, at the time of the sale and deposit of this $500 note, it was in contemplation that suit should be brought by the Electric Light Company against the Electric

Supply Company, on the claim or demand of the Electric Light Company against the Electric Supply Company.

The facts in this case conclusively show that this was the understanding of the parties.

Norton & Prewett, for appellant.

A corporation is a thing separate and apart from its stockholders. 4 Ark. 302. The assignor is a necessary party to a suit on a cause of action which is not assignable by statute. Sand. & H. Dig., § 5624; 47 Ark. 541. It was error to refuse to reinstate the case.

R. J. Williams, for appellee.

HUGHES, J., (after stating the facts). We are of the opinion that the facts in this case show that the appellant did have an interest in this suit, and that it was really its duty to prosecute the claim of the Electric Light Company against the Electric Supply Company. Its authority to bring the suit arose from the facts in the case, and no order of its board of directors was necessary to authorize it to bring this suit. 1 Beach, Priv. Corp. § 360. The Electric Light Company was still bound for the debts of the company existing before the purchase of the stock of the company; and the prosecution of this suit was primarily a means of protection to it against the debts of the company existing before the purchase and reorganization, and it was for the benefit of the old stockholders of the Electric Light Company, inasmuch as it was, in effect, to indemnify them against loss. The agreement and arrangement was, in effect, an authority to sue for the benefit of the old stockholders of the Electric Light Company. It was not necessary that the outgoing stockholders of the Electric Light Company should have been made parties on motion, which was refused.

The judgment is reversed, and the cause is remanded, with directions to overrule the motion to dismiss, to reinstate the cause, and proceed according to law.

RAYBURN v. STATE.

Opinion delivered March 25, 1901.

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1. ALIBI—BURDEN OF PROOF.—An instruction that the burden of showing an *alibi* is on the defendant, but if, on the whole case, the testimony raises a reasonable doubt that the defendant was present when the crime was committed, he should be acquitted, is not erroneous as shifting the burden on defendant to show his innocence. (Page 180.)
2. CIRCUMSTANTIAL EVIDENCE—INSTRUCTION.—Where the court had instructed the jury that the law requires that the guilt of defendant be established beyond a reasonable doubt, but does not require that each circumstance in the chain of evidence be established beyond a reasonable doubt, and defendant's counsel argued to the jury that a chain of circumstantial evidence is no stronger than its weakest link, it was not error for the court to give an additional instruction to the effect that the series of facts in a case of circumstantial evidence are not as links in a chain, but as threads or strands in a rope. (Page 181.)
3. CAUTIONARY INSTRUCTIONS—DISCRETION AS TO.—While great care should be exercised as to the time, manner and form of giving cautionary instructions, lest they make the impression on the jury that the court has convictions on one side or the other of the controversy, the discretion of the trial court will not be limited, unless grossly abused. (Page 182.)
4. MURDER—EVIDENCE—INSTRUCTION.—Under an indictment for murder alleged to have been committed with malice aforethought and after premeditation and deliberation, the transcript showed that the state introduced several witnesses "whose testimony tended to show by facts and circumstances that the defendant was guilty, as charged in the indictment, of murder in the first degree," without setting out their testimony; and the court instructed the jury that if they find that defendant, in the perpetration of, or the attempt to perpetrate, the robbery of deceased, shot and killed him, then defendant is guilty, *Held*, (1) that the instruction erred, as proof of a murder committed in the perpetration of, or the attempt to perpetrate, a robbery would not sustain the charge of a murder committed with malice aforethought and after premeditation and deliberation; (2) that it will not be presumed that the instruction was harmless, notwithstanding the court certified that the evidence tended to show "that the defendant was guilty as charged," as the court's instruction indicated a misconception on the court's part as to what evidence would be sufficient to convict. (Page 184.)

Appeal from Crawford Circuit Court.

JEPHTHA H. EVANS, Judge.

Mechem & Bryant, for appellant.

The sixth instruction was erroneous. 11 Ark. 456, 548, 460; Sand. & H. Dig., § 644. The indictment did not properly submit to the jury the question of appellant's guilt of murder in the first degree, committed in the perpetration of or attempt to perpetrate robbery. Sand. & H. Dig., § 2674; 26 Ark. 330; 2 Ark. 497; 1 Bish. Cr. Proc. § 589. The burden was not on appellant to show his absence at the time of the commission of the crime. 55 Ark. 248; 105 Mass. 451; 100 Mass. 487; 39 Oh. St. 315; 93 Mich. 641; 18 Neb. 154; 64 N. Car. 56; 16 Ore. 534; 47 Ala. 356; 94 Ala. 76; 72 Cal. 623; 117 Ill. 35; 40 Kans. 482; 111 Mo. 248; 87 Mo. 668; 86 Pa. St. 54; 7 S. C. 63; 30 Tex. App. 341. The ninth instruction was erroneous, in that it suggested to the jury the court's view of the value of the testimony. Const. 1874, art. 7, § 33; 49 Ark. 439; *id.* 147; 37 Ark. 590; 43 Ark. 294; 45 Ark. 172; 55 Ark. 247; 2 Th. Tr. § 2301; 34 Ark. 703; 110 U. S. 582; 65 La. 500, 511; 25 Ala. 235.

Geo. W. Murphy, Attorney General, for appellee.

Mechem & Bryant, for appellant, on motion for re-consideration.

The indictment was insufficient to charge murder in the first degree, committed in the perpetration of crime. *Cf.* 27 Ia. 402, 409; 4 Gr. 500; 21 Kans. 47; 2 Bish. New Cr. Proc. 569, 570. 573, 574, 576, 577, 579, 580, 581, 585, 588, 589; 60 Ark. 571.

WOOD, J. Appellant was convicted of murder in the first degree upon an indictment charging that he "did unlawfully, wilfully, feloniously, and of his malice aforethought, and after premeditation and deliberation, kill and murder one A. T. Carpenter," etc. The record shows that the state introduced several witnesses, "whose testimony tended to show by facts and circumstances that the defendant *was guilty as charged in the indictment* of murder in the first degree." On behalf of defendant several witnesses testified to facts tending to establish an *alibi.*

We are asked to reverse because the court gave the following instructions: "(6) If you find from the evidence beyond a reasonable doubt that defendant in the perpetration of, or in the

attempt to perpetrate, the robbery of A. T. Carpenter shot and killed Carpenter, then defendant is guilty of murder in the first degree, and you will so find. (9) The defendant in this case does not set up justification, but he undertakes to show that at the time that Carpenter was killed he, the defendant, was not at the place where such killing occurred, but at another place, and that therefore he was not connected with or implicated in such crime. The burden of showing an *alibi* is on the defendant, but if on the whole case the testimony raises a reasonable doubt that the defendant was present when the crime was committed, he should be acquitted; but the jury should scrutinize the testimony of witnesses to see if some of them may or may not be mistaken as to dates and times when they saw the defendant, and it is proper for the jury to consider the lapse of time since the occurrence happened, and whether witnesses are likely or not likely after such lapse of time to be accurate as to the precise time or hour that they saw defendant on the night the shooting occurred. In other words, in arriving at your conclusion on this point, the jury should consider whether it may or may not be true that defendant was present at the time and place Carpenter was shot, and that some of the witnesses are honestly mistaken as to the exact time they saw defendant upon the evening and night of November 3, 1900."

1. The indictment was good for murder in the first degree. It was not necessary for it to set forth the facts and circumstances constituting the crime. That was matter of proof. Any proof which showed the defendant to be guilty of murder in the first degree, as defined by our statute, was competent. It was not necessary to charge specifically in the indictment that the murder was committed in the attempt to perpetrate robbery, in order to admit proof of that fact. *State* v. *Johnson,* 72 Ia. 393-400; *Com.* v. *Flanagan,* 7. Watts & S. 415; *State* v. *Hopkirk,* 84 Mo. 278; 10 Enc. Pl. & Pr. 150; *People* v. *Giblin,* 115 N. Y. 196, 4 L. R. A. 757.

The record shows affirmatively that the facts and circumstances tended *"to prove the murder as charged in the indictment."* In the absence of any proof tending to show that the homicide, although committed in the attempt to perpetrate robbery, was unintentional, it must be held that it was as stated to be shown in the record. The court's charge, so far as the record shows, was but based upon the proof.

2. Instruction 9 is a literal copy of an instruction approved by this court in *Ware* v. *State,* 59 Ark. 379. That case was well considered, and the conclusion we then reached was sound. Learned counsel for appellant, we think, misapprehend the purport of the instruction. It does not shift the burden upon the defendant to prove his innocence. The burden is still upon the state to prove beyond a reasonable doubt upon the evidence in the whole case (which would include evidence of *alibi*) that the defendant was present when the crime was committed.

In *Com.* v. *Choate,* 105 Mass. 456, the court passed upon an instruction which told the jury "that where the defendant sought to establish the fact that he was at a particular place at any given time, and wished them to take it as an affirmative fact proved, the burden of proof was upon him, and if he failed in maintaining that burden, the jury could not consider it as a fact proved in the case; that the burden, however, was upon the government to show that the defendant was present at the time of the commission of the offence, and as bearing upon that question the jury were to consider all the evidence offered by the defendant tending to prove an *alibi,* and if upon all the evidence the jury entertained a reasonable doubt as to the presence of the defendant at the fire, they were to acquit." The court said of this: "The substance of the whole ruling was that if the evidence of the defendant which tended to prove an *alibi* was such that, taken together with the other evidence, the jury were left in reasonable doubt as to whether the defendant was present at the alleged fire, they should acquit him." The instruction in the form given in the Massachusetts case is perhaps a preferable statement of the law. But the instruction under consideration, fairly construed, is of exactly the same purport. The burden to show the defendant's presence and participation in the crime is still upon the state, when the evidence is considered as a whole, including that introduced by the defendant on the question of *alibi.* But, as to the particular defense of *alibi* set up under the general plea of not guilty, the defendant, if he relies upon it as an affirmative fact, must show that particular fact. The state could not be expected to prove that he was not present. That would be to devolve upon the state the duty of proving a negative; *i. e.* that defendant was not present, and not guilty. The state must prove its charge—the guilt of the accused—beyond a reasonable doubt, notwithstanding the testimony tending to prove an *alibi,* or the defendant must be acquitted; but it is the

province of the defendant to introduce evidence tending to show an *alibi* when relied on as an affirmative matter of defense, and as to this the burden rests upon him.

3. The court also gave the following: "(13) The law requires that the guilt of the defendant shall be established to your satisfaction beyond a reasonable doubt before you can convict him, but it does not require that each circumstance in the chain of evidence shall be established to your satisfaction beyond a reasonable doubt. It is sufficient if, on the whole case, you are satisfied beyond a reasonable doubt, although the individual circumstances may not themselves be so established."

During the argument to the jury of J. C. Byers, of counsel for defendant, he said in substance: "This is a case depending on a chain of circumstantial evidence. No chain is stronger than its weakest link. If any link in this chain is weak or broken by the evidence of the defendant, then the entire chain is broken and destroyed, and you should acquit the defendant." After this statement of counsel, and while he was addressing the jury, the court prepared, and, after counsel for defendant concluded his address, gave in writing, instruction marked "A," as follows:

"A. We often speak of a chain of circumstantial evidence. This is an expression used in these instructions, and found in the law books. It is a metaphor used to convey an idea. It is not strictly accurate. It is more accurate to speak of the series of facts given in evidence in a circumstantial evidence case not as links in a chain, but as threads or strands making a rope or cord of evidence. The individual fibers may be of very small strength, in themselves unable to sustain any weight of consquence, but when sufficiently numerous, and properly intertwined with others of like kind, may make the strongest cordage—cordage sufficient to hold the largest ship in a great storm. Gentlemen, it is for you in this case to declare whether or not the fibers of evidence are sufficiently numerous and properly arranged with their fellows to unescapingly bind together the defendant and his guilt of the charge against him."

The court offered to allow defendant's counsel further time to address the jury on the instruction.

The court having used a metaphor to characterize the evidence, counsel for appellant seized upon this in argument, and by literal adherence to it was perverting the well-established rule that each circumstance in cases of circumstantial evidence does not

have to be proved beyond a reasonable doubt, it being sufficient if, upon the whole case, the evidence convinces the jury beyond a reasonable doubt. Thus the argument of counsel was inconsistent with the principle which the court had correctly announced in the same instruction in which the inaccurate metaphor was used. In order, therefore, that the jury might not get an erroneous impression of the force and effect to be given circumstantial evidence, both from the prior inaccurate statement of the court and the argument of counsel, it was exceedingly appropriate that the court explain and correct its charge. In doing so the court thought it proper to use another metaphor, and this time one approved by text writers as an apt illustration and designation of circumstantial evidence. Wills, Cir. Ev. 279. It was certainly not incumbent upon the presiding judge to use metaphorical language to set forth the simple and well-settled rules of the law, and we would not be understood as approving as a precedent the instruction given by the court. The writer is of the opinion that the plain principles of the law are best declared to the ordinary jury in our terse English, unadorned by figures of speech or flowers of rhetoric. This, however, is a matter of taste. The mere form and verbiage of an instruction cannot be considered as prejudicial and reversible error, so long as no erroneous principle of law is announced, and so long as the instruction is free from an expression of opinion on the facts, and is not calculated to confuse or mislead the jury.

The latter part of the ninth, *supra,* and instruction "B" given after the close of the argument, were cautionary. Such instructions are within the sound discretion of the presiding judge. Great care should be exercised as to the time, manner, and form of giving such instructions, lest they make the impression on the jury that the court has convictions on one side or the other of the controversy, and subject the judge to the suspicion of holding an uneven balance in the cause. Circumstances and occasions do frequently arise, however, when cautionary instructions, drawn in proper form, given at the proper time, and in the proper manner, are important and necessary. The discretion of the trial judge will not be limited in these matters, unless it has been grossly abused to the prejudice of the accused. We cannot say that the court abused its discretion in this case.

Finding no reversible error, the judgment is affirmed.

BUNN, C. J., (dissenting). This is a case in which we are not favored with the evidence on the part of the state, except that it

is stated in the record that the state's evidence tended to show that the defendant was present, and committed the homicide. The evidence as to the robbery is wanting. On his plea of *alibi* the defendant made out what must be regarded as a strong case. I do not concur in the opinion of the other judges that errors as to the exact time may account for the difference in the testimony of unimpeached witnesses. They all were positive as to the time they saw the defendant in Fort Smith, and this particular time was as definitely settled by the testimony for the state as the time when the homicide was committed.

When the attorney for the defendant was arguing the case of his client before the jury, by way of illustrating the force and effect of the evidence, he stated that this was a case of circumstantial evidence, and that such a case is based upon a chain of circumstances, which chain is no stronger than its weakest link. At this point he was interrupted by the presiding judge, who proceded to address the jury, in which he said substantially that the metaphor of defendant's counsel was not the correct one to use in such a connection, but that the proper metaphor is that a case of circumstantial evidence depends not on a chain of circumstances, but that it is like a rope composed of many strands twisted together, of which one or more strands might break, and yet the rope be not broken. An advocate must be allowed to make use of tropes and metaphors and other figures of speech according to his taste, so he does not misstate the evidence. This manner of presenting the facts is but arguing upon the facts, and the jury must be the judges of the appropriateness of the figures of speech. Where the court undertook to correct the attorney in this matter, it was but making an argument in answer to his, and commenting on the testimony, and determining its weight by his metaphor, which the jury, in their loyalty to the authority of the court, naturally took to be as adding strength to the circumstantial evidence upon which the state relied to make out her case, as more authoritative than the metaphor of defendant's counsel, which tended to weaken the force of circumstantial evidence.

In a case like this, hanging in the balance as it were, it is impossible to imagine, even, the degree of unfairness this was to the defendant.

The judgment should have been reversed.

ON REHEARING.

Opinion delivered June 1, 1901.

BATTLE, J. We are asked by the appellant to reconsider what we have said in a former opinion in this cause in reference to the following instruction: "If you find from the evidence beyond a reasonable doubt that defendant, in the perpetration of, or in the attempt to perpetrate, the robbery of A. T. Carpenter, shot and killed Carpenter, then defendant is guilty of murder in the first degree, and you will so find."

This instruction was given in a trial upon an indictment in the words and figures following: "The grand jury of Crawford county, in the name and by the authority of the state of Arkansas, accuse Love Rayburn of the crime of murder in the first degree, committed as follows: The said Love Rayburn, on the 3d day of November, 1900, in the county of Crawford aforesaid, did unlawfully, wilfully, feloniously, and of his malice aforethought, and after premeditation and deliberation, kill and murder one A. T. Carpenter with a certain pistol, which he, the said Love Rayburn, then and there had and held in his hands, the said pistol being then and there loaded with gunpowder and leaden bullets, against the peace and dignity of the state of Arkansas."

The statutes upon which this indictment was based are as follows: "Murder is the unlawful killing of a human being, in the peace of the state, with malice aforethought, either express or implied." "All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate, malicious and premeditated killing, or which shall be committed in the perpetration of, or in the attempt to perpetrate, arson, rape, robbery, burglary or larceny, shall be deemed murder in the first degree." Sand. & H. Dig., §§ 1639, 1644.

According to these statutes two classes of murder constitute murder in the first degree, to-wit: (1) All murder committed by any kind of willful, deliberate, malicious and premeditated killing; and (2) all murder which shall be committed in the perpetration of, or in the attempt to perpetrate, arson, rape, robbery, burglary or larceny.

In *Cannon* v. *State,* 60 Ark. 564, this court held that it is essential to the validity of an indictment for the first class of murder in the first degree to use the words "willful," "deliberate," "malicious," "premeditated," or equivalent words, in charging the

offense. The reason for the ruling is, these words are descriptive of the elements necessary to constitute that class of murder. For the same reason it is necessary to allege that the killing was done in the perpetration of, or in the attempt to perpetrate, one of the felonies named in the statutes quoted, in order to charge the second class of murder in the first degree. These two classes of murder in the first degree are separate and distinct. In the former a precedent intent to kill is necessary to constitute the offense, while in the latter it is not. While the former may be committed in the perpetration of, or attempt to perpetrate, the felonies named, an indictment for the same will not always include the latter; and when it does, it is only because the essentials necessary to constitute the former exist. The perpetration of or attempt to perpetrate, a felony necessary to constitute the second class is not equivalent to the premeditation, deliberation and intent necessary to constitute the first, except in effect. They raise the killing to the grade of that in the first class, but the allegations necessary to charge murder in the first degree in the first class are not equivalent to those necessary to charge the offense in the second. Hence an indictment which charges only the offense in the first class will not be sufficient to accuse the defendant of murder committed in the perpetration of, or in the attempt to perpetrate, one of the felonies named in the statute, unless it is committed with the intent to kill, and after premeditation and deliberation. In support of this conclusion we cite *Cannon* v. *State,* 60 Ark. 564, and the cases and authorities cited in the same.

A defendant cannot be lawfully convicted of a crime with which he is not charged in the indictment against him. Some courts have held that he can be convicted of murder committed in the perpetration of, or in the attempt to perpetrate, the felonies named in the statute, under a common-law indictment for murder. But they do so because they hold that the law dividing murder into two degrees introduced no change in the form of the indictment, created no new offense, and only reduced the punishment for one of the degrees. We disapproved of this view in *Cannon* v. *State,* 60 Ark. 564, and held that it did make a change in the form of the indictment.

It follows, the instruction should not have been given. Was it prejudicial? The evidence adduced by the state to sustain the indictment is not set out in the bill of exceptions. But it is stated in the bill of exceptions that the state "introduced several witnesses

whose testimony tended to show, by facts and circumstances detailed by them, that the defendant was guilty, as charged in the indictment, of murder in the first degree." But this is a statement of the court, and necessarily means that the evidence adduced tended to show that the defendant was guilty as charged in the indictment, under the instructions of the court, for they (instructions) indicate what the court considered sufficient to convict. In the absence of a contrary showing, the giving of an instruction indicates that the court was of the opinion that the evidence warranted the giving of it. We therefore think that the record shows that the instruction was prejudicial.

Reversed and remanded for a new trial.

WOOD and RIDDICK, JJ., dissent.

WOOD, J. The error of the trial court is not shown. If the murder was deliberate, although in an attempt to commit robbery, the indictment was sufficient. There could not possibly be any prejudice if the proof all showed that the killing was deliberate. We must presume, until the contrary appears, that the charge of the court contained in the sixth instruction was based upon the evidence. As the indictment charges a deliberate killing, the presumption is the court would not have given instruction six had there been any proof whatever that the killing in an attempt to commit robbery was unintentional.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY v. HARPER.

Opinion delivered March 23, 1901.

1. CARRIER—WHO IS PASSENGER.—One who carelessly entered a train which he should have known did not stop at his station, but which he hoped would stop either there or near there, and who had a ticket to his destination, but refused to pay the additional fare to the nearest stopping place beyond, is a passenger within Sand. & H. Dig., § 6192, providing that if any passenger shall refuse to pay his fare the conductor may put him out of the cars "at any usual stopping place," and is entitled to damages for being ejected at a place other than a usual stopping place. (Page 187.)

2. EJECTION OF PASSENGER—DAMAGES.—A judgment of $25 is not excessive where a passenger, suffering from a slight fever, was ejected from a railway train a mile or two from a station in the night time, while a slight rain was falling. (Page 189.)

Appeal from Columbia Circuit Court.

CHAS. W. SMITH, Judge.

STATEMENT BY THE COURT.

James B. Harper got on the "Cannon Ball" passenger train on defendant's railroad at McNeil for the purpose of going to Milner, another station on defendant's road. Milner was not one of the stations at which that train stopped, and when Harper offered a ticket to Milner he was informed of this fact by the conductor, and told that he must pay fifteen cents more, and go on to Stephens; that being the next stopping place for that train. Harper refused to pay, and was thereupon ejected from the train at a point about a mile and a half from the station. He brought this action for being put off at a place other than a usual stopping place for trains. There was a verdict in favor of plaintiff for $125, but the court required a remittitur of $100, which having been done, the court gave judgment for the remaining $25, and costs against defendant. From this judgment defendant appealed.

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

Sand. & H. Dig., § 6192, applies only *passengers* who refuse to pay fare. 49 Ark. 358. Appellee was not a "passenger," within the meaning of that statute, and appellant did not owe him the measure of care due a passenger. Ray, Neg. Imp. Duties, 4; 2 Am. & Eng. Enc. Law, 742; 29 S. W. 713; Sh. & Redf. Neg. § 448; Patt. Ry. Law, §§ 210-214; 29 S. W. 367; 29 S. W. 1106; 40 Ind. 37; 18 S. W. 589; 9 Am. & Eng. Ry. Cas., 307; Rorer, Railroads, 984; 67 Fed. 522; 29 S. W. 1106.

RIDDICK, J., (after stating the facts). This is an action for damages alleged to have been caused the plaintiff by being ejected from one of defendant's passenger trains. Our statute provides that "if any passenger shall refuse to pay his fare or toll, it shall be lawful for the conductor of the train and the servants of the corporation to put him out of the cars at any usual stopping place the conductor shall select." Sand. & H. Dig., § 6192.

Counsel for the defendant company contend that this statute does not apply here, for the reason that the plaintiff knew, or by the exercise of ordinary care could have known, that the train which he entered did not stop at Milner, and that, as he refused to pay his fare to any station at which the train did stop, he was not a passenger. It is doubtless true that one who enters a railway train, and afterwards wrongfully and persistently refuses to pay his fare, is not entitled to the high degree of care which the law exacts of railroads for the protection of passengers. Within the meaning of the rules requiring such care, it has been often held that such a person is not a passenger. *Condran* v. *Chicago, M. & St. P. Ry. Co.*, 67 Fed. Rep. 522; 2 Wood, Railroads (Minor's Ed.), 1213; 5 Am. & Eng. Enc. Law (2d Ed.), 496, and cases cited.

We do not controvert the soundness of these decisions, but it is evident that the reasons upon which they are based do not apply here; for the object of this statute was to prevent railroad companies from ejecting a passenger for refusal to pay fare at other than a usual stopping place. If those refusing to pay fare are not passengers, within the meaning of this act, then the statute can have no application, and is meaningless. It is therefore very evident, we think, that the refusal to pay by one traveling on a train does, not within the meaning of this statute, show that he is not a passenger.

It may, of course, be doubted whether one who enters a train, intending not to pay his fare and to defraud the company, would be protected by this statute; but we need not determine that question, for the evidence here, we think, does not show such a state of facts. The plaintiff carelessly entered a train which he should have known did not stop at Milner, but he did so, hoping that it would stop either at Milner or at a water tank near there, and thus afford him the opportunity to reach his destination. He had a ticket to Milner, which he gave to the conductor, but the ticket was returned, and the plaintiff ejected, because he refused to pay the additional fare to the first regular stopping place for that train. The company could have excluded him from the train, or ejected him at the place he entered, but, having carried him away from that point, was, under the statute, required to carry him to some other usual stopping place before ejecting him. The plaintiff may not have desired to go to Stephens, the next stopping place, but, as he had carelessly entered a train that was not required to stop before reaching that place, he could have been

carried there whether he wished to go or not; for the company in such a case was not required to stop the train sooner for his own convenience. As the place at which he was ejected was not a usual stopping place for trains, and as he was not given the option of being carried to Stephens, instead of being put off there, the ejection was unlawful.

The injury to plaintiff was small, but it was night, a slight rain was falling, and plaintiff was suffering some from fever. He was put off a mile or two from a station. Under these circumstances the sum for which the court gave judgment was not excessive.

Affirmed.

EASTLING v. STATE.

Opinion delivered March 30, 1901.

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1. GRAND JURY—RIGHT OF CHALLENGE.—One accused of a felony can not on appeal raise the objection that, although at the time in jail, he was not afforded an opportunity to appear and object to the formation of the grand jury, if in his motion to quash the indictment he did not show that any of the grand jury were disqualified. (Page 190.)

2. FOURTEENTH AMENDMENT—DISCRIMINATION AGAINST NEGRO RACE.—Where, on a motion to quash an indictment against a negro on the alleged ground that the jury commissioners selected no negroes to serve on the grand jury, and that there was a discrimination against his race which denied him the equal protection of the laws of the United States, it was shown that there was 859 white and 175 negro qualified electors in the county, and that no negroes had been selected to serve on a jury in the county for 18 years past, and the jury commissioners who selected the grand jury testified that they selected for grand jurors those whom they believed to be best qualified, and that the question whether or not negroes should be put on the grand jury was not discussed, a finding of the trial judge that negroes were not excluded from the grand jury solely because of their race or color was not erroneous. (Page 191.)

3. MURDER—SUFFICIENCY OF EVIDENCE.—Where, in the course of a dispute over a trivial matter, insulting language was used, and defendant and another negro began shooting at deceased, and he was killed by one of them, a conviction of murder in the first degree will not be sustained. (Page 193.)

4. SAME—MODIFICATION OF JUDGMENT.—Where, on appeal from a conviction of murder in the first degree, the evidence fails to show premeditation, a necessary element of murder in the first degree, but shows that defendant was guilty of murder in the second degree, the judgment will be set aside, and the cause remanded with instructions for the trial court to sentence the defendant for murder in the second degree. (Page 193.)

Appeal from Perry Circuit Court.

ROBERT J. LEA, Judge.

Scipio A. Jones and *J. H. Carmichael,* for appellant.

It was error not to allow appellant to be present at the formation and impaneling of the grand jury. Sand. & H. Dig., § 2067; 50 Ark. 542; 42 Ark. 394; 43 Ark. 395; 10 Ark. 631; 177 U. S. 447. In the selection of the jury appellant was denied the equal protection of the law. 103 U. S. 370; 100 U. S. 339; *id.* 313; *id.* 303; 140 U. S. 278; 58 S. W. 97; 177 U. S. 442; 39 Tex. Cr. Rep. 345. The evidence fails to show premeditation and deliberation, and the sentence cannot stand for murder in the first degree. 56 Ark. 5.

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

No such discrimination is shown in the selection of the grand jury as entitled appellant to have the indictment quashed. 100 U. S. 313, 320, 322, 334.

BUNN, C. J. This is an indictment against the appellant, Ed Eastling, in the Perry county circuit court, upon which he was tried and convicted in said court at its August term, 1900, of murder in the first degree, from which he appealed to this court, after motions to quash indictment and for new trial were made by him and overruled.

There were two causes assigned in support of the motion to quash the indictment. The first was that the defendant, although in jail at the time, was not given an opportunity to appear and object to the formation of the grand jury which found the indictment, as entitled by statute to do in such case; and also because he was taken before the grand jury, while considering the case, without his knowledge of the nature of the proceedings had by them, and without his consent, and while there he was required to make statements in regard to the alleged crime.

It was irregular to fail to give him an opportunity to challenge the grand jury before they were sworn as such, for the statutory cause, but the defendant does not show that any of the grand jurymen were disqualified under the statute, which showing could be made available as well on the motion to quash as by challenge in the first instance.

The evidence does not sustain the motion to quash on the ground that the defendant was compelled to testify before the grand jury while investigating the charge against him, but, on the contrary, it appears from the evidence, that while before the grand jury for the purpose of identification, while another was testifying, he was warned that he could not be required to make any statement unless he chose to do so; and it appears that while he made a statement as to the matter leading up to the homicide in this case, he did so by his own request, in order, as he expressed it, that he might tell his side of the transaction.

The second ground of the motion to quash is, in the language of the motion, as follows, to-wit: "Because the jury commissioners appointed to select the grand jury which found and presented said indictment selected no persons of color, or of African descent, known as 'negroes,' to serve on said grand jury, but, on the contrary, excluded from the list of persons to serve as such grand jurors all colored person, or persons of African descent, known as 'negroes,' because of their race and color; that fully one-fourth of the population and of the legal electors who were qualified to serve as such jurors in Perry county were negroes, and that on account of their race and color, they have been excluded from serving on any jury in said circuit court for eighteen years, which is a discrimination against the defendant, who is a negro; and that such discrimination is a denial to him of the equal protection of the laws of the United States."

The allegation constituting the second ground of the motion to quash is to the effect that the absence of negroes on the grand jury was not only a fact, but that it had for its purpose a discrimination against the negro race, and did in fact discriminate against the defendant, and amounted to a denial to him of an equal protection of the laws, as guarantied by the first section of the fourteenth amendment of the constitution of the United States.

It is sufficient to say, in the outset of the discussion of this particular subject, that a mere absence of negroes from the grand jury cannot of itself be considered as a sufficient showing to sus-

tain the motion to quash on this ground. It must appear that the exclusion of the negroes from the grand jury was brought about for the purpose solely of denying the equal protection of the laws to the defendant, or his race, on account of race or color.

The first section of the fourteenth amendment of the constitution of the United States reads as follows, to-wit: "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any lay which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any persons within its jurisdiction the equal protection of the laws."

Primarily, as will be readily seen from the language, the effect of this first section of the fourteenth amendment is to prohibit the states from making laws which discriminate against the negro race, but recently emancipated when the amendment was adopted; and it has been so construed in many decisions of the federal supreme court. In that view of it congress has legislated upon the subject, and in that view alone, and provided that whenever it shall appear that any law of a state so discriminates, then it shall be ground for removal of any cause affected thereby from the state to the federal court. In such cases, the question is purely one of law,—that is to say, it arises upon the proper construction of the state law,—to determine whether or not the law does really so discriminate. All cases in which that phase of the amendment is the subject of discussion are applicable only incidentally, if at all, to the case at bar, which arises also from the fourteenth amendment, but not from any express language therein contained, but from the construction given to it by the courts.

In *Virginia* v. *Rives,* 100 U. S. 313, Mr. Justice Strong, in delivering the opinion of the court said: "The provisions of the fourteenth amendment of the constitution we have quoted all have reference to state action exclusively, and not to any action of private individuals. It is the state which is prohibited from denying to any person within its jurisdiction the equal protection of the laws, and consequently the statutes partially enumerating what civil rights colored men shall enjoy equally with white persons, founded as they are upon the amendment, are intended for protection against state infringement of those rights. Section 641

[of the Revised Statutes] was also intended for their protection against state action, and against that alone." That was a case in which the application was for removal under said section of the statute. The petition was denied because no discriminating law of the state was called in question by it, but it contained only allegations of a failure to administer the state laws, which were in accord with the federal constitution (as they are in this state). The allegation is one of fact, to be determined in the course of the trial and judicial proceedings as any other fact in the case. Continuing, the learned judge said in that case: "But when a subordinate officer of the state, in violation of state law, undertakes to deprive an accused party of a right which the statute law accords to him, as in the case at bar, it can hardly be said that he is denied, or cannot enforce, 'in the judicial tribunals of the state' the rights which belong to him. In such case it ought to be presumed that the court will redress the wrong. If the accused is deprived of the right, the final and practical denial will be in the judicial tribunal which tries the case, after the trial has commenced. If, as in this case, the subordinate officer whose duty it is to select jurors fails to discharge that duty in the true spirit of the law; if he excludes all colored men solely because they are colored; or if the sheriff to whom a *venire* is given composed of both white and colored citizens neglects to summon the colored jurors only because they are colored; or if a clerk whose duty it is to take the twelve names from the box rejects the colored jurors for the same reason,—it can with no propriety be said the defendant's right is denied by the state, and cannot be enforced in the judicial tribunals. The court will correct the wrong, will quash the indictment or the panel, or, if not, the error will be corrected in a superior court. * * * The assertions in the petition for removal that the grand jury by which the petitioners were indicted, as well as the jury summoned to try them, were composed wholly of the white race, and that their race had never been allowed to serve as jurors in the county of Patrick in any case in which a colored man was interested, fall short of showing that any civil right was denied, or that there has been any discrimination against the defendants because of their color or race. The facts may have been as stated, and yet the jury which indicted them, and the panel summoned to try them, may have been impartially selected."

That case is perhaps the most instructive one to be found, as touching the question of the denial of equal rights to the negro. The case is in point, in this, that on motion to quash an indictment it is purely a question of fact whether the equal rights of the defendant have been observed in the selection of jurymen, and whether or not he has been discriminated against on account solely of his race or color. If there are other lawful reasons for the exclusion, then the motion to quash will not necessarily be sustained. It was shown in evidence in the case at bar that there were in Perry county at the time 859 white and 175 colored qualified electors, and that no colored men had been selected to serve as jurymen in the county for eighteen years past.

As to the personal qualifications of the negro electors in the county to serve as jurors, one of the witnesses testified: "I have lived in Perry county from boyhood until about five years ago. I have practiced law, and attended the courts at Perryville for twenty-five years. There are 175 colored voters in Perry county. The colored people have schools and churches in Perry county accessible to them all, and have their own preachers and teachers. I know colored men in Perry county whom I think qualified to sit on grand and petit juries. I know colored men in the county to whom I think no personal objection could be raised against as jurors. Until about fifteen years ago colored men were occasionally selected on grand and petit juries, but since then none have been selected. All of the circuit judges that have appointed jury commissioners in the last twenty years have been white, and the jury commissioners have been also white. Yes, there are many colored or negro electors who live in Perry county, with good character, approved integrity, sound judgment and reasonable educational attainments and qualifications. The number of negroes qualified to serve as jurors is small compared with the number of white persons who possess such qualifications, and the commisioners can more easily select the juries from the white people than from the negroes."

It is, of course, always a question with the jury commissioners to determine what portion of the white, as well as of the negro, electors are qualified really to serve as grand and petit jurymen, although all of these are qualified electors. It is, of course, a fact, as stated by the witness, that the proportion of colored men thus qualified is much less than the corresponding proportion of white men. On the question the presiding judge took the testi-

mony of many witnesses, among them two of the jury commissioners who had selected the grand jury that found the indictment. J. C. Dickinson testified: "I was one of the jury commissioners who selected the grand jury who indicted Ed Eason (Eastling). Q. Do you know any negroes in the county who are qualified to serve on the jury? A. I think there are some. Q. Would you select a negro on the jury, if he possessed the qualifications of a juror? A. I would not, as I knew a white man was as well or better qualified. Q. Then this is why you did not put any of them on the jury? A. Yes." On cross-examination, in answer to the question, "Was the question whether or not negroes should be put on the jury discussed by the jury commisisoners or mentioned by any one of them," he answered that it was not. He said the commissioners had before them a list of all persons in the county who had paid their poll tax, and that they selected from the entire list of pool tax payers the men they believed to be best qualified to serve on the grand jury.

L. G. Volmon testified that he was one of the jury commissioners that selected the grand jury which found the indictment, and that the question whether or not negroes should be put on the juries was never discussed nor mentioned; that he selected the men to serve on the grand jury whom he believed to be the best qualified.

The trial judge overruled the motion to quash on this ground also, and, in effect, found from the evidence that colored men were not excluded from the grand jury solely because of their race or color.

There are obviously many considerations which enter into a question like this. Here was a negro accused of the homicide of another negro. Indeed, the act of the killing lay between the defendant and still another negro. In such a case there is little reason for believing that white men comprising the grand jury would or did act otherwise than with a desire to see the criminal laws enforced, and the sequel proves the unquestioned character of their findings. Race prejudices could have nothing to do with their conclusions, so far as can be seen. The jury commissioners, who testified, testified that they sought to select men the best qualified to serve as grand jurymen. It is true, one of them said that he would not select a negro as long as he knew of a white man equally as well qualified or better qualified than the negro. As between two persons of equal qualifications, it is the province of a jury

commissioner to make a selection, and it is difficult to say how his act could be called in question in so doing. And it is his duty to select the best of any number. Jury commissioners are required by statute to select from the electors of the county sixteen persons to serve as grand jurors at the ensuing term of the circuit court. These must be of good character, of approved integrity, of sound judgment and of reasonable information.

Under our statutes the objections that may be successfully interposed to a person summoned to serve as a grand juror are few indeed, for the language of the statute is: "Every person held to answer a criminal charge may object to the competency of one summoned to serve as a grand juror, before he is sworn, on the ground that he is the prosecutor or complainant upon any charge against such person, or that he is a witness on the part of the prosecution, and has been summoned or bound in a recognizance as such; and, if such objection is established, the person so challenged shall be set aside." Sand. & H. Dig., § 2067. Except for the causes named, the question of bias or prejudice does not enter into the composition of the grand jury in this state. In these respects the selection of grand jurymen is upon different grounds from those upon which petit jurymen are selected, although under the statute the same general qualifications are required in both. As the jury commissioners testified that they endeavored to select men the best qualified to serve as grand jurymen, and the evidence to the contrary being not very definite, under the rule we see no reason to overturn the findings of the trial judge, and his judgment on this ground of the motion will not be disturbed.

Our attention has been called to the case of *Smith* v. *State*, decided in the criminal court of appeals of Texas on June 29, 1900, and reported in 58 Southwestern Reporter, page 97. In that case a motion similar to the one under consideration was sustained. It appears, however, that that decision was expressly made to conform with the decision of the United States supreme court in the case of *Carter* v. *State*, then but recently decided on appeal from the court of criminal appeals of Texas, since reported in 20 Supreme Court Reporter, 687, 177 U. S. 442, decided April 16, 1900, which was thought to be identical with *Smith* v. *State, supra*, and it was said expressly in the opinion in the latter case that the same was rendered because of the ruling in the former, and that otherwise the opinion in *Smith* v. *State* would have been

different. On examination of the opinion of the Supreme Court in *Carter* v. *State,* we find the identical points were made in the motion to quash as in the case of *Smith* v. *State,* and the same facts substantially stated therein; but the trial court in *Carter* v. *State* refused to permit the defendant to introduce testimony to sustain his motion to quash, and this, in truth, was the point upon which the court decided that case, and not upon the evidentiary facts at all. This is the language of the court: "The bill of exceptions tendered by the defendant, and allowed by the presiding judge, and made part of the record by his order, explicitly states that, 'after reading the said motion, the defendant asked leave of the court to introduce witnesses, and offered to introduce witnesses, to prove and sustain the allegations therein made; but the court refused to hear any evidence in support of the said motion, and thereupon overruled the same, without investigating into the truth or falsity of the allegations of said motion, to which action of the court the defendant then and there excepted.' It thus clearly appears by the record," continues the court in that case, "that the defendant, having duly and distinctly alleged, in his motion to quash, that all persons of the African race were excluded, because of their race and color, from the grand jury which found the indictment, asked leave of the court to introduce witnesses, and offered to introduce witnesses, to prove and sustain that allegation; and that the court refused to hear any evidence upon the subject, and overruled the motion, without investigating whether the allegation was true or false."

The judgment of reversal was then entered, not on the evidence, but because in reality the trial court, having refused to admit evidence, and overruled the motion without considering any evidence in relation thereto, in effect decided the case upon the allegations of the motion, which being admitted as true by this action of the court, its decision was erroneous. No such issue as this was presented in the case of *Smith* v. *State,* and the decision of the criminal court of appeals therein seems to have been rendered on a misapprehension of the real meaning of the decision in *Carter* v. *State.* No such issue arises in the case at bar as was the turning point in the Carter case, for the trial court in this case heard the evidence in full on the motion to quash, and ruled on the facts thus ascertained.

The only other ground we will consider is whether or not the evidence is sufficient to sustain the charge of conviction of murder

in the first degree. It appears from the testimony that these negroes, with others, had been engaged in the game of "craps" in what was known as the "stockade;" that, coming out of the stockade, a quarrel arose between the defendant and deceased over a trivial matter, in the course of which insulting language was used between them, and immediately the defendant began firing upon the deceased with a pistol, and simultaneously another negro began firing upon the deceased from a somewhat different direction, and thus the deceased was killed, leaving the question who did really kill the deceased more or less in doubt, there seeming to be no connection between those who did the shooting. Under the circumstances we are of opinion that the evidence does not show that premeditation and deliberation necessary to constitute the crime of murder in the first degree, but that there is sufficient evidence to justify a verdict of murder in the second degree. The judgment, for that reason, is reversed, and the cause remanded, with directions to the circuit court to set aside the judgment and verdict for murder in the first degree, and to sentence the defendant as for murder in the second degree.

BUNN, C. J., and BATTLE, J., do not concur in the order to sentence, but think, under the circumstances, the cause should be remanded for a new trial. Otherwise, we concur in the opinion and judgment.

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LESTER v. RICHARDSON.

Opinion delivered March 30, 1901.

1. MORTGAGE—PRIORITY.—A new mortgage executed in lieu of one barred by the statute of limitations is a separate and distinct contract, and an intervening mortgage, not barred, is entitled to priority. (Page 201.)

2. SUBROGATION—TAXES.—A junior mortgagee paying taxes on the mortgaged property to protect his lien will be subrogated to the state's paramount lien therefor. (Page 201.)

Appeal from Garland Chancery Court.

LELAND LEATHERMAN, Chancellor.

Suit by L. D. Richardson against Thompson T. Lester and others. From a decree for plaintiff, defendant has appealed.

Wood & Henderson, for appellant.

Equity should relieve against the effects of a mistake of law and fact into which appellant was induced by the fraudulent representations of Murray. 1 Story, Eq. §§ 110, 136; 2 Pom. Eq. Jur. § 849; Jones, Mortg. § 971; 54 Ark. 154; 43 N. W. 91; 9 N. W. 844; 28 N. W. 924; 13 Pac. 434; 35 N. W. 629; 89 Mo. 383; 35 Ia. 157; 69 N. E. 495; 23 Me. 388; 15 Wis. 612; 54 Miss. 446; 64 N. Y. 397; 5 S. E. 418.

G. G. Latta, for appellees.

The court's ruling as to the priority of appellee's mortgage was correct. Sand. & H. Dig., § 5091; 9 Ark. 112; 20 Ark. 190; 18 Ark. 105; 49 Ark. 457; *Cf.* 1 Jones, Mortg. 605; 2 N. J. Eq. 239; 36 Barb. 571; 1 Sandf. Ch. 383; 9 Gill, 185; 29 Md. 178. Appellant's mortgage was barred by limitation. Sand. & H. Dig., § 5094.

BATTLE, J. On the 28th of June, 1889, R. Murray and Mary Murray executed to Thompson T. Lester their promissory note for the sum of $500, due and payable on or before the 28th day of March, 1890, bearing interest at the rate of 10 per cent. per annum from date until paid; and on the 28th of June, 1889, conveyed by deed of mortgage to Lester the north half of lot 5, in block 47, in the city of Hot Springs, in this state, to secure the payment of said note. This mortgage was properly acknowledged on the day of its execution, and was recorded on the 30th of August, 1889. On the 25th of November, 1893, R. Murray executed to L. D. Richardson his promissory note for the sum of $16,405.47, due one day after date, and bearing 10 per cent. per annum interest from maturity until paid; and on the same day R. and Mary Murray conveyed said north half of lot 5, in block 47, in the city of Hot Springs, among other lands, to Charles N. Rix, in trust to secure the payment of the note for $16,405.47. The deed of trust was acknowledged on the day of its execution, and was properly filed for record on the 28th of November, 1893, and was duly recorded. R. Murray, from time to time, paid the interest on the note executed to Lester for $500, but no memorandum of such payments, with the dates thereof, was indorsed on the margin of the record where the mortgage is recorded. On the

28th of November, 1894, R. Murray fraudulently and falsely represented to Lester that the said north half of lot 5, in block 47, was not incumbered in any manner except by the mortgage to Lester, and he and his wife, Mary Murray, executed to Lester a note for the said $500 and 10 per cent per annum interest from date until paid, and due on or before the 28th of May, 1895, and conveyed the said north half of lot 5 in block 47 to J. H. Scoggins in trust to secure the payment of the last mentioned note, and by said false representation R. Murray induced Lester to accept the last mentioned note and deed of trust in lieu of the note first given for the $500 and the mortgage to secure the same, and to enter on the margin of the record of the mortgage satisfaction thereof and a release of the property mortgaged therein. Murray failed to pay the taxes assessed against the property mortgaged to Lester, and on the 14th of June, 1898, Lester paid $25.96 to satisfy the same and the costs and penalty incurred on account of such failure. No one except Murray participated in the fraud upon Lester.

In a cross-complaint filed in this action Lester sought to have the satisfaction and release entered on the margin of the record set aside on account of the fraud perpetrated upon him, and to foreclose the mortgage executed on the 28th of June, 1889, to secure the $500, and also to have the property mortgaged sold for the purpose of refunding to him the $25.96 expended in payment of taxes, penalty and costs. Richardson pleaded the five years' statute of limitation in bar of his right to the relief demanded. The trial court sustained the plea as to Richardson and his assigns, and held that the deed of trust made to secure Richardson was superior to the deed of trust executed to secure Lester, and canceled the satisfaction of Lester's mortgage, and ordered that all the property conveyed to Rix in trust, except the north half of said lot 5, be first sold, and that the north half of said lot 5 be then sold, and that the deed of trust made to secure Richardson be first satisfied out of the proceeds of the sale of the property in the order sold, so far as they will extend, and, if there shall be any part of the proceeds of the sale of the north half of lot 5, in block 47, thereafter remaining, that it be appropriated to the satisfaction of the mortgage first executed to secure Lester, so far as it will extend, but made no order in respect to the $25.96, and Lester appealed.

The appellant contends that the court erred in holding that the lien of the deed of trust executed by R. and Mary Murray on the 25th of November, 1893, to secure Richardson, on the north half of lot 5, in block 47, was superior to the lien of the mortgage executed on the 28th of June, 1889, to secure Lester, and to the lien of the deed of trust executed on the 28th of November, 1894, for the same purpose. This contention seems to imply that the two instruments made to secure Lester were a part of the same contract, whereas more than five years intervened between the execution of the same, and Lester, on the 30th of November, 1894, entered on the margin of the record of the mortgage the following: "I hereby acknowledge full satisfaction of the note herein described, and hereby release the property from the operation of this deed of trust or mortgage;" and signed the same. The contention is clearly incorrect. The deed of trust, executed on the 28th of November, 1894, was intended to be, and was accepted, in lieu of the mortgage, and a new note was made and accepted in full discharge of the note secured by the mortgage. The cancelling of the entry on the margin of the record by the court did not join the two instruments and make them one contract. They still remained separate and distinct contracts in reference to the same subject-matter, and, the note secured by the mortgage not being kept alive, except by part payments, of which no memorandum was indorsed on the margin of the record, where the mortgage was recorded, the mortgage was barred by the statute of limitation, so far as it affected the rights of third parties (Sand. & H. Dig., § 5094); and the deed of trust to secure Richardson, having been made, filed for record, and recorded before the deed of trust to secure Lester was executed, was prior and superior to the last-mentioned deed of trust, and was entitled to be first satisfied out of the proceeds of the sale of the property thereby conveyed to Rix in trust. *Frazee* v. *Inslee,* 1 Green (N. J.), 239; *Neidig* v. *Whiteford,* 29 Md. 178; *Woollen* v. *Hillen,* 9 Gill, 185; 1 Jones, Mortgages § 605.

Lester, having paid the taxes, penalty, and costs charged against the north half of lot 5, in block 47, for the purpose of protecting his lien thereon, is entitled to be subrogated to the lien held by the state to secure the payment of the same, which is paramount to all other liens, and to receive the amount paid out of the proceeds of the sale of the property charged. *Ringo* v. *Woodruff,* 43 Ark. 498.

The decree of the circuit court, so far as it is consistent with this opinion, is affirmed, and, as to the $25.96 expended in the payment of taxes, penalty and costs, the cause is remanded, with directions to the court to enter a decree in accordance with this opinion and to enforce the same.

BOYD v. MITCHELL.

Opinion delivered March 30, 1901.

SCHOOL DISTRICTS—USE OF BUILDING FOR RELIGIOUS WORSHIP.—Under Sand. & H. Dig., § 7042, giving to the directors the care and custody of school houses and other property belonging to the district, and requiring them to preserve the same, school directors have the right to prohibit the use of a school building for religious worship where it is shown that the building and its contents were being injured, notwithstanding the land on which the school is situated was conveyed to trustees for the purpose of religious worship, and was by them conveyed to the school directors for the same purpose, and the building was erected in part by subscriptions, with the understanding that it was to be so used under the charge of the directors.

Appeal from Lincoln Chancery Court.

MARCUS L. HAWKINS, Chancellor.

STATEMENT BY THE COURT.

This is an appeal from a decree of the Lincoln chancery court brought by appellees as trustees for the public to compel the school directors of School District No. 45 of said county to open for religious worship a school house alleged in the complaint to have been built by said district and by private subscriptions, upon the agreement and understanding between the directors of said school district and said subscribers that the same should be for school house and be used also for religious services, when school was not being kept therein, and to enjoin said school directors from preventing its use for religious services. After hearing

the testimony, the court granted the prayer of the complaint, and ordered an injunction as prayed for, from which decree the school directors appealed to this court.

On the 7th of November, 1883, H. C. Stephens executed and delivered to appellees, as trustees, the deed of trust exhibited with their complaint, providing that the tract of land upon which the building is situated should be held by them in trust for the following purposes, to-wit: "That said land be a free burial ground for white people only, and that it is understood and agreed that said ground is to be free for all denominations to build their churches, and the first church built shall have preference; provided said land shall be used by white people only. After these conditions the trustees may build school houses, or erect any other improvement they may think proper; *provided that all improvements and expenditures shall be and remain thereon for that purpose for all time to come.*" At the annual school meeting held in May, 1894, the electors of School District No. 45 voted an appropriation of $150 for the purpose of building a school house on the tract of land mentioned in the deed of trust. The directors of said district got permission of the trustees of said land to build a school-house thereon, and the house was built in accordance with said agreement. The school house was paid for by warrants issued by the directors of said district and by subscriptions. The house and furniture cost $640.75, of which about $150 was paid by subscriptions. It was agreed and understood that the directors were to control said house as a school house, it being clearly set forth in the subscriptions circulated that said house would be used for educational and religious purposes, in charge of the directors of said district.

The house was so used until the seats and desks were injured by large persons sitting on them during religious services, when the directors met and decided that it would be best to put up public notices forbidding anyone entering the house without having obtained permission from the directors. There were also complaints of the loss of books, slates, pencils, and damage done to the house, when the directors considered it their duty to deny the use of the house for any other than school purposes. No power is given the so-called trustees to sue or be sued in the deed of trust.

F. M. McGehee, for appellants.

Appellees have no right to sue as trustees. 27 Ark. 122; 59 Ala. 335. The directors had power to control the school building. Sand. & H. Dig., § 7042.

HUGHES, J., (after stating the facts). Passing by the question of the right of the trustees to sue in this case, and the power of the directors of the School District No. 45 to make an agreement to build a house to be used as a school house and also as a church, or as a place for religious worship, we think it is clearly shown that the house was, when built, to be under the control of the directors of the school district, and was the property of said district. If it was to be under their control, in contemplation of law it was within their province, and was, perhaps, in strictness, their duty, not to allow it used for purposes other than school purposes. It seems that this is apparent. They have no power, beyond those expressly granted or arising by necessary implication.

Section 7042 of Sandels & Hill's Digest provides that the directors "shall have the care and custody of the school house and grounds, the books, records, papers, and other property belonging to the district, and shall carefully preserve the same, preventing waste and damage."

It appears in this case that by the use of the school house for religious worship the seats were being damaged, and the books, pencils, etc., of the school children were being injured by persons attending the meetings for religious worship.

In the exercise of their power of control and their duty to preserve the property of the district, the school directors of this district did right, we think, in prohibiting the use of the school house for religious meetings. It is true that about $150 were contributed by individuals to be used, and which were used, in erecting the schoolhouse, upon the understanding that the house was to be used for a school house and for religious worship. This house was to be in charge of the directors of the district, and was so stated in the subscription lists upon which the $150 were subscribed. This could make no difference in the power and duty of the directors to control and protect the property of the district.

The decree is reversed, and the cause is dismissed.

FORD v. HARRISON.

Opinion delivered March 30, 1901.

JUDGMENTS AND DECREES—LIEN.—While the general lien of a decree continues in force as to the judgment debtor's land only three years from the date of the decree, unless revived, the lien of a mortgage on land, enforced by decree, does not lapse after three years from the date of the decree.

Appeal from Lafayette Circuit Court.

CHAS. W. SMITH, Judge.

STATEMENT BY THE COURT.

R. B. Ford, being the owner of a tract of land in Lafayette county, on March 30, 1889, mortgaged it to Henry Moore to secure a debt due him. This mortgage was duly recorded April 6, 1889. Afterwards on February 6, 1890, Ford conveyed the land to his son, R. F. Ford, by deed which stated the consideration to be $200. The mortgage debt was not paid, and Moore brought suit, and on August 3, 1891, obtained a decree against R. B. and R. F. Ford foreclosing the mortgage, and ordering the land sold for the payment of the debt. The day fixed in the decree for the sale was 14th of December, 1891, but the decree was entered by consent, and contained the following provision: "It is by consent further ordered that, if said defendants, or either of them, shall on or by the 14th day of November, 1891, pay as much as $100 to plaintiff upon the judgment herein rendered, no sale of said lands herein mentioned shall be made before the 14th day of November, 1892, and this cause is continued."

The foreclosure judgment was not paid, and Mrs. E. O. Harrison in September, 1891, recovered a judgment against R. F. Ford before a justice of the peace for $125 and costs. Afterwards on November 22, 1892, a transcript of this judgment was filed in the office of the clerk of the circuit court of Lafayette county, and entered upon the docket for judgments and decrees, and thus became a lien upon the land of R. F. Ford in that county. But R. F. Ford, who now claims the land burdened by the fore-

closure decree and the judgment lien of Mrs. Harrison, sold the land to his brother, M. H. Ford, the consideration expressed in the deed being $325, though it is claimed by Ford that nothing was paid or agreed to be paid, except that he agreed to pay off or purchase the foreclosure decree. Moore, who owned the foreclosure decree, testified that after the decree was taken R. F. Ford notified him that he could not pay the decree, and that he had turned the land over to his brother, M. H. Ford. Moore further testified that he thereupon agreed with M. H. Ford that, if he would pay the amount of the decree and all costs connected with it, the decree would be used to perefect his title. "I explained to him," said Moore, "that he was in fact simply buying the decree that I held against the land. No credits were entered upon the decree, and it was understood that none were to be entered, but that this decree was to be used to get him a good title to the land." This agreement with M. H. Ford was made only a few months after the decree was entered. M. H. Ford took possession of the land, and continued from time to time to make payments to Moore under this agreement. Meantime Mrs. Harrison had caused an execution to be issued on her judgment against R. F. Ford, and to be levied upon the land in controversy as his property. The land was sold under the execution in June, 1895, and the sheriff executed his deed to Mrs. Harrison in August, 1896. At the time the execution was levied, M. H. Ford had not fully paid off the amount he agreed to pay Moore, and, R. B. Ford, the mortgagor, being dead, M. H. Ford, as administrator of R. B. Ford, was, by consent, made a party to the proceedings, the action revived against him, and another order of sale was procured, and in October, 1895, the land was sold under the decree, and purchased by Moore. He bid for the land the full amount of the judgment and costs. Deed was executed to Moore by the commissioner in February, 1896, and he in turn conveyed the land to M. H. Ford. Mrs. Harrison brought this action against M. H. Ford to recover the land, and he set up as a defense the title acquired under the foreclosure sale. On a trial there was a judgment for the plaintiff, from which defendant appealed.

Henry Moore, for appellant.

The mortgage and the mortgagee's rights thereunder were not merged in the decree, so far as to make the lien of the mortgage expire in three years unless the judgment be revived. 45

Ark. 376; 73 Ind. 219, S. C. 38 Am. Rep. 133; 85 Am. Dec. 146; 21 Cal. 103. *Cf.* 43 Ark. 488; 43 Ark. 519.

King & Searcy, for appellee.

Appellant is estopped by taking the deed from R. F. Ford to set up his abandoned claim under the foreclosure decree. 35 Ark. 540; 60 Ark. 491; 33 Ark. 465; 37 Ark. 47; 38 Ark. 571; 39 Ark. 131; 36 Ark. 96; 47 Ark. 317; 48 Ark. 409; 45 Ark. 37; 52 S. W. 671; 54 S. W. 1107.

RIDDICK, J., (after stating the facts). This is an action of ejectment, where both parties claim title under R. B. Ford, who is admitted by both parties to have been the owner of the land. R. B. Ford mortgaged the land to Henry Moore, and afterwards conveyed it to R. F. Ford. Mrs. Harrison, the plaintiff, claims title by virtue of an execution sale of the land as the property of R. F. Ford. The defendant, M. H. Ford, rests his title upon a sale under a decree foreclosing the mortgage given by R. B. Ford to Moore. As R. B. Ford had mortgaged the land to Moore before he conveyed it to R. F. Ford, and as R. F. Ford was a party to the foreclosure decree obtained by Moore, it is evident that a sale under such decree would ordinarily cut off all interest of R. F. Ford in the land. It would cut off not only the interest of R. F. Ford, but also the interest of any purchaser or person by virtue of a sale under execution against him, when there was no attachment, and when the judgment upon which the execution was issued was recovered after the rendition of the foreclosure decree. But counsel for Mrs. Harrison contend that the sale under the decree did not have that effect in this case, for the reason, as they contend, that Moore abandoned his decree, and waived his lien, and that both he and M. H. Ford, his vendee, are now estopped from setting up such decree and sale. But we see nothing in the evidence to sustain such a contention. A man may purchase the same land from two different persons, and, if he is sued by a third person, he can rely on either or both of the titles he has purchased. The fact that M. H. Ford had purchased this land from his brother did not prevent him from purchasing it from Moore. Nor does the fact that he had recorded the deed from his brother estop him from setting up the title acquired from Moore. But counsel say that the foreclosure decree directed the commissioner to sell on the 14th of December, 1891, unless $100 were paid before that day, but directs that, if such payment was made, the commissioner

should postpone the sale for the remainder of the debt until December 14, 1892. The last-mentioned day having passed without a sale, they contend that the presumption is the decree had been satisfied by the payment of the debt. But under the facts of this case the contention that the decree should be treated as satisfied because the land was not sold on the day named in the decree is, we think, utterly untenable, and is only noticed on account of the somewhat strenuous argument made by counsel in support of it.

The next contention urged by counsel for plaintiff is that the title or lien given by the mortgage was merged in the foreclosure judgment rendered in 1891, and that the lien of this judgment, not having been revived, expired after three years, and that thereupon the judgment of plaintiff, filed in 1892, became a first lien on the land. But, while the note secured by the mortgage and sued on—in other words, the cause of action—was merged in the judgment, so that plaintiff could not maintain another action on the note or mortgage, yet the mortgage lien or title was not merged in the judgment. On the contrary, the object of the suit was to establish that title. All conflicting liens or interests adverse to the mortgage possessed by the defendants in the foreclosure suit were cut off by the foreclosure decree, and the mortgage lien or title was by that decree established as superior and paramount. After such decree Moore still held his mortgage lien or title, but he held it freed from any defects or uncertainty as to the rights of the defendants, these having been determined by the decree. The debt secured by the mortgage was no longer a promissory note, liable to be barred by statute of limitations after five years, but a judgment, which would not be barred until ten years from its rendition. The statute requiring suits to foreclose mortgages to be brought within the period of limitation prescribed for a suit on the debt for the security of which the mortgage was given does not affect this case, for the mortgage has already been foreclosed, and the land sold under the decree in less than five years after it was rendered—long before the decree was barred by the statute, and while the lien of the mortgage was still in force. It results from what we have said that, in our opinion, the purchaser under the foreclosure sale obtained a title superior to that of the purchaser at the sale under execution against R. F. Ford, whose interest in the land was determined by the decree to be subject to the mortgage. Had plaintiff, after obtaining her judg-

ment lien, brought suit in equity to redeem from the mortgage and decree, and to subject the interest of R. F. Ford in the land to her judgment, different questions would have been presented. But this is a suit in ejectment, not an action to redeem or set aside for fraud, and the only question presented is, which has the superior legal title, plaintiff or defendant? We are of the opinion that the title of the defendant is superior to that of plaintiff, and that the circuit court erred in its findings and judgment in favor of plaintiff. The judgment is therefore reversed, and the cause remanded for a new trial.

CONANT v. STORTHZ.

Opinion delivered April 6, 1901.

PLEADING—MOTION TO MAKE COMPLAINT MORE SPECIFIC.—Where a complaint alleged that plaintiff paid a certain sum to defendant for becoming surety on his bail bond, and that defendant, in violation of his agreement to remain on the bond until the trial of the cause, exercised his statutory privilege of surrendering plaintiff into custody, and that plaintiff was compelled to pay a like sum to another party for becoming surety on a second bond for his release, and it was uncertain from the face of the complaint whether the action was based on a tort or a contract, it was not error to require the plaintiff to make his complaint more specific.

Appeal from Pulaski Circuit Court.

JOSEPH W. MARTIN, Judge.

Action by Conant against Storthz. From a judgment for plaintiff defendant has appealed.

E. M. Merriman and *John D. Shackleford*, for appellant.

There was no error as to joinder of the causes of action for the breach of the contract and for the tort growing out of the breach. 154 Mass. 163; 149 Mass. 410; 4 Allen, 504; 167 Pa. St. 393; 23 N. Y. Supp. 56; 1 Jagg. Torts, 22, 24, 26, 28, 29; 92 Mich. 304; 87 N. Y. 382; *Cf.* Sand. & H. Dig., §§ 5601, 5602, 5604, 5605; 31 Ark. 382; *id.* 657. The suit was, in substance,

one in tort. 1 Enc. Pl. & Pr. 143-4, 147; 4 *id.* 915; 43 Hun, 493; 18 How. Pr. 94; 35 Hun, 281; 64 Ala. 1.

John H. Cherry, for appellee.

The causes of action were inproperly joined. 1 Chitty, Pl. 201; Steph. Pl. 267; Bl. Code Pl. §§ 5, 412, 290; Sand. & H. Dig., § 5717; 33 Ark. 316; 66 Ark. 135. The motion to make more definite was properly sustained.

BUNN, C. J. The appellant, J. D. Conant, charged with murder, on a petition for writ of habeas corpus before the Hon. R. J. Lea, judge of the first division of the Pulaski circuit court, was held to bail in the sum of $5,000, to be and appear in said court at its ensuing term, and not depart without leave thereof, in the form of the statute. Conant procured the appellee as his bondsman, paying him $50 to go his bail, and was thereby released from custody. He contends that, by a verbal contract between them, appellee should have remained his bail on said bond until his trial, or other final disposition of the case. It appears, however, that appellee, exercising his statutory privilege, surrendered appellant into custody before the case was called for trial, and, as appellant avers, in violation of his said contract; and appellant was reincarcerated, and gave $50 to another party to make a second bond for his release from custody and to appear in said court, appellant avers, in violation of his said contract; and appellant was reincarcerated, and gave $50 to another party to make a second bond for his release from custody and to appear in said court, as was the condition of the first bond. These facts were substantially set forth in the complaint, and on motion of defendant the trial court ordered plaintiff to make the complaint more specific and certain, which he declined to do, and judgment was rendered for the defendant.

The action of plaintiff was for a tort, which he claimed resulted from a breach of the contract, and his damages were laid in his complaint at $5,000; thus giving the circuit court exclusive jurisdiction, if the action as for a tort was maintainable at all. If we eliminate the contract, there could be no tort, since the defendant was but asserting his statutory right when he surrendered the plaintiff into custody. If the contract is to be relied on as a basis of the action, then the claim for damages as for tort would not lie; for the two cannot be joined in one action under ordinary circumstances, and there is nothing in the facts of the case to take it out of the ordinary rule, as was held in *Fordyce* v. *Nix,*

58 Ark. 140. This is the whole difficulty in the case. If the plaintiff declares on his contract, alleging a breach of it, the measure of damages is the loss of time and expenditure of money, with interest; and in the present case the circuit court might not have jurisdiction, but the case might fall within the exclusive jurisdiction of a justice of the peace. On the other hand, if the declaration is for a tort, and the amount is sufficient, the circuit court has exclusive jurisdiction; but the evidence to sustain it is entirely different from that on a breach of contract, or, rather, it is something in addition. Hence they ought not to be joined. The circuit court has a large discretion in the matters of practice, and the direction to make more specific and certain in this case was altogether reasonable, and should have been obeyed; and failing to do so but emphasizes the intention of plaintiff to recover on the tort, thus ignoring the contract in fact, or making it, at most, a mere incident. The plaintiff contends that the two causes of action, or rather the two kinds of action, can be properly joined in one; but grant this for the sake of argument, and yet the complaint should show which of the two the plaintiff will rely on. The defendant was entitled to know this much.

Under the circumstances the judgment will be affirmed.

HARDIN v. MCGREEVY.

Opinion delivered April 6, 1901.

ESTOPPEL—TAX SALE.—Plaintiff purchased certain lots belonging to defendant at a commissioner's sale for delinquent sewer taxes, and afterwards paid the state and county taxes due thereon. Plaintiff permitted defendant to repay the state and county taxes, without apprising him of his purchase at the sewer tax sale, although the circumstances showed that defendant was ignorant of such sale. *Held* that, by accepting repayment of the state and county taxes without disclosing the previous purchase at the sewer tax sale, plaintiff was estopped from claiming title thereunder.

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

STYLES T. ROWE, Judge.

Hardin purchased certain lots at a chancery sale, and filed a motion to direct the commissioner to execute to him a deed, and that an entry on the margin of the judgment record, showing redemption of the lots, be canceled. McGreevy, as owner of the lots, resisted the motion. From an order denying the motion, Hardin has appealed.

Mechem & Bryant, for appellant.

The "time of sale" from which the period allowed for redemption begins to run is the date of the public offer for sale and its acceptance by the purchaser, and not the date of the confirmation of the sale. Black, Int. Laws, 129, 132; 54 Cal. 111; 11 Mich. 199; 2 Ired. Eq. 584; 6 Wall. 759; 16 Tex. 382; 46 Ala. 118; *Cf.* Sand. & H. Dig., §§ 5353, 5341, 5350, 5352, 5380, 5382, 5385, 5386, 5387, 5381; 23 Ark. 39; 32 Ark. 97; 55 Ark. 307; 38 Ark. 78; 47 Ark. 417; 48 Ark. 248; 62 Ark. 213. Appellant was under no duty to speak as to his title under the purchase for improvement tax. 30 Ark. 407; 48 Ark. 411; 11 Am. & Eng. Enc. Law (2d Ed), 435, 436; 60 N. Y. 73; 38 Ill. 456; 105 Ala. 451; 121 Mo. 50; 79 Md. 27; 130 Ind. 579; 145 Ill. 389; 69 Miss. 403; 113 N. Car. 327; Big. Estop. 407, 502, 503; 6 Cush. 210; 44 Ala. 352; 18 Ala. 229; 25 Conn. 250; 40 N. Y. 191; 97 Mo. 263; 4 Johns. Ch. 64. Estoppel from silence cannot arise where there is no duty to speak. 63 Ark. 300; 50 Ark. 128; 39 Ark. 131; 55 Ark. 426; 36 Ark. 114; 46 Ark. 117; 51 Ark. 61; 24 Ark. 255. Appellee having entertained no intention to redeem, appellee did not *cause* or *induce* him to fail to do. Hence no estoppel arose. 11 Ark. 264; 53 Ark. 196; 56 Ark. 380; 11 Am. & Eng. Enc. Law (2d Ed.), 436; 6 Ad. & E. 469; L. R. 8 Q. B. 420; 38 Am. Dec. 620; *S. C.* 3 Hill, 215; 6 Cush. 210; 40 Vt. 51; 55 N. Y. 222, 229; Big. Estop. 549; 97 Mo. 263.

Hill & Brizzolara, for appellee.

Appellant is estopped by silence to set up his tax title against appellee. 33 Ark. 465. As to appellant's duty to speak, see 63 Ark. 300.

BUNN, C. J. The Board of Improvement of Sewer District No. 1, of Fort Smith, brought suit against Nathaniel Carter and others under section 5341 of Sandels and Hill's Digest, and obtained judgment of condemnation and order of sale of certain property in said sewer district for the nonpayment of the assess-

ment thereon. Among the property so condemned and ordered sold were lots 7, 8, 9, 10, 11, in block 612, Reserve addition to the city of Fort Smith, owned by the appellee, Edward McGreevy, a non-resident, whose agent at Fort Smith for the payment of his taxes was one E. C. Brogan. The notice to McGreevy, as a non-resident party to the suit and judgment and order of sale, were all legally and properly had. The sale was advertised and made on February 3, 1898, and at the sale the appellant was purchaser of the above lots, and obtained certificate therefor. On April 17, 1899, he filed his motion in the above cause of *Board of Improvement* v. *Nathaniel Carter et al.*, with his certificate, praying the court to direct the commissioner to make a deed to said lots, and that an entry appearing on the margin of the record of judgment, showing a redemption of said lots on April 3, 1899, be canceled and held for naught. To this motion Edward McGreevy appeared by attorneys, and filed answer alleging redemption of the lots *within one year from the confirmation of the sale,* and also that the lots were not properly advertised for sale, and that the purchaser (appellant) was estopped from asserting his right to a deed.

The motion and response were heard on two agreed statements of facts, which constituted all the evidence in the case.

The first is as follows, viz: "That said Edward McGreevy was owner of said lots, which were located in plaintiff's (Board of Improvement's) district; that an assessment for the benefit of the improvement was made on said lots, in common with other lots within said district, which assessment was not paid, and in August, 1897, said board brought above-entitled cause to condemn said lots, together with other property, to be sold to pay the assessment; that on October 19, 1897, upon due notice had to the owner of the above-mentioned lots, Edward McGreevy, judgment was rendered condemning the same to be sold to pay said assessment, penalty and costs, amounting to the sum of $7.46; that said judgment was regular, and in all things in accordance with the law in such cases made and provided; that on April 3, 1899, E. C. Brogan, the duly-authorized agent of Edward McGreevy for that purpose, by tender legally and properly made according to law, offered and tendered to A. E. Hardin the amount paid by him for the lots, together with 20 per centum thereon, which said Hardin refused to receive, whereupon said Brogan on April 3, 1899, paid said amount and 20 per centum to the clerk of the court, who made the following entry on the margin of the decree aforesaid, to-wit:

"April 3, 1899. Redeemed. Redemption money deposited with the clerk. (Signed) D. P. Durden, Clerk, by H. A. Durden, D. C."

The case is thus summed up in appellee's brief: "On March 26, 1898, Hardin paid state and county taxes on said lots for the year 1897. On April 9, 1898, Brogan, as agent of McGreevy, offered and tendered said Hardin the amount of said state and county taxes, which Hardin accepted, and the receipt which had been issued to Hardin was taken up, and a new receipt, dated April 9, 1898, issued. At the time of this payment of state and county taxes by Hardin, neither of the parties mentioned the sewer tax, nor the fact that said lots had been condemned and sold for said sewer taxes and bought in by Hardin, and Brogan did not then know that said lots had been sold for sewer taxes, when as a matter of fact Hardin was then holding the certificate for the same.

"On March 3, 1899, Hardin again paid the state and county taxes for the year 1898 upon the property, and on April 3, 1899, Brogan offered to pay said taxes, and was informed again that they had been paid by Hardin, and at once went to see Hardin, and offered to pay the same, which Hardin refused [to accept], and [Brogan] then learned for the first time that Hardin had bought the lots at sewer sale, and he immediately, to-wit, on the 3d April, 1899, offered to redeem said land from the sewer tax sale, and made tender of the amount due thereon, with penalties, also state and county taxes, to Hardin, which was refused, and then made said payment to the clerk, and caused said payment to be entered of record as stated."

When Brogan, on the 9th April, 1898, tendered and paid Hardin the taxes, state and county, which the latter had paid on the 26th of March, 1898, for the year 1897, if Hardin intended to claim title under his previous purchase at sewer tax sale, he should not have accepted the money from Brogan. To accept the state and county taxes from him, and yet not disclose his real claim, was, of course, misleading to Brogan, who was ignorant of the sewer-tax sale, and this itself was a circumstance going to show to Hardin the ignorance of Brogan on the subject; for no prudent man would seek to redeem land from one burden, while a still more fatal one to his interest was suffered to remain. Hardin's withholding this information from Brogan could have had but one object, and that to hold the secret lien until the time for redemption should expire, and his lien should ripen into a title. This

theory is the more apparently correct when he refused the very same tender on April 3, 1899, when he thought the time for redemption from the sewer tax sale had expired. The chancellor, in effect, found that Hardin knew of the ignorance of Brogan as to his purchase, and that Hardin acted upon that theory in the transaction, and held that he was thus estopped from claiming title under his purchase. We see no cause to disturb his findings.

Affirmed.

STATE FAIR ASSOCIATION *v.* TOWNSEND.

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Opinion delivered April 6, 1901.

1. ACTION—DEATH OF PARTY—ABATEMENT AND REVIVAL.—Under Sand. & H. Dig. § 5934, providing that "an order to revive an action against the personal representatives of a defendant, or against him and the heirs or devisees of the defendant, cannot be made, unless by consent, until after six months from the qualification of the personal representative," and § 5935, providing that "an order to revive an action against the representatives or successor of a defendant shall not be made without the consent of such representatives or successor, unless in one year from the time it could have been first made," where a defendant died during the pendency of an appeal taken by the plaintiff, and the latter neglected to revive the suit against the administrator for more than eighteen months after his appointment, and neither the administrator nor his heirs consented to such revivor, the appeal will be dismissed. (Page 217.)

2. REVIVAL OF ACTION—REPRESENTATIVES.—Sand. & H. Dig. § 5935, provides that an order to revive an action against the "representatives" of a defendant shall not be made without the consent of such representatives, unless in one year from the time it could have been first made. *Held*, that the term "representatives" includes heirs as well as personal representatives. (Page 218.)

3. APPEARANCE—CONSENT TO REVIVAL.—A recital of the record that a motion to revive the action was continued by consent is not sufficient to show that the administrator had appeared and consented to the revival. (Page 218.)

Appeal from Pulaski Chancery Court.

THOMAS B. MARTIN, Chancellor.

STATEMENT BY THE COURT.

The State Fair Association executed a mortgage upon its property to secure certain bonds issued by the association, and afterwards brought suit in the Pulaski chancery court against Joe Townsend and others to redeem. The court found that the association had the right to redeem, determined the amount due on the bonds secured by the mortgage, and gave plaintiff 90 days in which to make payment and redeem. The association failed to make the payment, and after the expiration of the time allowed by the decree for redemption, it being shown to the court that no portion of the mortgage debt had been paid as ordered, the court on motion dismissed the action to redeem, and gave judgment for costs against the plaintiff association. To this decree dismissing its action the association excepted, and appealed to this court. This judgment was rendered February 9, 1898, and afterwards, while the action was pending in this court, to-wit, on the 6th day of March, 1899, Joe Townsend, the defendant and appellee, died. Five days afterwards, on the 11th day of March, 1899, Walter J. Terry was, by the probate court of Pulaski county, duly appointed and qualified as administrator of Townsend's estate. Over a year afterwards, on the 16th of April, 1900, the association filed in this court a motion to revive, in which motion the name of the heirs and administrators were given. Still later, on July 16, 1900, a preliminary order for revivor and to show cause was made by the court, but no service of this order was made or attempted until October 17, 1900. On that day an affidavit of warning order was made by the attorney of the association, and filed with the clerk of this court. The clerk thereupon, without any order from the court, made an order for the publication of the warning order.

Under these facts counsel for the administrator and heirs of Townsend insist that proceedings to revive were not made within the time required by the statute, and that the appeal should be dismissed, and action stricken from the docket.

Cockrill & Cockrill, for appellee, on motion to dismiss.

The revivor had to be within the time and after the mode prescribed by Sand. & H. Dig., § 5927. 18 Enc. Pl. & Pr. 1125-8; 7 Bush, 687; 48 Ark. 30. *Cf.* Sand. & H. Dig., §§ 5928, 5929, 5934. The provisions of the statute apply to appellant courts also.

18 Enc. Pl. & Pr. 1123; 1 Bates, Pl. & Pr. 224; Civil Code of Ark. §§ 796, 780. The proceedings for revivor were not in time. Process must be sued out in the statutory time, else no revivor can be had. Sand. & H. Dig., §§ 5929-30; 5967; 86 Ky. 15, 20; 6 Ore. 166; 80 Ky. 64, 67, 68; 1 Metc. 549; 39 Ark. 235; 14 Bush, 671. Since the administrator was not a necessary party to the motion to revive, the six months' limitation did not apply. Sand. & H. Dig., §§ 5934, 5931, 5937, 5928. Even if the administrator had been a proper party, the heirs were *necessary* parties, and no suit or appeal could be prosecuted without their presence. 33 Ark. 665. Service of process can be had, and an action revived, only by a substantial compliance with the statute. 48 Ark. 31, 32; 39 Ark. 104; 7 Bush, 687; 18 Enc. Pl. & Pr. 1125, 1128.

P. C. Dooley, for appellant, on motion to dismiss.

RIDDICK, J., (after stating the facts). The question here arises on a motion to strike this case from the docket because not revived against the administrator and heirs of defendant within the time allowed by the statute. Our statute provides that "an order to revive an action against the personal representative of a defendant, or against him and the heirs or devisees of the defendant, cannot be made, unless by consent, until after six months from the qualification of the personal representative." Sand. & H. Dig., § 5934. This provision of the statute refers to the final order of revivor. The preliminary order requiring the personal representative to show cause can be made so soon as the administrator is appointed and qualified. *McNutt* v. *State,* 48 Ark. 30. The preliminary order of revivor or order to show cause may be served upon the personal representative as soon as convenient after being made; but the final order reviving the action cannot be made until six months after the qualification of the personal representative.

Now, Joe Townsend died on the 6th of March, 1899, and, his administrator having been appointed and qualified on the 11th day of the same month, the preliminary order of revivor and to show cause could have been made during the same month. As the next term of this court began on the 22d of May following, there was ample time to have served the order, even by publication, in time to have procured the final order of revivor at that term. If the proper steps had been taken, the final order of revivor could have been made six months after the appointment and qualification of the administrator. This appointment and qualification,

as before stated, was on the 11th day of March, 1899, and the final order could have been obtained on the 11th day of September, 1899, or at the next session of the court, which was on the 2d day of October, 1899. But it was nearly a year after this time before the preliminary order of revivor was made, and over a year before any attempt was made to serve such order on either the administrator or heirs of Townsend.

The statute provides that "an order to revive against the representatives or successor of a defendant shall not be made without the consent of such representatives or successor, unless in one year from the time it could have been first made." Sand. & H. Dig., § 5935. As it was over a year after the revivor could have been first made before any summons or warning order was issued against either the heirs or administrator, we are of the opinion that the action cannot now, to quote the language of the statute, be revived against "the representatives or successor" of the defendant, without their consent.

After considering the argument of counsel on the question as to whether the heirs of the defendant are included within the meaning of the words "representatives or successor of a defendant" used in the statute, we are of the opinion that they are included. The word "representative" means in law one who represents or stands in the place of another. It is frequently used to denote the personal representative—in other words, the administrator or executor—of a deceased person, but it has also a broader meaning, and the word "representatives," as used in this statute, we think was intended to include both the heirs and administrator or executor of a plaintiff or defendant who has died pending the action. The whole statute on this subject, when taken together, makes this very clear. For instance, one section provides that upon the death of a plaintiff in an action it may be revived in the name of "his representatives to whom his right has passed." It then provides that, if his right has passed to the personal representatives, the revivor shall be in his name; if it has passed to the heirs, the revivor shall be in their names; thus clearly distinguishing the meaning of "personal representatives" from "representatives," as used in the statute, and showing that both the personal representative and the heirs are included within the general term "representatives" of the plaintiff or defendant.

It follows, then, that, in our opinion, the action cannot be revived against either the heirs or personal representatives unless

within one year from the time it could have been first made. But it is said, conceding this to be true, the administrator has appeared of his own motion, and a revivor can be had against him. The record shows that on one occasion, before any motion to revive had been made, the cause was continued by consent, but it does not show that the administrator has in any way consented to the revivor of the action, or that he has appeared to the proceedings to revive, except to move to dismiss it. If at the time, or after, the preliminary order to revive or show cause had been made, the administrator had appeared, this would have dispensed with summons as to him; but his only appearance after the proceedings to revive were commenced was for the purpose of moving to dismiss the appeal because not revived within the time required by the statute, and for this reason we think the point is not well taken.

We have concluded that, as the administrator and heirs do not consent to a revivor, and as the time during which the law permitted a revivor without their consent passed without any summons having been issued against them, the motion to dismiss the appeal must be sustained, and the case stricken from the docket of this court. It is so ordered.

BUNN, C. J., dissents. HUGHES, J., not participating.

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BORDER CITY ICE AND COAL COMPANY *v.* ADAMS.

Opinion delivered April 13, 1901.

CONTRACT—DAMAGES.—An ice company obligated itself to supply ice to a local dealer at a fixed price for the entire season, but after July 17 failed to do so, whereupon the dealer continued his business by purchasing of other parties until August 20, when he was compelled to abandon his business on account of inability to purchase ice. *Held*, that plaintiff was entitled to recover (1) the difference between the price paid to others and the contract price, and (2) the daily profit which he would have earned up to the end of the season, had he not been compelled to abandon his business.

Appeal from Sebastian Circuit Court.

H. C. MECHEM, Special Judge.

Winchester & Marlin, for appellant.

Evidence of prospective profits is not admissible to prove damages for breach of contract. 57 Ark. 203; 7 Hill, 61; 139 U. S. 169; 34 N. Y. 634; 71 N. Y. 133; 36 N. J. L. 262; 38 *id.* 496; 139 U. S. 199; 78 Ala. 249; 16 N. Y. 489. The damage growing out of loss of profits was too remote, and the amount too contingent and uncertain, to admit of recovery therefor. 110 U. S. 238; S. C. 28 Lawy. Ed. 198; 3 L. R. A. 587; 19 Ga. 416; 139 U. S. 199; S. C. 35 Lawy. Ed. 147; 30 Ga. 560; 47 Ark. 527; 34 Ark. 710; 48 Ark. 502-10; 55 Ark. 331; 16 N. Y. 489; 13 Mo. 517; 32 Mo. 305; 78 Ala. 249; 94 Ala. 626; 106 Mich. 542; 58 Ill. App. 519; 86 Ill. 215; 49 Tex. 260; 56 Tex. 149; 8 Am. & Eng. Enc. Law (2d Ed.), 620; 1 Sedgw. Dam. 108; 1 How. 28; 100 U. S. 500, 507; 19 Wall. 37; 9 Ex. 341, 354, 356.

Hill & Brizzolara, for appellee.

The loss of profits was recoverable. 22 Kans. 374; 92 Fed. 293; 12 N. W. 640; 139 U. S. 199; 153 U. S. 540; 106 Pa. St. 237; 58 Ill. App. 519; 56 Kan. 614; 48 Ark. 502; 16 N. Y. 489; 71 N. Y. 118; 22 Kan. 374; 43 Kan. 267; 56 Ark. 309; 52 Ark. 246; 54 Ark. 216; 1 Sedgw. Dam. § 182; 42 Pac. 706; 33 S. W. 835; 49 Ill. 219; 52 N. W. 609; 11 Mich. 542; 62 Mo. 171; 43 Kans. 272; 12 N. W. 640; 14 Mich. 34; 52 N. W. 609; 101 N. Y. 205; S. C. 4 N. E. 269; 3 L. R. A. 587; 5 Laws. Rights, Rem. & Pract. § 2623; 8 Am. & Eng. Enc. Law (2d Ed.), 620-624.

BUNN, C. J. This is a suit for damages growing out of a breach of a contract for the sale and supplying of ice during the season of 1896, brought by the appellee, Adams, against the appellant, the Border City Ice and Coal Company, in the Sebastian circuit court, Fort Smith district, on the 7th day of October, 1897. Trial by a jury, and judgment for plaintiff for the sum of $422.10, with interest on $325 of same from October 1, 1896, and on the remainder, $97.10, from July 17, 1896, at 10 per centum per annum, and defendant appealed.

The suit was for a breach of the following contract, to-wit:

"March 28th, 1896.

"In consideration of receiving all of your orders for ice in car lots during the season of 1896, we agree to furnish your entire requirements of ice in fifteen ton shipments at four and no hundred dollars per ton delivered at Muskogee, I. T., and to keep you

promptly supplied on thirty-six hours' notice. Should the general price of ice decline, or any *bona fide* competitors shade this price, we agree to give you the benefit of such lower price as prevails on purchases made while such lower price is in force.

[Signed] "BORDER CITY ICE & COAL COMPANY,
"Per W. O. Caldwell, Mgr."

The contract made on the day named and on the terms set forth therein was performed by both parties up to the 17th day of July, 1896, when, by reason of an accident to its machinery, the appellant company ceased to fulfill its part of the contract, and never again offered or undertook to do so, the appellee having ceased to carry on the local ice business at Muskogee on the 20th August, 1896, having been forced to do so, as he claims, by the said failure of appellant to perform its part of the contract. The proof tends to show that the appellant was a manufacturer of and wholesale dealer in ice in the city of Fort Smith, Arkansas, and by the contract sued on had engaged to furnish ice, as stated in the contract, to the appellee, a local and retail dealer in ice, in Muskogee, in the Indian Territory; and that the former ceased to comply with its contract from and after the 17th day of July, and that, by making other temporary arrangements and purchasing elsewhere, the latter continued to carry on the local ice business until the 20th August, 1896, when, as stated, by the default of the former, he was compelled to close out.

The contention of the appellee is that he was actually damaged from the 17th of July until the 20th August in an amount equal to the difference of what he was compelled to pay for ice purchased from other parties and what he would have had to pay appellant had he continued to furnish him; that is, the contract price. The instructions of the court and also the findings of the jury sustained this contention, and there is no reason why the verdict and judgment on this part of the case should not be sustained.

As to the damages for loss of profits that would have accrued after the 20th August and until October, 1896, when the contract season closed, a more difficult question is presented. The difficulty is not so much in determining whether or not the appellee has a cause of action for his damages by reason of loss of profits which he would have enjoyed had appellant fulfilled its contract, but rather in determining with any degree—that is, with the

proper degree—of certainty the amount of such damages, and how to measure them.

In *Allis* v. *McLean*, 12 N. W. Rep. 640, the supreme court of Michigan, speaking by Judge Cooley, said: "We had occasion in *McEwen* v. *McKinnon*, 11 N. W. Rep. 828, decided at the last term, to pass upon a question much like the one which arises here. In that case, as in this, a mill-owner had contracted for machinery to be furnished by a specified day, and he sought to recover profits lost by reason of his mill lying idle, as damages for the failure to perform the contract in time. It seems reasonable that where profits are thus lost the defaulting party should make them good, for the machinery is purchased with a view to the profits, and the contract would not be entered into if the profits were not expected and counted upon. But the difficulty in measuring damages by profits is that they are commonly uncertain and speculative, and depend upon so many contingencies that their loss cannot be traced with reasonable certainty to the breach of contract. When that is the case, they are said to be too remote; and the damages must be estimated on a consideration of such elements of injury as are more directly and certainly the result of the failure in performance.

"But in some cases profits are the best possible measure of damages, for the very reason that the loss is indisputable, and the amount can be estimated with almost absolute certainty. The case of a contract for the delivery of grain or any other article which at all times finds a ready sale at a current price is an instance; if the contract is not performed, the purchaser may recover the advance beyond the purchase price; and this, though not recovered under the name of profits, will be dependent upon the performance of another; and if the second contract is broken, the loss of definite and fixed profits is really nothing else. It often happens also that one contract, the performance of which will result in certain and definite profits, will be dependent upon the performance of another; and if the second contract is broken, the loss of definite and fixed profits under the other is a necessary and immediate consequence. There is no difficulty in saying in some cases that profits lost are the proper measure of damages." [Citing many cases.] The facts in that case determined against the claim for damages on account of the loss of profits, for the reason, as given by the court, that "the profits of running a sawmill are proverbially uncertain, indefinite and contingent." The same doc-

trine is announced in *Central Trust Co.* v. *Clark,* 92 Fed. Rep. 294, and indeed there seems to be no real difference in opinion on the subject, when considered as an abstract proposition of law; but the trouble is in the application of the rule of law to the facts of each case as they are presented for consideration.

The elements of uncertainty growing out of the occurrences after the 20th of August (for the appellee has fairly shown, we think, that he was compelled to close out his business on that day by reason of the failure of the appellant to comply with its part of the contract) could only be the inability of the appellee to carry out his part of the contract, had the breach not been committed by appellant, and the probable varying conditions of demand for ice from that time until the close of the contract season —the 1st October,1896.

The evidence shows that the appellee, while the contract was being carried out, was making a reasonable profit in the business, and was even making a daily profit of $15, when the appellant ceased to furnish him with ice, and he was compelled to purchase at $6 per ton up to the very time he closed out; and that his closing out was occasioned by his inability to procure ice from any source known to him.

The question is one by no means free of doubt. But we cannot assume that appellee would have ceased to do business had it not been for the default of appellant and his inability to procure ice elsewhere for his trade; nor can we conclude from the evidence that he could have resumed the business after he closed out on the 20th August, and before the 1st October, the end of the season, when the contract would have expired by limitation. It follows that the appellee had his right of action for the loss of the profits.

The extent of that loss—the measure of damages—we think, though involved in much doubt, was susceptible of proof, substantially, and there was sufficient proof to sustain the verdict of the jury.

These are both questions of fact, more or less, and as we find no objection to the instructions of the court, we do not think the verdict and judgment should be disturbed.

Affirmed.

SUMPTER v. ARKANSAS NATIONAL BANK.

Opinion delivered April 13, 1901.

1. FRAUDULENT CONVEYANCE—APPARENT OWNERSHIP.—In 1873 N. furnished to W., her brother-in-law, $400 with which to purchase a lot in the government reservation at Hot Springs, and he thereafter remained in possession for 23 years, claiming it as his own, collecting rents from it, and making valuable improvements. In 1878 he claimed the right to purchase the lot under act of congress of March 3, 1877, and it was awarded to him by the Hot Springs commissioners in 1879. *Held*, that W. was the owner of the land, and that a conveyance of it by him to N.'s husband for her benefit, in fraud of W.'s creditors, will be set aside. (Page 232.)

2. ESTOPPEL—CONSIDERATION.—S. occupied land within the government reservation at Hot Springs as tenant of G. prior to S.'s death in 1861. In 1865 S.'s wife and two sons, J. and W., improved the property, and in a contest with G. before the United States court of claims for the right to purchase the property from the government S.'s heirs abandoned all claims by virtue of their ancestor's possession, in order to avoid the claim of G. as having been S.'s landlord, and by reason of improvements made by them since 1865 S.'s wife and J. and W. were awarded the right to purchase and did purchase the land in 1877, and remained in possession until 1896, and collected the rents, and sold and mortgaged part of the land. *Held* (1) that the other heirs of S. were estopped from claiming any equities by virtue of the possession of S.; (2) that an agreement of J. and W. to secure the interest of the other heirs of S. in consideration that they be allowed to purchase the land from the government in their names was a *nudum pactum*, as S. never had any interest in the land; (3) that a conveyance by J. and W. to the other heirs of S. after the insolvency of J. and W. was fraudulent as to the creditors of J. and W. (Page 233.)

Appeal from Garland Chancery Court.

LELAND LEATHERMAN, Chancellor.

Action by Arkansas National Bank and others against John J. and William Sumpter and others. From a judgment in favor of plaintiffs, defendants appeal.

E. W. Rector, J. M. Moore and *W. B. Smith*, for appellants.

The patentees were trustees for appellants. 2 Pom. Eq. §§ 981, 1031, 1040. Resulting trusts are provable by parol. Sand.

& H. Dig., § 348; 9 Ark. 518; 40 *ib.* 624; 20 Ark. 373. There was no fraud in the transaction, and appellants are not estopped to set up their claim. 109 Mass. 54; 12 Allen, 401; 63 Ark. 169; 1 Johns. Ch. 344; 86 N. Y. 221; 14 Cal. 355; 97 Cal. 72; 70 N. W. 115; *id.* 432; 24 Atl. 928; 13 Pet. 107; 18 Wall. 255, 271; 93 U. S. 326, 335; 106 U. S. 447; 105 U. S. 100; 11 Ark. 263, 266; 24 Ark. 400; 49 Ark. 63; 35 Ark. 365; 53 Ark. 197, 200; 54 Ark. 499, 508; 59 Ark. 614.

Wood & Henderson, for appellees.

The conveyances by John J. and William Sumpter were fraudulent and void as to creditors. 8 Ark. 470; 23 Ark. 494; 38 Ark. 419; 50 Ark. 42; 52 Ark. 493; 55 Ark. 59; *id.* 116; 56 Ark. 253; 62 Ark. 26; 73 Fed. 327; 21 S. W. 847; 31 Ark. 666; 6 Wall. 78; 44 Ark. 310; 46 Ark. 127; 41 Ark. 186; 23 Miss. 75; 9 Sm. & M. 394; 8 N. H. 288; 14 N. H. 61; 6 N. H. 67. The evidence to establish a resulting trust must be full, clear and convincing. 48 Ark. 169; 44 Ark. 365; 45 Ark. 481; 11 Ark. 89. If appellants ever had any rights or equities as the heirs of James Sumpter, they are now estopped from setting them up against appellee. 12 Am. Rep. 124; 46 Miss. 349; 25 Conn. 128; 50 N. Y. 575, 578; 69 N. Y. 113; 17 So. 654; 42 N. E. 223; 17 N. E. 612; 50 Ark. 42; 58 Ark. 27; 62 Ark. 32; 49 Ark. 134; 33 Ark. 458; 66 Ark. 98; 11 Am. & Eng. Enc. Law (2d Ed.), 431; 108 Ind. 419; S. C. 9 N. E. 392; 109 Ind. 457; S. C. 9 N. E. 585; 110 Ind. 552; S. C. 11 N. E. 453; 101 U. S. 572; 92 Pa. St. 390; 82 N. Y. 327; 31 N. Y. 510.

BATTLE, J. This suit was brought by the creditors of John J. and William Sumpter against John J. Sumpter and others to set aside certain conveyances of real estate in the city of Hot Springs, in this state, which before then had been made by John J. and William Sumpter to their mother and sisters and to the wife of John J. Sumpter. They alleged in their complaint that the defendants John J. and William Sumpter were indebted to them and other persons, and that at the time of the creation and making of said indebtedness they were the owners, as tenants in common with Elizabeth Sumpter, of certain lands in the city of Hot Springs, including the said real estate; and that, for the purpose of hindering, delaying and defrauding their creditors, they made certain

deeds, by which they undertook to convey to Mary E. Sumpter, Sallie E. Gordon and Ella Little the said real estate; that William Sumpter and John J. Sumpter, with like intent, undertook to convey to the defendant, Nannie E. Sumpter, the wife of John J. Sumpter, lot 9, in block 87, a part of said real estate; that plaintiffs had brought actions in the Garland circuit court on their claims, and had caused orders of attachment to be issued and levied on said real estate, by which they claimed liens on the interest of John J. and William Sumpter therein; and that John J. and William Sumpter were insolvent. And plaintiffs asked that the conveyances of said real estate be set aside, that they be decreed to have liens on two-thirds of said real estate, and that the same be sold to satisfy the liens.

The defendants, Mary E. Sumpter, Ella Little and Sallie E. Gordon, separately answered, and denied the allegations in the complaint, and alleged that the deeds severally executed to them were not voluntary, "that is, in the sense they were without consideration, but that they were made for these reasons and under these circumstances: That James Sumpter, who died in 1861, the husband of defendant Elizabeth Sumpter and the father of defendants John J. and William Sumpter, Mary E. Sumpter, A. E. Little and Sallie E. Gordon, in 1844 obtained possession of a tract of land on the Hot Springs Reservation in the city of Hot Springs and state of Arkansas embracing besides other lands all of the lots mentioned in said complaint; that the said James Sumpter died in possession of the said tract, and left defendants in possession of it; that said tract was a portion of the four sections of land reserved from sale by an act of Congress of the United States in 1832, and is now a part of the city of Hot Springs; that the government of the United States was the owner of said tract, as well as the balance of said Reservation, and never parted with title thereto until the year 1880; that in 1864, during the war, said defendants were constrained to temoprarily leave said tract, but returned in 1865, after the war, and rebuilt their houses and improvements on said tract, the burning of which had necessitated the family's departure from it; that in 1877 William H. and Maria Gaines, under an act of Congress passed in that year, entitled 'An act in relation to the Hot Springs Reservation in Arkansas,' filed before the Hot Springs Commission, appointed under the provisions of said act, a claim of right to purchase said tract on the theory that James Sumpter had occupied it as their tenant,

and thereby sought to deprive said defendants of the benefits of their occupancy of or their improvements upon it; that, on consultation among themselves, and after advice of their attorneys, said defendants agreed that their claim of right to purchase said tract by reason of their occupancy of and improvements on it should be filed before said commission and prosecuted in the name of the defendants Elizabeth, John J. and William Sumpter, for the equal benefit of all of said defendants; that under said agreement all of said defendants Elizabeth Sumpter, John J. Sumpter, William Sumpter, Mary E. (Daniels) Sumpter, A. E. Little and Sallie E. Gordon should share equally in said tract, or such part of it as they might acquire title to under said proceeding, and conveyances were to be made in accordance with this agreement by said defendants Elizabeth, John J. and William Sumpter after title should be acquired; that under said proceedings the defendants Elizabeth, John J. and William Sumpter for their benefit, as well as for said Mary E. Sumpter, Ella Little and Sallie Gordon, acquired title to said lots and to other parts of said tract, and obtained a patent therefor; that the price paid to the United States for said lots was the money of all of said defendants, and that, while title and the patent were obtained in the names of the said Elizabeth, John J. and William Sumpter, as grantees, they took title upon the foregoing terms, and in trust that said deeds were executed to said defendants Mary, Ella and Sallie to sever their interest in said land and to complete the execution of said agreement."

They made their answers cross-complaints.

Nannie E. Sumpter answered, and denied the allegations of the complaint, so far as they affected her, and alleged: "That before the passage of the act for the settlement of the land titles at Hot Springs in March, 1877, George Belding owned and occupied a store house located on that part of said Reservation now known and designated as 'lot 9, block 87;' that said Belding was adjudged a bankrupt by the district court of the United States for the Eastern district of Arkansas, and said lot was sold by his assignee in bankruptcy to one William Sumpter, her brother-in-law; that said purchase was made with her money, and for her, but a deed was taken in the name of the said William Sumpter; and that said William Sumpter presented and filed a claim before the Hot Springs Commission in his name and right to purchase said lot; that it was understood at the time that the title to said lot, if acquired, should be conveyed to her; that the right to purchase said lot was awarded

by said commission to the said William Sumpter, but that he held it in trust for her, as was agreed and understood; that said William Sumpter on the 6th day of May, 1890, conveyed said lot to her husband, John J. Sumpter, for the expressed consideration of $4,000, but that the real consideration was the execution of said trust, and by error said deed was made to her husband, John J. Sumpter, instead of herself; that to cure this error the defendant, John J. Sumpter, on the 20th day of September, 1892, conveyed said lot to defendant Orlando H. Sumpter, who on the same day conveyed it to her, and delivered to her the deed to it; and that no money was paid or agreed to be paid in consideration of either of the last mentioned deeds." She made her answer a cross-plaintiffs.

The plaintiffs in the action filed answers to the cross-complaints, denying the equitable interests or ownership of the sisters of John J. and Wm. Sumpter, and the wife of John J., and in addition set up as an estoppel against them that they permitted John J. and Wm. Sumpter to procure title to said property in their own names, and to hold themselves out to the public as absolute owners, from the award of the commissioners, in 1878, until the alleged fraudulent conveyances were placed of record in 1896, on the strength of which ownership the said John J. and Wm. Sumpter had obtained credit and incurred the indebtedness with plaintiffs.

Upon the hearing of the evidence adduced, the chancery court found that John J. and William Sumpter were indebted to plaintiffs in divers sums of money; that they conveyed the lands in controversy to their co-defendants; that they were insolvent at the time the conveyances were made; that the conveyances were made for the purpose of defrauding creditors; and set the same aside, and ordered that the interest of John J. and William Sumpter in the lands be sold to pay the plaintiffs; and the defendants appealed.

The facts in the case, as we find them, are, substantially, as follows: In 1832 four sections of land, embracing the Hot Springs in this state, were, by an act of Congress, reserved from sale; the land in controversy being a part of the reservation. At the time this reservation was made, the quarter of a section on which the hot springs are located was claimed by Henry M. Rector under a New Madrid location, and by John C. Hale and William H. Gaines under alleged pre-emption rights. After the land was reserved, litigation ensued between Rector, Hale and Gaines in the state

courts, but the United States was not a party. This continued until 1870, when Congress passed an act authorizing all persons who claimed any portion of the reservation to institute suit in the court of claims at Washington. Rector, Hale and Gaines then abandoned their suits in the state courts, and filed their respective petitions in the court of claims, claiming title to the land. On the 24th of April, 1876, the supreme court of the United States, on appeal of the cases from the court of claims, decided that the land belonged to the United States, and that none of the claimants had any title to it. The court of claims, after the final decision of the supreme court, appointed a receiver, who took possession of the lands reserved, in behalf of the United States, and rented out the buildings and improvements on the reservation. Thus matters remained until the year 1877, when Congress passed an act providing for the appointment of a commission, and authorized it to inquire into and determine the rights of purchase, under the act, of all claimants and occupants on the reservation to the lands they claimed and occupied. The section of the act which so authorized the commission is as follows:

"That it shall be the duty of said commissioners to show by metes and bounds, on the map herein provided for, the parcels or tracts of land claimed by reason of improvements made thereon or occupied by each and every such claimant and occupant on said reservation; to hear any and all proof offered by such claimants and occupants and the United States in respect to said lands and in respect to the improvements thereon, and to finally determine the right of each claimant or occupant to purchase the same, or any portion thereof, at the appraised value which shall be fixed by said commissioners.

"Provided, however, that such claimant and occupants shall file their claims, under the provisions of this act, before said commissioners within six calendar months after the first sitting of the said board of commissioners, or their claims shall be forever barred.

"And no claim shall be considered which has accrued since the 24th day of April, 1876." 19 Stat. 378.

The facts we have related constitute a part of the history of the entire reservation. The facts which relate solely to the land in controversy, so far as it is necessary to state them in this opinion, are as follows: It (the land in controversy) was a part of the land claimed by Gaines in his litigation with Hale and Rector and

the United States, and was occupied by James Sumpter, the husband of Elizabeth Sumpter, and the father of John J. Sumpter, William Sumpter, Mary E. Sumpter (Mrs. Daniels), Ella Little, Sallie E. Gordon, and Loretta E. Tombler, as a tenant of Gaines, until he died in 1861. After his death his widow and daughters continued in possession of the land until in August, 1864, when all the improvements on it were destroyed by fire. At that time John J. and William Sumpter were in the Confederate army, and after the destruction of the improvements William returned to Hot Springs, and he, Elizabeth and her daughters, the said Mary E., Ella Little, Sallie E., and Loretta E., moved away from Hot Springs, and located in Arkadelphia, in this state, and there resided until October or November, 1865, when they returned to Hot Springs, and took possession of the land. When they returned, the land was wholly unoccupied and destitute of improvements. Elizabeth and William erected houses on the land, which they and the daughters occupied. In 1866 John J. returned to Hot Springs, and entered into possession of the land with his mother, Elizabeth, and brother, William, and thereafter they made many valuable improvements on the land. In fact, all the improvements made after October, 1865, and before April 24, 1876, were made by Elizabeth, John J., and William Sumpter; and they held possession, controlled and managed the property as their own, collecting and appropriating to themselves the rents from the time they took possession in 1865 until the commissioners appointed under the act of March 3, 1877, came to Hot Springs.

When the commissioners arrived at Hot Springs, and entered upon the discharge of their duties, William H. Gaines presented a petition to them, asking that he be allowed to purchase the land in controversy, claiming it on the ground that James Sumpter held it as his tenant, and that the possession of his widow and children was a continuation of his possession and held in the same right. Elizabeth, John J., and William Sumpter also presented a petition claiming the right to purchase the property in their own right, by virtue of their taking, occupying, and improving it after October, 1865, and asking that they be allowed to purchase according to the act of Congress of March 3, 1877. They alleged in their petition that the improvements made on the land by James Sumpter were wholly destroyed by fire, and his possession was afterwards abandoned; that James Sumpter died in the year 1861; that in the year 1865, after the destruction of

all his improvements, and after every member of his family had left the land, they returned to and took possession of it, and began and thereafter made valuable improvements thereon, and that they remained in possession, using it as their own ever since, until the United States took possession. They adduced evidence before the commissioners in support of their petition, from which the commissioners found that their claim accrued prior to the 24th day of April, 1876, by reason of the use, occupation and improvement of a portion of the premises described in their petition, and that the petitioners were the owners and entitled to the possession of the improvements made thereon, and awarded to them the right to purchase the land.

At the time John J. and William Sumpter presented their petition to the commissioners, and the award to them was made, their sisters, Mary E., Sallie E., Loretta E. and Ella Little, defendants in this action, claimed an interest in the land as heirs of James Sumpter, their father. But it was known that James Sumpter, at and sometime before his death, held the land as a tenant of William H. Gaines. To avoid the effect of the lease of Gaines under which their father held, the widow and children of James Sumpter agreed that the petition to purchase should be presented to the commissioners by and in the names of Elizabeth, John J. and William Sumpter, and that the claim of the right to purchase should be based upon the improvements made by the petitioners after their return to the possession of the land in 1865, and no reliance should be placed upon the previous occupancy and improvements of James Sumpter; and it was understood that Elizabeth, John J., William, Mary E., Sallie E., Loretta E., and Ella Little should each have an equal interest in any award that was made. Under this agreement and for the purpose stated, the petition was presented and prosecuted; and in this manner, it appears, the claim of Gaines was defeated.

After the award, which was rendered in 1879, Elizabeth, John J., and William Sumpter occupied and used the land, and exercised acts of absolute and exclusive ownership over it. They rented various portions of the land for long and short terms—a part of it for terms of five and ten years—and collected large sums for rent, receiving from one tenant more than $23,000, and sold valuable portions of it, and received for two parcels as much as $24,000; and John J. and William mortgaged a portion of

it to secure the payment of two loans of money, amounting in the aggregate to $12,000. They collected and appropriated to their own use the moneys collected for rents and purchase, and never accounted in any way to the sisters for the same. The deeds and leases were executed by them, and no other persons joined. They continued to use and dispose of the property until October, 1895, a period of fifteen years or longer, when John and William became deeply involved in debt and insolvent, and conveyed their respective interest in the property to their mother and sisters, their co-defendants in this action. Many of the debts, especially those owing to the plaintiffs in this action, were contracted on the faith of their ownership of the property, and after making inquiries about the same and an examination of the records of the county of Garland, in which the land lies.

The defendant, Nannie E. Sumpter, wife of John J., claims lot 9, in block 87, in controversy in this action. She and William testified that her husband, as assignee in bankruptcy of the estate of George Belding, was authorized to sell the lot; that they agreed that William should purchase it for her and have it conveyed to himself; that she furnished him $400 for that purpose; and that he purchased and paid for it with her money, and took the deed for it in his own name. This transaction occurred in 1873. William conveyed the lot to John J. by a deed dated May 6, 1890, but executed after the 22d of August, 1892, and recorded on the 25th of May, 1896. John J. and his wife, Nannie E., conveyed to their son, Orlando H. Sumpter, and he conveyed to his mother, by deeds dated September 20, 1892, and filed for record on the 26th of May, 1896.

When he purchased, William took possession of the lot at once, and held it continuously up to 1896, a period of about twenty-three years. He held it, and claimed it as his own. Soon after his purchase he expended at one time $700, and at another $113, in making improvements. The money so spent was his own, and John J. acted for him in making the contract for the improvements. The lot being a part of the Hot Springs Reservation, he presented a petition to the commissioners in 1878, claiming the right to purchase under the act of Congress of March 3, 1877, and it was awarded to him by the commisisoners in 1879. He and John J. testified before the commissioners, in support of the petition, that he owned the improvements on the lot by virtue

of his purchase from John J. as assignee, and the other improvements made by him after the purchase. After the award he still held and used the property as his own. It rented well, being used as a saloon until 1896. A portion of the time he carried on a saloon business on it in his own name and for himself, but it was occupied the most of the time by tenants to whom he rented, and from whom he always collected the rents in person, or through the Arkansas National Bank acting for him. A portion of the time it rented for $150, and from that down to $100 per month. Mrs. Nannie E. never in the whole period of twenty-three years received any of the rent or asked for it. From these and other facts too numerous to state in this opinion, we find that William was the owner of the lot until 1896, and that he conveyed it in that year, by a deed antedated, to John J., at a time when he was insolvent, for the purpose of hindering, delaying or defrauding his creditors in the collection of their claims against him, and that the deeds for the same property subsequently or at the same time made by John J. and Orlando H. were of the same fraudulent character.

The conveyances made by John J. and William Sumpter to their sisters are clearly fraudulent and void as to their creditors, as well as the deeds made by William, John J. and Orlando H. to lot 9, in block 87. Mary E. Sumpter (Mrs. Daniels), Ella Little, and Loretta E. Tombler, who succeeded to the rights of Sallie E. Gordon, she having died, abandoned in this court all claims under the conveyances executed to them by John J. and William Sumpter, and base their case solely on their rights and equities as the heirs of James Sumpter, deceased, if they had any.

James Sumpter held the land as a tenant of William H. Gaines. By reason of this relation he was estopped from disputing the title of Gaines while he retained possession. *Rector* v. *Gibbon,* 111 U. S. 276; *Lawrence* v. *Rector,* 137 U. S. 139; *Goode* v. *Gaines,* 145 U. S. 141. It is apparent that his heirs acquired no greater rights than he had. They seem to have been aware of this fact when they consented that the petition to purchase under the act of March 3, 1877, should be made in the names of Elizabeth, John J. and William Sumpter. Having inherited from their father nothing more than he had, it follows that their claim to rights and equities in the land as heirs of James Sumpter is without foundation. It follows, too, that their agreement as to

the petition and award was without consideration, and was a *nudum pactum.* Being without consideration, the land acquired by the award, so long as it remains in force, was the absolute property of Elizabeth, John J. and William Sumpter; and the conveyance of it by John J. and William Sumpter to their sisters, without consideration, when they were insolvent, and under the circumstances shown by the evidence, was certainly a fraud upon creditors and void.

Mary E., Ella, Sallie E. and Loretta E. permitted Elizabeth, John J. and William Sumpter to acquire the land in controversy ostensibly as their own. For about fifteen years or longer they knowingly permitted their mother and brothers to use it and dispose of it as their own; to rent it and collect from the tenants large sums of money, and to use the same without accounting; to sell and convey valuable portions of it, receiving for two tracts as much as $24,000; and to mortgage the same to secure large sums of money that they were owing. Their failure to assert any right to the land under these circumstances was calculated to, and doubtless did, lead creditors to believe that they had no interest, and to extend to John J. and William credit on such faith. They had, if they had any interest in the land, assisted in clothing Elizabeth, John J. and William with all the legal *indicia* of ownership by permitting and encouraging them to secure the award of the right to purchase the property, and by removing, so far as they could, all obstacles in the way to their so doing, and by that and subsequent conduct, in effect, denied that they had any interest in the property, and by their supineness increased the credit of John J. and William Sumpter. They should have known, if they had any interest, that their conduct would increase the credit of their brothers; and they were guilty of gross carelessness in failing for so long a period of time to assert their interest, if they had any, and are now estopped by their conduct from so doing in this action. *Bramble* v. *Kingsbury,* 39 Ark. 134; *Bunch* v. *Schaer,* 66 Ark. 104; *Geo. Taylor Com. Co.* v. *Bell,* 62 Ark. 26; *Driggs & Co.'s Bank* v. *Norwood,* 50 Ark. 46; *Brant* v. *Virginia Coal & Iron Co.* 93 U. S. 326, 335.

Decree affirmed.

KEMPSON v. GOSS.

Opinion delivered April 13, 1901.

STEPCHILDREN—MAINTENANCE.—Where a stepfather cut timber from the lands of his stepchildren, and applied the proceeds in part to their maintenance, he should not be charged with the value of the timber unless it exceeded the cost of their maintenance, as he had undertaken to maintain them only with the aid of their means.

Appeal from White Circuit Court.

HANCE N. HUTTON, Judge.

Ben Isbell, for appellant.

Appellant had the legal right to cut the timber as the husband of the life tenant. 36 Ala. 80; 50 Me. 374; 47 Ark. 457; 9 Am. & Eng. Enc. Law, 842-3. Appellant was not bound to support his step-children.

Grant Green, for appellees.

The life tenant had no right to commit waste. 1 Washb. Real Prop. §§ 107, 125; 28 Am. & Eng. Enc. Law, 891; Tied. Real. Prop. §§ 72, 73; Webb's Poll. Torts, 429.

HUGHES, J. This is an appeal from a judgment of the White circuit court in favor of the appellees and against the appellant for the value of timber alleged to have been wrongfully cut and converted to his own use by the appellant from the lands of the appellees. In the action the appellant set up a counterclaim for the value of improvements made by him upon the lands, and for the board and clothing of the appellees, who were the children of his wife by a former husband. It is admitted that the land from which the timber was taken, to-wit: southeast quarter of the southeast quarter of section 24, and west half of the northeast quarter of section 25, township 9 N., range 5 W., was inherited by appellees from their father, A. J. Finger, and that they with their mother occupied the 80-acre tract in section 25 as a homestead. The evidence of the appellees tends to show that the appellant had cut and removed from the lands of the appellees 982 cross-ties, and that 942 of them were taken from the 40-acre tract. The testimony on the

part of the appellant tends to show that he cut timber on the 40-acre tract, and he says he cut 300 cross-ties outside of the clearing on the 80-acre tract, and that some of these were from the 40-acre tract, and others were from land other than plaintiffs'.

The appellant married the mother of the plaintiffs on the 20th of August, 1889, and she at that time had five children living by her former husband, all of whom were under the age of 12 years. He moved on her place, cleared land on the 80-acre tract described above, put some of it in cultivation, supported and provided for the minor children of his wife, till her death, which occurred April 29, 1898. He paid taxes on the lands, and testified that he made various valuable improvements, and kept the place in repair, etc. He admitted the lands were the lands of the plaintiff at the death of their mother.

Upon its own motion the court instructed the jury as follows: "The jury are instructed that the defendant's counterclaim offered as a setoff for board, clothing and provisions furnished to them by the defendant is not an allowable claim or defense to the plaintiffs' cause of action for the value of timber cut and removed from the land in controversy." "The jury are instructed that if they find from the evidence that the defendant cut and removed timber and railroad ties from the land, and used the proceeds of such sales for the benefit and maintenance of his family, including the plaintiffs and their mother, he is liable, and must account to the plaintiffs for the value of such timber." To which instructions the defendant excepted, and asked that his exceptions be noted.

The jury, after hearing all the evidence and the argument of counsel, retired under said instructions of court, and they returned the following verdict: "We, the jury, find for the plaintiffs, and assess their damages at $62.50," and thereupon the court gave judgment for the plaintiffs against the defendant for same amount.

We are of the opinion that the above instructions do not present this case properly to the jury. A father, it is true, is bound to support his minor children, if able to do so, but it is held that he is not bound to support his step-children. Schouler, Domestic Relations (5th Ed.), page 369, § 237, says: "In the absence of special statutes, the father-in-law is not obliged in this country to support his step-children, and consequently is not entitled to their earnings;" citing a number of authorities in note

4, to support the text, from Massachusetts, Minnesota and Illinois. It has been held that the father may be allowed in equity for the expenses of past maintenance and education of his children, if special circumstances exist. 17 Am. & Eng. Enc. Law (1st Ed.), pp. 358-360. "Every such case must depend on its own facts." Where the parent is poor, and the children have property or means of their own, it is but just that the parent should be compensated out of their estate for their maintenance and education. Schouler, Domestic Relations (5th Ed.), § 238. In section 273 the same author says: "It is well settled that, in the absence of statutes, a person is not entitled to the custody and earnings of step-children, nor bound by law to maintain them. Yet if a step-father voluntarily assumes the care and support of a step-child, he stands *in loco parentis* for the time being, and the presumption then is that they deal with each other as parent and child, and not as master and servant, in which case the ordinary rules of parent and child will be held to apply; and, consequently, neither compensation for board is presumed on the one hand, nor for services on the other."

We think the court erred in instructing the jury to ignore entirely the appellant's counterclaim for board and maintenance of the appellees. If they owned the property from which the timber was cut, and he applied the proceeds of the sale of said property to their maintenance in part, we think he should not be charged with the proceeds of the sale or the value of the timber cut, unless its value exceeded the value of their maintenance, as he had undertaken to support and maintain them with the aid of their means.

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

COOLIDGE *v.* BURKE.

Opinion delivered April 13, 1901.

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1. DESCENT AND DISTRIBUTION—PERSONALTY CONVERTED INTO REALTY.—Where a surviving partner, for the purpose of winding up the partnership business, took land in payment of debts, thereby converting personal assets into real, upon a settlement being had the deceased

partner's interest in the land goes as realty to his heirs, and not as personalty to his distributees. (Page 241.)

2. DESCENT—ANCESTRAL ESTATE.—Where a granddaughter took land by descent from her maternal grandfather, and died intestate and without issue, the land goes to her maternal uncle as the heir of her maternal grandfather, and not to her father as her next of kin. (Page 243.)

Appeal from Phillips Circuit Court.

HANCE N. HUTTON, Judge.

This is an appeal from a judgment overruling a demurrer to the following complaint:

"Comes the plaintiff, F. Noel Burke, and complains of the defendant, Charles R. Coolidge, Sr., and for cause of action says: That he is the owner of the following lands lying in said county, to-wit, the northeast quarter of section 28, the east half of the northwest quarter of section 28, the west half of the southwest quarter of section 22, northeast quarter of the southwest quarter of section 22, west half of northwest quarter of section 22, south half of the southeast quarter of section 21, northeast quarter of southeast quarter of section 21, southeast quarter of the southwest quarter of section 21, southeast quarter of the northeast quarter of section 21, all in township 2 south of range 4 east, known as the 'Taylor Place;' lot 37 in E. J. Lewis division of the city of Helena in what is known as the 'Pat Cassidy' tract, being one acre, more or less. And claims title thereto as follows: That on the 23d day of April, 1872, one Henry P. Coolidge departed this life in this county, leaving him surviving his widow and relict, Eliza Coolidge, his son, Charles R. Coolidge, the defendant herein, and his granddaughter, Mary E. Burke, born on the —— day of December, 1865, who was the daughter of plaintiff, as his only heir, the mother of said Mary E. Burke, who was the daughter of said H. P. Coolidge, having departed this life prior to the death of said H. P. Coolidge; that by his last will and testament the said H. P. Coolidge devised and bequeathed a large amount of real and personal property to his said son and granddaughter, after having made ample provisions for his said widow, and directed that it be divided equally between them, share and share alike, and named as his executors the defendant and John J. Hornor, all of which will more fully and at large appear by reference to said will, which appears of record in the proper office, and a duly certified copy of

which is filed herewith, marked 'Exhibit A,' and which was duly probated, and is in full force and effect. That at the time of the death of the said Henry P., he and the defendant were carrying on a large mercantile business as partners under the firm name and style of 'H. P. Coolidge & Company,' in the city of Helena, in said county of Phillips. That, after the death of the said Henry P., the defendant, as surviving partner, proceeded to wind up said business and to account to said executors. That among the assets of the said firm there was a debt of $20,000 due from one W. P. Taylor, which was secured by a deed of trust on the real estate described above and in controversy in this suit, which is known as the 'Taylor Place,' maturing November, 1870. That upon the undivided half of this place there was a subsisting and prior deed of trust to secure a debt amounting to the sum of $350, in favor of W. D. S. Taylor. That, after the death of the said W. P. Coolidge, the said W. D. S. Taylor brought suit in the Philips circuit court in equity to foreclose his lien on the undivided one-half of said land, and enforce the payment of said debt. On the 23d day of June, 1873, the defendant, Charles R. Coolidge, as surviving partner of the firm of H. P. Coolidge, made himself party defendant, and prayed that the lien of the mortgage of the firm of H. P. Coolidge & Company might also be foreclosed, and the land, subject to the debt of the said W. D. S. Taylor, be sold to satisfy the claim of H. P. Coolidge & Co., amounting to the sum of $23,180.50—all of which was so decreed by said court, and in pursuance of said decree said land was sold by commissioner of said court duly appointed for the purpose. That after said decree, and pending the sale, the said Charles R. Coolidge purchased the decree of the said W. D. S. Taylor at and for the sum and price of $3,150.48, which sum he as such surviving partner borrowed from the firm of T. L. Airey & Co. for the purpose, and at the sale of said land he bid the same in at the sum of $2,000, no part of which he paid, he having purchased the decree of the said W. D. S. Taylor, and as such surviving partner holding both debts, and taking the said commissioner's deed in his own name for all of said lands, but holding the same, as such surviving partner, for and as the property of the said firm of H. P. Coolidge & Company. * * * That afterwards, litigation having arisen between the plaintiff, as guardian of Mary E. Burke, and the defendant touching the settlement of the partnership affairs of H. P. Coolidge & Co. in the year 1876, in the circuit court of Phillips county, it was, among

other things, found by said court that the lands herein sued for were a part of the assets of the firm of H. P. Coolidge & Co., but standing in the name of the defendant, C. R. Coolidge, and purchased by him after the death of H. P. Coolidge and the dissolution of the firm of H. P. Coolidge & Co., as above set forth. * * * That on, to-wit, the —— day of November, 1879, the defendant, Charles R. Coolidge, and Eliza Coolidge, widow and relict of the said Henry P. Coolidge, filed a complaint in the circuit court of Phillips county against Mary Elizabeth Burke and this plaintiff as her guardian, praying for a partition and division of the real estate of the said H. P. Coolidge and H. P. Coolidge & Co.; that commissioners were appointed by said court to make partition, who, among other things, found and reported to the court that the lands here in controversy were held in the name of C. R. Coolidge, and belonged one-half to him as surviving partner of the firm of H. P. Coolidge & Co., and one-half to the estate of H. P. Coolidge, deceased, and in said partition the commissioners awarded the lands in controversy to the said Mary E. Burke, which report of said commissioners was in all things approved and confirmed by the court and the title to said lands, among others, was by the judgment, order and decree of said circuit court vested in the said Mary E. Burke. * * * That, as surviving partner of said firm of H. P. Coolidge & Co., and in the process of winding up and settling its affairs, and in the payment of a debt due said firm, the defendant, the said Charles R. Coolidge, on —— day of January, 1877, took a deed to said lot 37, of the Eli J. Lewis division of the city of Helena, above mentioned, in his own name, but for the use and benefit of the said firm of H. P. Coolidge & Co., which lot, under the decree of partition aforesaid, although standing in the name of the defendant, C. R. Coolidge, in fact belonged to the firm of H. P. Coolidge & Co., and was partitioned and allotted to the said Mary E. Burke by the decree aforesaid. That after said decree the said Mary E. Burke entered upon and took possession of said lands above described, and continued to hold the same as her sole and separate property and estate until her death on the 17th day of November, 1892, long before which date she had become of full age; that said Mary E. Burke on the last-named date departed this life intestate, without issue and unmarried, leaving plaintiff, her father, her sole surviving heir. That, having left no unsettled debts, no administration was had upon her estate, but that soon after her death the defendant took possession of the

land herein mentioned, claiming title to the same as the remaining and surviving heir of his father, the said Henry P. Coolidge, claiming that said estate was ancestral, and that, upon the death of the said Mary E. Burke, it reverted to him, and has ever since held the same. That said defendant, Charles R. Coolidge, Sr., is in the unlawful possession of said lands, and has been for six years last past, during all of which time plaintiff has had the title to said lands, and still has, and the right to possession thereof; and plaintiff says that, by reason of the said wrongful possession of said lands by said defendant, he has sustained damages in the sum of $4,000. Wherefore he prays judgment for the recovery of the possession of the said lands and for said damages for the unlawful detention of the same."

R. W. Nicholls and *Rose, Hemingway & Rose,* for appellant.

The estate was an ancestral one. 15 Ark. 556; 24 Am. & Eng. Enc. Law, 395; 2 Humph. 588; 1 Ohio, 395; 5 *id.* 522. A mortgagee has an *interest in* the land. 35 Ark. 85; 49 Ark. 214; 7 Ark. 310; 18 *id.* 166; 34 *id.* 346; 43 *id.* 504; Tied. Real Prop. §§ 287, 319; 98 Mass. 107, 113. On the death of one partner, the surviving partner took all the firm property for the purpose of winding up the business, and the heirs of the deceased partner acquired no right to any specific asset of the firm until the partnership was so wound up. 48 Ark. 563; Pars. Part. 371; 16 B. Mon. 634; 2 Barb. Ch. 165; 11 Barb. 75; 59 N. W. 1011; 48 Pac. 861; 5 Heisk. 757; 4 R. I. 207; 47 Ala. 104. As to duty of surviving partner, see: 19 Ark. 443; 26 *id.* 135; *id.* 154.

M. L. Stephenson, for appellee.

The deed of trust was but a mortgage. 31 Ark. 429; 53 Ark. 545; 18 Ark. 53; 43 Ark. 488; 25 Ark. 279; 18 Ark. 91; *id.* 166; 31 Ark. 581; 43 Ark. 519; 31 Ark. 429; 1 Jones, Mortg. §§ 2, 700. The property was a new acquisition. 19 Ark. 398. The mortgage was a personal asset, and the acts of the surviving partner could not change its character, so far as concerns the case.

WOOD, J. 1. "Where conversion is rightfully made, whether by the court or a trustee, all the consequences of conversion must follow if there be no equity in favor of the heir or any one else for reconversion." *Foster* v. *Foster,* L. R. 1 Ch. Div. 588; *In re Simmons,* 55 Ark. 485. This principle applies here. The mortgage

held by the firm of Coolidge & Company, being but a security for debt—a chose in action—was personalty. *Turman* v. *Sanford, ante,* p. 95. When the elder Coolidge died, the surviving partner held the partnership assets as trustee, for the sole purpose of winding up the partnership buisness. *Hill* v. *Draper,* 54 Ark. 395. As such, it was his right, as well as his duty, to gather in and make available all the assets of the firm for satisfying firm creditors, adjusting partnership equities, and then to hold the residue for distribution to those entitled thereto. In this process of winding up the partnership, all partnership assets of whatever form, by a fiction of equity, for commercial convenience, were personalty in the hands of the surviving partner. But, when the necessity required, in the business of bringing the partnership affairs to a close, the surviving partner had the unlimited power and right, so long as he acted in good faith, to change the form of the assets from personalty to realty, and the reverse. That is, he had the right of conversion. He exercised that right in this case, converting personalty into realty. There is no charge of fraud. Therefore the asset must continue as realty, and go to the devisees under the will as such, unless there be some equity in favor of appellee for reconversion. There is no such equity. *In re Simmons,* 55 Ark. *supra.* Before the affairs of the partnership were concluded, that which was personalty by rightful process of conversion had become partnership realty, and it so remained until the time for distribution. This brings the case within the rule of the American cases announced by Chancellor Walworth in *Buchan* v. *Sumner,* 2 Barb. Ch. 165, and quoted by this court, through Judge Cockrill, in *Lenow* v. *Fones,* 48 Ark. 563, as follows: "As between the personal representatives and the heirs at law of a deceased partner, his share of the surplus of the real estate of the co-partnership, which remains after paying the debts of the co-partnership, and adjusting all the equitable claims of the different members of the firm, as between themselves, is considered and treated as real estate."

But it is urged that the death of Coolidge, intervening the conversion of the mortgage into the real estate in controversy, renders inapplicable the above doctrine to the case at bar. While the death of Coolidge *ipso facto* dissolved the partnership, the *delectus personae* being at an end, it did not *eo instanti* wind up the concern and distribute its assets. Firm assets remained such during the time required to pay off the debts and

get the assets in shape for distribution. During this time neither the surviving partner, in his indivdual capacity, nor those standing on the rights of the deceased, had any interest which they could take. Had Coolidge lived, and the partnership been dissolved by mutual consent, or otherwise, he could not have received or held any of the firm assets in his own individual right, until same had been distributed to him in his character as an individual. Those succeeding to his rights as distributees or devisees under his will take only what he had or could have taken, had he been living and the partnership been dissolved, *i. e.* his individual interest in the assets of the firm. As was said by Chief Justice Shaw in *Howard* v. *Priest*, 5 Metc. 582: "The true and actual interest of each partner in the common stock is the balance found due him after the payment of the debts and the adjustment of the partnership account. * * * And, as the widow and heirs claim only in right of the husband and father, such derivative right, in equity, will extend no further in behalf of the wife and children than that of the partner from whom it was derived." This is the inevitable result, it seems to us, under the law peculiar to partnership property. The law of descents and distribution operates upon the property of the individual, and not upon the property of the firm, and there is no individual property until the firm property is at an end, which does not occur until its debts are paid, its affairs closed, and the residue of the assets distributed. The learned counsel have not cited us to a case where the facts are exactly similar to the case at bar, and after a somewhat exhaustive research we have not been able to find one. But the doctrine announced is logical and sound, and supported by analogous principles announced by many eminent text writers and learned courts. Par. Part. 371; Lindley, Part. § 341; Story, Part. §§ 90-95, and note; *Cobble* v. *Tomlinson*, 50 Ind. 550; Collyer, Part. § 135, note; 1 Bates, Part. §§ 290, 297, note; *Dyer* v. *Clark*, 5 Metc. 562; *Woodward-Holmes Co.* v. *Nudd*, 58 Minn. 236, S. C. 59 N. W. 1011, 27 L. R. A. 340; *Griffey* v. *Northcutt*, 5 Heiskell, 757; *Sternberg* v. *Larkin*, 48 Pac. 861; *Tillinghast* v. *Champlin*, 4 R. I. 207.

2. The land in controversy was clearly ancestral, and in the paternal line. It was not acquired by Miss Burke through "any industry or exertions of her own," nor did it come to her "by the deed or will of a stranger to her blood." She took it by devise from her grandfather, who was also the father of appellant. The land was therefore not a new acquisition, but ancestral. Having

come from the father of appellant, the grandfather of Miss Burke, at her death without issue of her own blood it must go back to the line whence it came—to appellant as the heir at law, and not to appellee as the next of kin. *Kelly's Heirs* v. *McGuire,* 15 Ark. 556; *Galloway* v. *Robinson,* 19 Ark. 396; 24 Am. & Eng. Enc. Law, 399.

The complaint states the facts, which the demurrer admits, and it follows that the demurrer should have been sustained, as the complaint fails to state a cause of action.

Reversed and remanded, with directions to sustain the demurrer.

BELL *v.* TALLMAN.

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Opinion delivered April 20, 1901.

APPEAL—QUESTIONS CONSIDERED.—Where a chancery cause was decided on a demurrer to the complaint, the supreme court on appeal will not go into the merits, although testimony was taken and presented in the transcript.

Appeal from Prairie Circuit Court in Chancery.

JAMES S. THOMAS, Judge.

Thos. C. Trimble and *J. E. Gatewood,* for appllants.

The complaint stated a cause of action and equity had jurisdiction thereof. 19 Ark. 139; 22 Ark. 103; 24 Ark. 431; 32 Ark. 478; 2 Story, Eq. § 700. It was error to sustain the demurrer.

W. E. Atkinson, for appellees.

The court correctly sustained the demurrer. The taxation being valid, appellants cannot recover in equity and aquire a title because of irregularity in the assessment or sale, without first tendering to the purchaser, or those claiming under him, the taxes, penalties and costs. 39 Ark. 263.

BUNN, C. J. This is a bill in chancery in the Prairie circuit court by the appellant to establish a lost certificate of entry of the southwest quarter of section 33, in township 1 south of range 6

west, in Prairie county, issued to one Herr and by him transferred to one Harvel, through which, by successive transfers, appellants claim title, and also to set aside a tax title under which appellees claim the same land, and to quiet appellant's title thereto. The bill sets up the successive links in appellant's chain of title, and the answer sets up a tax sale and lost certificate thereof, whereby the appellants and those under whom they claim were divested of the title to said property, and concludes with a general demurrer to the complaint.

On the hearing, the chancellor considered the demurrer to the complaint only, and sustained the same, and dismissed the bill, although testimony was taken and presented in the transcript upon the whole case. But, having decided the cases upon the demurrer, the inquiry into the merits on the testimony was not gone into; and we are thus left to review the action of the chancellor on the demurrer only. Upon its face, and standing alone, it is our opinion that the complaint is good upon demurrer, and the same should have been overruled, and the case decided upon its merits.

The judgment and decree is reversed, and the cause is remanded, with directions to overrule the demurrer and to proceed with the cause not inconsistently with this opinion.

BIMS v. COLLIER.

Opinion delivered April 20, 1901.

1. WITNESS—IMPEACHMENT.—It was not improper to refuse to permit a witness, an attorney, to be questioned whether he had not been disbarred, as he might have been disbarred for conduct that would not affect his credibility as a witness. (Page 249.)

2. SAME.—Where an attesting witness testified that the testator was of sound and disposing mind, it was error to refuse to permit him to be asked if he did not say that he would not have signed the affidavit annexed to the will if he had known that the words "of sound and disposing mind and memory" were in it. (Page 249.)

3. SANITY—BURDEN OF PROOF.—An instruction that the burden of proof upon the issue of the sanity of testator at the time of making the will is upon the contestants, and they must establish by a preponderance of the evidence, with reasonable certainty, that at

the time of making said will the testator was insane, or the will must be taken as valid, and that if there was only a mere balance of evidence, or a mere doubt only of the testator's sanity, the presumption is in favor of sanity, was erroneous, as tending to induce the jury to believe that it was not sufficient to prove defendant's insanity by a bare preponderance of the evidence. (Page 249.)

Appeal from Jefferson Circuit Court.

A. B. GRACE, Judge.

Austin & Taylor, for appellants.

It was competent for appellants to ask witness Anthony questions tending to impeach his character. Steph. Dig. Ev. art. 129; 53 Ark. 391; 42 N. Y. 270. The court erred in its instruction as to the burden and degree of proof of insanity. 52 Ark. 517; 37 Ark. 589.

White & Altheimer, for appellee.

There was no error in the court's instruction as to the burden and degree of proof. Sack. Inst. to Juries, p. 592, § 7; Jarm. Wills, 104; Redf. Wills, 31-50; 39 N. H. 163; 36 Ind. 129; 42 Ill. 376; 11 Ga. 337; 12 Ia. 491; 45 Atl. 378. There was no error in the instruction of the court as to mental capacity of the testator. 49 Ark. 372; 64 Ark. 351; 29 Pa. 298; 6 L. R. A. 167-8; 36 *id.* 725; 2 *id.* 668. The court properly excluded the question to witness Anthony.

BATTLE, J. In February, 1891, Dawson Nance died at his late residence in Jefferson county, in this state, leaving Fannie Bims and Bertha Trulock, his children and only heirs, and a widow, who was the step-mother of his children, him surviving; his widow having since died. After his death an instrument of writing purporting to be his last will and testament was presented to the Jefferson probate court for probate. Fannie Bims and Bertha Trulock objected on the ground that the deceased was not of sound and disposing mind, memory and understanding at the time of its execution. The will was admitted to probate, and the contestants appealed to the Jefferson circuit court; and upon a trial there as to the validity of the will the issue was decided against the contestants, and the writing was adjudged to be the will of Dawson Nance, and from this judgment an appeal has been taken.

In the trial in the circuit court, which was before a jury, F. B. Anthony testified, substantially, as follows: He was a real

estate agent, notary public, and lawyer. In 1890 or 1891, about eight or nine years before the time he was testifying—the 11th day of May, 1899—he wrote the will of Dawson Nance, at his request. At this time Nance was confined to his bed, and was very sick. Witness talked to him about an hour, and ascertained what disposition he desired to make of his property, and wrote the will accordingly. Nance seemed to be in his right mind. He signed the will by making his mark, and J. Flagg, Jas. C. Havis, and witness attested it as subscribing witnesses. Witness in the course of his examination was asked if he was not suspended from the practice of law on account of unprofessional conduct, and the court would not permit him to answer the question, and contestants excepted.

The will and the affidavits of Anthony and Havis, as subscribing witnesses, were read as evidence. In the affidavits the affiants stated that Nance at the time he executed the will was "of sound and disposing mind and memory."

Havis testified as follows: He was requested to attest the will. Before signing some one asked Nance, "Is this your sentiments?" or something to that effect, and he said, "Yes; and I want this plan carried out." "He bowed, and nodded his head, and I understood that to mean yes— that was the substance by the nod of the head." In the course of his examination, contestants asked him if at a certain time and place, before certain persons, he did not say that he would not have signed the affidavit annexed to the will if he had known that the words, "and of sound and disposng mind and memory" were in it, and the court refused to permit him to answer, and the contestants excepted.

Flagg testified: He was requested to go to the residence of Dawson Nance, and witness his will. He went, and when he arrived there he found Nance's room crowded. He pushed his way to Nance's bedside, and asked him how he felt, "and he asked me what I was doing there," and said, "I want you all to go home and not bother me." Anthony read the will to witness, and asked him to sign it, which he did. When witness spoke to Nance he was quiet, but as soon as witness spoke he became restless and noisy, and used obscene language in the presence of women, and was noisy the whole time Anthony was reading the will. Witness was the first to attest the will. When he was well, Nance did not act as he did when his will was attested, and was a very good old man—very civil and gentlemanly. Witness does not think he was of sound mind when he executed the will.

J. W. Davis testified: "I was at the residence of Dawson Nance when S. B. Anthony wrote his will, and when it was executed and attested." "While Anthony was there writing out that will, he spoke some vulgar words in his rage, and was trying to get out of bed; and we had to wait on him every now and then, until his right mind came to him, so he could tell us what he wanted to say. He would throw the cover, and want to get out of the bed, and we would hold him, and keep him quiet until he could speak what he wanted us to do for him about his home." "He was flighty." "He was not of a sound mind. None of us that was in the room—we all agreed that he was not of his sound mind. Even Anthony himself said he was not in his sound mind." Anthony got the facts stated in the will from Nance. "When he [Nance] was having his will made out, he would take them spells that way, and we would have to wait and let him rest, and go to him and rouse him up, and ask him what he wanted to say, and what must Anthony do. Anthony would ask him, 'Do you want me to put in the will so and so?' and of course he would say 'Yes.' And he would go off and write a while, and say 'Do you want me to put it in this way?' Anthony asked him to make me executor, and he said, 'Yes.'"

Fannie Bims testified: "Dawson Nance was my father. When Anthony was writing his will, and father executed it, he (father) was talking a great deal or random talk, and it was a very hard matter to keep him still; and he was always trying to show you something around and about the house, and in the window, and by the door. He was always trying to show Mrs. Johnson and Mrs. Havis. He would say, 'Look at such and such a thing;' would not call any particular name, and would get kind o' quiet; and Mr. Davis asked him what was the matter with him, and he would worry and want to get up, and we would not let him get up. He did not act like a man of sound mind."

Florence Collier testified: "I was at Dawson Nance's house when Anthony wrote his will. He told Anthony how he wanted the will written, and seemed to have a good mind, and knew what he was talking about. I thought he was acting like he was in his good mind. He would act—We asked him did he know what he was doing. I remember asking him once, and he says, 'Yes, I know what I am doing.' I asked him this question because he would act funny to me."

Upon this evidence, over the objections of the contestants, the court instructed the jury, in part, as follows:

"First. The jury are instructed that the burden of proof upon the issue of the soundness of mind or sanity of Dawson Nance at the time of the making of the will is upon the contestants of the same, and they must establish by a preponderance of the evidence, with reasonable certainty, that at the time of the making of said will the said Dawson Nance was insane or of unsound mind, as explained in these instructions, or the will must be taken as valid. If there is only a bare balance of evidence, or a mere doubt only of the sanity of the testator, the presumption is in favor of sanity."

Did the court err in excluding evidence? It did not err in refusing to permit Anthony to answer the question in which he was asked if he had not been suspended from the practice of law. The question was obviously asked for the purpose of impeaching the testimony of Anthony. An affirmative answer to the question would not have had that effect, because he could have been suspended for ungentlemanly conduct which could not have affected his credibility.

The court erred in refusing to allow Havis to answer the question propounded to him in which he was asked, if he did not say that he would not have signed the affidavit made by him and annexed to the will of Nance if he had known that the words, "and of sound and disposing mind and memory" were in it. These words were in the affidavit which was read as evidence to the jury. The question, evidently, was asked for the purpose of impeaching the testimony of Havis. An affirmative answer to the question, or evidence that he made the statement about which he was asked, would have shown that he was of no fixed opinion as to the sanity of Nance, and would have tended in that way to weaken the testimony of Havis, and for that purpose was admissible.

Should the instruction have been given? In *McCulloch* v. *Campbell,* 49 Ark. 373, Mr. Justice Smith, in delivering the opinion of the court, said: "There is some confusion in the reported cases on the adjustment of the burden of proof of insanity in will contests. But we think the weight of authority, both in England and in this country, establishes the rule that the production of a proper writing purporting to be the will of a deceased person, which is rational on its face, and which is proved to have been executed and witnessed in accordance with the statute, makes a *prima facie*

case, and devolves upon the contestants the *onus* of showing the testator's incompetency. This rule rests upon the presumption that all men are sane until the contrary is proved."

Mr. Schouler in his work on the law of Wills, says: "All or most of our decisions agree, in substance, that, whether as a legal presumption or as a presumption of fact or mixed presumption, amounting only to a *prima facie* case, there exists, upon proof that the will, a natural one on its face, was duly executed by an adult not otherwise incompetent, a presumption in favor of the testator's sanity, which they who impeach the will are bound at this stage to overcome. And the larger and better class of American authorities point, moreover, to the conclusion that the court or jury trying the case must, upon the whole evidence, be satisfied that the testator was of sound mind; so that, if there be inevitable doubt left on this point from all the testimony, the will cannot be considered as proved." Schouler, Wills, § 174.

We do not think that the presumption of sanity in a case in which a will is contested has any greater force than any other rebuttable or disputable presumption of law has in any ordinary civil case. When such presumptions are overcome by evidence, the conflicting evidence on the question of fact is to be weighed, and a verdict rendered in favor of the party whose proofs have most weight; and the presumption is of value only as it has probative force, "except it be that on the entire case the evidence is equally balanced, in which event the arbitrary power of the presumption of law will settle the issue in favor of the proponent of the presumption." In *Graves* v. *Colwell*, 90 Ill. 616, it is said: "It has been said that presumptions of law derive their force from jurisprudence, and not from logic, and that such presumptions are arbitrary in their application. This is true of irrebuttable presumptions, and, primarily, of such as are rebuttable. It is true of the latter until the presumption has been overcome by proofs, and the burden shifted; but when this has been done, then the conflicting evidence on the question of fact is to be weighed, and the verdict rendered, in civil cases, in favor of the party whose proofs have most weight, and in this latter process the presumption of law loses all that it had of mere arbitrary power, and must necessarily be regarded only from the standpoint of logic and reason, and valued and given effect only as it has evidential character. Primarily, the rebuttable legal presumption affects only the burden of proof, but if that burden is shifted back upon the party from whom it

first lifted it, then the presumption is of value only as it has probative force, except it be that on the entire case the evidence is equally balanced, in which event the arbitrary power of the presumption of law would settle the issue in favor of the proponent of the presumption."

It follows, therefore, according to the general rules of evidence, that whenever the preponderance of evidence proves that a testator at the time of the execution of a will was of unsound mind, memory and understanding, the presumption of sanity loses its arbitrary force, and the verdict of the jury or decision of the court, as the case may be, should be in favor of the contestants.

Tested by the rule stated, the instruction copied in this opinion should not have been given. It was misleading, and was calculated to induce the jury to believe that a bare preponderance of the evidence showing the insanity of Nance was not sufficient to defeat his alleged will, and that in order to do so the contestants must prove that he was insane to the exclusion of all doubts, and that the presumption of sanity prevails, although a bare preponderance of the evidence was to the contrary. On account of the doubt in which the evidence leaves the sanity of Nance, it was prejudicial.

Reversed and remanded for a new trial.

HUGHES, J., (dissenting). It is a presumption of law that a person is not insane until it is overcome by proof. Sanity is a question of fact for the jury, under proper instructions by the court. The court committed no reversible error in its instructions. The verdict of the jury is not without evidence to support it. What Havis said in his affidavit proving the will, and what he had said previously to the contrary, was not material as it did not affect the issue in the case, which was only the sanity of the testator at the time of making his will.

It was not proper to show that witness Anthony had been disbarred from practicing law simply, without showing that he had been disbarred for some cause affecting his credibility as a witness. The court committed no error in not allowing the question, "Has your name been removed from the list of members of the Jefferson county bar?"

It is contended that the first instruction is erroneous, because it told the jury "that the burden of proof upon the issue of soundness of mind or sanity of Dawson Nance at the time of the making

of the will is upon the contestants of the same, and they must establish by a preponderance of the evidence, *with reasonable certainty* that at the time of making the will the said Dawson Nance was insane or of unsound mind, as explained in these instructions, or the will must be taken as valid."

"If there is only a bare balance of evidence, or a mere doubt only of the sanity of the testator, the presumption is in favor of sanity." By the expression "bare balance of evidence" is meant, if the testimony or evidence for and against sanity is evenly balanced, that is, if it is as much for as against sanity—the presumption of sanity turns the balance. There is nothing wrong in this. The expression "with reasonable certainty," in the connection in which it is used, only means that there must be reasonable certainty that the evidence preponderates in favor of the insanity of the testator's mind at the time of making the will.

I think the other instructions given clearly show the meaning of this instruction, and that the court committed no reversible error in giving it. I am of the opinion that no reversible error was committed, and that there was evidence to sustain the verdict of the jury; that the deceased made an equitable and just disposition of his small estate by will; and that the judgment of the court should be affirmed.

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

Opinion delivered April 20, 1901.

CARRIER—LIABILITY FOR LIQUORS DESTROYED BY OFFICER.—Where a carrier is sued by a consignor for the value of liquor shipped to a prohibited district to be sold contrary to law, it is a good defense that the liquor was seized and destroyed by an officer, under act of February 13, 1899, §§ 1, 3.

Appeal from Jefferson Circuit Court.

A. B. GRACE, Judge.

STATEMENT BY THE COURT.

The complaint charged that the appellees were merchants at Pine Bluff, Arkansas, and that the appellant railroad company was a common carrier operating between the city of Pine Bluff, in

Jefferson county, and Jonesboro, in Craighead county, Arkansas. "On June 19, 1899, the plaintiffs delivered to the defendant and the defendant received from plaintiffs at Pine Bluff, Arkansas, two casks containing 300 pints of whisky in 300 one-pint bottles, each bottle of liquor being of the value of 25 cents, consigned to Will Scott at Jonesboro, Arkansas, to be by defendant transported from said Pine Bluff to Jonesboro, and there delivered to said Will Scott. The defendant, in violation of its duties as common carrier, did not deliver the said whisky, nor any part thereof, to the said consignee thereof, Will Scott, but has converted the same to its own use and benefit. That, by reason of defendant's wrongful conduct and disregard of its duty as a common carrier, plaintiffs have been damaged in their personal property in the sum of $80. Wherefore the plaintiffs pray judgment for $80.".

Defendant demurred to the complaint because the complaint did not state a cause of action within the jurisdiction of the circuit court. The court overruled the demurrer, and defendant, having excepted, filed an answer denying "that it converted to its own use or by any act of the defendant deprived the plaintiff of the property described in the complaint, or caused plaintiffs any damage whatever in their property or otherwise." The defendant, for further answer to the complaint, stated that on the 19th day of June, 1899, plaintiff delivered to the defendant at Pine Bluff, Arkansas, two casks, containing whisky in bottles, consigned to Will Scott at Jonesboro, Arkansas. The defendant carried said goods to Jonesboro, Arkansas, and while the same were in the depot of the defendant, and after the same had been offered to the said Will Scott, the consignee thereof, and before they were taken out of the depot by said Scott, and while in the possession of the defendant in its depot at Jonesboro, a town in which the sale of such liquor is prohibited by law, were seized by one D. C. Martin, marshal of the city of Jonesboro, under a search warrant, issued pursuant to law, by A. E. Hastings, mayor of the city of Jonesboro, on the 23d day of June, 1899. That, immediately upon such seizure and taking of said goods from the defendant, the defendant notified said Will Scott and the plaintiffs of the seizure of said goods under said warrant by said marshal, and protested against the seizure thereof by said marshal, but was compelled to surrender the same under said warrant, a copy of which was filed as Exhibit "A," and made part of this answer. That, afterwards, to-wit, on the 28th day of June, 1899, said whisky was destroyed

by said D. C. Martin, city marshal of the city of Jonesboro, after notice to said plaintiff and pursuant to the orders of the mayor of the city of Jonesboro, entered in accordance with an act of the general assembly, approved February 13, 1899, entitled "An act to suppress the illegal sale of liquors and to destroy the same when found in prohibited districts," said liquors having been shipped into said town of Jonesboro to be sold contrary to law. Defendant, for further answer to the complaint, stated the plaintiffs could not maintain the action because the whisky described in the complaint as destroyed as aforesaid was shipped by plaintiffs into the town of Jonesboro, Arkansas, a district in which the sale of whisky was at that time prohibited by law, to be sold contrary to law.

S. H. West and *J. M. & J. G. Taylor,* for appellant.

Appellant was not responsible for the value of the whisky seized under process of law. *Cf.* Sand. & H. Dig., §§ 1618-1619. Appellees had an opportunity and the right to appear and show cause against the destruction of the liquor. Ell. Mun. Corp. § 91. The destruction of the liquor was not illegal or a taking of property without due process. 123 U. S. 623; 3 R. I. 64; 172 Mass. 311; 24 Pick. 352; 12 Cush. 414; 5 Gray, 97; 6 Gray, 1; 108 Mass. 27; 115 Mass. 153, 126, 269; 97 U. S. 25; 5 How. 504; 135 U. S. 100; 154 Mass. 357; 123 U. S. 623.

Irving Reinberger and *Albert E. Ewing,* for appellee.

Section 1 of the act of 1899 is unconstitutional. 1 Gray, 1; 57 Cal. 251; 35 N. Y. 307; Cooley, Const. Lim. 363; 4 Cr. Law Mag. 187; 8 Am. & Eng. Enc. Law, 1082. Section 3 of the act is unconstitutional, in that it is designed to take property without due process of law. 1 Gray, 1; 21 Ind. 370; 44 Ill. 142; 4 Metc. 385.

HUGHES, J., (after stating the facts). The answer in this case alleges by way of defense that, after the whisky in controversy had been offered to Will Scott, the consignee, and before it was taken out of the depot by said Scott, and while in the possession of the defendant, in its depot at Jonesboro, a town in which the sale of liquors is prohibited by law, the same was seized by one D. C. Martin, marshal of the city of Jonesboro, under a search warrant issued pursuant to law by A. E. Hastings, mayor of the city of Jonesboro, on the 23d day of June, 1899; that, immediately upon the seizure and taking of said goods from the defendant, the

defendant notified said Will Scott and the plaintiffs of the seizure of said goods under said warrant by said marshal, and protested against the seizure thereof by said marshal, but was compelled to surrender the same under said warrant, a copy of which was marked "Exhibit A," and filed with said answer. That afterwards, to-wit, on the 28th day of June, 1899, said whisky was destroyed by said D. C. Martin, city marshal of the city of Jonesboro, after notice to said plaintiff and pursuant to the orders of the mayor of the city of Jonesboro, entered in accordance with an act of the general assembly, approved February 13, 1899, entitled "An act to suppress the illegal sale of liquors, and to destroy the same when found in prohibited districts," said liquors having been shipped into said town of Jonesboro to be sold contrary to law. Defendant for further answer to the complaint stated the plaintiffs could not maintain the action because the whisky described in the complaint as destroyed as aforesaid was shipped by plaintiffs into the town of Jonesboro, Arkansas, a district in which the sale of whisky was at that time prohibited by law, to be sold contrary to law.

The answer set up a good defense to the action. The defendant could not lawfully have resisted the officer, armed with a legal warrant to seize the property. The consignee and the plaintiffs having been notified of the seizure, it was their duty—at least their privilege—to appear and show, if they could, and desired to do so, why the whisky should not be destroyed. It was the duty of the defendant to surrender the whisky to the marshal under the warrant, and if it did so the law protects it. 1 Jaggard, Torts, §§ 125, 139.

The first and third sections of the act to suppress the illegal sale of liquors, and destroy the same, when found in prohibited districts, provides:

"Section 1. It is hereby made and declared to be the duty of the chancellors, circuit judges, justices of the peace, mayors and police judges, on information given or on their own knowledge, or when they have reasonable ground to believe that alchohol, spirituous, ardent, vinous, malt or fermented liquors, or any compound or preparation thereof commonly called tonics, bitters or medicated liquors of any kind, are kept in any prohibited district to be sold contrary to law, or have been shipped into any prohibited district to be sold contrary to law, that they issue a warrant, directed to some peace officer, directing in such warrant a search for such intoxicating liquors, specifying in such warrant the place to be

searched, and directing such officers on finding any such liquors in any prohibited district to publicly destroy the same, together with the vessels, bottles, jugs or kegs containing such liquors; * * * *provided,* that any person on whose premises or in whose custody any such liquor may be found under warrant of this act shall be entitled to his day in court before said property shall be destroyed.

"Sec. 3. That if any suit shall be brought against any officer or his bondsmen, or any other person, to recover for any liquors, vessels, barrels, bottles, jugs or kegs destroyed under the provisions of this act, it shall be a complete defense to such suit for such officer, bondsman or other person to show to the satisfaction of the court or jury that such liquors so destroyed were being sold contrary to law, or were kept to be sold contrary to law, or had been shipped into any prohibited district to be sold contrary to law, or that any portion of the liquors so destroyed had been a part of any liquor sold contrary to law, or kept to be sold contrary to law, and, upon such showing being made, such officer, bondsman or other person shall not be liable for the value of the liquor, vessels, barrels, bottles, jugs or kegs so destroyed."

The judgment is reversed, and the cause remanded, with directions to overrule the demurrer.

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KANSAS CITY, PITTSBURG & GULF RAILROAD COMPANY *v.* PACE.

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Opinion delivered April 20, 1901.

CARRIER—LIMITATION OF CONTRACT—WAIVER.—Where a carrier sued for delay in shipment failed to allege in its answer the existence of a special contract limiting its liability, a defense based upon such contract will be treated as waived.

Appeal from Benton Circuit Court.

EDWARD S. MCDANIEL, Judge.

STATEMENT BY THE COURT.

This is an action brought by M. A. Pace and L. O. Woods, shippers of a car of live stock (cattle and hogs) over the Kansas City, Pittsburg & Gulf Railroad Company from Siloam Springs

to Kansas City. The complaint alleges that defendant company negligently failed to furnish a car within a reasonable time after demand for the shipment of the stock, and also caused delay after the start in the transportation of the stock, by furnishing a disabled engine to haul the car containing the stock; that, by reason of such delays and failure to furnish transportation, the stock was injured in value, and plaintiff damaged. The defendant appeared, and answered, and upon a trial there was a verdict and judgment in favor of plaintiff for the sum of $50. From the judgment the defendant appealed.

Read & McDonough, for appellant.

Appellees were not entitled to recover, because of their noncompliance with the provisions of their contract requiring them to furnish written notice of loss. 111 Ill. 351; 39 N. E. 426; 8 Pac. 465; 28 Pac. 1013; 44 Pac. 1000; 15 S. E. 88; 37 Am. St. Rep. 635; 16 Am. & Eng. R. Cas. 259; 63 Ark. 331. The court erred in its instructions to the jury and in the admission of evidence.

RIDDICK, J., (after stating the facts). This is an action against a railway company to recover damages alleged to have been caused to live stock by the negligence and delay of the company in shipping the same. One contention of the company is that the plaintiffs cannot maintain the action for the reason that they did not comply with a provision of the contract of shipment requiring the shipper to give notice in writing of any loss or damage to the property while in the possession of the company within five days after it occurred. But if the company wished to avail itself of such a defense, it should have set it up in its answer. The plaintiff was not required to allege or prove that the stock was shipped under a special contract, to make the company liable; for, by virtue of the common law, it was liable as a carrier for all damages to property in its possession not caused by the act of God or the public enemy. If the company held a contract limiting its liability, and relied as a defense upon the failure of the plaintiff to comply with the contract, it should not only have set up the contract, but should have stated the particulars in which plaintiff had thus failed. As it did not do this in respect to the notice, but went to trial on an answer setting up several other defenses, but making no reference to the failure of the plaintiff to give the notice referred

to, that defense, if it ever existed, must now be treated as abandoned or waived. *Bennett* v. *Northern Pac. Exp. Co.*, 12 Ore. 49; *Westcott* v. *Fargo*, 61 N. Y. 542, 551; *Hull* v. *Chicago, St. P., M. & O. Ry.*, 16 Am. St. Rep. 722; *Witting* v. *St. Louis & S. F. R. Co.*, 20 Am. St. Rep. 636, and note; Hutchinson, Carriers, § 259.

There were numerous other objections urged to rulings of the trial judge, but we have considered them, and are of the opinion that none of them are tenable. The instructions given, we think, were substantially correct, and the evidence sufficient to sustain the verdict. The judgment is therefore affirmed.

DOSS v. MOORE.

Opinion delivered April 20, 1901.

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LIQUORS—LICENSE—INCORPORATED TOWN.—Under act of March 19, 1881, providing that if a majority of the votes of a county be "for license," it shall be lawful for the county court to grant licenses within any township, town or ward of a city, where the majority of the votes cast upon the question was "for license," if an incorporated town is not a separate election precinct, but is in a precinct composed of the entire township, and a majority of the electors in the county and township vote in favor of license, a license may be granted in such town.

Appeal from White Circuit Court.

JOHN T. HICKS, Special Judge.

STATEMENT BY THE COURT.

In January last the county court of White county granted license to C. T. Doss, Jr., & Co. to sell liquors in the town of Beebe during the year 1901. Afterwards Edwin Moore and other citizens of Beebe filed a petition in the White circuit court asking for a writ of *certiorari* to bring up and quash the order of the county court granting license. The defendants filed a response to the petition, which showed the following facts: Beebe is an incorporated town in Union township of White county. There is no separate voting precinct for the town, but the town and township are both included in one precinct, the voting place for which is

in the town. At the general election held in September, 1900, a majority of the voters in White county voted "for license," and a majority of the voters in Union township, in which the town of Beebe is included, also voted for license, but no separate election was held for the town. The circuit court sustained a demurrer to the response, and quashed the order of the county court granting license. The defendant excepted and appealed.

J. H. Harrod and *Roberts & Roberts,* for appellants.

The court erred in holding that a separate election had to be held in each town, in addition to the vote at the general election. *Cf.* Sand. & H. Dig., §§ 4867, 4868. The word "town," as used in Sandels & Hill's Digest, § 4869, is without special significance. 48 Ark. 307; 34 Ark. 263; 37 Ark. 49; 59 Ark. 237.

Grant Green, J. N. Cypert and *W. E. Atkinson,* for appellees.

There was no error in the ruling of the court as to the necessity of a separate expression of the citizens of each town in the liquor question.

RIDDICK, J., (after stating the facts). In this case the circuit court quashed the order of the county court granting license to sell liquors in the incorporated town of Beebe on the ground that no separate election was held in the town on the question of granting license. The court, in other words, was of the opinion that an election must be held in an incorporated town separate from the township, and that a majority of the votes cast in the town must be in favor of license, before license to sell liquors in the town can be granted. The decision of this question depends upon a construction of the act of March 8, 1879, as amended by the act of March 19, 1881. The act of 1879 provided that at the general election for state officers there should be submitted to the electors of each township and ward in the state the question as to whether or not license shall be granted for the sale of ardent liquors, and provided further that, if a majority of the votes cast in any township or ward of a city on that question be for license, then it shall be lawful for the county court to grant license. Acts 1879, pp. 35, 37-9. It will be noticed that under this act of 1879 it was not required as a prerequisite to granting license that the majority of the votes in the county should be in favor of license, but only that a majority of the votes in the particular township or ward where license was granted should have been cast for license. The act

of 1881 amended two sections of this act. The statute, as amended, required the question of license or no license to be submitted to the electors of each county, and provided that, if a majority of the votes cast on that question in the county be against license, it should be unlawful to grant license at any place in the county until after the next general election. It also provided that, "if a majority of the votes cast in any county upon the question be 'for license,' then it shall be lawful for the county court of such county to grant licenses for the purposes aforesaid to persons of good moral character over the age of twenty-one years within any township, town or ward of a city in such county, where the majority of the votes cast upon the question was 'for license,' but in no other." Acts 1881, p. 132, §§ 1, 2.

Now, it seems obvious that the main purpose of this amendment to the act of 1879 was to require the vote of the whole county to be taken on the question of license, and to forbid the granting of license to sell intoxicating liquors at any place in the county where the majority of the votes in the county was not cast for license. Previous to the passage of this amending act, if one ward or township in a county, however small, voted in favor of license, it was lawful to license the sale of liquors there, though nine-tenths of the voters of the county may have been opposed to license, and may have voted against the granting of license. This was changed by the amendment, so as to require, not only a majority vote in the township or ward, but also in the county, before license could be granted. The amendment also provided that licenses to sell liquors should only be granted "to persons of good moral character over the age of twenty-one years." These, we think, were the chief purposes of the amendment.

But the circuit court no doubt rested its judgment on the provision of the amending statute above quoted to the effect that, if the vote in the county was in favor of license, then license might be granted in "any township, town or ward of a city in such county where the majority of the votes cast upon the question was for license, but in no other." This language, if read by itself, does seem to support the ruling of the circuit court; and, if the amending act was the whole law on the subject, we could concur in that ruling. But in arriving at the meaning of the legislature in passing this amendment the whole law must be read together. There are twenty sections in the act of 1879, and only two of them were amended. Reading the whole act together as amended, it seems

plain that the legislature did not intend to require a separate vote in each town in the state, or even in each incorporated town, or it would have said so. The intention was to require a majority vote in favor of license in the whole county as a prerequisite to the granting of license, and it expressly requires such a vote to be taken, but says nothing about a separate vote in either towns or incorporated towns. The statute, as it now stands, provides that the question as to whether license shall or shall not be granted by the county court shall be submitted to the qualified electors of the county at each general election for state officers. It further provides that such election "shall be held at the same time and place and in the same manner as other elections." Sand. & H. Dig., §§ 4867, 4868. Now, the statute covering elections requires that the general election for state officers, at which election, as above stated, the question of license must be submitted, shall be held in each precinct and ward of the state. Sand. & H. Dig., § 2598. At the time these statutes in reference to the granting of license were enacted, the law also required that each county should be subdivided into townships by the county court, and a place fixed in each township for holding elections therein, and further provided that no township line should pass through any town, but required that the whole of each town should be included in one township. Sand. & H. Dig., §§ 7340-7344. It thus appears that at the time these statutes requiring elections to determine whether license should be granted were enacted the only places in which the law required elections to be held at the election for state officers were townships, wards and election precincts. The townships and wards were all election precincts, but there was no requirement that elections should be held in incorporated towns separate from the townships in which they were located, unless such towns were election precincts. As before stated, the election precincts were usually townships and wards. In the county the different townships, in the cities the wards, were the election precincts. It was rare that a town was made a separate election precinct. Now, these statutes requiring elections on the question of license made no change in the voting precincts, but, on the contrary, expressly provided that the election should "be held at the same time and place and in the same manner as other elections." As the legislature certainly intended that each community or subdivision of the county where license was prohibited except on condition of a majority vote should have an opportunity of expressing its will on the question

of license, and as it neither made nor suggested any change in the election precincts, or in the time and place of holding elections, it is evident that it supposed that the will of those subdivisions which it desired to be made known could be expressed by holding elections in the different townships, wards and election precincts of the state as then constituted.

We therefore conclude that it was not the intention of the legislature, or the meaning of the statute, that a separate vote should be had in those towns which are not separate election precincts. Every ward and every township was, at the time these statutes were enacted, a separate election precinct, and it was therefore necessary, under these statutes, before license to sell liquors could be granted in a ward or township, that a majority vote should be cast therein in favor of license. *Siloam Springs* v. *Thompson,* 41 Ark. 456. But it was and is exceptional for a town to be a separate election precinct, and we do not think this statute intended to require separate elections in those towns which are not separate election precincts. If the town is not a separate election precinct, and a majority of the electors of the county and township in which the town is situated vote in favor of license, then license to keep a saloon in the town may be granted, it being in such case only a part of the township.

It results from what we have said that, in our opinion, the circuit court erred in sustaining the demurrer and quashing the judgment of the county court. Though the case was disposed of by the circuit court on demurrer, we infer from statements in briefs of counsel that the point above decided settles the case. For this reason we deem it unnecessary to notice the question raised as to whether *certiorari* was the proper remedy of petitioners in this case, for, considering that it was proper, there is nothing to show that the judgment of the county court was either void or erroneous.

For this reason, the judgment is reversed, and cause remanded, with an order to overrule the demurrer to the response, and for further proceedings.

WATKINS v. ARNOLD.

Opinion rendered April 27, 1901.

INTERVENTION—JUDGMENT.—Where plaintiff sought to restrain defendants from cutting timber on land claimed by him, and defendants claimed the right to cut under a third person who was permitted to intervene, setting up title in herself, on finding the issues in favor of the intervener judgment should be a dismissal of the bill for want of equity, and not a decree quieting the intervener's title.

Appeal from Izard Circuit Court.

JNO. B. MCCALEB, Judge.

Action by Watkins against Arnold and others to enjoin defendants from cutting timber on land claimed by plaintiff under a tax title. Defendants denied plaintiff's title, and alleged that Jane Gray was the owner of the land, and that they had authority from her to cut the timber. She was permitted to intervene and set up title in herself. The court denied the injunction, and decreed that plaintiff's tax title be canceled and intervener's title quieted. Plaintiff has appealed.

J. A. Watkins, for appellant.

Appellee was not in possession adversely to appellant's title. 58 Ark. 512; 34 Ark. 84; 15 Am. Dec. 433; 33 *id.* 165; 45 Ark. 427; 60 Ark. 70. A tenant at sufferance cannot give to his holding that character of adverse possession which would ripen into a title by limitation. 42 Ark. 118; 33 *id.* 633; 43 Ark. 485; Tied. R. Prop. § 226.

J. B. Baker, De E. Bradshaw and *T. E. Helm,* for appellees.

Appellee's title by adverse possession was complete. *Cf.* 27 Ark. 75; 23 Ark. 117.

BUNN, C. J. The decree in this case will be affirmed in effect, but modified so that the bill will be dismissed for want of equity, instead of decreeing title in fee in the appellee, Jane Gray, generally. She still holds under the same title, no greater, no less, than

when the suit was instituted, although, as between herself and the appellant, the latter must fail on her claim of title by adverse possession.

With this modification, the decree is affirmed.

RATCLIFFE v. PULASKI TURNPIKE COMPANY.

Opinion delivered April 27, 1901.

TURNPIKE—EXCLUSIVENESS OF PRIVILEGES.—Where a county court, under the act of March 6, 1875, authorizing county courts to grant exclusive privileges for the construction of turnpikes, etc., granted to plaintiff the right to construct a turnpike and collect tolls thereon for a certain period, the county court cannot, during the life of plaintiff's franchise, open a parallel and competing public road which would largely divert travel from plaintiff's turnpike.

Appeal from Pulaski Chancery Court.

THOMAS B. MARTIN, Chancellor.

John Fletcher and *Dodge, Johnson, Carroll & Pemberton,* for appellants.

The turnpike company had no exclusive rights which were violated by the acts of appellants. Such a grant as that claimed by appellees would be monopoly within the prohibition of the constitution. Art. 2, § 19, Const. Ark. The maxim *sic utere,* etc., applies only in cases where an owner is attempting or doing that which will infringe a right of another which is in the nature of or equivalent to an easement over the servitude upon such owner's land. 12 Mass. 157; 13 Wend. 261; 3 B. & Ad. 871; 2 M. & W. 22; 4 Paige, 169; 12 Mass. 220; 5 Johns. 101. Nor could this action be maintained upon the ground that the motive of the defendants, in doing the acts complained of, was malicious, had the evidence shown such to be the case. 13 Wend. 261; 5 Johns. 101; 24 Pa. St. 308; 75 *id.* 467; 76 Pa. St. 191. The county court could not confer upon appellees the exclusive right claimed by it here. Since such right is not given expressly in the charter, the franchise will not be so extended by implication, as to make the right of appellee an exclusive one. 11 Pet. 420; 24 Mass. 344;

9 N. Y. 444; 11 Leigh, 42; 17 Conn. 454; 1 Barb. Ch. 547; 3 Sandf. Ch. 625; 3 Kent's Comm. 459 *n.;* Gr. Cruise, Title *Franchises,* § 29; 43 Ark. 193; 44 Ark. 185; *Cf.* Sand. & H. Dig., §§ 541, 3391; 44 Ark. 189; 36 Ark. 467; 4 S. W. 140, 141; 15 S. W. 782; 18 S. W. 626, 628; 45 S. W. 345, 347; 16 N. J. Eq. 366-372; 4 Stew. & Port. 260; 89 Ind. 290, 292, 295; 99 N. Y. 599. See *contra*: 1 Johns. Ch. 611; 5 *id.* 101; 3 Kent's Comm. 459. But see also: 11 Pet. 420, and cases *supra* overruling same.

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

The act of March 6, 1875, conferred plenary power in the county courts of the state to make contracts for the building of turnpikes. Appellee's rights under the grant of power from the county court, being based upon a valid consideration moving between the parties thereto, stands upon a different footing from a mere voluntary grant, and will be protected and upheld, though exclusive in its terms. 85 Am. Dec. 647; 61 Md. 41; 20 Ark. 561. The maxim *sic utere tuo ut non alienum laedas* applies to this case, and appellees will not be allowed to injure or destroy the franchise of appellees. 36 Ark. 470. Every citizen is presumed to be a party to the contract of the state for public improvements which are for their benefit. 20 Ark. 560; 3 Ired. Eq. 613. Appellants are attempting the construction of what would be a nuisance to appellee's franchise. Cooley, Const. Lim. 279; 1 Johns. Ch. 611; 5 *id.* 110; 2 Bl. Comm. 219; 16 N. J. Eq. 372; 65 Am. Dec. 538; Johns. Ch. 101; 2 Stew. 211; 3 Tenn. Ch. 369; 8 Humph. 342. A statutory grant of fees or perquisites carries with it an exclusive right to perform the services that earn them. 4 Edw. Ch. 258. While appellants have the right to use their own lands for a roadway for themselves, they cannot maintain thereupon even a *free* road for the general public, to the detriment of appellee's franchise. 42 Am. Dec. 716; 6 Cal. 590; 3 Ired. Eq. 613; 1 Johns. Ch. 611; *id.* 101; 3 Tenn. Ch. 396; 5 Johns. Ch. 111; Martin's Ch. Dec. 339. The fact that the shun-pike does not touch the road is immaterial. 5 Johns. Ch. 101; 3 Tenn. Ch. 396; Martin's Ch. Dec. 339. The right of eminent domain is reserved by the county, and appellee's franchise may be taken by its exercise, if deemed necessary. Const. art. 18, § 9; 16 N. J. Eq. 366; 40 Am. Dec. 705; 60 *id.* 143; 11 N. H. 19; Martin's Ch. Dec. 339. Appellee's franchise, being to do something which is not common right, is not a monopoly. 16 Wall. 36; 33 L. R. A. 536; 115 U. S. 674;

Cf. Const. art. 2, §§ 18, 19; 4 Bl. Comm. 159; Bac. Abr. "Prerogative" T. 4; 3 Inst. 181. See also, generally, upon the case the opinion of the chancellor thereupon. Martin's Ch. Dec. 339.

BUNN, C. J. On the 18th day of April, 1885, in due course, the county court of Pulaski county, proceeding under the provisions of an act of the general assembly entitled "An act granting toll bridge and turnpike privileges," etc., approved March 6, 1875 (Acts 1874-5, p. 242), entered into a contract with the Pulaski Turnpike Company, for the construction of a turnpike over that portion of the Little Rock and Pine Bluff public road leading from Oakland cemetery in Little Rock across the Fourche Bayou, over the Iron Bridge belonging to the county, to the foot of Fourche Mountain; and in consideration of the construction of and the keeping the same in repair granted to said company the exclusive privilege of erecting and keeping a toll-gate on said turnpike and collecting tolls thereat, according to a schedule referred to in the order, for the period of 24 years from the time of the completion of the turnpike, and at the termination of which period all the right, title and interest of said company to revert to Pulaski county. The turnpike was completed and received on August 1, 1885, and said company erected its toll-gate and began to collect its tolls, and has continued to do so until the present time, keeping said turnpike and bridge in repair according to its contract with the county court.

On the 27th May, 1897, the Thomas Manufacturing Company, operating its mills in the eastern part of the city of Little Rock, the Consumers' Oil Mill, Charles M. Newton, John F. Boyle, George Reichardt, Allen N. Johnson, administrator of the estate of R. W. Martin, deceased, and other landowners in the vicinity, petitioned the county court to open a public road, commencing at the northeast corner of the Consumers' Oil Mill, and running thence in a southeasterly direction to the intersection of the Brooks Bridge road, at the southeast corner of the southwest quarter of southwest quarter section 18, township 1 north, range 11 west.

The road was opened by order of the county court, but Mrs. Mary Taylor, who owned some of the land over which this new road was located, and was also the secretary and treasurer of the Pulaski Turnpike Company, took an appeal from this order of the county court to the circuit court of Pulaski county, and there moved for an order compelling the petitioners for the road to give

bond, which order was made, and, said petitioners declining to make the same, their petition was dismissed. In the meantime, on the 27th July, 1897, and some days after Mrs. Taylor had taken her appeal, and before the convening of the September term of the circuit court, one W. H. Hicks, a contractor of the county, acting, as is alleged, under the orders of the county court, entered upon the southeast quarter of the northeast quarter of section 13, township 1 north, range 12 west, across which tract the said new road had been laid out and attempted to be opened, and with teams, wagons, piling, pile-driver and other appliances began the work of erecting a bridge thereon across Fourche bayou, and refused to discontinue the work and leave the premises on notice and demand from the said Mary Taylor.

Thereupon, as secretary and treasurer of the said turnpike company, as well as the owner of said tract of land, she filed her bill in the Pulaski chancery court for an order restraining and enjoining the said Hicks and the county judge from prosecuting said work, and all the said parties, being before the court, were enjoined from proceeding further with the work of opening said road until the appeal aforesaid could be determined in the circuit court. Immediately thereafter all the material, tools and appliances aforesaid in charge of the said Hicks were moved from the lands aforesaid of Mary Taylor on the west side of the Little Rock, Mississippi River & Texas Railroad to the land of Mrs. Geraldine Miller on the east side of said railroad; and during the months of October, November and December of 1897 the said Hicks erected thereon across the main stream of Fourche bayou and the two branches thereof three bridges, all of which, excluding abutments, exceeded 60 feet in length, the material and building of which were paid for by the county; there being no road at the time leading to and over these bridges, they being in an enclosed field as alleged. Testimony was adduced going to show that it was the intention of the county judge and the others to change the direction of the contemplated road so as to cross upon these new bridges, thus avoiding Mrs. Taylor's land altogether. At all events, such would be the natural effect of the scheme. In the early part of August, 1898, the appellants, owners of land between the Consumers' Oil Mill, in the eastern part of Little Rock, on the Fourche Dam Turnpike, and the Brooks Bridge road, between sections 13 and 18 and 24 and 19, opened up a road 60 feet wide across their lands, and at the same time the defendants Henry Shepard, George

Hudson, Sandy McFarland and John Durrah, and 25 or 30 other citizens of the Sweet Home neighborhood commenced cutting from the Stockade hill on the Little Rock and Pine Bluff public road to the Brooks Bridge road a right of way 30 feet wide over the lands of the defendant Ratcliffe, which would connect with the southern terminus of said new road on the land of the defendants, Boyle, Reichardt, Newton, Consumers' Oil Mill Company, W. C. Ratcliffe and Geraldine Miller; and at the same time the people of the Sweet Home neighborhood were cutting said right of way from the Stockade hill to the Brooks Bridge, and were making the abutments to the three new bridges on the lands of Mrs. Miller, and were opening the road on the lands of the others named.

These were allegations in the bill, and were all substantially proved, so that there is no doubt but that the intention of the parties defendant to succeed in the opening of a road from the Oil Mill across the Fourche over said new bridge and beyond, and also to open a road from said new road to Stockade hill on the Little Rock and Pine Bluff public road, and that one of the objects, if not the principal object, of the same was to divert the travel on the public road south of Stockade hill from passing through the plaintiff's toll-gate to said new road to and from the city of Little Rock, or such would be the effect of it.

All the travel coming north on the Little Rock and Pine Bluff road to Stockade hill is necessarily compelled to pass over the Iron Bridge and through the toll-gate of plaintiffs, unless diverted by some new road; and all the travel passing through said toll-gate out of the city of Little Rock over said turnpike must necessarily pass by Stockade hill, and southward towards Sweet Home under existing conditions, but a road from Stockade hill northerly to connect with the Brooks Bridge road or the new road, both of which are in a general way parallel to the plaintiff's turnpike road, must necessarily have the effect of diverting much of the travel and patronage from plaintiff's turnpike road and toll-gate.

The county court, in consideration of the construction of the turnpike by the plaintiff—necessarily a work of great cost—and keeping the same in repair, granted plaintiff the exclusive privilege of collecting the stipulated tolls. The county court itself was forbidden by the very terms of the act under which it undertook to have this turnpike constructed by the plaintiff to open a competing road, or in any way to injure the plaintiff's franchise.

On the question of how far such grants extend, the authorities apparently differ, but the conflict is more apparent than real after all, and the difference grows out of the language and terms of the grants, whether they purport to confer mere privileges or exclusive privileges. Thus, in the leading case of *Charles River Bridge* v. *Warren Bridge,* 11 Peters, 420, in which it was held that the privilege cannot be extended by implication, but must be restricted to the language of the grant, the grant was not exclusive in terms. So, also, in the case of *Auburn & Cato Plank Road Co.* v. *Douglass,* 9 N. Y. 444, and in all the cases where restraining orders have been refused, so far as our researches go. The rule seems to be that, where the privileges granted are exclusive, and are for a valuable consideration, the matter assumes the nature of a contract between the government and the individual grantee, whose obligation cannot be impaired by the government; and, more still, the good faith of the state government is pledged, so to speak, to protect the grantees against the unlawful and injurious interference of all parties.

The county court is but an agency of the state government in such matters, and in this instance was clothed by the legislature with authority to fully and exclusively grant the privileges to the plaintiff. This grant of power does not in any manner interfere with the private ownership of adjacent property, or property in the vicinity, to use the same for the owner's benefit; but it does restrain the owner's use of his property for the benefit of the general public or third parties, in so far as such use may injure the franchise of the grantee, which carries with it exclusive privileges. That the opening of the road from Stockade hill to the Brooks Bridge road, or the new road opened, but which ceased to be a county road, whereby public travel could be diverted from plaintiff's turnpike, would greatly injure, if not destroy, plaintiff's franchise property, is conclusively shown by the evidence in the case, and the findings of chancellor are sustained, and his decree is affirmed.

We deem it unnecessary to go more at length into this discussion, as the chancellor has elaborately and ably discussed the question involved, and we understand his opinion will be published.*

Affirmed.

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* See *Pulaski Turnpike Co.* v. *Pulaski County,* Martin's Ch. Dec. 339.

SACHS v. FULLER.

Opinion delivered April 27, 1901.

BILLS AND NOTES—AGREEMENT TO INDORSE—LIABILITY.—No liability accrues on an agreement to indorse an overdue note unless demand of payment was made upon the principal within a reasonable time after the indorsement should have been made and notice of non-payment was given to the indorser.

Appeal from Poinsett Circuit Court.

FELIX G. TAYLOR, Judge.

Action by Theresa Sachs against the Fuller Bros. Toll, Lumber and Box Company on an agreement to indorse a note. From a judgment in favor of defendant plaintiff has appealed.

Allen Hughes and *Chas. D. Frierson,* for appellant.

The court erred in giving instruction No. 1. 80 Am. Dec. 668. It was also error to refuse the instruction asked by appellant, to the effect that an indorsement without recourse was not a compliance with the contract. The whole contract was an agreement to indorse, with assumption of liability, and appellees are estopped to deny this. Bish. Contr. §§ 317, 381; 15 Oh. St. 225; 80 Am. Dec. 668; 88 Am. Dec. 337; 61 N. Y. 616.

N. F. Lamb, for appellee.

Appellee is not liable as an indorser with recourse. If its liability is such, it was entitled to notice of dishonor. 11 Ark. 504; 14 Ark. 334; 26 Ark. 155; 14 Ark. 127; 6 N. W. 119; 16 S. W. 66; 18 Pick. 260; 10 Am. Dec. 663; 16 *id.* 672; 13 *id.* 629; 2 Conn. 419; 12 Am. Dec. 436; Dan. Neg. Inst. 606, 611; 53 Am. Dec. 322; 39 *id.* 158.

BATTLE, J. Assuming that appellee agreed to indorse the note executed by W. T. Bishop to R. R. Bishop for $100, as contended by appellant, and failed to do so, its liability was no greater than it would have been had it done so. By agreeing to indorse the note it undertook to pay the amount due on the same, provided payment was demanded by appellant of the maker of the note within a reasonable time after the indorsement, and he refused to

pay the same, and due notice of such refusal was given to the appellee, the note being overdue at the time appellee agreed to indorse it. To hold appellee responsible, such demand must have been made, but appellant wholly failed to make it, and held the note sixteen days, when she discovered that it was indorsed by appellee "without recourse," and returned the note to appellee. Appellee is not liable for damages on the instrument or the agreement to indorse, the conditions upon which it was to become liable never having been performed.

Judgment affirmed.

H. B. CLAFLIN COMPANY v. BRETZFELDER.

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Opinion delivered April 27, 1901.

1. ATTACHMENT—CORPORATE SHARES.—Delivery of a writ of attachment containing a garnishment clause to the president of a corporation is not sufficient to fix a lien on any stock in such corporation held by the debtor; the statute (Sand. & H. Dig., §§ 336, 3057) providing that an attachment or execution may be levied upon corporate shares by the sheriff delivering to one of certain officers named a copy of the order with a notice or certificate that he has levied upon such shares. (Page 277.)

2. SAME.—Where an attachment was sought to be levied upon the debtor's corporate stock by means of a writ of garnishment served on the corporation, and the corporation appeared and admitted the debtor's ownership of the stock, and, the debtor failing to appear, judgment by default against him was entered, the attachment plaintiff acquired no lien as against a creditor who subsequently caused the debtor's shares to be levied upon and sold under execution. (Page 279.)

3. PLEDGE—WAIVER.—Where a pledgee of stock elected to have it levied upon under attachment and condemned as the property of the pledgor, she thereby waived her right to enforce the pledge, although the attachment proceeding was ineffectual for want of a proper levy on the stock. (Page 279.)

Appeal from Jefferson Chancery Court.

JOHN M. ELLIOTT, Chancellor.

Crawford & Hudson, Austin & Taylor, Reinberger & Ewing, for appellant.

An equity of redemption in mortgaged or pledged chattels cannot be reached under execution or attachment. 42 Ark. 236; 58 Ark. 289-291; 64 Ark. 213; 17 Mich. 141. Whether appellee claims the shares under an attachment or an attachment-garnishment depends solely upon the acts of the officers under her writ, and is immaterial. Shinn, Attach. § 314; Drake, Attach. (4th Ed.), § 424. The only evidence of this is his return. 40 Ark. 141. As to law governing seizure and sale of shares of stock under an order of attachment at that time, see Sand. & H. Dig., §§ 3057, 3058, 3059. Under these sections appellee could acquire an attachment lien on the shares only by a strict compliance with the terms of the statute. Shinn, Attach. § 8; 3 Ark. 509. The return does not show a compliance therewith. 64 Ark. 111; 75 N. W. Rep. (Mich) 952; 46 N. W. Rep. 750. Nor does it describe any of the shares in controversy as having been levied upon. Sand. & H. Dig., § 6003; Drake, Attach. (4th Ed.), § 208, 205; Shinn, Attach. § 223-231; Freeman, Ex. §§ 353, 355. An attachment is merely a preliminary execution. 23 Ark. 287; 52 Ark. 290. A new statute intended to cover the whole subject embraced will repeal an older law on the subject. 11 Wall. 88; 107 U. S. 445; 134 U. S. 206. The corporate property belongs to the corporation, and not to the individual stockholders. Wade, Attach. § 408. The return does not show that the sheriff delivered to the garnishees a copy of her order of attachment, with a notice specifying the property attached. 79 Ky. 509; 3 Ark. 509; Rood, Gar. §§ 257, 275, 277, 278; 87 Ky. 56. The return does not describe the property attached. Sand. & H. Dig., § 346. The schedule removes any doubt as to the extent of the attachment. 3 Ark. 509. The shares could be garnished only in the manner pointed out by the statute. Drake, Attach. (4th Ed.), § 451 *b;* Rood, Gar. § 485; 3 Ark. 509; 14 S. W. Rep. 827; 72 Ia. 696. Appellee lost any attachment lien she may have had by delay in suing out her order of sale on the judgment. 53 Ark. 98; Drake, Attach. (4th Ed.), § 224 *a;* 37 Cal. 121. The lawful period is three years. Sand. & H. Dig., § 4205. The execution must be sued out within the period. Shinn, Attach. § 454, 325, 327; 3 Am. & Eng. Enc. Law (2d Ed.), 243; 10 Johns. 129; 5 Col. 247; 44 Pac. Rep. 373; 54 S. W. Rep. 342. The office of an execution is to enforce a debt, and not to create a security. 9 Cent. Law Jour. 347. A party delaying to sue out his execution may impair his rights. 29 Ark. 85; 59 Ark. 307; 73 Hun, 179 (25 N. Y. Sup. 875); 4 Abb. Pr.

(N.Y.) 393; Drake, Attach. § 262 (4th Ed.); 2 Cranch (N. S. C C..), 538; 18 Ark. 315; 15 Ark. 274; Freeman, Judg. § 202; 44 Am. Dec. 780; 14 Ohio St. 18; Burrill, Ass. (3d Ed.), § 218-225; 60 Ark. 50. An order of attachment is a provisional remedy. 52 Ark. 296. Garnishment proceedings are independent suits. 62 Ark. 616. The appellee obtained no judgment against the garnishee, but abandoned both actions. Shinn, Attach. § 335; 45 Ark. 271; 48 Ark. 349; 52 Ark. 130; 60 Ark. 50; 62 Ark. 616; 3 Mason, 247. An attachment issued for a larger sum than is owing is void. 11 S. W. Rep. 1123; 3 Met. (Mass.), 44; 43 N. J. Eq. 90; 3 Rich. Eq. 412; 62 Ark. 171; 112 Mass. 180; 1 Pick. (Mass.), 204; 12 Pick. (Mass.), 388; 3 Mich. 531; 74 Texas, 73; 75 Texas, 278; 17 Pick. 213. Where one has an election between inconsistent causes of action, he is held to that which he first adopts. 29 Ind. App. 654; 68 Iowa, 460; 18 Am. & Eng. Enc. Law, 727; 65 Ark. 380; 64 Ark. 213; 85 Tenn. 332; 85 Ky. 503; 26 Ill. App. 238; 46 N. W. 72; 23 Mo. App. 436; 26 So. Rep. 136; 45 Ark. 40; 52 Ark. 389. Appellee's alleged pledge was void. 64 Ark. 415; 66 Ark. 98; Sand. & H. Dig., § 1338, 1342, 1339, 1353, 1355. These provisions stamp as fraudulent sales or pledges of tangible personal property unaccompanied by the delivery of possession. 6 Conn. 552; 71 Ia. 270; 2 Conn. 579; 5 Gray, 373; 6 So. Rep. 364. If shares are attached, the writ also binds the dividends. 35 Fed. Rep. 395, 38 Ark. 537. Attachments, restraining orders, etc., are merely ancillary to a pending action, and if granted or issued before the commencement of the action, are *coram non judice* and null and void. 47 Kans. 236, 366; 1 Am. & Eng. Dec. Eq. 658; 86 Ky. 240. An action is commenced by filing a complaint and issuing summons thereon. Sand. & H. Dig., § 5657; 57 Ark. 229; 57 Ark. 459; 62 Ark. 401. If a sheriff releases an attachment with or without plaintiff's consent, its lien is discharged. Shinn, Attach. § 256, 257-260; Drake, Attach. (4th Ed.), § 282 *et seq.;* 3 Am. & Eng. Enc. Law (2d Ed.), 227, and cases cited note 4; 29 Mo. App. 167.

White & Altheimer, J. M. & J. G. Taylor, for appellant.

Appellee did not forfeit her right to sell the attached property by her delay in doing so. 73 Hun, 179; 90 Mo. 239-251. Laches must amount to abandonment. 13 Gratt. (Va.), 354, 362; 4 Munf. (Va.), 332. An equity of redemption in mortgaged or

pledged chattels cannot be reached under execution or attachment. 42 Ark. 286; 58 Ark. 289; 64 Ark. 213; 17 Mich. 141.

Austin & Taylor, Crawford & Hudson, Reinberger & Ewing, for appellant in reply.

The return on appellee's writ did not create an attachment lien. 64 Ark. 111.

BATTLE, J. The property in controversy in this action "is 342 shares of the capital stock of the Standard Compress and Warehouse Company [which we shall hereafter call for convenience the 'Compress Stock'], originally evidenced by certificates numbered 23, 52 and 86, which were issued to Rosenberg & Miller for 200, 100 and 42 shares, respectively; and 420 shares of the capital stock of the Park View Land Company [which we shall hereafter call for convenience 'Park View Stock']' which were originally represented by certificates numbered 15, 16 and 17, issued to Felix M. Rosenberg for 100, 60 and 50 shares, respectively; and certificates numbered 18, 19 and 20, issued to Solomon Miller for 100, 60 and 50 shares, respectively."

Appellants claim them by virtue of levies thereon and sales thereof under executions issued upon judgments in their favor against Felix M. Rosenberg and Solomon Miller, who composed the firm of Rosenberg & Miller; and appellee, under an order of sale issued upon a judgment sustaining an attachment in her favor against the same persons.

On the 5th day of October, 1891, Rosenberg & Miller executed to Emelia Bretzfelder, the appellee, a promissory note, and thereby promised to pay her $4,646.37, and 8 per cent. per annum interest, on the first day of January, 1893, and transferred and delivered to her 200 shares of the Compress Stock and 100 shares of the Park View Stock to secure the payment of the same, but no transfer of the shares was made on the books of the corporation that issued the shares, or upon those of the office of the county clerk.

On the 3d of December, 1894, appellee, Emelia Bretzfelder, commenced an action in the Jefferson circuit court against Rosenberg & Miller, to recover of them the sum of $6,140.37, which included the amount due on the note for $4,646.37, and on the same day caused an order of attachment to be issued against their property, with a clause therein commanding the sheriff to summon the Standard Compress & Warehouse Company and the Park View Land Company to answer as garnishees in the action. This order

reached the hands of the sheriff on the same day it was issued, at 8:10 o'clock p. m., and he at 9 o'clock next following executed the same "by delivering a true copy thereof to A. Blum, president of the Park View Land Company, and by delivering a true copy thereof to M. W. Taggart, president of the Standard Compress & Warehouse Company, summoning the said corporations to answer as garnishees."

On March 25, 1895, the Park View Land Company filed its answer to said garnishment, in which it admitted that Felix M. Rosenberg was the owner of record of 210 of its shares of the par value of $25 each, evidenced by three certificates issued to him, all dated June 24, 1891, numbered 15, 16 and 17 for 100, 60 and 50 shares, respectively, and that Solomon Miller was the owner of record of 210 shares of its stock of the same par value, evidenced by its three certificates issued to him, also dated June 24, 1891, numbered 18, 19 and 20 for 100, 60 and 50 shares, respectively. And on the same day the Standard Compress & Warehouse Company filed its answer to said garnishment, in which it admitted that the firm of "Rosenberg & Miller" was the owner of record of 342 of its shares of the par value of $25 each, evidenced by three certificates issued to them—one No. 23, dated June 23, 1890, for 200 shares; one No. 52, dated June 27, 1890, for 100 shares; and one No. 86, dated June 15, 1891, for 42 shares.

On March 30, 1895, appellee recovered judgment by default against Rosenberg and Miller for the sum of $6,877.71, and at the same time the attachment was sustained, and all of the said stock in the Park View Land Company and in the Standard Compress & Warehouse Company aforesaid was condemned to be sold for the satisfaction of said judgment. The shares pledged to Emelia Bretzfelder to secure the payment of the note for $4,646,37 were included in the stock condemned to be sold. This was done because she was doubtful of the validity of the pledge, on account of the failure to transfer it to her on the books of the corporations and in the clerk's office.

On the 30th of March, 1895, the appellants also recovered judgments in the same courts against the same debtors for various amounts on which they caused executions to be issued on the 19th of September, 1898. On the same day, the 19th of September, 1898, the appellee caused a *venditioni exponas* to be issued on the judgment recovered by her on the 30th of March, 1895, commanding the sheriff to sell the stock in controversy to satisfy her judg-

ment. The executions sued out by the appellants first reached the hands of the sheriff. They caused him to levy on the stock in controversy to satisfy their executions and to advertise the same for sale on the first of October, 1898.

Upon the issue of aforementioned writs the appellants and appellee entered into a written contract in which the issue of said order of attachment, the recovery of said judgments, and the issue of executions thereon were recited, and agreed as follows:

"Now, this agreement is to show that the parties mentioned therein have agreed that the said Emelia Bretzfelder shall file forthwith a bill of interpleader in the chancery court of Jefferson county, Arkansas, against all the other parties herein mentioned, by which said suit it is contemplated that the rights of the several parties mentioned herein to said stock under their said executions shall be litigated and decided. It is further stipulated by the parties hereto that they will each file their several interventions or answers in said cause and assert their rights to said stock, or proceeds thereof, or right therein; that at said sales the said stock shall be purchased by Fred Hudson, as trustee for all the parties herein mentioned, who shall bid at such sale, if necessary to secure a purchase of said stock at said sale, any amount not exceeding 45 per cent. of the par or face value of the said Standard Compress & Warehouse Company stock, and not exceeding 25 per cent. of the Park View Land Company stock; that the said Fred Hudson shall hold the said stock so purchased as trustee for the parties herein mentioned as their rights shall hereafter be established by the said chancery court of Jefferson, or any court of final resort to which said suit may be carried, it being understood by all the parties hereto that no rights or priority of liens upon said stock, and no right to contest the right of any other party hereto to the same, is waived or impaired by this agreement, and it being the intention of the agreement that the said stock shall be purchased by the said trustee, who shall hold the same subject to the final adjudication of the said case and the settlement of the rights of the respective parties to this agreement."

The stock in controversy was sold by the sheriff, under the executions delivered to him, on the 1st day of October, 1898, and was purchased by Fred Hudson, as trustee, and is now held by him in that capacity according to the agreement.

Pursuant to the agreement, Emelia Bretzfelder brought a suit against the appellants in the Jefferson chancery court, on the 12th

of October, 1898, and alleged in her complaint, substantially, the facts we have stated, and asked that her lien or claim to the stock be declared superior to any of the claims of the defendants, and that they be restrained from interfering with her rights thereto.

The defendants answered the complaint, and, in effect, denied that the plaintiff acquired any lien on the stock in controversy by attachment or garnishment; and alleged that, if any of the stock were pledged to her, she lost and waived the pledge by her attempt to attach the same, and by having them condemned and sold, under attachment proceedings, to satisfy her judgment, and that they were entitled to the shares of stock in controversy.

After hearing the evidence adduced by all parties, which proved the facts we have stated, the chancery court adjudged as follows:

"First. That appellee held under a valid and subsisting pledge the 200 shares of Compress Stock evidenced by certificate No. 23 issued to Rosenberg & Miller, and 100 shares of Park View Stock evidenced by certificate No. 18 issued to Solomon Miller; that there were due and owing on the pledge debt $7,551.50; that appellants only had the right to redeem said shares by the payment of said debt; and perpetually enjoined them from questioning the fact of the pledge or the amount of the pledge debt, or appellee's right to hold the shares until the debt be paid."

"Second. That through her action at law against Rosenberg & Miller appellee acquired a right in the 342 shares of Compress Stock evidenced by certificates Nos. 23, 52 and 86, issued to Rosenberg & Miller for 200, 100 and 42 shares, respectively, and the 420 shares of Park View Stock, evidenced by certificates Nos. 15, 16 and 17, issued to Felix M. Rosenberg for 100, 60 and 50 shares, respectively, and Nos. 18, 19 and 20 issued to Solomon Miller for 100, 60 and 50 shares, respectively, prior and superior to the rights obtained by appellants under their actions at law against Rosenberg & Miller."

And the defendants appealed.

Did appellee acquire any lien on or title to the stock in controversy by attachment or garnishment? This question was virtually decided by this court in *Deutschman* v. *Byrne,* 64 Ark. 111. In that case it is said: "At common law the shares of a stockholder in the capital stock of a corporation were not subject to attachment or execution; but the statutes of this state make them liable to attachment. They are intangible and invisible, and can-

not be actually seized by an officer. There can be no visible change of possession as to them. To overcome this difficulty, the statute provides for a constructive seizure. It is obvious, therefore, there can be no seizure of them unless there be a substantial compliance with the statute providing how the seizure can be made: and that, if the statute is not complied with, there can be no valid sale by virtue of such seizure, and no title thereto can be acquired."

Section 336 of Sandels & Hill's Digest is as follows: "The order of attachment shall be executed by the sheriff or other officer without delay, in the following manner: * * * *Third.* Upon other personal property by delivering a copy of the order, with a notice specifying the property attached, to the person holding the same; or, as to a debt or demand, to the person owing it; or, as to stock in a corporation, or property held, or a debt or demand owing by it, to the chief officer, or to the secretary, cashier, treasurer or managing agent thereof, and by summoning the person or corporation to answer as a garnishee in the action."

Section 3057 is as follows: "Whenever an officer, having an execution or writ of attachment in his hands, shall levy on shares or stock in corporations, he shall make such levy or seizure by leaving a true copy of said writ with the president, secretary or cashier or other officer, with the certificate of the officer making such levy, that he levies upon and takes such rights or shares to satisfy such execution."

Under either of these sections, in order to attach such shares, it is necessary to deliver to one of the officers or agents named therein a notice in writing or certificate specifying the same. To enable the sheriff or other officer to make the levy, the statutes make it the duty of every person named above, to whom he shall apply therefor, to furnish him with a certificate of the number of shares of the defendant in the stock. *Id.* § 3056.

The order of attachment sued out by appellee was executed "by delivering a true copy thereof to A. Blum, president of the Park View Land Company, and by delivering a true copy thereof to W. M. Taggart, president of the Standard Compress & Warehouse Company, and by summoning the said corporations to answer as garnishees." No notice or certificate was delivered, and no property was attached; and the court was without authority to condemn any stock or shares to be sold to satisfy appellee's debt or judgment; and appellee acquired no lien or title to the stock in controversy by the attachment.

In the action instituted by appellee against Rosenberg & Miller, in which the order of attachment was issued, the defendants did not appear, and offered no resistance to the attachment in any way; and consequently appellee acquired no lien or title to the stock except that she acquired by conforming to the statute. The acts or answers of the garnishees in that case did not affect the rights of the defendants to the stock. Whatever they might have done or did respecting their own rights, they were powerless to do anything which affected other persons. *Gates* v. *Tusten* (Mo.), 14 S. W. Rep. 827; *Insurance Co.* v. *Friedman,* 74 Texas, 56; *Gage* v. *Maschmeyer,* 72 Iowa, 696; Drake, Attachments (17th Ed.), § 451b.

The effort of appellee, though ineffectual, to procure the attachment of the stock pledged to her, and a judgment condemning the same be sold to satisfy her debt, was a waiver of the pledge. The rights acquired by a pledge and an attachment are inconsistent, and cannot be maintained by the same person at the same time.

In *Hickman* v. *Richburg,* 26 Southern Rep. 136, the court stated the facts as follows: "The evidence, without conflict, shows that the lumber which was levied upon by the plaintiff in execution was sold by the claimant to the defendant in execution on or about the 1st of February, 1898; that the claimant at the time of the contract of sale of said lumber, by the express terms of his contract with the defendant, reserved the title to the lumber until the payment of the purchase money was made. The plaintiff's execution was levied on the lumber in the possession of the defendant on the 15th day of March, 1898, and on the 16th day of March—the day following the levy—the claimant filed a sworn statement of his account against the defendant for the lumber, in the office of the probate judge of Coffee county, with the purpose and intention of fixing and creating a material man's lien on the lumber in question under the statute. This attempt on the part of the claimant to create a lien was ineffectual by reason of a failure to comply with all the requirements of the statute in the statement so filed." The court held that the attempt to establish a material man's lien was an abandonment of the title reserved in the sale; and said: "It would seem, from these authorities, that the question of election is not made dependent upon whether such election may be rendered effectual or not. Any unequivocal act on the part of the vendor, recognizing the title as

being in the vendee, will preclude such vendor from afterwards setting up title in himself; and it is also well settled that, when an election between inconsistent rights is once made, it cannot be afterwards revoked. It is clear that the claimant in this case could not, under the statute, fix a material man's lien upon property the title to which was in himself; and when he filed his claim and statement with the probate judge for the purpose of creating a lien upon the lumber in question, this was an unequivocal act on his part to treat the lumber as the property of the defendant in execution, and, of course, a waiver and abandonment of the title reserved on the sale."

In *Cox* v. *Harris,* 64 Ark. 213, it was held that "where the holder of a chattel mortgage brings suit upon the mortgage debt, and causes the mortgaged chattel to be levied upon under an attachment, which is prosecuted to a judgment against the mortgagor, he will be held to have waived his mortgage lien upon the property, and cannot subsequently assert it after the mortgagor has claimed the property as exempt." The court said: "Now, so long as the mortgage lien existed, the mortgagor, Harris, had no interest in the mule subject to attachment, for mortgaged personal property is not subject to execution or attachment for a debt of the mortgagor. *Jennings* v. *McIlroy,* 42 Ark. 236. But appellants had the right to waive their mortgage lien, and attach the property. The levy of the attachment amounted to an assertion by appellants that the property was subject to seizure and sale under the attachment. But, as this could not be true if the lien of the mortgage still existed, the levy of the attachment was the same as a denial on the part of appellants that the mortgage lien existed, and was in effect a waiver on their part of the lien created by the mortgage."

In *Adler-Goldman Commission Co.* v. *People's Bank,* 65 Ark. 380, it was held, that "by attacking an assignment as fraudulent," by suing out an attachment against the assignor, "a creditor preferred therein is held to renounce the benefit of his preference, and, upon the assignment being sustained, he cannot claim the benefit of such preference," on the ground that he "is not entitled to two inconsistent and adverse rights. One is necessarily a denial of the other. In such case he must generally elect which he will take, and an election of one is the surrender or rejection of the other. Having made an election with a knowledge of the facts, he is bound by it, and cannot withdraw it without consent."

In the case before us the property pledged was not subject to attachment or execution so long as it remained unredeemed, but the pledgee had a right to waive or abandon her pledge, and she did so when she undertook to seize it under an order of attachment and to have it condemned by virtue of the attachment to be sold to satisfy a debt owing to her. *Citizens' Bank* v. *Dows,* 68 Iowa, 460.

It follows, therefore, that appellee had no lien on or title to the stock in controversy, and that the appellants are entitled to the same or the proceeds of the sale thereof.

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

SPRATLIN v. HALLER.

Opinion delivered April 27, 1901.

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APPEAL—LIMITATION—DISMISSAL.—An appeal in a civil case prayed before the clerk of the supreme court more than three years after the judgment was rendered in the trial court was too late, under Sand. & H. Dig., § 1027, and will be dismissed.

Appeal from Arkansas Circuit Court.

JAMES S. THOMAS, Judge.

Parker & Parker, for appellant.

James A. Gibson and *Jno. F. Park,* for appellee.

The transcript was not filed within time. *Cf.* Sand. & H. Dig., §§ 1022, 1018, 1027; Acts 1899, 111; 36 Ark. 517.

HUGHES, J. The judgment in this case was rendered on the 14th of April, 1896. On that day appellant filed a motion for a new trial, which was by the court overruled, to which he excepted and prayed an appeal to the supreme court, which was granted by the court, and he was allowed 60 days in which to prepare and file his bill of exceptions. The transcript was filed in this court January 25, 1900, more than nine months after the judgment was rendered.

Section 1022, Sandels & Hill's Digest, reads as follows: "It shall be the duty of the appellant to file in the clerk's office of the supreme court, within ninety days after the appeal or writ of error is granted, an authenticated copy of the record, otherwise his appeal or writ of error shall be dismissed; but the supreme court may for cause shown extend the time for filing such copy." It is not shown that the time for filing the transcript was extended by this court. But section 1018, Sandels & Hill's Digest, provides: "The appeal shall be granted as a matter of right, either by the court rendering the judgment or order, on motion made during the term at which it is rendered, or by the clerk of the supreme court in term time or in vacation on application of either party."

Having failed to file his transcript within 90 days from the time his appeal was granted in the circuit court, the appellant, on the 25th day of January, 1900, was granted an appeal by the clerk of this court, under section 1018 above quoted. This was three years, nine months and eleven days after the judgment was rendered in the circuit court.

Section 1027, Sandels & Hill's Digest, reads as follows: "An appeal or writ of error shall not be granted, except within three years next after the rendition of the judgment or order, unless the party applying therefor was an infant, married woman, or of unsound mind at the time of its rendition, in which case an appeal or writ of error may be granted to such parties, or their legal representatives, within one year after the removal of their disabilities, or death, whichever may first happen." It does not appear that the appellant is within the saving clause of this statute. But that section of the digest was amended by an act approved March 16, 1899. See Acts 1899, p. 111. The first section of that act is almost a verbatim copy of section 1027, Sandels & Hill's Digest, except that it changes the time for taking an appeal from three years to one year. Section 2 of the act reads as follows: "That parties to all judgments, orders or decrees rendered within two years prior to the passage of this act shall have one year from the time it shall take effect within which to pray an appeal or sue out a writ or error. The time for taking an appeal or suing out a writ or error on all judgments, final orders and decrees rendered more than two years prior to the passage of this act shall be three years from the date of the judgment, order or decree." Appellant does not come within the saving clause of

this act, as the judgment herein was rendered two years, eleven months and two days prior to the passage of this act.

Elliott on Appellate Procedure, § 111, says: "The time within which an appeal must be taken is fixed by law, and the appeal must be taken within the time designated. The provision which limits the time is jurisdictional in its nature." Citing a large number of decisions. It is only in cases where a party has been prevented by fraud or accident from taking an appeal within the limitation as to time fixed by law, or where there are equitable elements that enter into them, that the court may give relief, and allow an appeal after the time limited has expired. *Smythe* v. *Boswell,* 117 Ind. 365; *Boswell* v. *Boswell,* 117 Ind. 599. These cases recognize the rule that, if the appeal is not taken in time, there is no jurisdiction, but they hold that fraud may prevent the operation of the statute. The fraud of a party will prevent him taking advantage of the statute.

The rule that the court cannot enlarge the time for taking an appeal, unless the statute allows, is well established. Elliott, App. Pro. §§ 112, note 3, and 113. The appellant, who seeks to revive an appeal after the statutory time has expired asks extraordinary relief, and must present a strong and clear case, which calls into exercise the inherent equity power of the court. *Id.* § 116. Time will not be extended to the party in fault. *Id.* §§ 114, 128. "It results from the doctrines stated that if an appeal is not perfected, by doing all that the law commands, within the time fixed, the court should dismiss it, and so the authorities declare." *Id.* § 524; *Reynolds* v. *McCallum,* 28 Ark. 453. "While the authorities uniformly hold that the failure to perfect the appeal in time makes a dismissal imperative, yet it is held that a case may be made excusing the delay." *Chapman* v. *Bank of California,* 88 Cal. 419, 26 Pac. Rep. 608; *Garritee* v. *Popplein,* 73 Md. 322, 20 Atl. Rep. 1070. But a very strong case must be made to break the force of the general rule. Elliott, App. Pro. §§ 116, 117, and authorities cited.

The appellant contends that the appellee waived the objection by not making it in time. We think otherwise. Mr. Elliott says (Elliott, App. Pro. § 285): "It has been held that the defendant may waive his right to avail himself of the failure to file the transcript within the time prescribed. But we believe," he says, "that this doctrine is erroneous, and it certainly cannot be extended without violating principle and opposing authority.

It cannot, at all events, be so extended as to sustain an appeal, when the important steps have not been taken until after the expiration of one year [time limited] from the time the judgment was rendered."

From what has been said it becomes the duty of the court to dismiss this appeal. The motion of the appellee to dismiss the same because the transcript was not filed within the time prescribed by the statute is sustained, and the said appeal is dismissed.

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MEMPHIS TRUST COMPANY v. BOARD OF DIRECTORS OF ST. FRANCIS LEVEE DISTRICT.

Opinion delivered April 27, 1901.

CONSTITUTIONAL LAW—MUNICIPALITY.—Neither the St. Francis levee district, nor the board of directors thereof, is a "municipality," within the meaning of Const. 1874, art. 16, § 1, prohibiting any county, city, town or municipality from issuing any interest-bearing evidences of indebtedness, except to pay an existing debt.

Appeal from Pulaski Circuit Court.

JOSEPH W. MARTIN, Judge.

STATEMENT BY THE COURT.

The legislature of Arkansas in 1897 passed an act authorizing the Board of Directors of the St. Francis Levee District to issue bonds for the purpose of building and maintaining certain levees in said district. Afterwards the board of directors made a contract with the Memphis Trust Company, a corporation organized under the laws of Tennessee, whereby the Trust Company agreed to purchase of the board bonds to the amount of $10,000, and pay therefor par value with accrued interest. The contract to purchase was made on condition that the bonds were "valid obligations of the board of directors of the St. Francis Levee District." The Trust Company on investigation declined to take the bonds, on the ground that they were not valid. The board of directors ten-

dered the bonds, and brought this action on the contract to recover their face value with interest. The Trust Company filed its answer, alleging in substance that the Board of Directors of the St. Francis Levee District is a municipality, and as such prohibited by the constitution of the state from issuing bonds or other interest-bearing evidences of indebtedness, and that for this reason the bonds offered by it were invalid, and not binding upon the board or district. The board filed a demurrer to this answer. On the hearing the circuit court sustained the demurrer, and, the Trust Company declining to amend, but standing on its answer, the court gave judgment against it for $10,935, that sum being the face value of the bonds with accrued interest. The Trust Company appealed.

John H. Watkins, for appellant.

The board of directors in this case was a "municipality," within the meaning of art. 16, § 1, of the constitution of Arkansas, and the bonds are invalid. And. Law Dict. "Municipality." *Cf.* 55 Ark. 148.

R. J. Williams and *Norton & Prewett,* for appellees.

The board of directors in this case was not a municipality, because it exercises none of the usual functions thereof. It is merely the agent of the property owners, exercising powers delegated to it by the legislature; and hence the bond isssue is valid. 55 Ark. 148; S. C. 17 S. W. 702; 48 S. W. 629, 635.

RIDDICK, J., (after stating the facts). The only question presented by this appeal is whether the "St. Francis Levee District," or "the Board of Directors" thereof, is a "municipality," within the meaning of the provision of our constitution which prohibits a municipality from issuing interest-bearing bonds. The provision referred to declares that "neither the state nor any city, county, town or other municipality in this state shall ever loan its credit for any purpose whatever; nor shall any county, city, town or municipality ever issue any interest-bearing evidences of indebtedness," except to provide for the payment of existing indebtedness. Const. Ark. art. 16, § 1.

Counsel for appellant contends that the board of directors of the St. Francis Levee District is a municipality, and therefore, under the language of the constitution quoted, has no power to issue interest-bearing bonds. But the well-established legal mean-

ing of the term "municipality" is a public corporation created for governmental purposes, and having local powers of legislation and self-government,—such, for instance, as an incorporated town or city. Rapalje & Lawrence's Law Dict.; Anderson's Law Dict.; Century Dict.; *Heller* v. *Stremmel,* 52 Mo. 309.

Now, while every municipality is a public corporation, yet every public corporation is not a municipality, for, as defined above, a municipality is not only a public corporation; it is such a corporation created for governmental purposes, and having, to a large extent, local powers of legislation and self-government. An incorporated levee district, created for the sole purpose of constructing and maintaining a levee, is, like a municipality, a public corporation; but in respect to powers of self-government and legislation it falls far short, and in that regard is clearly distinguished from a municipality, such as an incorporated town or city. These are, to a certain extent, miniature governments, having legislative, executive and judicial powers; but a levee district has few if any such powers, and is not intended to have them, being only an agency created for a special and particular purpose.

The courts have often recognized the distinction between municipal corporations and these inferior corporations, such as levee districts, school districts, and the like. The distinction was pointed out by the supreme court of Missouri in *State* v. *Leffingwell,* 54 Mo. 458, where the court said that the term "municipal corporation" included only cities, towns and other like organizations with political and legislative powers for the local government and police regulation of the inhabitants thereof. In *Morrison* v. *Morey,* 146 Mo. 543-7, the same court held that the bonds of a levee district, payable out of assessments on lands of the district benefited by the levee, were not debts of a municipality, and did not come within the meaning of a provision of the state constitution limiting municipal indebtedness.

This court, in the case of *Fitzgerald* v. *Walker,* 55 Ark. 148, had before it for consideration the question whether an improvement district in a city was a municipality, or the agent of one, and held that it was neither. Speaking in that case of the same section of the constitution we have now under consideration, the court said that the term "municipality," as used in the constitution, meant a city or municipal corporation, and that, although the improvement district might be organized for a limited municipal purpose, yet it was not a municipal corporation. "It exercises,"

said the court, "no legislative powers, and lacks many other essential characteristics of a corporation created for the government of a city or town." The same thing might be said of this levee district, the limited and inferior powers of which were recognized by this court in a recent case when the court spoke of it as a *quasi* corporation, and likened it to a school district. See *Carson* v. *St. Francis Levee District,* 59 Ark. 513. Also Dillon's Municipal Corp. (4th Ed.), § 22; Tied. Municipal Corp. § 3.

Our conclusion is that neither the "St. Francis Levee District," nor the "Board of Directors" thereof, is a "municipality," within the meaning of the section of our constitution heretofore quoted. As before stated, the only defense set up to this action was that the board of directors of this district was in law a municipality, and therefore forbidden to issue interest-bearing bonds. But we are of the opinion that the defense is not tenable, and that the legislature had the power to authorize the issuance of the bonds. The answer was therefore insufficient, and the demurrer properly sustained.

Judgment affirmed.

NEWPORT ICE & COLD STORAGE COMPANY *v.* LUNYON.

Opinion delivered May 4, 1901.

1. EVIDENCE—RECEIPT IN FULL by an employee for a certain month's wages will not be evidence that he was paid for certain previous months where the employer's answer denied that it was ever liable for the wages of such months. (Page 288.)

2. MASTER AND SERVANT—COMPENSATION.—An employee who has rendered services to a company under the direction of its general manager, though the latter took no active part in its business, may recover therefor, where the company has accepted such services without paying for them. (Page 289.)

Appeal from Jackson Circuit Court.

FREDERICK D. FULKERSON, Judge.

Gustave Jones, for appellant.

M. M. Sluckey, for appellee.

Appellee was entitled to the verdict, either upon express contract or *quantum incruit.* 15 Am. & Eng. Enc. Law (2d Ed.), 1081, 1082; 58 Ark. 348; 2 Ark. 370; 19 Ark. 671; 26 Ark. 360. The receipt was not conclusive evidence of full payment. 21 Ark. 361.

BUNN, C. J. The appellee sued the appellant company for services rendered in hauling ice and collecting ice-bills for the months of May, June, July and August of 1898, at the rate of $15 per month, aggregating the sum of $60, and obtained judgment for that amount, and the defendant appealed.

The defendant denied that it owed plaintiff anything, and that it had ever contracted with him or agreed to pay him anything for said services; and plaintiff's receipt for $15, dated October 31, 1898, which purports on its face to be a receipt in full to that date, was offered in evidence. Also it was shown that a similar receipt had been given by plaintiff for the sum of $5 for services for ten days of September, 1898.

The secretary and treasurer of the defendant company, who had authority to employ and pay off hands, testified that he never employed the plaintiff to do the work charged for. On the contrary, the plaintiff testified that he was employed by the secretary to do the work, but from his own testimony the employment was more a matter of inference or implication than of express language, so far as anything which occurred between him and the secretary is concerned. The evidence shows that the plaintiff was in the employ of one Dougherty, and was the driver of his beer wagon; that, with the consent of Dougherty, he was permitted to haul ice and collect ice-bills at the trains for the defendant company, after his work for the day for Dougherty was performed. The evidence also showed that Dougherty was the general manager of the defendant company, although in fact he appears to have taken no active part in its business. The only statement as to the pay for this service was made by Dougherty, as testified to by plaintiff, and that to the effect that he (Dougherty) told plaintiff he would see it paid, if he had to pay it out of his own pocket, or words to that effect.

It is evident that the receipt was for the services of October and the other receipt was for the latter third of September, 1898, and that the monthly rate was $15 for those months. The cir-

cumstances in evidence plainly show that the expression "in full to date" had no reference to the months of May, June, July and August, even according to the theory of the defendant, for the secretary of defendant, its only witness, testifies that the company never at any time owed plaintiff for those months. If it never owed him for such services, it follows that his receipt could not be evidence of the satisfaction of such indebtedness, no previous payment for the same having been shown or even claimed to have been made. The receipt therefor was not even *prima facie* evidence of such satisfaction, or, if it was, the *prima facie* case was overcome by the circumstances of the transaction in evidence.

There is no contention that the services charged for had not been performed, nor that they were not worth the price charged therefor; nor that the same had ever been paid by any one, nor that any one but the plaintiff claimed the same from defendant.

The defendant enjoyed the benefit of plaintiff's labor and services, and it does not appear, nor is it suggested, that it might be liable to another for the same. Under the circumstances, we cannot see that the verdict is wrong in any sense. There does not appear to be any reversible error in the instructions, in this view of the evidence, and we think the judgment should be affirmed.

Affirmed.

LITTLE ROCK TRACTION & ELECTRIC COMPANY *v.* MORRISON. 69 77 289 601

Opinion delivered May 4, 1901.

1. INSTRUCTIONS—FORM OF.—Where the instructions requested by the parties to an action were plain and simple, and not inconsistent, save in so far as the evidence conflicted, it was not error to give them as asked, with an introductory statement that they are assumed to be applicable, and are given, the one from plaintiff's standpoint, the other from defendant's. (Page 291.)

2. CONTRIBUTORY NEGLIGENCE—WHEN NOT A DEFENCE.—The fact that plaintiff, seeking recovery for a horse and buggy injured in collision with an electric street car, was himself guilty of contributory negligence does not debar a recovery if the peril was discovered by defendant's motorman in time to avoid the injury, had the defendant not been negligent either in selecting the motorman or in furnishing appliances for stopping the car. (Page 293.)

3. STREETS—TRESPASSERS.—The rule that a railroad is not liable to trespassers on its tracks for negligence in selecting employees, or in failing to keep its machinery in repair has no application to cases involving the duty of street cars towards persons and property on the streets of a city. (Page 294.)

Appeal from Pulaski Circuit Court.

JOSEPH W. MARTIN, Judge.

Rose, Henningway & Rose, for appellant.

It was error for the court to premise the instructions with remarks designating them as emanating from the one side or the other. 53 Ark. 118. It was error to refuse appellant's third prayer for instruction. Antecedent negligence of a defendant becomes immaterial when the plaintiff is shown to have been guilty of contributory negligence. 62 Ark. 235; 64 *id.* 367; *id.* 420; 65 *id.* 435. It was also error to give appellee's second and third instructions. 55 Ark. 393; 51 Ark. 89; 57 Ark. 203; 25 Ark. 490, 493; 30 Ark. 384.

Cantrell & Loughborough, for appellee.

There was no error in appellee's third instruction. The refusal of appellant's third and fifth prayers for instructions was proper. The second and third instructions, taken together, clearly enunciate a correct proposition of law, and there was no error in giving them. 37 Ark. 354; 58 S. W. 434. A judgment which is right upon the whole record should not be reversed for a harmless error or omission in one instruction, especially when it is cured by others. 10 Ark. 9; 14 Ark. 114; 10 Ark. 53; 19 Ark. 96; 2 Ark. 15; 21 Ark. 469; 23 Ark. 121; 24 Ark. 587; *id.* 326; 26 Ark. 373; 64 Ark. 237. Appellee was not guilty of contributory negligence. 7 Am. & Eng. Enc. Law (2d Ed.), 371, 391; 155 Pa. St. 279; 153 *id.* 31; 89 Me. 594; 49 N. Y. Supr. 779; 37 N. E. 952; 41 S. W. 578; 2 Thomps. Neg. 1172, p. 18; Shearm. & R. Neg. 99, 31; Deering, Neg. 16.

BUNN, C. J. This is an action for damages for injury to a horse, so as to necessitate its killing, and also for injury to a buggy and harness; in which verdict and judgment were for plaintiff in the sum of $250, and defendant appealed.

The plaintiff's driver was driving his horse to his buggy on the west side of Main street in Little Rock, between Twenty-third and Twenty-fourth streets, going north, and at the same time

defendant's street car was approaching from the north, going south. The horse began to show some restiveness when within fifty feet of the car, which was moving at a very moderate rate of speed, and under ordinary circumstances would have been fully under the control of the motorman. When within ten or twelve feet of the car, the horse suddenly jumped to the right and across the car-track, and was immediately knocked down and partially run over by the front platform of the car, and in the collision and in the effort to extricate it from the car was so badly crippled as to make it necessary to kill it. The buggy was also much broken up, as was the harness.

The questions arising upon the evidence are: First, "was the defendant guilty of negligence in running its car upon the horse and buggy? Secondly, was the plaintiff guilty of contributory negligence in suffering his horse to be driven in such close proximity to the street car? Thirdly, was the defendant guilty of negligence in failing to prevent the collision after the motorman saw the perilous situation of the horse?

The evidence of the company's negligence, primarily, is not at all definite and satisfactory, and the plaintiff's case therefore rest mainly on the question whether or not the motorman did his duty after he discovered the perilous situation of the horse. The contributory negligence of plaintiff, if he was guilty of contributory negligence at all, consisted in the incompetency of the driver, or in the unsafe character of the horse, or both. The driver was shown to be a negro boy 17 years old and well grown, who had had 5 years' training under his father, who was a professional horse trainer, and sometime in the service of the plaintiff, taking care of the horse in question and driving him to plaintiff's buggy, principally on the streets of Little Rock. The spirit and nervous character of the horse, and the use of it on the street car streets, appear to be the main grounds for the charge of contributory negligence on the part of the plaintiff.

Upon this state of facts, the trial judge instructed the jury, premising by certain introductory statements,—among them the following: "On the application of the plaintiff in this case, I give you the following instructions, that is, these instructions are all assumed to be applicable to the case. The court gives them all, one from the standpoint and theory of the plaintiff, and one on the theory of the defendant company." To this manner of presenting instructions to the jury the defendant's counsel strenuously

objects, saying that "from it the jury could only infer that there was one law for the plaintiff and another for the defendant, and that they were free to apply whichever they preferred. Naturally, their preference was not in favor of the corporation." In support of this contention, the case of *Davis* v. *Railway,* 53 Ark. 118, is cited, in which this court said: "While it is the duty of counsel to present their prayers for instructions, they are advisory merely; and the court should embody no more than their substance in a connected and consistent charge which contrasts the issues on each phase, and presents the whole law of the case as emanating from the court, without apparent instigation from either side."

From an examination of the opinion in that case, we are led to believe that the instructions were given as asked by counsel for both parties, without much reference to their consistency with one another, and with too little regard to that discrimination which should be exercised in giving the law to be applied to conflicting testimony. But in a case like the one at bar, where the instructions given at the instance of both parties are plain and simple, not misleading in the least, and withal inconsistent, if at all, only in so far as the facts in evidence on the one side are different from those on the other, we do not see that the mere manner of presenting them is so objectionable as claimed, or in this case at least should be cause of reversal; for this is to be determined at last by the specific instructions themselves.

Whatever may be the theory on the subject, the practice is very generally for the counsel to ask instructions to be in writing, and further to formulate them for the benefit of the court, and the court adopts or rejects or modifies these suggestions. If the court adopts them, they are given; if it modifies, they are given as modified; and if rejected, they are not considered at all by the jury. Indeed, we have a rule that a party cannot complain of the failure of the court to give a particular instruction unless he asked it, and this, of course, implies an asking in writing; and if not given in the exact language of the request, the party asking is not bound to accept it.

But the latter clause of the paragraph in the opinion in the case cited would seem to imply, as does the contention of counsel in the case at bar, that there is some innate evil in instructions being delivered to the jury in the handwriting of the two parties, for that, of itself, will indicate to the jury the desires of the parties. This reason for the objection goes either to the mental or moral

competency of the jurymen—a subject we do not desire to discuss. We see no reversible error in the instruction on this score.

The defendant asked and the court refused several instructions, and modified one, the fifth; but the only objection we deem it necessary to consider involves a question of principle somewhat involved in several of these, especially the one numbered 4, which reads as follows, to-wit: "If you find that the motorman did everything in his power to stop the car and avert the injury after discovering the perilous situation of the horse, your verdict should be for the defendant, even though you find that the failure to stop the car and avoid the collision was (due) to the inexperience of the motorman or the defective brakes or appliances, if you further find that the plaintiff's own negligence contributed to the injury."

This was refused by the trial court, and we think properly so; for it only makes the defendant company liable for the personal negligence of its motorman in not exercising the proper care to avoid the injury after he saw the perilous situation of the horse, and ignores the question of the incompetency of the motorman and the defect of the brakes and appliances as factors which, one or both, may have been the real cause of the failure to avoid the injury after the danger was apprehended. If a motorman does not know how to stop a car when it is desired to stop it, and the circumstances go to show that the incompetency was known or should have been known to the master when he put the motorman in charge of the car, the master is directly to blame; for he has, in effect, failed to provide himself with the means to prevent injuries, which he could otherwise do. And the same rule applies in the case of defective brakes and other appliances.

Again, negligence in employing servants and in using defective machinery, while antecedent in a sense, is yet contemporaneous with such an injury, in the more important and the more practical sense. An incompetent motorman, until he is put in charge of a car, and directed to run it, is a harmless incompetent; but, as soon as he sets his car going on the track, he is a dangerous agent, because, while he knows how to put his car in motion, he does not know how, or is unable, to stop it when he should do so to prevent injury; for much of that which the company owes to the public depends upon the skill and competency of the motorman. It is not only negligence in the master to knowingly employ an incompetent servant, and to use machinery so defective as to refuse to

respond to the demands of a competent servant in charge, but it is also negligence in the master to employ an incompetent servant or to use defective machinery at any time. In both instances the negligence of the master in employing the incompetent servant and not keeping his machinery in order, while commencing antecedently to the injury, yet is contemporary, as to the time when called into active service and use, and does an injury.

The cases cited in support of the contention of defendant that the company owes no duty to trespassers on the track, and therefore is not liable for antecedent negligence, such as the want of care in selecting servants and keeping machinery in repair in cases of contributory negligence, are railroad cases, and are in most respects not applicable to cases involving the duty of street car companies; for it may be said, in a general way, that there are no trespassers on the streets of a city. Every one has a right to go on the streets and on any part of them. In a sense, it is said that street cars have the right of way; but that is because of the weight, speed and momentum of the cars, the great number of persons carried on them, their necessity to run on schedule time, and their strict confinement to the appropriate track, and other like circumstances. Except to accommodate these peculiarities, the street cars have no real right of way over all travelers on the streets, and it cannot therefore be said there are any trespassers. The case is different with railroads.

The crossings of public roads are the nearest analogy of the case of railroads to the case of a street car line.

The street car company owes a duty to all persons on the streets, perfectly commensurate with the relative situation between it and them. One of those duties is to exercise reasonable care not to injure, for the privileges of both are such as call forth such care at all times.

Affirmed.

PLANTERS' MUTUAL INSURANCE ASSOCIATION OF ARKANSAS *v.* DEWBERRY.

Opinion delivered May 4, 1901.

1. FIRE INSURANCE—DEATH OF INSURED—EFFECT.—Where a policy of fire insurance provided that a change of title or possession of the insured property should avoid the policy, the death of the policy holder and the descent of the property to his wife and children was not such a change as would avoid the policy. (Page 300.)
2. CHANGE OF POSSESSION—LEASE.—Where a fire insurance policy provided that a change of possession of the insured property should avoid the policy, and the wife of the insured, on his death, leased the property to tenants without the insurer's consent, there was such a change of possession as would avoid the policy. (Page 300.)

Appeal from Lee Circuit Court.

HANCE N. HUTTON, Judge.

Action by Clara A. Dewberry, administratrix of R. A. Dewberry, deceased, against the Planters' Mutual Insurance Association. From a judgment for plaintiff, defendant has appealed. The facts are stated in the opinion of the court as follows:

The appellee brought this suit in the court below as the administratrix of the estate of R. A. Dewberry, deceased, upon an insurance policy executed to R. A. Dewberry in his lifetime for a loss which occurred after the said R. A. Dewberry died, and she alleged in substance: That she was the widow of R. A. Dewberry, deceased, who departed this life on the 25th day of July, 1898, and that on the 21st day of March, 1899, she was appointed by the probate court of Lee county as administratrix of his estate; that the said R. A. Dewberry, at the date of his death, was the owner in fee of the real estate upon which the insured property was located; that on the 31st day of March, 1896, the defendant, in consideration of the payment of a premium of $78, executed its policy of insurance to said R. A. Dewberry, which is attached to the complaint; on the 21st day of February, 1899, said dwelling house was totally destroyed by fire; on the 22d day of March, 1899, the plaintiff, her said husband having previously died, fur-

nished the defendant with proof of her loss, as such administratrix, and she brings this suit to recover said loss.

To which the appellant, the defendant in the court below, filed, in substance, the following answer: It admits that on the 31st day of March, 1896, it executed its policy of insurance in writing, whereby it insured the said dwelling house against loss by fire in the sum of $750 for a term of three years; that it is true that the plaintiff, on or about the 22d day of March, 1899, as administratrix as aforesaid, furnished the defendant with the so-called proof of loss, as such administratrix, but in said proof it appeared that at the time of loss it was not occupied by the assured or by his family, but by a stranger to the contract, and it denies that the plaintiff has performed all the conditions in said policy contained. It denies that the plaintiff was entitled to recover the sum of $750, and for further defense it says that in said contract of insurance there is the following clause, to-wit: "If there is, or shall be, other prior, concurrent or subsequent insurance (whether valid or not) on said property, or any part thereof, without the association's written consent, or if said building now is, or shall become, vacant or unoccupied; or if the hazards shall become increased in any way, whether under the control and knowledge of the member or not; or if the property, or any part thereof, shall be sold or conveyed, or if the property insured now is, or shall become, incumbered by mortgage or otherwise, or any change takes place in the title, occupation or possession thereof whatever, or if the interest of the member in said property, or any part thereof, now is, or shall become, any other or less than a perfect legal and equitable title and ownership, free from all liens whatever, except as stated in writing thereon, or if the buildings, either of them, stand on leased ground, or land of which the assured has not a perfect title; or if his contract shall be assigned without the association's written consent hereon,—then, and in every such case, this contract shall be absolutely null and void." That said clause in said policy is a part and parcel of the contract, and the said contract of insurance has been violated as follows: First. That said property became vacant or unoccupied without the consent of this defendant after the execution of said policy. Second. That the hazard and risk which the defendant originally undertook was increased by placing a tenant in possession of the property, which was done without the consent of the defendant. Third. Because there was a change in the occupation or possession of the premises

and house alleged to be burned, after the execution of the policy sued on. Fourth. That at the time of the alleged fire neither the said deceased nor his family were in possession or occupancy of the same, but said property was occupied by and in possession of another, who had no connection with this contract whatever. All these causes of defense occurred without the knowledge or consent of this defendant, and by reason thereof the said policy is void. Fifth. Because there was a change in title to the property alleged to be burned between the date of the execution of the policy sued on and the date of the alleged loss, said change of title being caused by the death of the assured before the date of the loss complained of. The defendant further states that in the application of insurance made by the said R. A. Dewberry the question was asked him if the dwelling was occupied by himself or by a tenant. He answered that it was occupied by himself as a private dwelling, and the defendant states that any change of possession or occupancy in any way whatever vitiated and annulled said policy, and the defendant says the plaintiff is not entitled to sue as administratrix herein. It therefore states that it is not liable to the plaintiff in any sum whatever.

The plaintiff demurred to the fifth paragraph of the defendant's answer, which was sustained by the court, and the defendant excepted to the ruling of the court, and the same was made a cause for a new trial.

The following evidence was adduced at the trial: The policy of insurance was introduced, in which will be found the clause which is quoted in the answer as above stated.

Mrs. Clara A. Dewberry testified as follows: "I am the widow of R. A. Dewberry. At the time of his death he was living in the house covered by this insurance. He had lived there five years up to the date of his death. The house insured has been entirely destroyed by fire. It was burned on the 21st of February, 1899. At the time of the fire, I was living at my father's, D. E. Holland. It was about two miles from the property insured. Mr. R. A. Dewberry died on the 24th day of July, 1898. I moved from my husband's home back to my father's two weeks before last Christmas. From the time I left until the house was destroyed by fire, it was occupied by Woodford Haile, a colored man, a good, reliable man. I left home because I had no one to protect me. My brother was with me, and my two little children, the oldest one three years old, the other sixteen months. My brother was

not a member of the family." Cross-Examination.—"I do not know how many persons Woodford Haile has in his family. Do not know whether he has eleven members or not. He has a tolerable good-sized family. Woodford Haile took charge of the house as soon as I left it. I had gone when he took possession; that is, when he went in. He moved in the night after I left in the morning. I did not see him move in. I did not see him there the next morning. I was not there when he moved in, but I know he moved in directly after I moved out. I know he would not tell me a story."

Here the defendant exhibited a contract executed by Mrs. Clara A. Dewberry and Woodford Haile, which said contract was dated the 2d day of January, 1889, and shows a lease of the property by Mrs. Dewberry to Woodford Haile for a period of one year; that is, the real estate upon which the property destroyed by fire was located.

Here the defendant introduced the application made by R. A. Dewberry in his lifetime, in which the following question is asked and answered, as follows:

"Is it (that is, the house insured) occupied by applicant or tenant?

"A. Applicant, as a private dwelling."

Here the defendant introduced the proof of loss. In said proof of loss is the following, to-wit: "That the building insured was occupied in its several parts by the parties hereinafter named for the following purposes, to-wit: By Woodford Haile and family as a residence, and for no other purpose whatever." Woodford Haile was in the possession of the house at the time it was burned. He had been in possession from the time he took possession until it was burned.

The defendant introduced the following testimony: Woodford Haile, a colored man, being duly sworn, testified as follows: "I am the party who was in possession of the property at the time it was destroyed by fire. I have about eleven members in my family. I am one, my mother-in-law and her daughter, my two grand-daughters, and I have five little children; that is, the children are from three and four up to twenty. Three of them are under fifteen. My mother-in-law lives with me, and she has a daughter. There were four sleeping rooms in the house with the one upstairs, but my family only occupied three."

There was testimony tending to prove that Woodford Haile was a reliable and careful colored man. There was also testimony tending to show that insurance companies as a rule would not insure property occupied by colored people in a sum exceeding $500.

Defendant asked the following instructions, to-wit: "(1) The jury are instructed that if they find from the evidence that the policy of insurance sued on was executed to R. A. Dewberry, and that the said Dewberry departed this life after the execution of the same, and before the fire which occasioned the loss complained of, then, under the terms of the policy, there was a change of title to the property, and the plaintiff cannot recover, and your verdict must be for the defendant. (2) The jury are instructed that if they find from the evidence that at the time the policy of insurance sued on was executed the premises insured belonged to R. A. Dewberry, and were occupied by him as a residence, and that, before the loss complained of, the said Dewberry departed this life, and his wife, Clara Dewberry, rented the property to Woodford Haile, and at the time of the loss the said Haile occupied said property as a tenant of the plaintiff, this would constitute a change of possession under the terms of the policy, and the plaintiff cannot recover, and your verdict should be for the defendant. (3) The jury are instructed that if they believe from the evidence that the policy of insurance sued on was executed to R. A. Dewberry, and that afterwards said Dewberry departed this life, and the plaintiff was a white woman with only three children, and that she rented the property insured to Woodford Haile, a colored man with a large family, consisting of eleven members, including himself and ten others, consisting of women and small children, then, under the terms of the contract sued on, there was a change of occupancy, and the plaintiff cannot recover." The court refused to give these three instructions.

J. W. House, for appellant.

It was error to refuse to instruct the jury that the leasing and occupancy of the property thereunder constituted such a change in possession as would avoid the policy. 51 Me. 110; 30 Pa. St. 311; 18 Mo. 128. The death of the assured made a sufficient change in the title to avoid the policy. Ostrander, Fire Ins. 239, 240, 241; 73 N. Y. 449; 54 Ill. App. 55; 93 N. Y. 75; 58 Barb. 335.

Quarles & Moore and *McCulloch & McCulloch,* for appellee.

The death of the assured did not operate, *ipso facto,* as a forfeiture of the policy. 89 Ky. 551; 24 N. H. 550; 182 Ill. 39; 28 Gratt. 88. In continuing the stipulations of a policy, that construction is to be given, if possible, which will avoid forfeiture. 100 Wis. 118; 104 Ga. 67; 124 N. C. 315; 112 Mich. 425; 121 Cal. 458; 97 Ia. 226; 160 Ill. 642; 38 Minn. 501; 68 Tex. 144; 67 Ark. 553; 54 Ark. 376; 154 N. Y. 449. The statement in the application that the possession was in the assured did not constitute a warranty that it would so continue. 83 Ky. 468; 58 Pa. St. 419; 1 Sumn. 345; 45 Me. 168; 48 Me. 558; 71 N. Y. 508. There was no such change of occupancy as to avoid the policy. 61 Ark. 108; 34 S. W. 393; 45 L. R. A. 204; 46 N. Y. 526; 98 Ky. 305; 52 Ark. 257.

HUGHES, J., (after stating the facts). While there is a conflict in the decided cases upon the question involved in the first instruction,—that is, that the title to the property was changed by the death of R. A. Dewberry after the execution of the policy and the descent of the property insured to his wife and children,—we incline to the opinion that the more reasonable view is that the title to the property was not changed by the death of R. A. Dewberry and the succession of his wife and children to his rights therein, within the meaning of the policy. We think this view amply supported by the decisions. *Richardson* v. *German Ins. Co.,* 89 Ky. 571; *Burbank* v. *Rockingham,* 24 N. H. 550; *Forrest City Ins. Co.* v. *Hardesty,* 182 Ill. 39; *Georgia Home Ins. Co.* v. *Kinnier,* 28 Grat. 88.

We are of the opinion that the court committed reversible error in refusing to give instructions two and three asked by the defendant, which were to the effect that renting the property to Woodford Haile for twelve months and its occupancy by him at the time of the loss constituted a change of possession under the policy. The house destroyed was occupied by Mrs. Clara A. Dewberry at and after the death of her husband, until she rented the property to Woodford Haile, and gave him possession thereof, and moved away from the premises, and thereafter, until the house was consumed by fire, it was in the possession of Woodford Haile, and occupied exclusively by himself and family consisting of nine others. If this was not a change of possession and occupancy, it is difficult to determine what would be. The parties to

the insurance policy made their contract, and stipulated that there should be no change in the possession or occupancy of the property without the consent of the insurance company. The change of possession and occupancy was made without the consent of the insurance company, and continued to the time the house was consumed by fire. This was a violation of an express provision of the terms of the policy, the contract between the company and R. A. Dewberry, the insured, and avoids the policy according to its stipulations.

"Where the policy provides that it shall be void if any change takes place in the interest, title or possession of the subject of insurance, such provision has reference to change subsequent to the time of effecting the insurance. Leasing the property and surrendering possession to the lessee is a change in the possession. If the policy is conditioned to be void in case any change takes place in the interest, title or possession of the subject of insurance, whether by legal process or judgment, or by voluntary act of the insured, or otherwise, an assignment for the benefit of the creditor will avoid the policy." 3 Joyce, Ins. § 2238.

In *Wenzel* v. *Commercial Ins. Co.,* 67 Cal. 440, the court said: "Another point made by the appellant is that the condition of the policy in regard to a change in possession of the property was broken by the insured. In the ninth finding it is found by the court as a fact in the case that on the 17th day of January, 1882, the plaintiff and others, without the consent of the defendant, leased the property insured, and surrendered the possession thereof to James Hoskins and his associates. This was a breach of condition in the policy which rendered the same void according to the express language thereof." *Hartford Fire Ins. Co.* v. *Ross,* 23 Ind. 180; *Germania Fire Ins. Co.* v. *Home Ins. Co.,* 144 N. Y. 195.

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

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87 83

CENTRAL COAL & COKE COMPANY *v.* JOHN HENRY SHOE COMPANY.

Opinion delivered May 4, 1901.

1. TRESPASS—CUTTING TIMBER—ENHANCED VALUE.—Where a trespasser wilfully entered upon another's land, and cut and removed timber therefrom, and by his labor enhanced its value, one who innocently purchased the timber from such trespasser will be liable to the owner for the value of the timber with 6 per cent. interest from the date of the conversion, without deduction on account of the increase in value caused by the work and labor of such trespasser. (Page 303.)

2. EVIDENCE—HEARSAY.—Evidence of a witness, in an action for trees cut and converted into railroad ties, to the effect that he and two others went through the timber three abreast, and each noted in a book the number of trees cut, and that their figures, added together, showed that a certain number of ties were cut, was hearsay and inadmissible. (Page 304.)

3. APPEAL—DEFECTIVE TRANSCRIPT—DISALLOWANCE OF COSTS.—Where a transcript on appeal was not arranged in order, and the bill of exceptions, containing over 200 pages, was not indexed, the court, on a reversal, will direct that the costs of the transcript be not taxed against the appellee. (Page 305.)

Appeal from Little River Circuit Court.

WILL P. FEAZEL, Judge.

STATEMENT BY THE COURT.

The John Henry Shoe Company, a corporation organized under the laws of Louisiana, and Abbie McShea were the owners of certain timber lands in this state. In 1895 Gus Less and S. G. Watkins, partners doing business under the firm name of Gus Less & Co., wilfully and without right entered upon these lands, and cut timber therefrom, and converted it into railway ties. They afterwards sold the ties to the Central Coal & Coke Company, a Missouri corporation, engaged, among other things, in the business of buying and selling ties. The Coal & Coke Company took possession of the ties near where they were cut, and paid Less & Watkins for them, and then shipped the ties out of the state.

Afterwards the Shoe Company and Abbie McShea brought this action against the Coal & Coke Company for conversion of the ties and to recover damages. There was a verdict and judgment in favor of plaintiffs for the sum of $2,000, from which the defendant appealed.

W. H. Arnold and *Estes & King,* for appellant.

The court erred in instructing the jury that appellee could recover the market value of the ties, irrespective of the motive or knowledge or good faith with which they were cut from the land or purchased by appellant. Upon the difference of the rules as to wilful and unintentional trespassers, see: 55 Ark. 307; 37 Mich. 332; S. C. 7 Am. Rep. 124. In the latter case only actual damages are recoverable. 32 Oh. St. 571; S. C. 30 Am. Rep. 630; 32 Mich. 311; S. C. 7 Am. Rep. 654; 3 Suth. Dam. 376; Cooley, Torts, 56. But the former rule cannot apply where an innocent purchaser has come into the case. 32 Oh. St. 571; S. C. 30 Am. Rep. 629. It was error to admit the hearsay testimony of Harkness and Watkins.

Scott & Jones, for appellees.

Appellees were entitled to the value of the ties at the date of their manufacture, and interest thereon, since they were made by wilful trespass. 44 Ark. 210; 55 Ark. 307; 65 Ark. 448; 106 U. S. 432; 55 S. W. 392; 9 Ark. 46; 33 N. E. 391; 23 Wend. 285; 3 Comst. 379; 32 Atl. 714. The objection to the evidence of Watkins, being only general, cannot be sustained if any portion of it is proper. 65 Ark. 106; 25 Ark. 380; 48 Ark. 177.

RIDDICK, J., (after stating the facts). This is an action for damages for the unlawful conversion of railway ties. The evidence makes out a very clear case of willful trespass on the part of Less & Watkins, from whom defendant purchased the ties. Less & Watkins had notice that the land from which the ties were cut belonged to the plaintiffs, and yet, without permission or authority from them, entered upon it with a large force of men, and cut the timber and converted it into ties. Under these circumstances, it is clear that, being willful trespassers, they were liable to the plaintiffs for the full value of the ties at the time of the sale and conversion, and, had they been sued, would have been entitled to no reduction on account of labor and expense. The rule would have been different had they been innocent of intentional wrong, the reasons for

which are fully explained in the opinion in a recent case decided by this court. *Eaton* v. *Langley,* 65 Ark. 448. But they were not innocent, and the question here for decision is whether the defendant, who purchased the ties from these trespassers, and then converted them to its own use, is entitled to any reduction in the damages on account of the increase in value caused by the work and labor of the willful trespassers. We must answer this question in the negative. The timber belonged to plaintiffs. The title to it was not changed by the trespass, or the conversion to cross ties. It still belonged, in its improved shape, to the plaintiffs. Had Less & Watkins, who knowingly and wrongfully put labor upon these ties, been sued, they, as before stated, would have been entitled to no allowance or reduction of damages on account of the labor expended or value added to the timber, and could convey no such right to the Coal & Coke Company. Admit that the company was an innocent purchaser; still it purchased property belonging to plaintiffs from those having no right to sell, it converted this property to its own use, and plaintiffs were by this conversion damaged to the extent of the value of the property at the time of the conversion.

The company, it will be noticed, did not perform any work and labor on these ties, nor add any value to them. Under these circumstances, we think the circuit judge correctly ruled that the measure of damages was the value of the ties at the time and place they were converted by the defendant company, with interest at 6 per cent. from date of conversion. *Woodenware Co.* v. *United States,* 106 U. S. 432; *White* v. *Yawkey,* 108 Ala. 270, 54 Am. St. Rep. 159; *Powers* v. *Tilley,* 87 Me. 34, 47 Am. St. Rep. 304; *Glaspy* v. *Cabot,* 135 Mass. 435.

The next contention is that the judgment should be reversed because it is said the trial judge admitted hearsay testimony tending to show the number of ties taken from the lands of plaintiffs. The only question of fact in the case about which there was any room for doubt was as to the number of ties which were taken by Less & Watkins from the lands of plaintiffs and sold to defendant. On this point the circuit judge permitted the plaintiffs to introduce the deposition of one Harkness, who testified that he went over plaintiffs' land with three men, and estimated the number of ties taken therefrom. The witness said that they "took the woods three abreast." "In making our estimate," he said, we "would go along, and each one carried a book, and marked therein each tree cut,

as we came to it, with the letters 'N. 2,' meaning the trees cut in 1896 and 1897, and with 'O' for old, meaning the trees that had been cut in 1895, and from these, placed together, I found that there had been cut but 14,700 ties, of which 4,700 had been cut in 1896 and 1897."

Now, counsel for appellee contends that the witness did not, by this language, mean that he put the books together carried by the different men, but that by "putting the trees together," or, in other words, he added the different entries in his own book, and determined the number of ties in that way. But it seems to us that the natural import of the language is that each of them carried a book in which they entered each tree cut as they came to it, and that, by putting the entries in their books together, the witness ascertained the number of ties cut. If we concede that the witness meant that he "put the trees together," as counsel contend, the language he used does not show that he measured each of the trees, but leaves it uncertain whether he relied altogether upon his own masurements, or in part upon measurements made by his assistants. It was for plaintiff, who introduced the deposition of the witness, to show that the witness referred only to his own entries or to those concerning the correctness of which he had a personal knowledge. He did not do this, and the language is nowhere explained, and we think the court should have excluded it. The same objection was made to portions of the deposition of S. G. Watkins, introduced by plaintiff. Watkins testified that, from the reports of men hired by himself and Less to work in the woods, he understood that about 12,000 ties came from the lands of plaintiffs. This was plainly hearsay. The defendant in apt time objected to these portions of the depositions of Harkness and Watkins, and they should have been excluded. In refusing to do so, we think the trial judge committed an error prejudicial to the appellants.

Our attention has been called by counsel for appellees to the state of the transcript in this case. It would seem, to quote the language of counsel, "that some sudden and severe wind blew the leaves of the transcript apart, and that when they were picked up no attempt was made to arrange them in proper order before they were fastened in the record." The pages are numbered consecutively as they are placed in the record, thus showing that they were wrongfully arranged by the clerk, or some one for him before having the numbers placed on them. In addition to this, the bill

of exceptions, containing over two hundred pages, is not indexed. A record in such a confused shape without an index adds greatly to the labors of both counsel and court. It is the duty of the appellant to see that not only a complete, but a correct and orderly, transcript is filed in this court. If he submits his case upon a transcript such as this one, we have the discretion, if we choose to consider it, not to permit the costs of same to be taxed against the other party, in the event the judgment below is reversed. We are of the opinion that it is proper to make such an order in this case, and therefore direct that no costs be taxed against the appellee for the making of the transcript filed here.

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

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PAPE v. STEWARD.

Opinion delivered May 4, 1901.

1. LANDLORD'S LIEN—INNOCENT PURCHASER.—One who purchased cotton which he knew was raised on rented land, and who had notice of facts sufficient to put him upon inquiry, cannot, as against the landlord's lien, claim that he was an innocent purchaser because the tenant misled him into believing that the landlord had abandoned his claim for rent. (Page 309.)

2. INNOCENT PURCHASER—WHAT CONSTITUTES.—One who purchases a tenant's cotton on which there is a landlord's lien cannot claim to be an innocent purchaser for value if the only consideration was the satisfaction of an account already due, in addition to a small amount for picking the cotton which was not paid until the landlord has brought suit to enforce his lien. (Page 310.)

Appeal from Crawford Circuit Court.

JEPHTHA H. EVANS, Judge.

STATEMENT BY THE COURT.

The Union Central Life Insurance Company was in 1896 the owner or in control of a farm in Crawford county of this state. It rented the farm during that year to one Hauptman for $140, and Hauptman sub-rented a part of the farm to Sam Lyons. But

J. R. Steward also claimed to be the owner of this farm, and in the fall of that year he brought suit against Hauptman and Lyons before a justice of the peace to recover for the rent. On the 29th of September, 1896, he obtained a judgment for the amount claimed by him. The attorney for the Insurance Company, who was present when this judgment was rendered, protested against it, and offered to make the Insurance Company a party, and to take an appeal, but the justice of the peace refused to allow the appeal. Thereupon the attorney brought suit in the circuit court for the company to enforce its lien, and to enjoin J. R. Steward and the justice of the peace from proceeding to enforce the judgment of the justice. A writ of injunction against Steward and the justice of the peace was issued from the circuit court on the 6th day of September, 1896. An attachment against the crop was also issued. But before this was done J. R. Steward had, under an order from the justice, sold a portion of the crop attached by him, and had then collected his rent, or at least a portion of it.

Sam Steward, the plaintiff in this action, was the owner of a store located about the center of the farm above mentioned, but on a separate half acre owned by him. The store fronted on the public road, which passed through the farm. He had furnished Sam Lyons provisions and supplies to make his crop, amounting to $90, which debt was unpaid. A few days after the judgment of the justice of the peace in favor of J. R. Steward, and after Steward had collected his rent, Lyons, the tenant, came to the store of Sam Steward with a load of seed cotton. Steward purchased this load of seed cotton and also other cotton which Lyons had on the farm, amounting in all to 3,000 pounds of seed cotton, enough to make two bales of lint cotton. Steward gave Lyons credit for the purchase price of the cotton, less the sums due for picking, which he agreed to pay in cash, and which he paid ten days afterwards. The cotton was in less than ten days afterwards attached in the action brought by the Union Central Life Insurance Company to recover the rent as above stated. J. R. Steward, Hauptman, the tenant, and Lyons, the sub-tenant, all appeared in the circuit court, and filed answers to the complaint of the company. But on the hearing the finding of the circuit court was in favor of the company. The court thereupon gave judgment in favor of the company against Hauptman for the rent, made the injunction against J. R. Steward and the justice of the peace perpetual, sustained the attachment which had been levied on the crop, including cotton purchased by

Sam Steward, and ordered it sold to pay the judgment and costs, No appeal was taken from this judgment, but Sam Steward, the merchant, who was not a party to that suit, brought this action of replevin against the sheriff to recover the two bales of cotton which he had purchased from Lyons. The other facts are sufficiently stated in the opinion.

On the trial there was a verdict and judgment in favor of Steward, from which judgment the sheriff appealed.

Jessee Turner, for appellant.

The sale to appellees was not completed before the issue of the attachment. 47 Ark. 210; 14 Am. & Eng. Enc. Law, 372, 373; 25 Ark. 545. Appellee was not a purchaser without notice. 31 Ark. 135; 49 Ark. 214; 55 Ark. 47; 31 Ark. 253; 34 Ark. 85; 58 Ark. 252; 21 Am. & Eng. Enc. Law, 574, 575; 23 Cal. 570; 64 N. H. 59; S. C. 10 Am. St. Rep. 377; 13 Wend. 570; 89 Ia. 454; 63 Ark. 87.

RIDDICK, J., (after stating the facts). This is an action of replevin for two bales of cotton brought by Sam Steward, who purchased the cotton from a sub-tenant of the Union Central Life Insurance Company, whose rent had not been paid. The defendant is a sheriff, who had seized the cotton under a writ of attachment issued in an action brought by the company to recover its rent. There is no question here as to validity of the company's lien as against the sub-tenant, but the plaintiff, Steward, claims that he purchased the cotton without notice of the lien. On this question the jury found in his favor, but we see nothing in the transcript to support the finding. The plaintiff's store where he purchased the cotton is located on a half acre owned by him near the center of the farm upon which the cotton was produced. A portion of the cotton at the time he purchased it was in a wagon in the public road in front of the store, and the remainder was still on the farm. The plaintiff knew that the sub-tenant from whom he purchased had raised the cotton on the farm, and knew that the company claimed to own the farm, and was familiar with the controversy that arose concerning the farm and rents between the company and one J. R. Steward. But he says that at the time that he purchased he supposed that the company had abandoned its claim to the rents. He came to this conclusion he says under the following circumstances. J. R. Steward, claiming to be the landlord, had attached the crop for the rent before a justice of the

peace. The justice gave judgment in favor of J. R. Steward. Plaintiff, who was not at the trial before the justice, was told by Lyons, the sub-tenant, from whom he purchased the cotton, and who was present at the trial, that the attorney for he Life Insurance Company had stated to him that "J. R. Steward had him beat before he got there, and that he had as well quit." Hearing afterwards that J. R. Steward had sold a part of the crop attached and collected the rent, plaintiff concluded that the company had no lien, and he thereupon purchased the cotton. Now, the testimony of Lyons, the sub-tenant, who also testified, is very different from that of the plaintiff. He shows that plaintiff knew of the company's lien, and says that plaintiff remarked at the time he purchased the cotton that "he would have trouble with the Insurance Company." Yet we disregard that testimony for the reason that, the finding of the jury being in favor of plaintiff, it should stand if there be evidence to support it.

But, taking the testimony of the plaintiff alone, it shows that, knowing that the company claimed to be the landlord of the farm and entitled to the rent, he purchased the cotton from the sub-tenant, on his statement that the company had abandoned its claim. Indeed, this is putting it more favorably to plaintiff than his own testimony warrants, for he does not say that he was told that the company had abandoned its claim, but only that its attorney had stated at the trial before the justice that "J. R. Steward had him beat before he got there, and that he had as well quit." This did not show that either the attorney or the company had abandoned the company's claim for rent. There was nothing in this remark by the attorney to estop the company from further efforts to collect its rent. The plaintiff should have known that, if the company was a party to this action before the justice of the peace, it had thirty days after the judgment in which to take appeal. If the company was not a party, it was not bound by the judgment, and had the right to commence another suit to collect its rents. By inquiring of the attorney for the company or of others who attended the trial before the justice, plaintiff could have learned that the company had not abandoned its claim for rents; but, although the means of obtaining correct information was at hand, he chose to rely upon the statement of the tenant, who had the cotton for sale, and made the purchase a few days after the trial before the justice of the peace, without further inquiry. When a purchaser from a tenant has notice of such facts as would put a

man of ordinary prudence upon an inquiry that would lead to a knowledge of the landlord's lien, he must be treated in law as having notice of such lien. *Merchants & Planters Bank v. Meyer,* 56 Ark. 499. The testimony of the plaintiff himself shows, we think, that he had notice of facts sufficient to put him upon inquiry, and, had he made the inquiry, he could easily have ascertained the fact that the company had a lien. He is therefore a purchaser with notice, and the lien of the landlord was not affected by his purchase.

If the law were otherwise, the lien given by the statute to the landlord would be of very uncertain value, for in that event any one, even a neighbor of both landlord and tenant, though knowing that the relation of landlord and tenant existed, and that the cotton offered for sale was the produce of the landlord's farm, could safely purchase on the assurance of the tenant that the rent had been paid, or the claim therefor abandoned. A rule giving immunity to a purchaser under such circumstances would furnish to the tenant an easy way of avoiding the lien of his landlord for rent, and would, to a considerable extent, defeat the purpose of the law in giving such a lien. The law protects purchasers in good faith and for value from secret liens of which they have no notice. It does not protect one who, with notice of facts calling for an inquiry, neglects to use means of information easily accessible to him. 1 Jones, Liens, § 578.

There is still another reason why the contention of plaintiff that he is a purchaser without notice cannot avail in this case. He paid out nothing of value on this purchase until after the cotton had been seized under the landlord's writ of attachment. Lyons, the tenant from whom plaintiff purchased the cotton, was indebted to him more than the value of the cotton, and plaintiff simply gave him credit for the value of the cotton on his account, less a small amount due by Lyons for the picking of the cotton. But plaintiff did not pay any portion of the sum which he promised Lyons to pay the pickers until after the cotton had been seized by the sheriff under the writ of attachment issued in the action brought by the company to collect its rent. In other words, the only thing of value that he parted with in the purchase of this cotton was paid out after he had been informed by the seizure of the cotton that the company was still pressing its claim for rent, and he can gain no advantage from such payment. *Ames Iron Works* v. *Kalamazoo,* 63 Ark. 87. The credit placed on his books in favor of Lyons for the value of the cotton was not binding on

him, if he had chosen to rescind the trade upon finding that Lyons had misled him as to the existence of a lien. He was therefore, when the cotton was seized by the sheriff, in the same position that he was before the purchase.

We conclude that the plaintiff, under the facts shown by him as they appear in the transcript, was not a purchaser of this cotton for value and without notice. The judgment in his favor is therefore not supported by the evidence. For this reason the judgment is reversed, and a new trial ordered.

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WATKINS v. MARTIN.

Opinion delivered May 11, 1901.

1. STATUTE OF LIMITATIONS—BURDEN OF PROOF.—Where the statute of limitations is pleaded in an action on an account, the burden is on plaintiff to show that his action is not barred. (Page 312.)
2. JUDICIAL NOTICE—FORMER ACTION.—The fact that an indorsement of the clerk upon a complaint in an action shows that the same complaint was filed in a previous action will not be judicially noticed in the pending suit. (Page 313.)
3. STATUTE OF LIMITATIONS—BURDEN OF PROOF.—Where, to rebut the defense of the statute of limitations, plaintiff relies upon the fact that two actions were brought by him on the same cause of action, of which one was brought within time and nonsuit taken, and the other was brought within one year thereafter, the burden is on him to establish such fact. (Page 313.)

Appeal from Pulaski Circuit Court.

JOSEPH W. MARTIN, Judge.

Mark Valentine, for appellant.

A married woman has free power to sell and convey her separate property as if she was a *feme sole.* Sand. & H. Dig., § 4940; Const. 1874, art. 9, § 7; 53 N. Y. 93. The power of attorney was the best evidence to show agent's authority. 52 Ark. 234. A principal, on being fully informed of one's act acting without authority for him, must disaffirm it in a reasonable time, or he will he held to have ratified it. 40 Wis. 431. A single act and

a single recognition of authority may serve the agency. 24 Minn. 269. Every new item on a running account draws with it all preceding items. 2 Mo. App. 580; 40 Iowa, 41. A married woman may contract through an agent for improvement of her real estate. 71 Ind. 159 A husband may act as such. 99 Ind. 469.

J. H. Carmichael, for appellee.

Our statute does not authorize married women to make executory contracts for future conveyances. 29 Ark. 658; 29 Ark. 346; 30 Ark. 612; 38 Ark. 31; 39 Ark. 120; 16 Cal. 533. Before the passage of act of 1893 a married woman's executory contract to convey land was void. 39 Ark. 357; 44 Ark. 112; 53 Ark. 109; 44 Ark. 153; 41 Ark. 169. The power of attorney was void. 41 Ark. 169. For what she did, unless for the benefit of her separate estate, she was not liable. 29 Ark. 346; 33 Ark. 266; 34 Ark. 32. Statute of limitations was sustained. 2 Ark. 14; 3 Ark. 532; 5 Ark. 309; 6 Ark. 456; 14 Ark. 27; 13 Ark. 316; 18 Ark. 53; 27 Ark. 292; 33 Ark. 828. The bill of exceptions does not profess to set out all the evidence, and the presumption is in favor of the judgment. 2 Ark. 33; 8 Ark. 429; 24 Ark. 602; 22 Ark. 179; 25 Ark. 334; 14 Ark. 298; 37 Ark. 57; 40 Ark. 185; 46 Ark. 67; 27 Ark. 395; 45 Ark. 240; 43 Ark. 451; 55 Ark. 126.

BATTLE, J. William M. Watkins brought this action against Francis C. Martin upon an open account for services rendered by him to the defendant. The defendant answered and denied the account, and, among other things, pleaded the three-years' statute of limitation in bar of plaintiff's right to maintain the action. The defendant recovered judgment, and the plaintiff appealed. The burden was upon the plaintiff to show that his action was not barred by the statute of limitations. *Leigh* v. *Evans,* 64 Ark. 26; *McNeil* v. *Garland,* 27 Ark. 343; *Carnall* v. *Clark, ib.* 500; *Railway* v. *Shoecraft,* 53 Ark. 96. He has utterly failed to do so.

Judgment affirmed.

WOOD, J., absent.

ON REHEARING.

Opinion delivered November 23, 1901.

BATTLE, J. The appellant moves for a rehearing in this cause, because the court, in holding that he failed to show that this action was brought within the time prescribed by the statute of limita-

tions, overlooked the fact that the indorsement of the clerk upon the complaint therein shows that it was filed in the Pulaski circuit court, and that the writ was issued, on the 9th day of November, 1894, and the fact that the last service for which he sought to recover compensation was rendered upon the 24th day of November, 1891.

The action was based upon an open account for services rendered. It was commenced on or after the 3d day of October, 1896. The indorsement of the clerk upon the complaint, showing that it was filed, and that the writ was issued, on the 9th day of November, 1894, was the day on which it was filed in another action, which had been dismissed. The trial court could not take judicial notice of what was done in the other or latter suit. *Gibson* v. *Buckner*, 65 Ark. 84, 86. That should have been proved. The three-years' statute of limitation having been pleaded in bar of the action, the burden of proof was upon the appellant to show when his cause of action accrued, and that the writ issued was sued out within the three years, or, if two actions were brought upon the same account, and one was dismissed before the commencement of the other, that the first was begun within the time, and that a nonsuit was suffered therein, and that the last was brought within one year after the nonsuit. Sand. & H. Dig., § 4841. But he did not make the proof or offer to do so.

The motion for rehearing is denied.

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McCarthy v. McArthur.

Opinion delivered May 11, 1901.

1. General Exception to Evidence raises objection to its competency only. (Page 316.)

2. Contract—Parol Evidence of Custom.—Where plaintiff agreed to clear 20 miles of right of way for $12 per acre, parol evidence was admissible to show the existence of a general custom, at the time the contract was made, of paying for clearing a right of way through open fields the proportion of the contract price which such work bore to the work to be done in clearing a right of way through the forest. (Page 317.)

Appeal from Faulkner Circuit Court.

GEORGE M. CHAPLINE, Judge.

J. W. House, for appellants.

Parol evidence is always admissible to show how the measurement should be made. 49 N. Y. 64; 9 Gray, 401; 15 Ohio St. 179; 2 Zabriskie, 22 N. J. L. 165; 9 Wend. 346; 15 M. & W. 737. Evidence of usage is received, as any other parol evidence, when a written contract is under consideration. Starkie, Ev. 637-710; 3 Green. Ev. § 276; 69 Am. Dec. 298; 1 Green. Ev. § 292; 18 Mo. 509; 81 Mo. 37; 70 Md. 124; 79 Mich. 307. It was error to exclude the depositions of Dan Carey, Thos. Welsch and Geo. K. McCormack. 86 Ga. 408; 23 Me. 90; 6 Porter (Ala.), 123; 19 Wend. 386; 138 Mass. 375; 43 Am. St. Rep. 870; 106 Ind. 572; 46 Ark. 210; 46 Ark. 222; 56 Ark. 55; 12 N. Y. 40; 114 N. Y. 190; 19 Ark. 276. A general custom not only enters into the contract, but is binding upon both parties. 133 Pa. St. 241; 44 Barb. 541; Clark, Cont. 580; 2 Pars. Cont. 652-655; 3 Ala. 590; 13 Peters, 89; 54 N. Y. 357; 1 Beach, Cont. § 714-15-34; 2 Conn. 69; 12 Wend. 566; 20 Am. Dec. 424; 8 Serg. & R. 533; 81 Mo. 37; 59 Am. Rep. 214; 5 Am. Rep. 241. When a general custom is established, both parties are presumed to have contracted with reference to it. 34 Am. St. Rep. 350; 48 Am. St. Rep. 140; 130 Ill. 73; 41 Minn. 105; 62 Ark. 33. Evidence is admissible to explain the terms of a contract as applied to particular work to be performed. 7 Met. 354; 2 Cush. 271; 100 Mass. 63; 100 Mass. 518; 37 Mo. 313; 27 Vt. 79; 5 Am. Rep. note 241. Conversations, declarations and acts of parties to a contract may be given in evidence to explain the terms thereof. 22 Vt. 160; 1 Starkie, 86; 1 Story (Mass.), 574; 1 Comstock, 96; 92 N. Y. 529; 10 Bosw. (N. Y.), 433; 13 N. Y. 569; 41 N. Y. 644. The plaintiff is estopped from objecting to evidence to prove a general custom, they having first introduced it. 106 Md. 572; 94 Md. 450; 3 Dana (Ky.), 41; 20 Ala. 65; 28 Ala. 601; 29 Ala. 62; 36 Ala. 525; 20 Ohio St. 516; 54 Ark. 25.

O. L. Miles, Bolton & Young and *Ratcliffe & Fletcher,* for appellees.

Extraneous evidence is not admissible for purpose of adding more stipulations to a contract. 13 L. R. A. 440; 23 How. 49; 1 Wall. 456; 10 Wall. 589; 20 Wall. 488; 101 U. S. 686; 16 S. W.

172. Custom and usage are resorted to only to ascertain the meaning of the parties. 112 N. Y. 530; 14 Am. Rep. 230; 78 Fed. 151; 95 Va. 50; 83 N. Y. 1073; 30 Iowa, 205; 36 Iowa, 623; 96 N. Y. 522; 134 U. S. 306; 10 Allen, 305-313. Appellants should have pleaded any custom which they contend was a part and at variance with the contract. 76 Iowa, 629; 2 L. R. A. 709. The terms of a written contract cannot be varied by proof of what was said. 46 Ark. 226; 13 Wall. 363; 110 U. S. 499. The proof of any usage, if admissible at all, must be of a uniform and general one, presumably known to the parties. 75 N. Y. 65; 39 Ark. 283; 91 Me. 24. No lien could exist upon the right of way for any work that McArthur or his laborers did. 65 Ark. 183.

J. W. House, for appellants, in reply.

Custom need not be averred. 46 Iowa, 433; 53 Iowa, 542; 12 Iowa, 32; 15 How. 539; 10 Am. St. Rep. 669; 87 N. C. 9. All persons are presumed to contract with reference to a general custom, and the same need not be pleaded. 15 Ohio St. 179; Lawson, Usage & Custom, 3-112; Clarke, Usage & Custom, 210; Abbot's N. C. (N. Y.), 471; 7 Hun, 482; 49 N. Y. 641; 51 N. Y. 641; 57 N. Y. 651; 58 N. Y. 373.

BATTLE, J. J. S. McArthur and Wood Rainwater brought an action against J. H. McCarthy and George Reichardt, partners doing business under the firm name and style of McCarthy & Reichardt, upon a contract in the words and figures following:

"Little Rock, Ark., November 29, 1898.

"Memorandum: It is agreed that James S. McArthur is to have the clearing of the right of way, subject to all conditions named in the Choctaw & Memphis specifications. He is to do 20 miles or more as hereafter agreed upon, and to work at such points as is necessary from time to time, for which we agree to pay $12 per acre. * * * No work will be estimated or paid for that is not in strict conformity to the requirements of the Choctaw & Memphis railroad specifications.

[Signed] "J. S. McARTHUR,
"McCARTHY & REICHARDT."

They alleged in their complaint that McCarthy & Reichardt and McArthur selected the 20 miles of the right of way of the Choctaw & Memphis Railroad Company which was to be cleared by McArthur under the contract, and that McArthur at once entered upon the work of clearing the said 20 miles of right of way,

and cleared the same to the extent of 12 miles, in accordance with his contract, amounting to 144 acres, of the value of $1,728, of which $300 have been paid, and that there still remain due and unpaid $1,428.

McCarthy & Reichardt, answering, denied that he (McArthur) cleared 144 acres, and alleged that he cleared only 59.39 acres, for which they agreed to pay him at the rate of $12 per acre, making the sum of $664.68, and that they had paid him the sum of $300.

The jury that tried the issues in the action returned a verdict in favor of the plaintiffs for $1,031; and the defendants appealed.

The amount due the appellees for the work done depends upon the meaning of the words and figures, "$12 per acre" in the contract sued on. It appears from the evidence adduced in the trial in this action that a large portion of the right of way which McArthur claims to have cleared passed through farms or open fields, where there was no or very little clearing to do, and that in many places in such farms or open fields he cut only an occasional tree or stump, and in some places did nothing. Appellees contend that they are entitled, for the work done by McArthur, to $12 per acre for the entire area covered by the right of way, without regard to the amount of work done in such farms or open fields; and appellants contend that appellees were entitled to $12 for each acre cleared where the forest had been undisturbed, and for the work done in farms and open fields in clearing the right of way they were entitled to the proportion of $12 that such work bore to that required to be performed in clearing the right of way where the forest was undisturbed.

Appellants offered evidence in the trial, in support of their contention, to prove that it was the general custom in this state to pay for work done in clearing the right of way for railroads through farms and open fields the proportion of the contract price that such work bears to the work to be done in clearing the right of way through the forest. To illustrate: Suppose the contract price was $40 an acre, and that the work of clearing the right of way through farms and open fields was one-tenth of that done in clearing the same through the forest, $4 would be the price paid for the work done in the farms and fields, according to the custom. They offered to prove that this custom was in existence at the time the contract sued on was entered into, and had been for many years prior thereto, in this state and elsewhere. To the admission of this evidence the appellees interposed a general objection.

The ground upon which the objection was based is not stated in the record, and we can consider it only as to the competency of the evidence. *Railway Co.* v. *Murphy,* 60 Ark. 333. The court sustained the objection, and refused to allow the evidence to be adduced, saying: "This is a suit upon a written contract. The price of the labor is fixed in the contract, and also the character of the labor to be done or performed is set out in the contract. Any extra or additional labor is not mentioned, and the court holds that custom and usage have no place in this suit upon this contract."

The contract in question is not entirely free from ambiguity. Appellants agreed to pay McArthur $12 per acre for clearing the right of way for 20 miles. Does it mean that $12 an acre shall be paid for the acres actually cleared, or that the 20 miles, when entirely cleared, shall be paid for according to the number of acres contained in the same? The 20 miles is not specified in the contract, but was to be thereafter "agreed upon." Either construction can reasonably be placed upon the contract. Was the excluded evidence admissible?

In speaking of usages and trade, Greenleaf says: "Their true office is to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature of their contracts, arising not from express stipulation, but from mere implications and presumptions, and acts of doubtful and equivocal character, and to fix and explain the meaning of words and expressions of doubtful and various senses." 2 Greenleaf, Evidence, § 251. Again he says: "But though usage may be admissible to explain what is doubtful, it is not admissible to contradict what is plain." *Id.* § 292.

In *Oelricks* v. *Ford,* 23 How. 63, it is said: "This proof is admissible in the absence of express stipulations, or where the meaning of the parties is uncertain upon the language used, and where the usage of the trade to which it was made may afford explanation, and supply deficiencies in the instrument. Technical, local, or doubtful words may be thus explained. So where stipulations in the contract refer to matters outside of the instrument, parol proof of extraneous facts may be necessary to interpret their meaning. As a general rule, there must be ambiguity or uncertainty upon the face of the written instrument, arising out of the terms used by the parties, in order to justify the extraneous evidence; and, when admissible, it must be limited in its effect to the clearing up of the obscurity. It is not admissible to add

to or engraft upon the contract new stipulations, nor to contradict those which are plain."

In *National Bank* v. *Burkhardt,* 100 U. S. 692, it is said: "A general usage may be proved, in proper cases, to remove ambiguities and uncertainties in a contract, or to annex incidents, but it cannot destroy, contradict or modify what is otherwise manifest. Where the intent and meaning of the parties are clear, evidence of a usage to the contrary is irrelevant and unavailing. Usage cannot make a contract where there is none, nor prevent the effect of the settled rules of law." See also, *Insurance Companies* v. *Wright,* 1 Wall. 456-470; *Hearne* v. *Marine Ins. Co.,* 20 Wall. 492, 493; *Walls* v. *Bailey,* 49 N. Y. 464; *Berkshire, etc., Co.* v. *Proctor,* 7 Cush. 417; *Clark* v. *Baker,* 11 Met. 186; notes to *Wigglesworth* v. *Dallison,* 1 Smith's Leading Cases, Pt. 2 (8th Ed.), 934-965.

In *Walls v. Bailey,* 49 N. Y. 464, the plaintiffs contracted in writing to furnish the materials to do certain plastering for defendant upon his building in Buffalo, and to the work of laying it on. The defendant was to pay them for the work and material a price per square yard. "They included in their bills and charged for the full surface of the walls, without deduction for cornices, base-boards, or openings for doors and windows. To support these charges they proved under objection that it was the uniform, well-settled custom of plasterers in Buffalo so to measure and charge." The court held: "The evidence was proper, the usage not unlawful or unreasonable, and (the evidence) raised a presumption that defendant contracted with reference to the usage."

In *Filzimmons* v. *Academy of Christian Brothers,* 81 Mo. 37, the "contractors undertook to do the masonry of a building according to plans and specifications for the same, for the sum of $2 in addition to the price of rock per perch, and the evidence showed a custom prevailing, in ascertaining how much masonry had been completed so as to pay the demand of a mason for laying rock in a wall, to count corners twice,—each corner a part of two intersecting walls; also all openings for doors and windows as if they were solid matter." The court held that "the contractors were entitled, under their contract, to a measurement in accordance with said custom."

The evidence of the existence of such usages, where they are uniform, continuous and well-settled, and pertain to the matters of the contract in question, and are reasonable, is admissible for the purpose of placing the court, in regard to the surrounding cir-

cumstances, as nearly as possible in the situation of the parties to the contract to be construed. Such usages, when proved, are used as a means of interpretation of words and phrases in a contract of doubtful signification, on the theory that the parties knew of their existence, and contracted with reference to them. *Barnard* v. *Kellogg,* 10 Wall. 390; *Hearne* v. *Marine Ins. Co.,* 20 Wall. 488; *Walls* v. *Bailey,* 49 N. Y. 464.

Tested by the rule stated, the evidence as to a general custom that the appellants offered to adduce was admissible, and the court erred in excluding it. All other evidence of surrounding circumstances which throw light upon what the parties meant by the use of any ambiguous word or phrase in the contract were admissible for the purpose of explaining, but not to contradict, add to, or vary the contract.

All the rulings of the circuit court as to the admissibility of evidence and the law in this case which are inconsistent with this opinion were erroneous, and should be so considered. No specification of the same is necessary.

Reversed and remanded for a new trial.

WOOD, J., absent.

MYERS v. WEINER.

Opinion delivered May 18, 1901.

CONTINGENT REMAINDER—TERMINATION.—A contingent remainder may be good, though limited upon on event that destroys the particular estate which supports it, provided it takes place by a union of the particular estate with the remainder, so as to merge the one in the other. Thus, where a deed to A.'s wife provided that she should hold during her natural life, or so long as she remained the wife or widow of A., and that, in the event of her death without issue of the marriage with A., or in either event of her ceasing to be his wife or widow and no such issue, then the title should vest in A. if living, and if dead in the heirs of his body, and A.'s wife was divorced from him while issue of the marriage was living, the estate, upon such divorce being granted, vested in such issue. (Page 321.)

Appeal from Benton Circuit Court.

EDWARD S. MCDANIEL, Judge.

E. P. Watson, for appellants.

The rule in Shelley's case applies to and governs this case. 58 Ark. 303. If not, then Mrs. Ames took an estate in fee tail. 67 Ark. 520; Sand. & H. Dig., § 700. A vested or contingent remainder can only operate by way of executory devise. 2 Wash. Real Prop. 541. The contingency in which a remainder is limited must not operate so as to defeat, abridge or determine the particular estate. 1 Greenleaf, Cruise, Dig. 737, § 16; 2 Wash. Real Prop. 582. A remainder cannot be based upon several contingencies, one upon the other. 1 Greenleaf, Cruise, Dig. 734; 2 Wash. Real Prop. 580. A remainder cannot be limited on a condition. 1 Greenleaf, Cruise, Dig. 742; 2 Wash. Real Prop. 26; Tiedeman, Real Prop. § 281; 4 Kent, 128. In order to create a condition, the deed must disclose an intention by the grantor to take the estate to himself upon forfeiture. Tied. Real Prop. § 277; 2 Wash. Real Prop. 25. There can be no forfeiture until all conditions are broken. Tied. Real Prop. § 396. Deeds are construed most strongly against the grantor. 4 Greenleaf, Cruise, Dig. * 273; Tied. Real Prop. § 844. The condition in restraint of marriage was void. Tied. Real Prop. § 275. Only the grantor or his heirs can take advantage of a forfeiture. 2 Wash. Real. Prop. 13-24; Tied. Real Prop. § 277.

J. A. Rice, for appellees.

In construction of deeds all parts are construed together. 50 Ark. 378; Martindale, Conveyancing, § 95, 100, 90. Only conditions which are in derogation of law or public policy are void. Martind. Convey. § 125. Mrs. Ames took nothing but a life estate by the deed. 44 Ark. 467; 2 White & T. Lead. Cases, Eq. (4 Am. Ed.), 483; 49 Ark. 125. The rule in Shelley's case is one of construction, not of law, and is not a medium for discovering intention of parties. 67 Ark. 521; 50 Ark. 311; Martindale, Convey. §§ 128, 333, 121.

BUNN, C. J. D. D. Ames, father of Clara Ames, and at the time the husband of Sophrona Myers, purchased of F. M. Seamster and his wife, A. A. Seamster, a certain tract of land for the sum of $250 cash paid, and caused said Seamster and wife to make the following deed, to-wit:

"Know all men by these presents that we, F. M. Seamster and his wife, A. A. Seamster, for and in consideration of the sum of $250 paid us by D. D. Ames, do by these presents grant, bargain, sell and convey unto Sophrona Ames, wife of the said D. D. Ames, and to the heirs of her body, upon conditions and restrictions hereinafter mentioned, the following real estate, situated in Benton county, Arkansas, to-wit: The southeast quarter of the northeast quarter of section (17) seventeen, township (20) twenty north, of range (29) twenty-nine west, containing 40 acres. To have and to hold unto the said Sophrona Ames during her natural life, or so long as she remains the wife or widow of the said D. D. Ames, and in the event of the death of the said Sophrona Ames without issue of the marriage with the said D. D. Ames, or either event of her ceasing to be his wife or widow, and no such issue, then the right, title and interest in said lands shall go to and vest in the said D. D. Ames, if living; if dead, then in the heirs of his body. We hereby covenant that we will warrant and defend the title to said lands against the lawful claims of all persons whomsoever. And I, A. A. Seamster, wife to the said F. M. Seamster, do hereby release and relinquish unto the grantees herein all my right of dower in and to said lands.

"Witness our hands and seals, this the 10th day of June, 1889.

[Signed] "F. M. SEAMSTER,
"A. A. SEAMSTER."

Another deed of like tenor was executed by and to the same parties for 10 acres of additional lands. After the execution of these deeds, and during the time D. D. Ames and Sophrona Ames were living together as husband and wife, the defendant Clara Ames was born, and was living at the rendition of the decree in this suit, and still is a minor. Subsequent to the birth of Clara, D. D. Ames obtained a decree of divorce from his wife Sophrona, on the ground of desertion, and subsequent to that she intermarried with her present husband and co-plaintiff, J. W. Myers. It thus appears that Sophrona had ceased to be either the wife or the widow of D. D. Ames, and the event had happened upon the happening of which the life estate of Sophrona should terminate. It also appears that Clara, the daughter, was then *in esse,* and, as the remainder-man, was capable of taking at once.

The contention of appellant is that the particular estate could not thus be cut off and determined before the death of Sophrona,

without making the remainder void. Mr. Washburn, in his work on Real Property, states the general rule thus: "Another requisite in the event upon which a contingent remainder may depend is that it must not be such as to abridge the particular estate [in this case the life estate of Sophrona]; for it is of the essence of a remainder that it should wait until the particular estate has had a natural determination, according to the terms of its limitation. The remainder must not, therefore, be in the nature of a condition at common law which may defeat the particular estate; for, first, no one but the grantor in such a case could take advantage of it; and, second, upon his doing so in the only way in which it can be done,—namely, by the making of an entry,—he could thereby regain his original seisin, and defeat the seisin as well as the freehold on which the remainder depended." 2 Washburn, Real Prop. (5th Ed.), pp. 631, 632, paragraph 5.

Such is the general rule, and upon this rule the appellant relies in this case; but the same author in the seventh paragraph of the same volume, on page 633, says: "A remainder may, nevertheless, be good, though limited upon an event that destroys the particular estate which supports it, provided it takes place by a union of the particular estate with the remainder, so as to merge the one in the others;" citing *Goodtitle* v. *Billington,* 2 Douglass, 753, to the text of which there is appended a lengthy note, where this doctrine is set forth as an exception to the general rule.

The point is the only material one in the case, and the decree was in conformity with this exception to the general rule. It must be affirmed, and it is so ordered.

CALDWELL *v.* STATE.

Opinion delivered May 18, 1901.

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1. JUROR—OPINION AS TO GUILT—COMPETENCY.—A juror is incompetent to serve who states on his *voir dire* that he has talked about the case with various persons, among whom was a witness for the state, and that he has formed and expressed an opinion about defendant's guilt which it would require evidence to remove. (**Page 324.**)

2. SAME.—INCOMPETENCY AS GROUND FOR REVERSAL.—An erroneous ruling that a juror is competent upon a challenge for cause is ground for reversal where the accused exhausted his peremptory challenges in challenging other jurors before completion of the panel (Page 326.)

3. INSTRUCTION—DEFENCE—BURDEN OF PROOF.—Where, on a prosecution for seduction, the court charged that if the jury had a reasonable doubt of defendant's guilt upon the testimony in the whole case, he was entitled to an acquittal, it was not error to instruct that, if defendant sought to justify his failure to marry the prosecutrix on the ground of her refusal to marry him, then he must prove such refusal on her part by a preponderance of the testimony. (Page 327.)

4. EVIDENCE—HANDWRITING—COMPARISON OF WRITINGS.—Where there was a dispute as to whether a certain document introduced in evidence by defendant was written by the prosecutrix or by the defendant, certain other documents, admitted by defendant to have been written by him, may be submitted to the jury for the purpose of comparison with the writing in dispute. (Page 328.)

5. EXPERT WITNESS—TESTS.—Where an expert witness has been called to testify his opinion as to whether certain documents were in the same handwriting, and certain specimen writings were submitted on cross-examination to test his judgment upon the question whether they were written by the same person, it is admissible to contradict his testimony in relation to the test writings by showing who wrote them. (Page 329.)

Appeal from Independence Circuit Court.

FREDERICK D. FULKERSON, Judge.

W. S. Wright and *J. C. Yancey,* for appellant.

It was error not to sustain appellant's challenge for cause against a juror who had formed an opinion of the case, as had Leggett. 45 Ark. 170; Const. Ark. art. 2, § 10; 56 Ark. 402. *Cf.* 66 Ark. 53; 12 Am. & Eng. Enc. Law, 354, and note. It was error to permit a comparison of the inscriptions on the envelopes and the letters with the writing in dispute. 32 Ark. 337; 7 Abb. N. Cas. 98; 56 Md. 439; 5 Ala. 747; 2 Heisk. 207; 3 Baxt. 45; 78 Ind. 64; 9 Am. & Eng. Enc. Law, 288; 3 Russ. Cr. 361; 36 Am. Dec. 431; 1 Best, Ev. § 238; 16 S. W. 557; 3 Russ. Cr. 361; 16 S. W. 559; 58 Ark. 242. It was error to give the sixth instruction asked by the state, because it cast upon appellant the burden of negativing one of the elements of the crime charged. 62 Ark. 478; 1 Bish. Cr. Law, § 496; Clark's Cr. Proc. 539; 62 N. W. 502; 30 S. W. 802.

G. W. Murphy, Attorney General, and *Silas D. Campbell* and *Robert Neill,* for appellee.

Appellant not having shown that he was in any way prejudiced by the ruling as to the competency of the juror Leggett, and the record in no way disclosing any attempt to challenge any subsequent juror for cause or peremptorily, no reversible error was committed. 9 Ark. 164. *Cf.* 56 Ark. 404; 19 Ark. 156; 59 Ark. 132. But the ruling of the court was not erroneous. 66 Ark. 53; 4 L. R. A. 601; 21 So. Rep. 378; 71 N. W. 444; 51 Pac. 879. There was no error in the evidence as to the writing. 58 Ark. 250; 67 Ark. 48; 43 Ark. 391; 68 Ark. 531. The sixth instruction was not erroneous. 2 Am. & Eng. Enc. Law, 657, note; *Cf.* 62 Ark. 47.

HUGHES, J. The appellant was indicted for seduction, entered a plea of not guilty, was tried, convicted and sentenced to confinement in the penitentiary for three months, and to pay a fine of $65, as assessed by the jury in their verdict. He filed his motion for a new trial, which was overruled, and he excepted and appealed to this court.

In making up a jury to try the case, Russ Leggett was sworn and examined as to his qualifications to serve as a juror, and stated that he had heard different ones talk about the case, and that they purported to know the facts; that he had formed and expressed an opinion; that it would require evidence to remove that opinion; that he had talked with Dr. Kennerly, a witness for the state; that that opinion was with reference to the guilt or innocence of the defendant. He was pronounced by the court a qualified juror. The appellant objected, and asked that he be excused for cause. His objection was overruled, and his request denied by the court, and he peremptorily challenged the juror and excepted to the ruling of the court. H. H. Martin, a talesman, was sworn, examined and qualified as a juror, and was taken by the state. The appellant did not excuse said Martin, having exhausted his peremptory challenges. He did not offer to challenge him peremptorily or for cause. Was the juror Leggett competent? He had talked with various persons about the case who purported to know the facts, and with Dr. Kennerly, a witness for the state. though, he did not know at the time that Dr. Kennerly was a witness. He had formed and expressed an opinion as to the guilt or innocence of the accused, which he stated it would require evidence to remove.

In *Polk* v. *State,* 45 Ark. 170, this court said: "That a juror has formed any opinion in such a case renders him *prima facie* incompetent, and it is for the state to show that such opinion is based on rumor, and not of a nature to influence his conduct. But one who leaps in advance of the evidence and the law, and settles in his own mind the question of guilt, is not fit to be a juror in the cause. The juror must be indifferent between the state and the prisoner. The burden of eradicating preconceived opinions upon the merits ought not to be cast upon either party. The fact that the jurors further said that they could try the case impartially was entitled to no consideration in the face of their admissions that their minds were preoccupied by impressions of the case. No reliance is to be placed on such declarations." This case was expressly followed and reaffirmed by this court in *Vance* v. *State,* 56 Ark. 402.

In the case of *Hardin* v. *State,* 66 Ark. 53, the ruling in *Polk* v. *State* was somewhat modified, and it is said (quoting from the syllabus): "A juror in a criminal case who states that, from rumor and from reading the newspapers, he has formed an opinion as to defendant's guilt which it will require evidence to remove, but that, for the purpose of the trial, he can disregard such opinion, and give the defendant a fair and impartial trial, is not incompetent, if it does not appear that he entertained any prejudice against the defendant."

In this case at bar the opinion which the juror had formed was as to the guilt or innocence of the accused, and was formed from talking with witnesses who purported to know the facts. While the mere fact that an opinion by a juror as to the guilt or innocence of the accused on trial for a criminal offense does not itself disqualify the juror, yet, if it appears that such opinion appears to be fixed, and is founded upon what the witness understands to be the facts in the case, such opinion renders him incompetent to act impartially as a juror in contemplation of law.

"In a few cases it is simply stated, without reference to the question of exhaustion of peremptory challenges, that one cannot complain of a denial of a challenge for cause, if he thereafter peremptorily challenges the juror. In these cases failure to state that the challenges were not exhausted was probably a mere inadvertence." 17 Am. & Eng. Enc. Law (2d Ed.), 1189, and cases cited. "In some cases it is held that the mere exhaustion of his legal number of peremptory challenges will not give to a complain-

ing party a right to a reversal, but that in addition he must show that an objectionable juror was impaneled, owing to the want on his part of another peremptory challenge; or, as it may be otherwise expressed, the complaining party must have made, or offered to make, a challenge to a juror subsequently called." 17 Am. & Eng. Enc. Law (2d Ed.), 1188. Such we think was the condition of the juror Leggett. It was error to hold that he was a competent juror.

But he was peremptorily challenged by the accused, and did not sit upon the jury, and the accused exhausted his peremptory challenges. Was the accused prejudiced, inasmuch as he made no objection to Martin, the talesman who came after? There are cases which hold, with much apparent force of reason, that when Leggett was peremptorily challenged, after being pronouncel competent, on a challenge for cause, as he did not sit on the jury, no harm was done. But the accused says that he was compelled to challenge the objectionable juror peremptorily, when his challenge for cause should have been sustained, and that he was thus forced to take some juror that he might have challenged, as he exhausted his peremptory challenges. This position is answered in the fact that no objection, peremptorily or otherwise, was made to any other juror, and that all the accused was entitled to was a fair and impartial jury. "That such error in overruling a challenge for cause is available as a ground for reversal, if the objecting party does exhaust his peremptory challenges before the impaneling of the jury, is stated and applied in a number of cases" (among them cases in our own state). 17 Am. & Eng. Enc. Law, (2d Ed.), 1188.

It is, of course, no ground of complaint if the accused has not exhausted his peremptory challenges before the panel of the jury is completed, as the accused might correct the error by peremptory challenge. *Meyer* v. *State,* 19 Ark. 156; *Benton* v. *State,* 30 Ark. 328; *Mabry* v. *State,* 50 Ark. 494; and other cases in our reports. In *Benton* v. *State, supra,* it is said (in the syllabus): "If, after the court has erroneously overruled the challenge of a juror for cause, the defendant elects to challenge him peremptorily, and the record shows he did not exhaust his peremptory challenges, he cannot avail himself of the error." This, of course, necessarily means that, if the accused had exhausted his peremptory challenges, he could avail himself of the error; otherwise he could not. We think that the necessary implication from the cases in our court upon this

question is that the erroneous ruling that a juror is competent upon a challenge for cause, where the accused has exhausted his peremptory challenges before the panel is completed, may be availed of by him, and is cause for reversal.

There are several grounds urged in the motion for new trial, the most serious of which, according to the appellant's contention, is the giving of instruction numbered 6 for the state. It reads as follows: "No. 6. If the jury believe from the evidence beyond a reasonable doubt that the defendant obtained carnal knowledge of Dora Reeves by virtue of an express promise of marriage made by him to her, and that said marriage was, by agreement of the parties, set to take place on the fourth Sunday in June, 1899, and that said marriage has not taken place, and that the defendant seeks to justify his failure to make said marriage on the ground of the refusal of the said Dora Reeves to join him in the marriage, then he must prove such refusal on the part of said Dora to your satisfaction by a preponderance of the testimony; in other words, the burden of proof is on the defendant in such matter of defense." It is said that the giving of this instruction relieved the state of the burden of proving every material allegation in the indictment, and cast upon the defendant the burden of negativing or disproving, by a preponderance of the testimony, one of the material and indispensable elements of the crime. We fail to appreciate this argument. The defendant set up the refusal of Dora Reeves to join him in the marriage as a substantive affirmative defense. Why is he not required to prove it, if he expects to be acquitted, if it is true? If he had not brought it in the case, it would not be in the case. If he offers no proof in regard to it, his mere affirmance amounts to nothing. He does not expect the state to prove it, for to prove it would defeat her case. He could not expect the state to prove that Dora Reeves did not refuse to marry him, for this would be to require the state to prove a negative, which the appellant contends he cannot be required to do. The defendant relying upon an *alibi* has the burden as to that issue, but this does not relieve the state of proving guilt upon the whole case.

The court in this case further instructed the jury as follows: "11. You are instructed that, if you have a reasonable doubt of the defendant's guilt upon the testimony in the whole case, he is entitled to an acquittal." This, in connection with instruction 6, states the law as we have ruled heretofore, in *Ware* v. *State,* 59 Ark. 379, and cases there cited, and in the very recent case of

Rayburn v. *State, ante,* p. 177, in which latter case it is said: "that it is the province of the defendant to introduce evidence tending to show an *alibi,* when relied upon as an affirmative matter of defense, and as to this the burden rests upon him." In *Commonwealth* v. *Choate,* 105 Mass. 406, the court passed upon an instruction which told the jury "that where the defendant sought to establish the fact that he was at a particular place at any given time, and wished them to take it as an affirmative fact proved, the burden of proof was upon him, and, if he failed in maintaining that burden, the jury could not consider it as a fact proved in the case; that the burden, however, was upon the government to show that the defendant was present at the time of the commission of the offense, and as bearing upon this question the jury were to consider all the evidence offered by the defendant tending to prove an *alibi,* and if upon all the evidence the jury entertained a reasonable doubt as to the presence of the defendant at the fire, they were to acquit." The court said of this: "The substance of the whole ruling was that, if the evidence of the defendant which tended to prove an *alibi* was such that, taken together with the other evidence, the jury were left in reasonable doubt as to whether the defendant was present at the alleged fire, they should acquit him." This is the law applicable to this case as we understand it. Instruction 6 is not reversible. Some of the judges think instruction 6 obnoxious to the objections of the appellant and erroneous, but a majority agree that, taken with the other instructions, it is not. Two of the judges incline to the opinion that the appellant waived his objection to the juror Leggett by peremptorily challenging him, and making no objection to Martin, the talesman summoned in his place.

Defendant testified that he was willing to marry the prosecutrix, and offered to do so on the day set for their marriage, but that she refused to execute the contract, and in her own handwriting wrote out her refusal, which defendant tendered in evidence. Certain letters and notes and the addresses upon certain envelopes were identified by defendant as being his handwriting. The court permitted these documents to be submitted to the jury for the purpose of comparing defendant's handwriting with the alleged signature of the prosecutrix. It was not error to permit a comparison of the inscription on the envelopes with the writing in dispute. *Redd* v. *State,* 65 Ark. 475.

The court instructed the jury as follows:

"No. 2. To sustain this charge, it must appear from the evidence (a) that defendant did obtain carnal knowledge of Dora Reeves; (b) that he did so by virtue of an express promise of marriage; (c) that such promise was feigned or false; (d) that such promise of marriage was made in a manner and under such circumstances as to induce Dora Reeves to believe that defendant was true and sincere in such promise, and that, so believing, she permitted his embraces when otherwise she would not have permitted his intimacy; (e) if you believe beyond a reasonable doubt that each of these facts have been proved, and that the offense was committed in Independence county, within three years prior to the 17th day of October, 1899, then you may find the defendant guilty as charged." Defendant asked the court to modify that part of instruction No. 2, marked (c) by stating after the words, "feigned or false," the following: "And was made for the purpose of obtaining such carnal knowledge." There was no reversible error in refusing to make this modification.

Expert witnesses were introduced by the defendant to testify from a comparison of certain documents in evidence whether they were written by the same person. For the purpose of discrediting their testimony a number of written sentences were submitted to them, and they were asked whether they were written by the same person. Subsequently their testimony in this respect was contradicted by Messrs. Campbell and Neill, attorneys in the cause, who testified to having written the test sentences after the controversy began. There was no reversible error in admitting these statements tending to contradict the expert testimony. 1 Greenleaf, Ev. § 578b.

For the error in pronouncing the juror Leggett competent, the judgment is reversed, and the cause is remanded for a new trial.

CROWDER v. STATE.

Opinion delivered June 1, 1901.

FORMER CONVICTION—SUFFICIENCY OF PLEA.—Under act of February 9, 1893 (Sand. & H. Dig., § 2343, *et seq.*), providing in substance that whoever shall commit a misdemeanor may submit his case to a justice of the peace of the township in which the offense occurred, and that, upon his entering a plea of guilty, a judgment of conviction shall be entered, which shall be a bar to another prosecution for the same offense, *held*, (1) that the act is not unconstitutional as unduly circumscribing the territorial jurisdiction of justices of the peace; (2) that a plea of former conviction before a justice of the peace of another township than the one in which the offense was committed, upon a submission and plea of guilty, is not a bar to a subsequent conviction for the same offense before a justice of the peace of the proper township.

Appeal from White Circuit Court.

HANCE N. HUTTON, Judge.

J. P. Roberts, for appellant.

Under the constitution a justice of the peace has jurisdiction over misdemeanors committed in any township of his county, Const. Ark. art. 7, § 40. *Cf.* 35 Ark. 327. The jurisdiction of the justice was concurrent with that of the circuit court, and his judgment was a bar to further prosecution. 34 Ark. 188. Sand. & H. Dig., § 2343, restricting pleas of guilty in misdemeanor cases to justice courts of the township where the offense was committed, is unconstitutional. Art. 7, § 40, Const. Ark.; 5 Ark. 534; 7 Ark. 173; 14 Ark. 545; 2 Ark. 440.

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

The plea of guilty should have been before a justice of the township where the offense was committed. Sand. & H. Dig., § 2343.

BUNN, C. J. This is an indictment for gaming. There was a plea of former conviction, verdict of guilty, and judgment and sentence accordingly, from which the defendant appeals, after motion for new trial filed and overruled. The plea of former convic-

tion is as follows, to-wit: "Comes A. H. Crowder, the above-named defendant, indicted as Gus Crowder, and files his plea of former conviction to the indictment herein, and says that he is not guilty as charged, because he says that heretofore, to-wit, on the 13th day of January, 1900, he pleaded guilty to said offense before Thomas Killem, a justice of the peace of Negro Hill township in White county, Arkansas, for playing "poker" in Red River township, White county, on the 9th day of January, 1900, which is the same identical game charged in the indictment herein as having been played on the 7th day of December, 1899; that he was fined by said justice of the peace for his said offense in the sum of $10 and the costs, which said fine and costs have long since been paid by the defendant; that he is the same person named in said indictment as Gus Crowder, and the offense with which he is charged is the same for which he was punished as aforesaid. A copy of the judgment of said justice of the peace as aforesaid is herewith filed, marked 'Exhibit A,' and is made a part hereof. Wherefore the defendant prays judgment for his discharge." The following judgment was entered by said justice of the peace, to-wit: "Now on this the 13th day of January, 1900, comes H. A. Crowder, and enters his plea of guilty to gaming by playing "poker" in White county, Arkansas, on the 9th day of December, 1899, whereupon the court assessed a fine against him for said offense for $10, and, having no constable in Negro Hill township, said fine is charged against H. A. Crowder, constable of Red River township, in White county." It thus appears that the defendant, H. A. Crowder, *alias* Gus Crowder, was constable of Red River township in White county, and that he is the party named in the indictment, and that he voluntarily appeared before Tom Killem, one of the justices of the peace of Negro Hill township in the same county, and pleaded guilty to having committed the identical offense charged in the indictment; that the offense was committed in Red River township on the 9th day of December, 1899. It appears, on the other hand, that, as charged in the indictment, the offense was charged as having been committed on the 7th day of December. The state interposed her demurrer to the plea of former conviction, which was sustained, and, on his refusing to plead over, judgment of conviction was rendered against the defendant, and a fine of $10 was assessed against him, and he appealed.

Briefly stated, defendant committed the offense of gaming on the 7th day of December, 1899, in Red River township. On the

13th of December he entered his voluntary plea of guilty before a justice of the peace in another township, and this former conviction he pleaded in this case. The demurrer to the plea was based upon section 2343 of Sand. & H. Dig., and was so sustained by the court. The defendant contends that those sections of the digest are in controvention of the constitution, in this, that they circumscribe the jurisdiction of justices of the peace. In our view of it, these statutes were enacted for the purpose of preventing frauds upon the laws in the cases of misdemeanor, and are not restrictions upon the jurisdiction generally of justices of the peace to hear and determine cases less than felony, but rather are wholesome provisions, regulating the manner of entering pleas of guilty and restricting the validity of such pleas to the townships in which the offense is committed, and providing the necessary statements of the plea, and other matters of mere procedure named therein. None of these requirements were observed, and the plea of guilty was therefore insufficient.

The judgment is therefore affirmed.

CRAIGHEAD v. FARMERS' BUILDING & LOAN ASSOCIATION.

Opinion delivered June 1, 1901.

ESCROW—DELIVERY OF NOTE TO MAKER.—Where a surety signed a note and handed it to the maker, under an agreement that it should not be delivered until another should sign as surety, the fact that the maker delivered the note without the additional signature is not a defense to the surety as against a *bona fide* purchaser for value.

Appeal from Garland Circuit Court.

ALEXANDER M. DUFFIE, Judge.

Wood & Henderson, for appellant.

The court erred in holding that appellee was an innocent holder of the note. The possession of the note by the maker, after indorsement by payee, raised the presumption of satisfaction. 47 Ark. 394. Appellee did not receive the paper in the usual course of business, and so took it subject to equities. Tied. Comm. Pap.

§ 294; 29 Mich. 355; 69 Me. 212; 11 N. Y. Sup. Ct. (4 Hun), 524; 50 N. Y. 158; 13 Ark. 160. The giving of a note by a debtor only operates as a conditional payment, unless the parties expressly or impliedly agree to consider it absolute payment. 32 Ark. 740; 45 Ark. 313; 46 Ark. 552; 48 Ark. 271; Story, Prom. Notes, § 104; 2 Dan. Neg. Inst. § 1260, *et seq.;* 2 Rand. Comm. Pap. § 750; 2 Am. Lead. Cas. 263; 1 Salk. 124.

J. D. Kimbell, for appellee.

Proof of payment rested on the maker, and will not be presumed. 49 Ark. 508. If the alleged fraud was really perpetrated, the indorser, by placing it in the power of the maker to negotiate the note, is estopped to deny liability. 48 Ark. 454.

BUNN, C. J. This is a suit on a promissory note, of which the following is a copy, to-wit:

"$375. Hot Springs, Ark., December 29, 1896. Ninety days after date I promise to pay to the order of T. J. Craighead, three hundred and seventy-five dollars ($375) at the Arkansas National Bank of Hot Springs, Arkansas, for value received, with interest from maturity at the rate of ten per cent. per annum until paid. [Signed] Charles R. Cogswell." Across the face of this note was this indorsement: "Protested for nonpayment, this the 1st April, 1897. [Signed] Fred N. Rix, Notary Public." Further indorsed as follows: "T. J. Craighead, F. G. Rice."

This suit was tried on the complaint and answers of defendant in the Garland county common pleas court, resulting in judgment for the amount claimed in the complaint, and, reserving all proper exceptions, the defendants appealed to the circuit court of said county. In the circuit court, the defendant, T. J. Craighead, filed his amended answer, which is in words and figures, to-wit: "The defendant, T. J. Craighead, for his amendment to his original answer herein, says that he indorsed the note sued on herein with the distinct understanding and agreement at the time with the said C. R. Cogswell, the maker thereof, that, before the same should become in full force and effect, he, the said maker, was to get one P. J. Deloney to indorse or sign said note as surety thereto; that said Deloney never signed said note, and the same became thereby void, and the plaintiff is not an innocent holder or owner of said note; that it did not obtain the same through the due course of trade, and is not an innocent holder thereof, and it obtained the said note with notice of defendant's equities against

the same; that he is not indebted to the plaintiff in any sum whatever; that said note is void, and he is not liable to plaintiff in any sum thereon whatever."

This amended answer to the complaint raises the only substantial issue in the case.

The evidence shows that Cogswell had been the local agent of plaintiff company at Hot Springs, and had got behind in his accounts with the company. Thereupon the company sent its other agent from Nashville, Tenn., McWherter by name, to adjust the matter. McWherter talked the matter over with Cogswell, and proposed to give him further time to pay the amount of the shortage, which they had found to be $375, if the latter would make a good note, indorsed by good men, which Cogswell said he thought he could do, naming Deloney as a man he thought would aid him by indorsing for him. This was the occasion of a conference between McWherter and Deloney, and, as we infer, with the knowledge of Cogswell. Deloney had McWherter to explain the nature of the trouble Cogswell had got into, and the amount of the shortage, and the character of the note he was asked to indorse. He finally refused to indorse the note for Cogswell as requested, and the result of this conference was communicated to Cogswell by McWherter, and two or three days after Cogswell informed McWherter that he thought Craighead would indorse the required note for him. McWherter desired the first indorser to be named in the note as payee for convenience of negotiation, and wrote out a note payable to Craighead, who was to indorse the same also; and in this form it was taken by Cogswell to Craighead, and he was asked by Cogswell to indorse it in that shape, which he at first refused to do, but ultimately indorsed it, and gave it to Cogswell to not deliver it until Deloney would also indorse it. Cogswell, without presenting the note to Deloney, carried it back to McWherter, who requested him to procure another name to make the note safe, doubtless having in view of the rules pertaining among brokers; and Cogswell then induced Rice to indorse it. and in this shape the note was accepted by McWherter. Although no express words to that effect were used at the time, yet all the circumstances connected with the transaction carry no other meaning than that the note was accepted in satisfaction of the demand against Cogswell.

In the case of *Tabor* v. *Merchants' National Bank*, 48 Ark. 454, referred to in the opinion and judgment of the trial court in

this case, this court said (quoting from the syllubus): "A surety who signs a note with an agreement that the maker is not to deliver it to the payee until it is signed by other sureties cannot plead against an innocent payee, without notice of the agreement, the fraud of the maker in delivering it without the additional sureties. He is regarded as having constituted the maker as his agent to negotiate the note, and, having clothed him with the means of perpetrating the fraud, he must bear the loss."

But, in order to meet the force of this ruling, defendants in the case at bar contend that from the very nature of the transaction, as appears from the face of the note as delivered to McWherter, the plaintiff was not an innocent holder of it, since it is merely an accommodation paper; and that plaintiff was affected with notice for that reason, or was in that way put on inquiry, which, if reasonably followed up, would have led to a knowledge of the understanding between Craighead and Cogswell. They also contend that a similar legal result follows from the fact that the maker of the note held possession of the same between the time it was signed and indorsed by Cogswell and Craighead and the delivery of the same to McWherter and the acceptance by him. The note was not finally executed until delivered to and accepted by McWherter. Until then it was in the possession of Cogswell as the agent of Craighead and Rice, so far as this particular point is concerned. Nor is it possible to see why it should be said that McWherter should be held to make inquiry as to the *bona fides* of a transaction which had been consummated in exact conformity to his directions by the parties to it, so far as he knew. It is not contended that he had any knowledge of the secret understanding between Craighead and Cogswell as to the indorsement and delivery of the note; nor is it claimed that there was any circumstance putting him on notice, except the face of the paper. The object of all parties was to obtain an extension of time to settle his shortage, and to do so it was necessary to execute and deliver to plaintiff's agent, McWherter, the note in settlement of the indebtedness. This was done by Craighead and Rice, the neighbors and friends of Cogswell, and in a manner which could neither raise suspicion, nor suggest inquiry on the part of McWherter, a stranger, that any secret transaction would be relied on to defeat the object in view. Had there been anything to put him on his notice, he doubtless would have declined to have anything to do with it—not even to the extent of inquiry. Craighead relied upon Cogswell to carry

out the understanding between them, and, he having failed to do so, Craighead must suffer the consequences.

We deem it unnecessary to discuss the other questions raised, as we see no reversible error in relation to any of them.

The judgment is affirmed.

CHILDERS v. DUVALL.

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Opinion delivered June 1, 1901.

COUNTY CLERK—INCREASE OF POPULATION—MODE OF ASCERTAINMENT.—Under Const. 1874, art. 7, § 19, providing that "in any county having a population exceeding 15,000 inhabitants, as shown by the last federal census, there shall be elected a county clerk," etc., and amendment 4 to said constitution, providing that the governor shall fill all vacancies in office by appointment, which shall be in force until the next general election; *held*, that until the director of the census has, by bulletin or otherwise, published the result of a census, no official notice can be taken of the census for the purpose of electing or appointing a county clerk, but after the result has been published the governor is authorized to appoint a county clerk in a county whose population since the previous census has increased sufficiently to entitle it to a county clerk.

Appeal from Lawrence Circuit Court.

FREDERICK D. FULKERSON, Judge.

G. G. Dent, for appellant.

Article 7, section 19, of the constitution does not apply to conditions coming into existence after its adoption. If future in its operation, it at least was not self-executing, and required legislative action to authorize its application. Under the census act of 1899, there could be no "official announcement" of the census of 1900 until the publication of the regular report in 1902. The "last federal census" referred to in art. 7, § 9, of the constitution of 1874 applied to the census of 1870; and the provision is to be construed in the light of the census laws then in force. 87 Pa. St. 350. The circuit clerk was not *de facto* county clerk, even if the provision of the constitution be treated as self-executing. 118 U. S. 441. But the constitutional provision was not self-executing,

and the previous law continued in force until proper legislative action was taken. 24 La. An. 214; 23 La. An. 402; 7 Kans. 189; 93 Va. 15; 67 Mo. 265; 34 La. An. 735; 24 Am. Rep. 214; 32 Am. Rep. 1200; 33 Am. Rep. 873; 34 *id.* 337; 15 Pet. 449; 10 Fed. 503. *Cf.* 48 Ark. 89.

Chas. Coffin, for appellee.

Appellee was duly elected. 50 Ark. 277. But, at all events, the office became vacant upon the publication of the census bulletin of October 31, 1900, and the governor had the right to appoint. 48 Ark. 82. Const. Amend. No. 4.

BATTLE, J. Upon the supposition that Lawrence county, in this state, contained over 15,000 inhabitants, the democratic party in March, 1900, held a primary election, and nominated T. M. Duvall for county clerk, and C. C. Childers for circuit clerk, of that county. In June, 1900, the federal census of Lawrence county was taken by the enumerators appointed for that purpose. On the third day of September, 1900, at a general election held on that day, C. C. Childers was elected circuit clerk, and T. M. Duvall, county clerk, of said county. On the third day of October, 1900, the director of the census published a bulletin in which he stated that the population of Lawrence county, according to the federal census of 1900, exceeded 15,000 inhabitants. On the 31st day of October, 1900, the governor of this state appointed Duvall clerk of the county and probate courts of that county to fill a vacancy occasioned by the last federal census showing that the inhabitants of that county exceeded 15,000. Duvall qualified and entered upon the discharge of the duties of the office. The question is, who is the county clerk of Lawrence county? The Lawrence circuit court held that Duvall is.

Section 19 of article 7 of the constitution of this state provides how the office of the clerk of the county and probate courts shall be filled. It declares that it shall be filled by the clerk of the circuit court. The constitutional convention of 1874 evidently did not intend that this should continue longer than the affairs of the county should require, and believed that the county would need two clerks when its population exceeded 15,000 inhabitants. Hence it provided in this section "that in any county having a population exceeding 15,000 inhabitants, as shown by the last federal census, there shall be elected a county clerk, in like manner as clerk of the circuit court, who shall be *ex officio* clerk of the

probate court of said county." This is the condition upon which the county is allowed two clerks. It (the convention) did not intend that the federal census of 1870, which was the last census at the time the constitution of 1874 was adopted, should for all time determine when the condition for which it provided existed. It provided for counties having a population in excess of 15,000 inhabitants. This is a condition, present and future, for which it provided. There was and is no reason for discrimination in favor of one county against another of the same population. Counties acquiring the requisite population after the adoption of the constitution would doubtless need, and be entitled to, two clerks, as much as those whose population already exceeded 15,000 inhabitants. The federal census was adopted as the guide to determine when the condition provided for shall arise, and the last one made was to be the criterion to govern, as it would more accurately furnish the information needed. We therefore conclude that, whenever a county acquires the necessary population, according to the last federal census, it is entitled to a clerk of the county and probate courts; that the clerk of the circuit court no longer holds the same *ex officio;* and that the two offices become separate and independent. Treating the office of clerk of the county court as vacant, as a consequence of its separation from that of clerk of the circuit court, the convention provided that it should be filled by election, the same provision that was then made for the filling of other vacancies in office. There was no other provision made for the filling of it until the next general election. Indeed, there is no more reason why there should be than in cases where it becomes vacant by the death of the occupant. But this provision of the constitution, in this respect, has been changed by a subsequent amendment, which declares: "The governor shall, in case a vacancy occurs in any state, district, county or township office in the state, either by death, resignation or otherwise, fill the same by appointment, such appointment to be in force and effect until the next general election thereafter." Under this amendment a vacant office should be filled by the appointment of the governor until the next general election, so much of the constitution as authorized special elections being abrogated.

When, under the constitution, was the clerk of the county court of Lawrence county to be elected or appointed? Evidently, not until so much of the census of 1900 as related to its population was complete and ready to be officially promulgated. So long

as the enumeration of its inhabitants for that year was subject to the examination and revision of an officer, it was not the census. The work that was to make it such was not finished. Until the law authorized the announcement of the enumeration as the census, no official notice of it as such could be taken; and, until official notice could be taken of it, no election or appointment could be based upon it. When was the last federal census—the census of 1900—complete, and when could official notice have been taken of it?

By an act of congress entitled, "An act to provide for taking the twelfth and subsequent censuses," approved March 3, 1899, it was provided that a census of the population of the United States should be taken in 1900, under the supervision of an officer to be appointed by the president of the United States, by and with the advice of the senate, and to be known as the "director of the census." The information required by the act was to be collected, under the direction of the director of the census, by supervisors, enumerators, and special agents. The supervisors were to be appointed by the director, and they were to employ, with the consent of the director, the enumerators in their respective districts, and were to examine and scrutinize the returns of the enumerators, and, in the event of discrepancies or deficiencies appearing in the returns for their respective districts, to use all diligence in causing the same to be corrected and supplied, and were to forward to the director the complete returns for their respective districts in such time and manner as the director should prescribe. It was the duty of each enumerator to obtain all the information required by the act as to population in his subdivision as of the date of June 1st, 1900, and to forward his original schedule, duly certified, to the supervisor of census of his district, as his return, on or before the 1st day of the following July. If any portion of the enumeration or census appeared to have been negligently or improperly taken, and was by reason thereof incomplete or erroneous, the director was authorized to cause the same to be amended or made anew under such methods as was in his discretion practicable. No supervisor, supervisor's clerk, enumerator, special agent, or other employee had or has authority, without the permission of the director, to communicate any information gained by him in the performance of his duties to any person except the officers in the census department authorized by the act to receive the same. The director of the census was authorized to print, publish, and

distribute from time to time bulletins and reports of the preliminary and other results of the various investigations required by the act; and it was his (director's) duty, upon the request of the governor of any state or territory, or the chief officer of any municipal government, to furnish such governor or municipal officer with a copy of so much of the population returns as will show the names, with the age, sex, color, or race, and birthplace, only, of all persons enumerated within the territory in the jurisdiction of such government, upon payment of the actual costs of making such copies. According to this synopsis of the act of March 3, 1899, it appears that the reports of the work of all persons taking the enumeration of the inhabitants of the United States was to be made to the director of the census, and were subject to his approval, and that he alone was authorized to make known the result. He was authorized to do so by printing, publishing and distributing bulletins and reports, or by furnishing a governor or chief officer of any municipal government, at his request and expense, copies of parts of the population returns. It is only by means of the printing, publishing and distributing of the bulletins and reports that he is authorized to give the information to the public before the publication of the entire census of the population of the United States in the form of volumes, which are required to be published not later than the first of July, 1902. Until this is done, or the volumes are published, we cannot know that the census is complete and final, and what it is; for these are the only means provided by law for making known the census. No report is required to be filed subject to inspection by the public. Until the means of information provided by law were or are furnished, it is clear that no official notice could have been or can be taken of the census for the purpose of electing or appointing a county clerk; the officers of the election could not lawfully hold an election for that purpose, and the governor could not appoint.

On the 3d day of October, 1900, the director of the census, by the publication of a bulletin, made known that the population of Lawrence county exceeded 15,000. This was the first time it was lawfully made known, and official notice could have been taken of the fact; and soon after this the governor of the state filled the office of clerk of the county court of that county by appointing T. M. Duvall county clerk. The appointment was lawfully made.

Judgment affirmed.

NICHOL v. McDONALD.

Opinion delivered June 1, 1901.

LANDLORD AND TENANT—RENT—EVICTION.—Where the defense to an action to recover rent for a tract of 60 acres was that the plaintiff had wrongfully evicted defendant from 4 acres, a material part, of the land, a finding of the jury that before the plaintiff sold the 4 acres of land the plaintiff and defendant had agreed that either one of them might make a sale of the land is an insufficient basis for a judgment for plaintiff because the tenant might be willing to have the whole tract sold when he would not consent to the sale of a part, and because the jury failed to find whether and to what extent defendant was entitled to a reduction in the rent.

Appeal from Greene Circuit Court.

FELIX G. TAYLOR, Judge.

STATEMENT OF FACTS.

In February, 1898, W. J. McDonald rented to Lewis Nichol a farm in Greene county, known as the "Clark Rowland place," containing about 60 acres of open land, for the term of 3 years at $175 rent per year. The written contract entered into by the parties also specified that Nichol had the option to purchase the place at the price of $25 per acre, taxes and interest. The rent was, under the contract, due and payable one-third on the 1st day of August, one-third on the 1st day of October, and one-third on the 1st day of December of each year. The first installment of rent, due August 1, 1898, not being paid, McDonald brought suit to collect the same. Nichol, for defense, alleged that McDonald had wrongfully evicted him from a material and valuable part of said farm, and had thus forfeited his right to recover rent. On the trial before a jury, there was evidence tending to show that McDonald, on July 16, 1898, sold and conveyed 4 acres of the land to certain parties, as trustees for the Catholic church of Paragould. The church bought it for a burial place, and soon afterwards took possession of it. The testimony, though rather vague on this point, tends rather to show that McDonald consented to the possession on the part of the trustees. As to whether Nichol consented to the

sale of this 4 acres, the evidence is conflicting; but there was evidence tending to show that he consented to a sale of the whole tract. The jury failed to agree on a verdict, but, in response to the following special interrogatories submitted to them by the court, they answered as follows: (1) "Do you find that when the plaintiff sold the 4 acres he reserved defendant's rights as a tenant?" Answer. "No." (2) "Do you find that before plaintiff sold the 4 acres of land the plaintiff and defendant had agreed that either one of them might make a sale of the land?" Answer. "Yes."

Thereupon the court gave judgment in favor of the plaintiff for $58.39, that being the full amount of the first installment of rent. From this judgment the defendant appealed.

Crowley & Huddleston, for appellant.

Eviction, partial or entire, works forfeiture of rent. Smith's Land. & T. * 211, 212; Tied. Real Prop. 130-1; 2 Ballard's Ann. Real Prop. § 348; 4 *id.* § 420; 1 U. S. 769; 12 Am. & Eng. Enc. Law, 758, *b* and *c;* 7 *id.*. 37-42. It was error to admit parol evidence to establish a reservation not in the lease. 29 Ark. 544; 20 Ark. 294; 4 Ark. 154; 1 Greenleaf, Ev. 282, 319; 30 Ark. 186; 2 Rice, Ev. 1260.

J. D. Block, for appellee.

No objections or exceptions having been saved to the admission of evidence and giving of instructions, there is nothing for review by this court. A partial eviction does not forfeit the entire rent, unless the tenant yields entire possession of the premises within a reasonable time. 120 Mass. 284; Taylor, Landlord & T. § 381; 140 Ill. 531; 146 Ind. 175; 90 N. Y. 293; 75 Ala. 188. There was no such eviction as works a forfeiture of rent. 22 Pa. St. 144. *Cf.* 31 N. Y. 514; 10 Gray, 285; 69 Ill. 211.

RIDDICK, J., (after stating the facts). This is an action by a landlord against his tenant, to collect an installment of past-due rent. The defense of the tenant was that the landlord had previously evicted him from a material portion of the demised land. Though it is doubtful whether many of the questions which counsel for the appellant have argued in their brief are properly presented by the record, yet we are relieved from discussing that question, for there is one error which appears on the face of the record which requires a reversal of the judgment. The findings of the jury were not sufficient to authorize the judgment of the court. It will

be noticed, from an inspection of the interrogatories and the answers thereto, that the jury found that the tenant had consented to a sale of the land. They do not expressly say that he consented to a sale of the portion of the land sold by the landlord. The fact that the tenant had agreed that the landlord might sell the whole of the demised tract would not necessarily show that he had consented that the landlord should sell any portion of it and put the vendee in possession. The tenant had, under the contract read in evidence, the option to purchase the land at any time during the continuance of his lease at a certain price per acre. If the whole tract was sold at a price greater than that named in the option, the excess would go, as a profit, to the tenant. Under such a contract the tenant might be willing for the whole tract to be sold, and yet be unwilling to consent to a sale of a portion only. The question propounded to the jury should not have been whether he consented to a sale of the whole tract, but whether he consented to the sale of the part sold, and of which he claimed to have been dispossessed. But, conceding that the presiding judge, in asking the jury whether the tenant agreed to a sale of the land, referred to the 4 acres sold, and admitting that the tenant consented to the sale of this part of the tract, and to its possession by the vendee, still in that event he would be entitled to a reduction of his rent to that extent. It would be very unjust to permit a landlord to collect rent from a tenant for that part of the land which he had sold and placed in possession of another. But the question of the rental value of these 4 acres of land sold by the landlord, or its effect upon the rental value of the remainder of the tract, was not submitted to the jury, nor determined by them, and there is nothing in the evidence from which we can determine it with any degree of certainty. The judgment must therefore be reversed, and a new trial ordered, for the reason that the findings of the jury were not sufficient to authorize the judgment.

FORDYCE v. GOREY.

Opinion delivered June 1, 1901.

DEFAULTING EMPLOYEE—DISCHARGE—WHEN PENALTY FOR NONPAYMENT OF WAGES NOT RECOVERABLE.—A receiver of a railroad is not liable to the statutory penalty for discharging a conductor without paying his wages on the day of his discharge if the conductor was short in his accounts with the railroad, and had failed to report his collections, so that it could not reasonably be known how much was due to such conductor.

Appeal from Polk Circuit Court.

WILL P. FEAZEL, Judge.

STATEMENT BY THE COURT.

In a suit for wages and to recover penalty for failure to pay when he was discharged from service by the receivers, the appellee recovered judgment against the appellants, as receivers, for $121 due him for wages for services as conductor on the railroad, while in hands of the receivers appointed by the state court first, and afterwards by the United States circuit court for the Western district of Missouri, and the Western district of Arkansas, and also recovered judgment for $226.40 penalty for failure to pay his wages when he was discharged from their service, as provided in section 6243 of Sandels & Hill's Digest.

The appellants in their answer set up their appointment as receivers, and denied that they were liable under the statute; said they were not included in the language of the statute; that it did not apply to them. They denied that the plaintiff was entitled to recover the penalty claimed in the complaint. They also say that "the plaintiff, as conductor of the train in charge of these receivers, collected moneys coming to these receivers, and at the date and time said Gorey was discharged, if he was discharged, the said Gorey was indebted to these receivers for money had and received and collected by the said E. Gorey in his capacity as conductor, which moneys were then and there in the possession of the said E. Gorey, and which he had failed, neglected and refused to turn over and account for. They deny that they withheld his

wages due him, and say they were ready and willing to settle at any time said E. Gorey should agree upon a settlement of the amount due from him to these receivers. They say they demanded settlement, but that Gorey failed and declined to make said settlement; that plaintiff and defendants were unable to agree upon the amount of plaintiff's shortage, and said defendants could not pay plaintiff, as the amount to be paid was in dispute."

Defendants tendered plaintiff $121, the amount of his wages, less the amount they contended he was short. This he declined to receive, but demanded $145 less $18.06, which he contended was the true amount of his shortage. The defendants' testimony tends to show that the plaintiff's shortage was $27.95.

Many instructions were asked and refused, which it is unnecessary to set out here. The court gave instruction No. 2 for the plaintiff, which is as follows: "If the jury find from the evidence that the plaintiff is entitled to a penalty in this case, then in that event he will be entitled to said penalty from the date of his discharge up to the date of the filing of the defendant's answer in this case." Exception was saved.

Lathrop, Morrow, Fox & Moore, of Missouri, and *Read & McDonough,* for appellants.

Sand. & H. Dig., § 6243, does not apply to "receivers" of railroads. 4 Tex. Civ. App. 166; 5 *ib.* 50; 83 Tex. 218; *ib.* 729; 2 Elliott, Railroads, § 577; 32 S. W. 77; 26 S. W. 486; 55 Ga. 481; 56 Ga. 373; 71 Fed. 636; 177 U. S. 305. Penal statutes will not be extended by construction. 38 Ark. 521; 59 Ark. 356; 58 Ark. 43; 55 Ark. 302; 6 Ark. 279. *Cf.* 36 Ark. 330; 46 Ark. 161; 47 Ark. 406; 53 Ark. 421; 56 Ark. 110; 65 Ark. 532; End. Int. Stat. §§ 4, 7, 8. The court erred in giving the second instruction for appellee. The fact that the balance due was in dispute, and that appellee would have refused to accept what appellant thought due, dispensed with the necessity for tender. 10 So. 293. Until the amount due was ascertained, the penalty did not attach.

HUGHES, J., (after stating the facts). We think there is reversible error in the second instruction set out herein, because there had been no ascertainment of the plaintiff's shortage, and consquently the amount which the railroad company owed him had not been, and could not have been, ascertained at the time of his discharge by the receivers; and this seems to have been his fault. He was laid off a few days before his discharge, which was on the

4th of July, at which time he was indebted to the company for money he had received for them while in their employment as receivers, and which he had failed to account for and turn over to them. At least, this was the contention, which there was evidence tending to establish. They could not be required to pay him until it could be known what they owed him, and that this could not be known seems from the evidence to have been due to his failure to report his receipts of moneys as conductor, which the evidence tends to show it was his duty to make.

The receivers therefore were not liable to a penalty for failure to pay his wages until they knew what was due him, or could by the exercise of reasonable diligence have ascertained the same, for failure to pay his wages after which time only the penalty would attach, and not from the time of his discharge.

The question as to the application of the statute to receivers of railroads (§ 6243, Sand. & H. Dig.) is not decided, but left open.

This is a penal act, and should be strictly construed. For the error in giving the second instruction, the judgment is reversed, and the cause is remanded for a new trial.

CASTLEBERRY v. STATE.

69 346
185 535

Opinion delivered June 1, 1901.

FOURTEENTH AMENDMENT—DISCRIMINATION AGAINST NEGRO RACE.—Where a negro defendant filed a motion to quash an indictment on the ground that the grand jury was impaneled before the offense was alleged to have been committed, and that for sixteen years negroes had been excluded from the grand juries of the county on account of their race and color, it was error to overrule the motion without hearing evidence as to the facts alleged.

Appeal from Pulaski Circuit Court.

W. H. PEMBERTON, Special Judge.

Scipio A. Jones and *J. H. Carmichael*, for appellant.

Appellant had a right to be present at the formation and impaneling of the grand jury; and also to take advantage of the lack of

of such opportunity by motion to quash the indictment. 177 U. S. 447; Sand. & H. Dig., § 2067; 50 Ark. 542; 42 Ark. 394; 43 Ark. 395; 10 Ark. 631; 58 S. W. 97. The refusal of the court to hear evidence on the motion to quash was error. If its allegations had been proved, appellant would have been denied the equal protection of the laws by a failure to quash the indictment. 100 U. S. 339; *id.* 313; *id.* 303; 140 U. S. 278; 58 S. W. 97.

Geo. W. Murphy, Attorney General, for appellee.

Appellant's failure to save exceptions and embody them in his motion for new trial waives the point as to the refusal to hear evidence on the motion. Sand. & H. Dig., § 1061; 26 Ark. 536; 27 *id.* 349; 32 *id.* 154; 37 Ark. 544; 43 Ark. 391; 45 *id.* 524; 55 *id.* 376; 46 *id.* 17; 53 *id.* 204; 67 *id.* 531. There was no error in the court's refusal to quash the indictment.

HUGHES, J. The appellant was indicted for larceny, pleaded not guilty, was tried and convicted, and appealed to this court.

When the cause was called for trial, the defendant filed a motion to quash the indictment. He offered to introduce evidence to sustain the allegations in said motion, which the court declined to hear, and overruled the motion, to all of which the defendant excepted, and filed his motion for a new trial, which was overruled by the court, to which the defendant excepted.

The attorney general contends that the question made in the court below is not presented here, and that the appellant has nothing before the court, inasmuch as he failed in his motion for a new trial to make the court's refusal to hear testimony upon his motion one of his grounds for a new trial. But, as we understand, he did make the action of the court in overruling his motion to quash the indictment a ground for a new trial in his motion for a new trial, which was overruled, and to which he excepted.

The refusal of the court to hear evidence on the motion to quash was, in effect, saying: "Grant that the facts exist as set up in your motion; the motion is bad, there is nothing in it." This was, in effect, treating the motion as bad upon demurrer, and sustaining the demurrer. Was the motion good, the facts set up in it being conceded for the argument?

The motion is as follows: "Comes Scipio A. Jones, attorney for the defendant, Fred Castleberry, and moves the court to quash the indictment against him herein for the following reasons, to-wit: First. Because the offense for which he stands charged in the

indictment, and as shown by the indictment herein against him, was committed, if committed at all, after the impaneling and swearing in of the grand jury that found said indictment, and he was therefore deprived of his right and opportunity to be present at the impaneling and swearing in of the grand jury herein, and had no opportunity to challenge, nor has he made any plea whatever to said indictment, and therefore he claims the right and opportunity of challenging the formation and impaneling of said grand jury at this time. Second. That he has not been arraigned, nor has he pleaded in any way to said indictment, and that said grand jury which found said indictment was composed exclusively of white persons, and that all persons of color or of African descent, and known as negroes, were excluded from said grand jury on account of their race and color; that one-third of the inhabitants, and one-fourth of the legal electors, of this county are persons of color, or of African descent, known as 'negroes,' and were excluded from serving on said grand jury by the commissioners of said county on account of their race and color, and for no other reason. Third. That the jury commissioners of this (Pulaski) county have for a long period of time, to-wit, sixteen (16) years, neglected and refused and excluded all colored persons, or persons of African descent, from serving on said juries solely on account of their race and color; that said exclusion, neglect and refusal is a discrimination against this defendant, who is a negro, and is a denial to him of an equal protection of the laws, as guaranteed to him under the constitution of the United States. Fourth. That all the circuit judges for a great number of years have been white persons; that they have selected no persons of color or of African descent, known as negroes, to serve as jury commissioners in this county; that, although there are many persons of color, or of African descent, known as 'negroes,' in said Pulaski county qualified to serve as jury commissioners, they have been excluded on account of their race and color by said judges in the selection of jury commissioners; that said failure of said circuit judges to select any persons of color, or of African descent, known as 'negroes,' to serve as jury commissioners is a discrimination against this defendant, who is a person of color or African descent, known as a negro, and is a denial to him of equal protection of the laws under the constitution of the United States. All of which the defendant is now ready to verify." And the same was verified.

The defendant, Fred Castleberry, to sustain his motion to quash the indictments herein, supœnaed witnesses, who were sworn, and were offered to prove the allegations set out in his motion to quash said indictment, but when said witnesses were called, and their testimony offered to sustain said allegation, the court declined and refused to hear the statement of said witnesses, or any evidence upon said motion, over the objection of the defendant. To which refusal of the court to hear such testimony the defendant at the time excepted, and asked that his exceptions be noted of record, which was accordingly done.

As we understand the decision in *Carter* v. *Texas,* 177 U. S. 442, it is held (quoting from the syllabus): "A person of the African race was indicted in an inferior court of a state for a murder, committed since the impaneling of the grand jury, and, before pleading in bar, presented and read to the court a motion to quash, duly and distinctly alleging that all persons of the African race were excluded, because of their race or color, from the grand jury which found the indictment, and, as was stated in his bill of exceptions allowed by the judge, offered to introduce witnesses to prove that allegation, but the court refused to hear any evidence upon the subject, and, without investigating whether the allegation was true or false, overruled the motion, and defendant excepted. After conviction and sentence, he appealed to the highest court of the state in which a decision in the case could be had. The court affirmed the judgment, upon the assumption that the defendant had introduced no evidence upon the motion to quash. *Held,* that this was plainly disproved by the statements in the bill of exceptions, and that the judgment of affirmance denied to the defendant a right duly set up and claimed by him under the constitution of the United States, and must therefore be reversed by this court on writ of error."

The court below erred in overruling the motion to quash without hearing the evidence. The appellant was entitled to introduce testimony to sustain the allegations in his motion. *Smith* v. *Mississippi,* 162 U. S. 596, 601.

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

COWLING v. HILL.

Opinion delivered June 8, 1901.

1. ESTOPPEL—FRAUDULENT CONVEYANCE.—Where a wife permitted her husband for 20 years to retain title to her land, knowing that his creditors were dealing with him under the belief that it belonged to him, she will be estopped, as to them, to claim it as hers, and a conveyance by the husband to the wife to prevent its seizure by his creditors is fraudulent and void. (Page 351.)

2. INFANT DEFENDANTS—GUARDIAN.—A decree cannot be rendered against infant defendants until a guardian has been appointed to defend for them. (Page 352.)

Appeal from Howard Circuit Court in Chancery.

W. V. TOMPKINS, Special Judge.

Action by Hill, Fontaine & Co. against John C. Cowling and others. From a judgment in favor of plaintiffs, defendants have appealed.

W. C. Rodgers, for appellants.

The husband had the right to make such a conveyance to his wife as that in this case. 56 S. W. 632. Creditors cannot insist upon the husband's pleading limitation as to the rents due the wife. 68 Ia. 132; S. C. 26 N. W. 35; 63 Me. 326. The burden of proving fraud rests upon the appellees. 119 Ala. 312; S. C. 25 So. 767; 94 Pa. St. 56, 316; 135 Pa. St. 434; S. C. 19 Atl. 1026; 7 Ired. Law, 341; 33 Kans. 504; S. C. 6 Pac. 890; 22 W. Va. 370; 105 Ala. 266; 92 Ia. 602; S. C. 61 N. W. 365; 75 Wis. 595; 44 N. W. 645; 41 W. Va. 13; S. C. 23 S. E. 671; 88 Wis. 538; S. C. 60 N. W. 792; 63 Me. 162. It devolved also upon appellees to show that the wife was a party to the alleged fraud. 94 Wis. 385; 79 Me. 302; 108 Ind. 345; 106 U. S. 260; 92 U. S. 183; 67 Ia. 77; 4 S. E. 206; 51 Neb. 668; 101 U. S. 731; 30 Kans. 125; 7 Pet. 349, 357, 358. A guardian *ad litem* must be appointed for an infant before a judgment can be rendered against it, and a substantial or earnest defense must be made in its behalf. 39 Ark. 235; *ib.* 62; *ib.* 104; 43 Ark. 521; 44 Ark. 236; 137 Pa. St. 569; 48 Ill. App. 608; 131 Ill. 210; 96 Ky. 415; 54 Tex. 220; 2

Munf. 129; 8 Pet. 128; 17 Ill. 276; 3 W. Va. 676; 18 Ark. 53; 103 Mo. 546; 14 Gray, 179; 3 McLean, 319; 106 Ala. 352; 39 Ark. 104; 120 Mo. 134.

Williams & Arnold and *Rose, Hemingway & Rose*, for appellees.

The conveyance to the wife was fraudulent as to creditors. 62 Ark. 32; 67 Ark. 111; 50 Ark. 46; 60 Ark. 461. The daughter cannot claim a resulting trust because she did not pay any aliquot part of the purchase money. 1 Perry, Trusts, § 132; Bish. Eq. § 81.

RIDDICK, J. This was an action brought by a judgment creditor to set aside and declare fraudulent and void certain conveyances made by the judgment debtor to his wife. The circuit judge found that the conveyances were fraudulent and void as to the rights of the plaintiffs, and adjudged that the lands conveyed were subject to the payment of plaintiffs' judgment. Under the facts and circumstances in proof, we think the judgment was right. The husband can, of course, convey property to his wife in payment of a valid debt due from him to her, as he can to any other creditor. But the courts cannot shut their eyes to the fact that, under statutes allowing the husband and wife to contract with each other, outside creditors of either are placed at a great disadvantage, should the husband and wife be dishonest and attempt to defraud them. In determining whether conveyances made between husband and wife are made in good faith or made to defraud creditors, judges must, in order to arrive at the truth, necessarily keep in mind the close relationship existing between the parties and the motives that, when one of them becomes involved in debt, may induce them to try to shift the title of the property to the other, thus, in law, placing it beyond the reach of the creditors of such party, while he still receives from it many of the benefits that an owner receives from property.

Now, in this case the land, which belonged to the estate of the wife's father, was conveyed to the husband, was held by him and treated as his own for about 20 years, without objection on the part of his wife. The husband was a merchant, and, in making statements to commercial agencies, he included the land as a part of his assets. As the legal title to this land was in the husband, both he and his wife must have known that his creditors were dealing with him under the belief that it belonged to him. The

circumstances in proof were such, we think, as to justify the finding of the chancellor that, after having permitted the husband to own and control it for such a time, she should not be allowed to set up a claim to it as against the creditors of the husband. A conveyance by him to her with a view to prevent its seizure by his creditors was fraudulent and void. The finding of the chancellor is supported by evidence, and as to the adult defendants must be affirmed. There were, however, two minor defendants, heirs of Mrs. Cowling, who had no guardian appointed to defend for them, and against whom, by oversight, perhaps, a decree was rendered. As to them the judgment must be reversed, but as to other defendants it is affirmed.

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FARMERS' SAVINGS & BUILDING & LOAN ASSOCIATION v. FERGUSON.

Opinon delivered June 8, 1901.

1. CONFLICT OF LAWS—LOCI CONTRACTUS.—Where an undertaking secured by a mortgage was dated and made payable in Tennessee, though the mortgage conveyed land situated in this state, the contract is to be governed by the laws of Tennessee. (Page 355.)

2. SAME.—ENFORCEMENT OF USURY LAW OF ANOTHER STATE.—Mill. & V. Tenn. Code, §§ 2701, 2709, providing that the amount of compensation for the use of money "shall be at the rate of $6 for the use of $100 for one year, and every excess over that rate is usury," and that "a defendant sued for money may avoid the excess over legal interest by a plea setting forth the amount of the usury," are not inconsistent with the laws of this state, and contain nothing contrary to its policy. (Page 355.)

3. BUILDING AND LOAN ASSOCIATION—USURY.—A loan by a building and loan association is not usurious because, in addition to monthly interest charges at the highest lawful rate, monthly dues were likewise to be paid, which were to be applied to the maturing of the borrower's stock. (Page 356.)

4. SAME—COMPETITIVE BIDDING FOR STOCK.—Where there was no evidence that there was no competitive bidding for stock in a building and loan association, as required by its by-laws, other than defendant's statement that he never heard of it, it will be presumed that the by-laws were complied with until the contrary is shown. (Page 356.)

Appeal from Hempstead Chancery Court.

JOEL D. CONWAY, Judge.

Action by the Farmers' Savings & Building & Loan Association against M. L. Ferguson and another.

J. W. House, for appellant.

The contract is not usurious. Usury must be established by clear proof. 48 S. W. 903; 57 Ark. 251; 30 S. E. 463. Where the building association is a mutual one, and the stockholders participate in profits, the contract is not usurious. 26 Ia. 527; 20 S. E. 154; 29 S. E. 197; 2 McA. 594; 20 S. W. 386; 70 Miss. 94; 62 N. W. 544; 22 S. E. 585; 31 S. W. 1098; 23 S. W. 629; 22 S. E. 711; 30 Atl. 872; 15 S. W. 793; Fed. Cas. No. 7406. The contingent rate of interest, occasioned by the uncertainty of the time required to pay out shares, prevents such contracts from being usurious. 56 Ark. 335; 63 Ark. 502; 52 Fed. 618; 15 So. 369; 26 N. J. Eq. 251. See also, holding such contracts not usurious: 43 N. H. 194; 60 Minn. 422; 25 Barb. 263; 23 Gratt. 787; 46 Ga. 166; 79 Mo. 80. When the elements of mutuality and uncertainty enter into the contract, it is not usurious. Thompson, B. & L. Assns. 535-6, 540; Endlich, B. & L. Assns. § 339; Thornton & Black, B. & L. Assns. § 239. The contract is not usurious under the Tennessee law, where the note and mortgage are payable. 14 Lea, 671; 39 S. W. 546; 46 S. W. 362; 36 S. W. 386. A premium paid in excess of the legal rate of interest charged does not constitute usury. 15 So. 369; 46 S. W. 362; *id.* 386; Thompson, B. & L. Assns. 535-6; 14 Lea, 677. The contract is not usurious under Arkansas law. 52 Ark. 335; 62 Ark. 572; 63 Ark. 502; 52 Fed. 618. The presumption is that, if the contract was usurious under the Tennessee law, the contract was made with reference to the Arkansas law. 88 Fed. 7; 29 S. E. 744; 25 Oh. St. 413. But the contract was not usurious under Tennessee law, and this court is barred by the adjudications of the supreme court of that state upon the question. 105 U. S. 667; 7 Wall. 541; 107 U. S. 33; 94 U. S. 260; 98 U. S. 359; 118 U. S. 425; 125 U. S. 555; 134 U. S. 632; 142 U. S. 293; 119 U. S. 680; 150 U. S. 132; 146 U. S. 162; 67 Ark. 258; 60 Ark. 269; 66 Ark. 79; 48 S. W. 903; 44 Ark. 230; 47 Ark. 54; 61 Ark. 329; 3 Zabr. 590; 1 Pars. 180; 36 Am. Rep. 643; 142 U. S. 591. That the contract

was not usurious in Tennessee, see: 14 Lea, 677; 36 S. W. 386; 39 S. W. 546; 46 S. W. 362.

W. C. Rodgers, for appellees.

The contract was usurious. 12 Rich. Eq. 124; 78 Am. Dec. 463; 11 Bush, 296, 302. A usurious contract will not be upheld, under whatever name it is cloaked. 66 Ark. 460; 46 Ark. 50; 36 Atl. 248; 47 Ark. 288, 291; 55 Ark. 268, 270; 39 Pa. St. 156, 159; 24 Conn. 147, 153; 75 N. C. 292; 25 Oh. St. 208; 7 Neb. 173, 177, 178; 51 Pac. 779; 48 Ia. 385; 39 Pa. St. 137; 77 N. Car. 145; 78 N. Car. 186; 2 Coldw. 418; 12 Bush, 296; 30 Pa. St. 465; 55 Pac. 1022; 22 Tex. 128; 68 Tex. 283; 87 Tex. 486; 86 Tex. 467; 37 S. W. 212; 54 S. W. 209. The laws of Tennessee make usury a crime, and the contract, being usurious under the laws of that state, will not be enforced by the courts. 4 Mass. 370; 16 Mass. 91; 58 Ill. 172; 3 Bing. N. C. 230; 2 Lev. 174; 144 Ill. 422; 53 Ark. 147; 55 S. W. 840; 20 Ark. 209, 210; 3 East, 222; 56 Ark. 519; 32 Ark. 620; 12 Wall. 349; 21 Ind. App. 551; 35 Ark. 52. If there is any Tennessee statute allowing the rate of interest here charged, it should have been pleaded and proved. 13 Minn. 390, 393; 37 Mo. App. 352; 10 Ark. 169, 173; 66 Ark. 77; 121 Cal. 620; 171 Mass. 425; 19 Ind. App. 469; 2 Mass. 83, 90; 8 Mass. 9; 80 Ind. 186; 19 Mich. 187; 37 Fla. 64; 147 Pa. St. 399; 37 Mo. App. 352. The fact that the period of maturity of the stock is indefinite does not excuse usury. 50 S. W. 1070; 59 Minn. 468; 170 U. S. 351; 77 Fed. 32. Further, that the contract was usurious, see: 26 So. Rep. 361; 26 *ib.* 362; 15 S. C. 462; 12 Ky. 110; 45 Atl. 1001; 24 Conn. 147; 75 N. C. 292; 97 Ala. 417; 80 N. W. 45; 120 N. C. 286. Comity does not require us to execute the laws of another state, when they are against the policy of our own laws. 20 R. I. 466; 1 Pars. 180; 98 Ky. 41; 155 Ill. 617; 146 Ill. 472; 112 Mass. 349; 28 N. H. 379; 13 Pet. 519; L. R. 14 Ch. 351; 48 Md. 455; 12 Bush, 110; 50 S. W. 50; 55 S. W. 193; 43 S. W. 422; 26 Pa. St. 269.

BUNN, C. J. This is a bill to foreclose a mortgage on appellees' lands. The answer of the defendants sets up the defense of usury against the note sued on. Decree for defendants, and the plaintiff association appealed.

The obligation sued on is as follows, to-wit:

"$800. Nashville, Tenn., November 9, 1895.

"Due the Farmers' Savings and Building and Loan Association, at its home office at Nashville, Tennessee, eight hundred dol-

lars, with interest at the rate of 6 per cent. per annum payable on the 10th days of November and May. This obligation is for money advanced me on 12 shares of stock of said association owned by me, certificate being No. 8121, which said stock is hereby assigned and pledged for the repayment of said loan, and the same is further secured by a mortgage of even date herewith, executed by me upon a tract or parcel of land situated in Hempstead county, state of Arkansas. I agree to pay to said association, on the 10th days of November and May, at its home office in Nashville, Tennessee, sixty seven and 20-100 dollars ($67.20), which shall be applied as follows: (1) To the payment of any fines made against me in pursuance of the by-laws of the association; (2) to the payment of the interest due on said loan; (3) the balance shall be credited as dues on said stock. Said payments shall be continued until the dues so credited on said stock, together with the profits thereon, shall equal the amount loaned. Should I fail for 6 months to make said payments, then the whole amount of said loan shall, at the option of said association, at once become due and payable." This much of the obligation sued on is all that is necessary to be set forth here. Aside from fines, the contract of the appellee with the association was to pay interest in the sum borrowed at the rate of 6 per centum per annum, amounting to $48 per annum, and dues amounting to $144.40 per annum.

The contract sued on, having to be performed in the state of Tennessee, according to the tenor thereof is a Tennessee contract, and is to be governed by the laws of that state. *Sawyer* v. *Dickson*, 66 Ark. 77, and cases therein cited.

The defendants further contended that, as a Tennessee contract, it will not be enforced in this state, because they say the statutes of Tennessee on the subject of usury are criminal statutes, and that no state will enforce the criminal statutes of another state. The statutes of Tennessee herein sought to be enforced are neither criminal statutes, nor statutes inconsistent with the statutes of this state, nor do they contain anything contrary to the policy of this state. Sections 2701 and 2707, Milliken & V. Code Tenn. The statute which declares the receiving of usurious interest to be a crime, and punishable by fine equal to the excess over the lawful interest, is a very different thing, for it will be observed that the crime is the "receiving," and not the "contracting for," more than 6 per centum interest. Sections 5622 and 5623, *ib.*

Again, it is contended by the defendants that the interest really contracted for in this case is more than 6 per centum per annum, notwithstanding that is the rate named in the obligation; for they say the amount stipulated for and denominated "dues" is in fact nothing else than interest cloaked under the name of "dues;" and they say this amount, added, as it should be, to the interest, makes the interest in fact usurious. As these several amounts are stipulated to be paid by the investor or the borrower, who also must be a member of the association, it has been uniformly held by this court that those so-called "dues" will be considered separate from those called "interest;" that the contract rights of the parties will be so far respected that they will be permitted to create a sinking fund, as it were, in this way, separate and distinct from the fund to pay the interest; for that is the real object of the dues at last. Thus it is that both the principal and interest of the investment or loan are paid off just when the stock is matured. It is then redeemed from pledge. This time of redemption is uncertain, and thus makes it impossible to determine a question of usury, if such is a proper question to consider in that connection. The fund thus created by the payment of dues includes the profits of the business, which must be distributed *pro rata* among the stockholders after payment of expenses of the business, and it is always impossible to say beforehand what proportion will be profits, and what proportion is to be credited on the stock redemption. The charge of usury must be supported by some certainty and definiteness of proof. But these and kindred questions are settled by the ruling of this court in the case of *Reeves* v. *Ladies Building Association,* 56 Ark. 335, in which, quoting from the syllabus, it was said: "(1) In a loan made by a building and loan association to a shareholder, in the usual form, there can be no usury, because the rate of interest payable by him is contingent upon the length of time required to pay out his shares. (2) A shareholder in a building association who procures a loan from it is not entitled to charge the association interest on his stock payments, nor to cause interest on the loan to cease running, from the time the payments are made, to the extent that they reduce the principal. All that he is entitled to receive is a share of the profits of the building association's dealings with the whole fund of subscription."

There is no evidence that there was no competitive bidding for the stock. The only thing the defendant says for himself in that

connection is that he never knew of this bidding. The presumption is that the by-laws were complied with until the contrary is shown. His presence at the bidding was not necessary.

The decree is reversed, and the cause is remanded with directions to foreclose the mortgage.

RHODES v. COVINGTON.

Opinion delivered June 8, 1901.

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1. TAX DEED—SUFFICIENCY OF DESCRIPTION.—A tax deed which describes the land conveyed as "L. B. R. W. Pt. southeast quarter of section 30, township 5 north, range 4 west," is void for want of a sufficient description. (Page 358.)

2. SAME—RIGHT TO QUESTION.—Sand. & H. Dig., § 6625, providing that no one can question a tax title acquired by deed from the county clerk "without first showing that he or the person under whom he claims title to the property had title thereto at the time of the sale, or that title was obtained from the United States or this state after the sale," has no application to a tax title void upon its face. (Page 359.)

Appeal from St. Francis Circuit Court.

HANCE N. HUTTON, Judge.

N. B. Fizer and *Rose, Hemingway & Rose,* for appellant.

The description "L. B. R. W. Pt."—meaning that part of the quarter section that was on the left bank of the river—was sufficient. Any description which sufficiently definite and certain to ascertain the premises is good. 1 Desty, Taxation, § 567; 23 Kans. 717; 36 N. J. L. 288; 4 Fed. 111; 41 S. W. 728; 2 Desty, Taxation, § 856.

R. J. Williams and *Norton & Prewett,* for appellee.

The description, designating the land as "part" of a tract, is too vague. 48 Ark. 419; 60 Ark. 487; 30 Ark. 640; 34 Ark. 534; 41 Ark. 495; 56 Ark. 44.

BATTLE, J. Appellant, Mary Lee Rhodes, brought this action against Lucy Covington, in the St. Francis circuit court, to recover the possession of a tract of land, described in her complaint as follows: "L. B. R. W. Pt. S. E. ¼ section thirty (30), township

five (5) north, range four (4) east, containing 45.88 acres of land, the same being 45.88 acres of land lying west of a line drawn north and south through that part of the southeast quarter of said section which lies on the left bank of the St. Francis river, and parallel to the east line of said section 30, so as to divide said part of said southeast quarter which lies on the left bank of said river into two parts, to-wit, the east part, containing 60.50 acres, and the west part, containing 45.88 acres." She alleged in her complaint that she inherited the land from her deceased father, and that he derived title to it by purchase of the same at a sale thereof on the 10th day of June, 1878, for the taxes assessed against it for the year 1877; that the defendant had been wrongfully in possession for ten years, the greater part of which time she had been a minor, she having attained her eighteenth year on the 6th of August, 1896. She attached to her complaint the tax deed of her father, in which the land is described as "L. B. R. W. Pt. southeast quarter of section 30, township 5 north, range 4 east."

The defendant answered, denying that she was wrongfully in possession, and claiming title to the land by adverse possession; and filed exceptions to the deed filed by the plaintiff, alleging, among other things, that it described no lands.

The land was described in the assessment and certificate of tax sale as it is in the deed.

The court sustained the exceptions, and, the plaintiff declining to amend or plead further, rendered judgment in favor of the defendant; and the plaintiff appealed.

Was the deed void because of an insufficient description of the land conveyed?

In *Cooper* v. *Lee,* 59 Ark. 460, it was held that a sale of land for taxes, advertised and sold under the description of N. NE., section 2, township 15, range 6, 87.19 acres, was void, because the description was insufficient to identify the land. In that case the court said: "It is said that the purposes in describing the land are: 'First, that the owner may have information of the claim made upon him or his property; second, that the public, in case the tax is not paid, may be notified what land is to be offered for sale for the nonpayment; and, third, that the purchaser may be able to obtain a sufficient conveyance.' Cooley, Taxation (2d Ed.), 405. A description of land in a tax proceeding that does not sufficiently identify it 'defeats one of the most just and obvious purposes of the statute,—that of giving the owner notice

that his land is to be sold, so that he may pay the tax and prevent the sale,' or at least redeem his land before the expiration of the time allowed for that purpose. To effect the laudable purpose of protecting the owner, the description should be such as will be readily understood by persons even ordinarily versed in such matters. A description which is intelligible only to persons possessing more than the average intelligence, or the use and understanding of which is confined to the locality in which the land lies, is not sufficient. *Schattler* v. *Cassinelli,* 56 Ark. 178."

In the case at bar the presumption is the land is described in the deed as it was advertised for sale for taxes. Sand. & H. Dig., §§ 6623, 6613. The description contained was insufficient to identify the land sold and conveyed. Assuming that "L. B. R." means left bank of river, who, ignorant of the land intended, would know what "W. Pt." meant? The land described in the complaint is 45.88 acres of land lying west of a line drawn north and south through that part of the southeast quarter of said section which lies on the left bank of the St. Francis river, and parallel to the east line of said section 30, so as to divide said part of said southeast quarter which lies on the left bank of said river into two parts, to-wit, the east part containing 60.50 acres, and the west part containing 45.88 acres. Who would know that this land was meant by the description in the deed? The description in the deed, to one ignorant of the land intended to be described, is unintelligible, and this is not sufficient. It does not meet the requirements of the rule laid down in *Cooper* v. *Lee, supra.* The deed upon its face, therefore, shows that the sale of the land for taxes was void.

Appellant contends that the appellee has no right to question her title, and cites section 6625 of Sandels & Hill's Digest to support her contention. That section is as follows: "But no person shall be permitted to question the title acquired by a deed of the clerk of the county court without first showing that he, or the person under whom he claims title to the property, had title thereto at the time of the sale, or that title was obtained from the United States or this state after the sale, and that all taxes due upon the property have been paid by such person, or the person under whom he claims title as aforesaid." But the deed in this case does not show that she acquired any title, but, on the contrary, shows that she did not; and the section cited has no application.

Judgment affirmed.

BUNN, C. J., dissents.

CRAWFORD v. STATE.

69 360
76 563
77 443

Opinion delivered June 8, 1901.

LIQUORS—UNLAWFUL SALE—INSTRUCTIONS.—Sand. & H. Dig., § 4881, provides that any person owning, using or controlling any house who shall sell or give away any alcohol, ardent or vinous spirits or malt liquors, or any compound or tincture commonly called bitters or tonics, shall be guilty of a misdemeanor. Defendant, accused of violating this act, testified that he sold in his store a drink made of acids according to a certain formula, which was not intoxicating, and contained no alcohol. The court gave two instructions to the jury to the effect that if defendant sold intoxicating compounds, or alcoholic compounds which, though not intoxicating, are used and drunk as a beverage, he was guilty. Defendant asked the court to instruct the jury that if "the articles sold, which the witnesses call 'cider,' was a combination of acids made by the formula introduced in evidence, and contained no intoxicating ingredients that intoxicate, as alcohol, ardent wines, malt or fermented liquors do, then the jury will acquit." The court amended the instruction by adding to it the words, "unless said acid or drink was used, sold or drunk as is pointed out" in the instructions above set out. *Held*, erroneous, as conveying the idea that if the drink sold by defendant was used as a beverage, a misdemeanor was committed, although it contained no intoxicating elements.

Appeal from Cleveland Circuit Court.

ZACHARIAH T. WOOD, Judge.

W. S. Amis, for appellant.

The evidence does not make out a violation of the "blind tiger act." The court erred in the giving and refusal of instructions and in qualifying appellant's second one.

Geo. W. Murphy, Attorney General, and *J. M. McCaskill,* for appellee.

There was no error in the court's refusal to give appellant's first requested instruction. 45 Ark. 173. Nor was the qualification of appellant's second one error. 56 Ark. 444. Cider is alcoholic. 35 Fed. 570.

BATTLE, J. Ed Crawford was accused before a justice of the peace "of running a blind tiger, by the clandestine sale or giving away of intoxicating liquors," "such as alcohol, and ardent and vinous spirits, and malt liquors, and cider and wine," "in his store or grocery house just east of the railroad crossing, south of the town of Rison about one-half mile, near the south corporate limits of the town," in the county of Cleveland, and in the state of Arkansas. He was convicted, and appealed to the Cleveland circuit court, and was convicted in that court, and fined in the sum of $100, and then appealed to this court.

In the trial before a jury, witnesses testified that they purchased cider of the appellant and drank it; that it had a stimulating effect upon them; that there was no taste of whisky or alcohol in it; that the taste was like cider, and was a pleasant drink; that appellant "drew it out of a small barrel sitting in his store, and sold it over the counter just as he did his other goods." One witness testified that he thought "it was somewhat intoxicating."

The appellant testified that he heard the witnesses testify that they had purchased cider from him; that he sold to them the cider; that he made it according to the following "formula:" "Put 5 gallons of water into a tub, and dissolve 22½ pounds granulated sugar; add three-fourths of a pound of tartaric acid, and dissolve; then add one-half ounce salicylic acid, then two ounces ruby color, and stir well; then add four ounces Moore and Hill's extract of cherrry, stirring the whole until well mixed; then measure up into a keg and fill out with water to make 16 gallons." He further testified that the cider sold by him contained nothing except what the formula called for, and was not made by fermentation; that it is a pleasant, sour drink; that the business men of his town came to his store and drank it; and that he never saw any one intoxicated by it.

Upon this evidence the court, among others, gave two instructions, and numbered them 3 and 4, which are as follows:

"3. The court instructs the jury that the statutes prohibit the sale of any compound or preparation containing alcoholic liquors, which, though not intoxicating, is used and drunk as a beverage, or in lieu of a stronger drink.

"4. You are instructed that if you believe from the evidence that defendant, at any time within twelve months next before the filing of the information in this case, sold or gave away any

kind of compound or preparation whatever, as a beverage, or otherwise, that contained intoxicating elements of any quantity, you should find him guilty as charged."

The appellant asked, and the court refused to give, the following instruction: "2. If the jury finds from the evidence that the articles sold, which the witnesses call cider, was a combination of acids made by the formula introduced in evidence, and contained no intoxicating ingredients that intoxicate, as alcohol, ardent wines, malt or fermented liquors do, then the jury will acquit the defendant." But amended it by adding the words, "unless said acid or drink was used, sold or drunk, as is pointed out in instructions numbered 3 and 4 in this case," and gave it as amended, over the objections of the appellant.

The court erred in refusing to give the instruction as asked, and in giving it as amended. The accusation against the appellant was based upon section 4881 of Sandels & Hill's Digest, which provides: "Any person owning or using or controlling any house or tenement of any kind who shall sell or give away, or cause or allow to be sold or given away, or keep or allow to be kept for sale or to be given away, any alcohol, ardent or vinous spirits or malt liquors, or any compound or tincture commonly called bitters or tonics, whether the same be sold or given away openly or secretly, by such device as is known as the 'blind tiger,' or by any other name or under other device, shall be deemed guilty of a misdemeanor." It is clear that it was not unlawful or a misdemeanor, under this statute, to sell the liquid manufactured and sold by the appellant, unless it was alcohol, or ardent or vinous spirits, or malt liquors, or any compound or tincture commonly called "bitters" or "tonics," or such liquors, compound or tincture, in another name or form. The obvious intent of the statute is to suppress the unlicensed sale of intoxicating liquors, as such, or as a compound or tincture commonly called "bitters" or "tonics," or by any other name or device. While it does not attempt to specifically mention all compounds or tinctures included, it does designate what is meant by a reference to the oft-repeated efforts to evade the penalties of the law by the sale of intoxicating or stimulating beverages under the name of "bitters" or "tonics," thereby showing the intent to make the unlicensed sale of all such beverages, under any name, a misdemeanor. Such being the plain intent and meaning of the statute, it is obvious that the liquid sold by the appellant must be a compound of one or more of the liquors

under the ban of the law with other ingredients, or contain the elements necessary to constitute an intoxicating liquid in such form as it may be used as a beverage, notwithstanding the other ingredients, in order to make the selling or giving it away a misdemeanor, within the meaning of the statute.

Inasmuch as there was evidence upon which to base it, the instruction refused should have been given in the form asked. The amendment added conveys the idea that if the so-called cider sold by the appellant was used, sold or drunk as a beverage, a misdemeanor was committed, although it contained no intoxicating elements. The amendment was a prejudicial error.

Reversed and remanded for a new trial.

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69 363
89 138

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

Opinion delivered June 8, 1901.

VARIANCE—PLEADING AND EVIDENCE.—Where, in an action against a railroad company to recover the statutory penalty for failure to signal at a certain highway crossing, the evidence tends to show that the offense, if committed at all, was committed at a different crossing from that named in the complaint, the court should direct a verdict for the defendant.

Appeal from Sebastian Circuit Court.

EDGAR E. BRYANT, Judge.

STATEMENT BY THE COURT.

This is an appeal from a judgment against the appellant for $200 penalty, as provided in section 6196, Sandels & Hill's Digest. The complaint alleged that the railway company, operating its railway in the Greenwood district of Sebastian county, ran, or caused to be run, through said township, along the tracks of its road, a locomotive and train across the Greenwood and Scullyville wagon road, in district numbered 13, in said township, going southward (the number of said engine being unknown), "without sounding a steam whistle or ringing a bell continuously for

80 rods, or at all, before such crossing. A plea of not guilty was interposed by the railway company. The evidence was that the offense was committed, if committed at all, in crossing the Greenwood and Hackett City public road. The defendant, declining to introduce any evidence, asked that the jury be instructed to return a verdict for the defendant, "because of the insufficiency of the evidence to support an adverse finding." This instruction was refused, to which the defendant saved its exceptions.

The court then charged the jury as follows:

"Gentlemen of the jury, the complaint alleges that the defendant, the St. Louis, Iron Mountain & Southern Railway Company, is operating a line of railroad through Center township, in Sebastian county, across the Greenwood and Hackett City road, district No. 6, in said township.

"The complaint further alleges that on February 26, 1897, defendant, by its servants and employees, ran, or caused to be run, along the track of its said railroad, a locomotive and tender across said road, which may be known as the 'Greenwood and Hackett City Road,' the number of said locomotive being 441, as plaintiff is informed, running south backward without sounding a whistle or ringing a bell, about 2 o'clock p. m., the hour not being exactly known.

"In this character of cases, gentlemen, it becomes necessary for the state, in order to recover, to prove, by a fair preponderance of evidence, the facts as alleged in the complaint. And the facts must be proved exactly as alleged.

"It becomes necessary for you to find that said locomotive was a locomotive and tender; that it was running backward; that it was No. 441; that it ran across the crossing on the Greenwood and Hackett City road; and that it failed to sound a steam whistle or ring a bell continuously for 80 rods before said crossing.

"The penalty is $200 if the defendant is found guilty. If you find for the defendant, it would simply be a verdict of not guilty for the defendant."

The defendant objected separately and properly to each paragraph of said charge at the time it was given, but said objections were overruled, and all separate and proper exceptions saved.

The jury returned a verdict in favor of plaintiff for $200. Defendant filed its motion for a new trial, which was overruled, exceptions saved, and defendant appealed.

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

The judgment is not sustained by the evidence. There is an utter failure of proof upon the allegation as to the *"Greenville and Scullyville road."* Sand. & H. Dig., § 5766; Newman, Pl. 723; 3 E. D. Smith, 408; 10 How. 321; 1 Abb. 237; 28 Barb. 441; 10 N. Y. 254; 2 Comst. 506; 1 Russ. & Mylne, 527; 2 Dan. Ch. Pr. 240; 2 N. Y. 506, 507. The evidence also fails to prove the time as set out in the complaint.

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

The indictment was sufficient. *Cf.* 58 Ark. 39. The court takes judicial notice of geographical facts. 53 Ark. 48; 29 Ark. 293; 7 Pet. 324.

HUGHES, J., (after stating the facts). The evidence in this case fails entirely to sustain the allegations of the complaint. The complaint alleges that the offense was committed at or near the Greenwood and Scullyville wagon road, while the evidence tends to show, if committed at all, it was committed in failing to ring the bell or sound the whistle when about to cross the Greenwood and Hackett City public road. It seems that the court must have made a mistake in stating the case to the jury. The court committed error, we think, in not instructing the jury to find for the defendant, and in its charge to the jury, which is without evidence on which to base it.

Reversed and remanded for a new trial.

READ v. MISSISSIPPI COUNTY.

Opinion delivered June 8, 1901.

CONSTITUTIONAL LAW—IMPAIRMENT OF OBLIGATION OF CONTRACT.—The act of March 21, 1893, providing that no judgment rendered against any county "on county warrants or other evidence of county indebtness shall bear any interest after the passage of the act," does not violate section 17, of article 2, of the constitution, which provides that no "*ex post facto* law, or law impairing the obligation of contracts shall ever be passed;" nor does it deprive a judgment debtor who obtained judgment before its passage of his property without due process, in violation of section 8, article 2, of the constitution.

Appeal from Mississippi Circuit Court.

FELIX G. TAYLOR, Judge.

STATEMENT BY THE COURT.

This was an application by the appellant to the county court of Mississippi county for the allowance against the county of the amount of a judgment against said county recovered by the plaintiff in the United States circuit court for the eastern district of Arkansas on the 15th of December, 1888, for $8,212.63, with interest thereon from the date of the rendition thereof until the date of allowance by the county court of Mississippi county, at the rate of 6 per cent. per annum, amounting to $12,806.68, principal and interest; and that county scrip be issued to him thereon. The county court disallowed the application on the ground: (1) That said county court is not authorized to issue county warrants in payment of said judgment, on account of there not being an appropriation out of which to pay said judgment; (2) that no interest is due on said judgment after March 21, 1893. From which judgment plaintiff took an appeal to the circuit court. The circuit court held that so much of the claim as is the principal of said judgment and interest thereon to the 21st of March, 1893, and the costs in the circuit court of the United States, is a valid claim against the defendant, and ought to have been allowed, and that so much of said claim as consists of interest from March 21, 1893, until now (date of judgment in circuit court) is not a valid claim against the defendant, and was by the county court properly disallowed; and proceeded to give judgment accordingly,—that the county court should allow interest on said claim from the rendition of said judgment to March 21, 1893, and the costs in the United States district court in said cause and costs in this cause, and that warrants issue therefor as provided by law, etc., and that the order of the county court disallowing interest on said judgment from March 21, 1893, until now be and the same is, in all things approved. The plaintiff brings up the cause by appeal.

Geo. W. Thomason, for appellant.

The act of March, 1893, is unconstitutional. Const. Ark. art. 5, § 25; *ib.* art. 14, § 1; *ib.* art. 2, § 18.

HUGHES, J., (after stating the facts). The court held in *Nevada County* v. *Hicks,* 50 Ark. 416, that "the allowance of

interest on a judgment against a county is not a contract by the county to pay interest, and does not violate section 1, art. 16, of the constitution, which forbids counties to issue any interest-bearing evidences of indebtedness." That a judgment against a county bears interest, whether mentioned in the judgment or not, at the rate of 6 per cent. per annum (sections 4740, 4741, Mansfield's Digest; sections 5082, 5083, Sandels & Hill's Digest), unless the judgment is rendered upon a contract for more than 6 per cent. when it will bear the rate of interest the contract bore (when it does not exceed 10 per cent., the lawful conventional rate, of course). Interest allowed on a judgment, where not stipulated for in the contract sued upon, is not by virtue of a contract, but is by operation of law, and in the nature of a penalty for delay in payment of the principal, after it becomes due.

By act approved the 21st of March, 1893, it is provided "that no judgment rendered or to be rendered against any county in the state, on county warrants, or other evidences of county indebtedness, shall bear any interest after the passage of this act." Sections 5082, 5083, Sandels & Hill's Digest. The appellant thinks this act violates sec. 17 of art. 2, of the constitution, which provides that no *ex post facto* law, or law impairing the obligation of contracts shall ever be passed, and the portion of sec. 8, art. 2, of the constitution which provides that no persons "shall be deprived of life, liberty or property without due process of law." These provisions are also contained in the constitution of the United States. In the case of *Morley* v. *Lake Shore, etc., Railway Company,* 146 U. S. 162, is to be found a case in point. It is as follows: "The court of appeals of the state of New York having held that a judgment obtained before the passage of the act of the legislature of that state of June 20, 1879, reducing the rate of interest (Sess. Laws 1879, c. 538), is not a contract or obligation excepted from its operation under the provisions of § 1, this court accepts that construction as binding here."

"The provision in sec. 10 of art. 1 of the constitution of the United States that no state shall pass 'any law impairing the obligation of contracts' does not forbid a state from legislating, within its discretion, to reduce the rate of interest upon judgments previously obtained in its courts; as the judgment creditor has no contract whatever in that respect with the judgment debtor, and as the former's right to receive, and the latter's obligation to pay, exists only as to such amount of interest as the state chooses

to prescribe as a penalty or liquidated damages for the nonpayment of the judgment."

"A state statute reducing the rate of interest upon all judgments within the courts of the state does not, when applied to one obtained previous to its passage, deprive the judgment creditor of his property without due process of law, in violation of the provisions of sec. 1 of the fourteenth amendment to the constitution of the United States." This decision is satisfactory to us, and fully answers the appellant's contentions.

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

RICHARDSON v. BOYD.

Opinion delivered June 8, 1901.

CONTINUANCE—ABSENCE OF DEFENDANT—DISCRETION.—Where defendant and his leading counsel were absent from the trial because they were misinformed by plaintiff as to the day set for the hearing, and defendant was an important witness, it was an abuse of discretion to refuse a postponement for one day, in order that defendant and his counsel might be present.

Appeal from Sevier Circuit Court.

WILL P. FEAZEL, Judge.

This was an action by R. A. Boyd against D. C. Richardson. The cause was set for trial on Wednesday of the second week of court, in the absence of defendant and his counsel, but plaintiff informed defendant's junior counsel that the cause was set for Thursday of the second week of court, and the latter notified defendant and his leading counsel. Afterwards plaintiff informed defendant's junior counsel that he had been mistaken, and that the cause was set for Wednesday, instead of Thursday, but it was then too late to get word to defendant and his leading counsel in time for them to be present. When the cause was called on the day set, defendant's junior counsel set up the foregoing facts, and asked a postponement until the following day, alleging, in addition, that there were facts essential to the defense which no

one but defendant could prove. The court overruled the motion, stating that counsel for defendant should not have relied upon the information received from plaintiff. There was judgment for plaintiff, from which defendant has appealed.

L. A. Byrne, for appellant.

It was an arbitrary abuse of discretion for the trial court to deny appellant's motion for continuance; and in so doing the court committed reversible error. 21 Ark. 460; 40 Ark. 114.

WOOD, J. The non-attendance of the defendant (appellant) and his leading counsel, it appears, was because of a misapprehension of facts caused by the statement of the plaintiff (appellee) which was believed and acted upon, and which was incorrect. To force the trial in the absence of the defendant and his leading counsel under such circumstances would be enabling the plaintiff to gain an unjust advantage through his own wrong. It matters not, in the result to the defendant, whether the wrong was intended or not. Without entering fully into the merits of the controversy, it is easy to see that the defendant had not only reason for being present himself in person, but needed the assistance of his leading counsel. The refusal of the court to grant a continuance, or at least a postponement of the trial, under the circumstances, for a short time, to allow an opportunity for the defendant and his leading counsel to be present was, we think, an unreasonable exercise of the court's discretion, which should be corrected by a reversal of the judgment and a new trial. It is so ordered.

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

69 369
87 586

Opinion delivered June 8, 1901.

CARRIER—UNLIGHTED PLATFORM—NEGLIGENCE.—At the intersection of the Searcy and the Iron Mountain railroads the former road built a platform as an approach to its trains, which was reached from its cars by a gang plank and from the ground by an incline. The platform was about 35 feet from the Iron Mountain depot, and was built without the latter road's permission, though it was used by passengers in transferring from one road to the other. Plaintiff

arrived in a coach over the Searcy road in the night time, intending to transfer to the other road. As there was a light and fire in the Searcy coach, plaintiff, by permission of the conductor, remained there, it being cold and dark outside. When plaintiff first arrived, there was a light on the platform, but it was extinguished before he left. On hearing an approaching train, plaintiff walked out, and, in attempting to descend the incline, fell and was injured. *Held*, that plaintiff was not guilty of contributory negligence in not leaving the coach while the platform was lighted.

Held, also, that the Searcy railroad was negligent in not keeping its platform lighted.

Held, further, that the Iron Mountain railroad was not liable as a joint tort-feasor.

Appeal from Pulaski Circuit Court.

JOSEPH W. MARTIN, Judge.

STATEMENT BY THE COURT.

The Searcy & West Point Railroad, which we will designate as the "Searcy Road," intersects at right angles with the Iron Mountain Railroad at a station on the Iron Mountain called Kensett. The Iron Mountain road was built first. Within the angle of the intersection of the two roads a platform was erected by the Searcy road, on the right of way of both roads. It stood about six feet west from the track of the Iron Mountain, and about three feet north of the track of the Searcy road. It was three and one-half or four feet high, twelve feet wide and thirty-seven feet long. It stood about on a level with the platform of the cars of the Searcy road, and was reached from said cars by a gang plank. It was about thirty-five feet from the station house of the Iron Mountain road. The cinder platform or ground between the elevated platform and the station house was reached from the elevated platform by an incline about sixteen feet long and six and one-half feet wide. This incline was at the east end of the elevated platform, and situated diagonally across from the east end of the Searcy coach. It was in evidence that the elevated platform was built by the Searcy road for its own use and convenience. The Searcy road did not have affirmative permission of the Iron Mountain to erect the platform, but it was built without objection from the Iron Mountain. The Iron Mountain knew the platform was there. Sometime before the accident it had given directions to the Searcy road to have the platform removed. The same was

not removed, however, until sometime after the accident. The reason given by the officers of the Iron Mountain for wanting the platform removed was because of its unsightliness. Passengers on the Iron Mountain road who were intending to go to Searcy over the Searcy road without break in their journey had to reach the coach of the Searcy road by way of the elevated platform and the incline thereto. Likewise, passengers on the Searcy road who intended to take the Iron Mountain train at Kensett, on continuous journey, passed over this platform and the incline thereto to the cinder platform and the station house of the Iron Mountain. It was the only route for such passengers,—at least the natural and usual route. The Searcy road's cars were drawn by a mule. The road ran from Searcy to Kensett.

On the night of January 21, 1898, appellee, a citizen of Little Rock, being at Searcy, took the Searcy road for Kensett, intending to go thence, without break in his journey, to Little Rock over the Iron Mountain road. The Searcy train left Searcy at about the usual hour (10:45 p. m.), and arrived at Kensett at about 11:40 p. m. The Iron Mountain train which Battle expected to take was due at Kensett at 12:03 a. m., but was somewhat belated. Appellee and other passengers, after arriving at Kensett, remained some fifteen or twenty minutes on the Searcy coach, when, hearing the sound of an approaching engine, and supposing it to be the train desired, they passed out of the Searcy coach at the east end, onto the elevated platform; and appellee, in attempting to reach the incline and descend to the cinder platform or ground, fell and was severely injured. He sued the appellants, alleging that his injuries were caused by the negligent construction and use, and permitting the maintenance and use, of a dangerous platform and approaches thereto, and by the failure to keep the platform and approaches thereto lighted at night for the safety and convenience of persons arriving and departing on the respective trains of appellants.

The separate answer of appellants denied the negligence charged, and set up the contributory negligence of appellee. Other facts will be stated in the opinion.

Dodge & Johnson, for appellant, St. Louis, etc., Ry. Co.

Appellee was guilty of negligence, such as bars recovery. 149 Pa. St. 65; Ray, Neg. Imp. Duties, 387. Only ordinary care in lighting its platforms is required of a railroad company. 84 Ala.

159; 64 N. W. 766; 8 Houst. 529; 112 N. Y. 443; 107 N. Car. 576. A passenger not using the approach in the ordinary and usual way, and while same was safely lighted, cannot hold the carrier to extra vigilance to guard against accidents occasioned by his voluntary delay. 106 N. Y. 136; 51 Mich. 601; 32 Minn. 390; 4 Elliott, Railroads, § 1590. There was no joint liability, and no judgment should have been had against the Iron Mountain company. 119 Ind. 583; 13 Ill. App. 437; 31 *ib.* 596; 110 Ill. 294; 2 Hilliard, Torts, 248; 26 Pa. St. 482. If there is any liability, it rests upon the first carrier, the appellee not having been discharged, as its passenger, when the accident happened. 36 N. W. App. 669; 23 S. W. 737; 142 Mass. 251; 154 Pa. St. 364; 15 N. Y. Supp. 579; 22 S. W. 242; 30 S. W. 592; 100 Mass. 208.

Further, as to rules governing joint liability of railroads, see: Hutch. Carr. § 515; 58 Am. & Eng. R. Cas. 594; 22 N. Y. 258; 58 Fed. 762; 3 Biss. 43.

Grant Green, Jno. T. Hicks and *R. A. Dowdy,* for appellant, Searcy & West Point Railroad Company.

The evidence fails to show any custom which would bind appellant to continue the lights on the platform until the arrival of the Iron Mountain train. 27 Am. & Eng. Enc. Law, 717; 62 Ark. 33. The conductor had no authority to permit appellee to remain in the car; and the objection to the evidence on that point should have been sustained. 27 S. W. 496; 97 Mich. 154; 96 Pa. St. 201; 78 Ind. 292; 4 Am. & Eng. R. Cas. 602; 48 Miss. 112; 1 Sh. & Redf. Neg. § 147; 55 Kan. 586. *Cf.* 40 Ark. 298; 53 Ark. 298; 58 Ark. 318; S. C. 24 S. W. 500; Mech. Ag. 706-710; 18 Wis. 185; 94 Mo. 255; 27 L. R. A. 161; Thomp. Neg. 459; 42 Kan. 465.

J. W. House, for appellee.

Railroad companies are required to keep in a reasonably safe condition all portions of their platform and approaches thereto to which passengers or those coming to take passage would naturally resort, and especially all such platforms and approaches as have been constructed and used, or permitted so to be, by the company. 37 Ark. 519; 46 Ark. 195; 48 Ark. 125; 65 Ark. 255; 26 Ia. 124; 2 Am. & Eng. R. Cas. 497; 13 *id.* 29; 18 *id.* 153; 27 *id.* 137; Ell. Railroads, § 1641; 35 Am. & Eng. R. Cas. 476. It is the duty of railroad companies to have their platforms and approaches

adequately lighted at night, and for failure to do so they are liable for injuries occasioned thereby. 49 Ark. 279; 18 Am. & Eng. R. Cas. 153; 34 La. Ann. 777; 8 Del. 529; Thomp. Carr. 108; Ray, Neg. Imp. Duties, Pass. 90, 91. The rule applies as well to persons coming to take passage as to persons departing. Hutch. Carr. § 516; Ray, Neg. Imp. Dut. 97; 36 Fed. 72; 48 Ark. 491. Appellee, having remained in the coach with the assent of the conductor, was guilty of no negligence in so doing. 86 Pa. St. 139; 37 Ark. 519; 47 Am. & Eng. R. Cas. 573; 25 Fed. 627; 66 N. Car. 499; Whart. Neg. § 371; Whitt. Smith, Neg. § 371. Appellants are joint tort-feasors and are jointly or severally liable. 16 Am. & Eng. Enc. Law, 471; 35 Pa. St. 128; 19 Am. St. Rep. 755; 129 Ill. 152; 105 Ill. 364; 45 N. Y. 628; 39 Minn. 328; 16 Am. St. Rep. 250; Patt. Ry. Acc. Law, § 224; Ray, Passenger Carr. 121; 122, 152; Hutch. Carr. 515 *a;* L. R. 6 Q. B. 73; 59 Me. 187; 99 Mass. 217; 53 Kan. 431; 152 Pa. St. 334; 56 Kan. 559; Bish. Non-Contr. Law, §1086; 19 C. B. (N. S.), 183; 34 La. Ann. 777; 40 N. E. 807; 35 Pa. St. 128; 110 Ill. 294, 301; 21 Cal. 381; 13 Ill. App. 439; 119 Ind. 590; 120 Ind. 205; 3 Biss. 45; 30 S. W. 278; 1 Sh. & Redf. Neg. § 345; 3 Allen, 405.

WOOD, J., (after stating the facts). 1. Considering first the question of contributory negligence, the proof shows that Battle was not very familiar with the platform and its incline, having passed over it only once before. On the occasion in question, when the train whistled which they supposed to be the one desired, Battle put on his overcoat, gathered up his valise in his left hand, with umbrella in his right, and walked out of the car (first feeling with his umbrella for the gang plank) onto the platform, still using his umbrella as a guide to feel his way until he fell. There was not sufficient light to enable him to see the platform or the incline at the time he made his exit. But the proof tended to show that for ten minutes after the arrival of the Searcy train the platform was sufficiently lighted to have enabled Battle to pass out safely, and it is insisted that he was guilty of contributory negligence in not passing out during that time. The proof tended to show a custom for passengers who did not intend to buy tickets, and had no baggage to check, to remain on the Searcy coach until the arrival of the Iron Mountain train which they desired to take. Battle and the other passengers were invited by the driver and conductor of the mule car to remain on the Searcy coach, as there

was no night porter at the depot who kept up the fires. True, the driver of the mule car testified that he did not think he notified the passengers to remain on his coach, but he does not say that he did not do so. There is positive proof by other witnesses that he did invite them to remain, and the driver himself testified on this point as follows: "I remember Mr. Battle speaking to me, if I wanted them to get out, so I could go to sleep. I told them that I did not aim to go to sleep. That was just before I went into the depot." The Searcy road had no station house of its own. The only waiting place for its passengers was therefore its car. It was shown that it usually arrived at Kensett before the Iron Mountain train with which it made connection, perhaps as much as twenty minutes. We do not think the conductor, who had entire charge of the Searcy coach, and was the only representative of his company on the ground, and stood for it for all purposes, so far as the duty to passengers was concerned at Kensett, exceeded his apparent or real authority in inviting the passengers to remain on his coach until the arrival of the Iron Mountain train, which they were expecting to take.

Even in the absence of any custom or positive invitation to remain, the passengers were invited by the very surroundings to remain on the Searcy coach, if they so desired, until the arrival of the Iron Mountain train which they expected to take. It was cold and dark on the outside, the fires were not kept up in the station house of the Iron Mountain. The Searcy coach had a fire, and was comfortable. It expected to await the arrival of the Iron Mountain train. Only about fifteen or twenty minutes intervened. There was no rule of the company forbidding its passengers to remain while awaiting the arrival of the Iron Mountain train. In the absence of such rule, and with no other waiting room provided for its passengers by the Searcy road, we know of no rule of law that would force them from the only comfortable waiting place provided. The instructions of the court on all these points was therefore more favorable to the Searcy road than it had the right to expect. The verdict acquitting Battle of contributory negligence was amply sustained by the proof.

Was the Searcy road liable? It was its plain duty to exercise ordinary care to have its platform and the incline or approach thereto sufficiently lighted to enable its passengers and those intending to become its passengers to enter upon and depart from its

trains with reasonable safety. *Fordyce* v. *Merrill,* 49 Ark. 277; Thompson, Carr. Passengers, 108.

The light should be maintained a reasonable time before and after the arrival and departure of trains. A finding of negligence for failing to keep the platform lighted for fifteen or twenty minutes, under the circumstances of this case, cannot be considered unreasonable. The Searcy & West Point Railroad failed to discharge the duty which it owed to the appellee in this regard, and is therefore liable. We find no error in the charge of the court of which it can complain, and the judgment as to it is affirmed.

2. The court, by a majority of its judges, has concluded that, under the facts as stated, the Iron Mountain is not liable, and that as to it the judgment must be reversed, and the cause remanded for new trial. From the decision and judgment holding the Iron Mountain not liable, and reversing and remanding the cause as to it, Justice RIDDICK and I dissent. We are of the opinion that the elevated platform and its incline is a necessary approach to the platform and station house of the Iron Mountain road at Kensett. This by reason of its necessary and usual, if not unavoidable, use by its passengers who intend to go to Searcy over the Searcy road in continuous journey, and likewise by passengers of the Searcy road who intend to become passengers of the Iron Mountain road. By reason of its contiguity to the platform and station house and the necessary use as indicated, it was an approach to the platform of the Iron Mountain road, as well as the Searcy road, and devolved upon the Iron Mountain the common duty with the Searcy road of exercising care to keep it reasonably safe for passengers, which duty could only have been discharged by lighting the platform for a reasonable time before and after the arrival and departure of its trains. It was immaterial that the platform was erected by another and without its affirmative permission. It was its right and duty to object to a dangerous agency being placed in such proximity to its platform and station house as to become a necessary approach to its trains by certain of its patrons, and its failure to object and to take steps to remove was tantamount to assent or concurrence, so far as the law is concerned, in fixing duties and liabilities.

The facts of this case in our opinion make the Iron Mountain a joint tort feasor with the Searcy road; and the principle of law applicable is correctly and concisely stated in 16 Am. & Eng. Enc. Law, 471, as follows: "Where a breach of duty is committed by

more than one person, each contributing to the injury as a joint tort-feasor, the plaintiff has his election to make either or all of them defendants. And it is not always essential, in order to make them liable as joint tort-feasors, that they should have acted in concert; acting independently and causing together a single injury, they are liable jointly and severally."

The judgment should be affirmed against both appellants.

DOBSON v. STATE.

Opinion delivered June 8, 1901.

CONSTITUTIONAL LAW—JURISDICTION OF COUNTY COURT—BASTARDY.—Act of November 29, 1875, as amended March 17, 1879, providing that the county court shall have exclusive original jurisdiction in bastardy cases, and that "when the case is ready for trial, if the accused denies being the father of such child, the court or judge shall hear the evidence and decide the case as other issues at law," etc., is not void, as conferring upon the county judge, as distinguished from the county court, the authority to hear bastardy cases, in violation of Const. 1874, art. 7, § 28, giving to the county court exclusive jurisdiction in such cases; the words "court" and "judge" in the act being synonymous.

Appeal from Independence Circuit Court.

JAS. W. BUTLER, Special Judge.

STATEMENT BY THE COURT.

Thomas Dobson was convicted of being the father of a bastard child at a trial by jury had before the county judge of Independence county. Judgment was rendered against him in favor of the mother of the child for the sum of $12.50 for lying-in expenses, and the further sum of $1.50 per month from the birth of the child until it should attain the age of seven years; and he was ordered to give bond for the payment of such monthly dues and for indemnity to the county as required by statute. The trial did not take place at a regular or adjourned term of the county court, but on a day appointed by the county judge in vacation. Afterwards the defendant filed a petition in the circuit court alleging

that the judgment was void, and asking that the same be quashed. A writ of *certiorari* was thereupon granted by the circuit judge, and a transcript of the proceedings and judgment of the county court was brought before the circuit court for review. But the circuit court, being of the opinion that the judgment of the county court was valid, affirmed the same, and dismissed the petition. Dobson appealed.

J. C. Yancey, for appellant.

Under the constitution the county court has "exclusive original jurisdiction in all matters relating to bastardy." Const. art. 7, § 28; act November 29, 1875. The act of 1879 is not constitutional. A *court* is not a *judge,* nor *vice versa.* 158 U. S. 285; 87 Ga. 330; 18 Civ. Rep. 186; 22 Nev. 280. The meeting of the court and officers at a time a place other than that fixed by law was not a *court,* and their acts were *coram non judice.* 2 Ark. 228; 20 Ark. 77; 22 Ark. 123; 22 Ark. 371; 25 Ark. 208; 27 Ark. 353; 32 Ark. 687; 49 Ark. 230; 60 Ark. 155.

H. S. Coleman, for appellee.

The act of 1879 is not unconstitutional. *Cf.* 45 Ark. 58; 55 Ark. 387; 61 Ark. 409.

RIDDICK, J., (after stating the facts). The only question raised by this appeal is whether the act of 1879 regulating proceedings in cases of bastardy is a valid and constitutional statute. The constitution of the state gives the county courts exclusive original jurisdiction in all matters relating to bastardy. Const. 1874, art. 7, § 23. The legislature in 1875 passed an act regulating the procedure before the county courts in such cases. Among other matters, this act provided that if a complaint charging any person with being the father of a bastard child should be made before the county judge in vacation, the judge should issue his warrant commanding the officer to have the accused person before the next term of the county court held thereafter. Act November 29, 1875, § 2. The act of 1879 under consideration amended this statute of 1875, and provided that, upon such complaint being filed before the county judge in vacation, he should issue his warrant "commanding the officer to have the person accused before the judge at any time that may be fixed by the judge in said warrant for the trial." Act March 17, 1879, p. 96. It is contended by appellant that this act is void for the reason that it attempts to confer upon the county

judge in vacation, as distinguished from the county court, the right to hear and determine bastardy cases. The language of the act certainly furnishes ground for this contention, and at first thought we did not clearly see how this construction of the statute could be avoided. But further consideration has changed our opinion, and convinced a majority of us that the statute should be upheld.

It is a well known rule that statutes are presumed to be framed in accordance with the constitution, and should not be held invalid for repugnance thereto, unless such conflict be clear and unmistakable. Black, Const. Law, § 35. "In the exposition of a statute it is the duty of the courts to seek to ascertain and carry out the intention of the legislature in its enactment, and to give full effect to such intention; and they are bound, when practicable, so to construe the statute as to give it force and validity, rather than to avoid it or render it nugatory." Cooley, Const. Lim. (6th Ed.), 219.

Now, while it is true that the author of this statute, judging from the language used, does not appear to have had a very clear conception of the distinction between the powers of a judge and a court, yet these words are often used as convertible or interchangeable terms. The judge is sometimes spoken of as the court, and again the court is referred to as the judge. *The Michigan Central R. Co.* v. *Northern Ind. R. Co.*, 3 Ind. 240. It may not be very accurate to use such words in that way, but if this act can be upheld by treating the word "judge" as meaning "court" when the act speaks of a trial before the county judge, and intends that he should exercise the powers of a court, we think it should be done, for in that way the intention of the legislature in enacting the statute can have effect. The legislature clearly had the power to authorize county judges to hold special terms of the county courts for the purpose of trying bastardy cases at such times as might be specified by the judge, and of which the accused and other parties were notified, and this is exactly what the statute under consideration means if we give it the construction above suggested.

That this is a correct construction of the statute appears, we think, from a consideration of the act of 1875 in connection with the amendatory act of 1879. The first section of act of 1875 declares that county courts shall have exclusive jurisdiction of bastardy cases. The act of 1879 does not change this section, and the act as amended still declares that exclusive jurisdiction in such

cases belongs to such courts. It provides for an appeal from a judgment of the county court, not from the judge; thus showing that the legislature was not intending to confer jurisdiction to try cases upon any other than the county court. Though the words "judge" and "court" are used rather loosely in the amendatory act, yet there is language in that act indicating that the legislature intended that such cases should be tried by a court. For instance, section 3 of the act provides that when the case is ready for trial, if the accused denies being the father of such child, the court or judge shall hear the evidence, and decide the case as other issues at law; but if a jury is demanded by the accused, the court shall order a jury to be summoned, who shall be elected, impaneled, and sworn to try the issues joined, and a true verdict render according to evidence, as in other cases at law. If it is found by the court or the verdict of a jury that the accused is the father of the child, the court shall render judgment for lying-in expenses and costs, etc. Act March 17, 1879, § 3. This language shows that upon a finding of guilt "the court" was to render judgment. It is true that, farther on, the same section provides that, if claimed by the mother, the "court or judge" shall render judgment for a monthly support. But this does not justify the courts in annulling the act; for, reading the original and amended act together, it is clear that the object of the legislature in making this amendment to the law of 1879 was not to deprive county courts of exclusive jurisdiction in bastardy cases, but to expedite the trial of such cases. The purpose was in that way to prevent the fathers of such offspring from escaping their share of responsibility, and to compel them to shoulder the burden and pay the necessary expenses without delay.

While the act is not a model, so far as clearness or accuracy in the use of language is concerned, we think it is not void. The effect of the amendatory act, as we feel compelled to construe it, was to authorize county judges to hold special terms of the county court for the trial of bastardy cases on any day named by them of which the accused was notified, and where he has reasonable opportunity to prepare for his defense. In this view of the statute, the judgment of the circuit court was correct, and it is therefore affirmed.

BUNN, C. J., and BATTLE, J., dissent.

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ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY *v.* TOWNSEND.

Opinion delivered June 15, 1901.

1. ACTION FOR NEGLIGENT KILLING—BURDEN OF PROOF.—In an action against a railroad company for negligently killing plaintiffs' intestate the burden is on plaintiffs to prove that the killing was due to defendant's negligence. (Page 382.)

2. KILLING BY TRAIN—PRESUMPTION.—Upon proof that deceased was killed by defendant's train, the statutory presumption arises that his death was due to the defendant's negligence. (Page 382.)

3. CONTRIBUTORY NEGLIGENCE AS DEFENCE.—Although one killed by the train of a railway company upon its track is presumed to have been killed by the company's negligence, no recovery can be had therefor if the deceased was guilty of contributory negligence in being upon the track, unless his situation was discovered by the trainmen in time to avoid killing him. (Page 382.)

4. SAME—BURDEN OF PROOF.—In an action against a railroad company for negligently killing plaintiffs' intestate upon its track, where it is shown that intestate was guilty of contributory negligence in being upon the track, the burden is upon the plaintiffs to show that the defendant's employees discovered intestate upon its track in time to avoid injuring him, and willfully and recklessly killed him, unless it is shown by the evidence adduced by defendant. (Page 382.)

5. DAMAGES—ABSTRACT INSTRUCTION.—It was error to instruct the jury, in an action for negligently killing plaintiffs' father, that the jury might consider the damages sustained by the plaintiffs in the loss of their father's moral and intellectual training if there was no evidence that they would have had the benefit of such training in the event he had lived. (Page 384.)

Appeal from Sebastian Circuit Court.

STYLES T. ROWE, Judge.

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

The court should have instructed the jury peremptorily for appellant. 62 Ark. 156; 49 Ark. 257; 47 Ark. 497; 36 Ark. 371. The first instruction given by the court was erroneous, in that it cast the burden on appellant to show: (1) That a constant lookout was kept. 65 Ark. 429, 434, 436; 36 Ark. 371-5; 47 Ark.

497; 49 Ark. 257; 61 Ark. 617; Beach, Contr. Neg. §§ 197, 201, 391-2; 3 Ell. Railroads, §§ 1165, 1175, 1254; 62 Ark. 619, 624. (2) That deceased was guilty of contributory negligence. 46 Ark. 182-193; 48 Ark. 106, 103; 61 Ark. 549, 555; 2 Rorer, Railroads, 1059, 1061. (3) "That it used a proper degree of care after becoming aware of the negligence on the part of the deceased." 49 Pa. St. 192; 8 Kan. 651; 57 Ark. 203. In order to authorize an instruction that a child may recover for the loss of intellectual and moral training caused by the killing of a parent, there must be proof that the parent was capable of instructing intellectually and morally. Tiff. Death by Wrongful Act, § 162, note; 18 Ill. App. 28; 52 Ill. 290; 69 Ill. 426. *Cf.* 57 Ark. 306, 314. Deceased was guilty of such contributory negligence as bars recovery. 12 Am. & Eng. R. Cas. (N. S.), 343; 12 Am. & Eng. R. Cas. 77; 19 *id.* 95; 47 Ark. 497; 52 Ark. 120; 62 Ark. 235; *id.* 245; Beach, Contr. Neg. §§ 197, 201, 391, 392; 3 Ell. Rys. § 1254; 2 Rorer, Railroads, 1059, 1061; 60 Am. & Eng. R. Cas. 159.

Winchester & Martin and *Mechem & Bryant,* for appellees.

The instruction as to the burden of proof of lookout was not erroneous; but even if it had been, taken in connection with the other instructions given, it could not have misled the jury, and is not reversible. 2 Th. Tr. § 2401; 56 Ark. 602; 65 Ark. 624; 65 Ark. 432; 62 Ark. 235; *id.* 164. The killing being shown to have taken place on the track of the railway company, the presumption arises of negligence on the part of the company. 65 Ark. 235; Sand. & H. Dig., § 6349; 33 Ark. 316; 49 Ark. 535; 39 Ark. 413; 42 Ark. 122; 47 Ark. 321; 53 Ark. 96; 54 Ark. 214; 52 Ark. 402; 51 Ark. 136; 59 Ark. 140; 57 Ark. 192.

BATTLE, J. R. B. Townsend was killed by a train of the St. Louis & San Francisco Railroad Company, while he was lying on its track. Flora Townsend, the widow of the deceased, for herself, and as next friend of his and her children, brought this action against the railroad company to recover the damages suffered by them by reason of his death. In the trial that followed little evidence, if any, was adduced to prove that the railroad company discovered the deceased upon its track in time to avoid killing him. The plaintiffs, however, recovered a judgment against the defendant for $1,999, and the defendant appealed.

After the introduction of the testimony in the case, the court instructed the jury that tried the issues in part as follows:

"The burden is on the defendant to show that a constant lookout was kept; yet where that is shown to have been done, and where it is also shown that the deceased has been guilty of contributory negligence, and the defendant used a proper degree of care, after becoming aware of the negligence on the part of the deceased, to have avoided the killing, then the burden is on the plaintiff to show when defendant's servants discovered the condition of deceased, or under what state of facts they did discover his condition as to being unable from intoxication or other causes to have gotten off the track."

The burden of proving the facts necessary to show that the deceased was killed on account of the negligence of the appellant and the damages suffered by them rested upon the appellees. When it was shown that he was killed by a train of appellant upon its track, the presumption was that his death was the result of the negligence of the railroad company. *Little Rock & Fort Smith Railway Co.* v. *Blewitt,* 65 Ark. 233. While this fact was proved, the effect of it was avoided by showing that the deceased was lying upon the track of the railroad at the time of his death. *St. Louis, Iron Mountain & Southern Railway Co.* v. *Leathers,* 62 Ark. 235. He was thereby shown to have been instrumental in causing his own death, and he would not have been killed if he had not been guilty of negligence. It was not incumbent upon the appellant to show that it did not discover his presence upon its track in time to avoid injuring him. By proving that the deceased was guilty of contributory negligence, it established a sufficient defense to bar recovery by the appellees, unless other facts were shown. It was not necessary for it to prove additional facts to exonerate itself from liability until the effect of the contributory negligence was overcome. This being true, it is clear that the burden was upon the appellees to show that the appellant discovered the deceased upon its track in time to avoid injuring him, and willfully and recklessly killed him, unless it was already shown by the evidence adduced by the appellant. *St. L., I. M. & S. R. Co.* v. *Jordan,* 65 Ark. 429, 436; *Texas, etc., R. Co.* v. *Hare,* 23 S. W. Rep. 42; *Lee* v. *De Bardeleben Coal, &c., Co.* 102 Ala. 628.

In *Little Rock & Ft. S. Railway Co.* v. *Pankhurst,* 36 Ark. 371, *St. Louis, I. M. & S. Railway Co.* v. *Ledbetter,* 45 Ark. 250, *Little Rock, M. R. & T. Railway* v. *Haynes,* 47 Ark. 497, *St. Louis, I. M. & S. Railway Co.* v. *Monday,* 49 Ark. 257, *Sibley* v. *Ratcliffe,* 50 Ark. 483, *St. L., I. M. & S. Ry. Co.* v. *Taylor,* 64 Ark. 364, and

Little Rock Traction & Electric Co. v. *Nelson,* 66 Ark. 494, this court in effect held that a railroad company owes no duty to a trespasser on its track or trains except the negative duty not to wantonly, recklessly, or willfully injure him after it or its employees discover his presence. In *St. Louis, Iron Mountain & Southern Railway Company* v. *Freeman,* 36 Ark. 46, it is said: "It is a plain principle of law that no railway company nor other person can be held liable for negligence when the plaintiff, by his own negligence, has contributed to the injury, unless it was a willful injury, or one resulting from the want of ordinary care on the part of the defendant to avert it after the negligence of the plaintiff had been discovered." Such a failure to use ordinary care to avoid injuring the plaintiff after his situation has been discovered rises to the grade of wanton or reckless conduct, and renders immaterial the inquiry as to the contributory negligence of the plaintiff in exposing himself to injury.

In *Georgia Pacific Railway Company* v. *Lee,* 92 Ala. 270, which was an action for injury to a wagon and team caused by a collision therewith of a train of the railway company, the court said: "The true doctrine, and that supported by many decisions of this court, as well as the great weight of authority in other jurisdictions, is that notwithstanding plaintiff's contributory negligence he may yet recover if, in a case like this, the defendant's employees *discover the perilous situation in time to prevent disaster by the exercise of due care and diligence, and fail, after the peril of plaintiff's property becomes known to them as a fact,*—and not merely after they should have known it,—*to resort to all reasonable effort to avoid the injury.* Such failure, with such knowledge of the situation, and the probable consequences of the omission to act upon the dictates of prudence and diligence to the end of neutralizing plaintiff's fault and averting disaster, notwithstanding his lack of care, is, strictly speaking, not *negligence* at all, though the term 'gross negligence' has been so frequently used as defining it that it is perhaps too late, if otherwise desirable, to eradicate what is said to be an unscientific definition, if not indeed a misnomer; but it is more than any degree of negligence, inattention or inadvertence, —which can never mean other than the omission of action without intent, existing or imputed, to commit wrong—it is recklessness, or wantonness, or worse, which implies a willingness to inflict the impending injury, or a willfulness in pursuing a course of conduct which will naturally or probably result in disaster, or an intent

to perpetrate wrong. The theory of contributory negligence, as a defense, is that, conjointly with *negligence* on the part of the defendant, it conduces to the damnifying result, and defeats any action the *gravamen* of which is such negligence. If defendant's conduct is not merely negligent, but worse, there is nothing for plaintiff's want of care to contribute to; there is no lack of mere prudence and diligence of like kind on the part of defendant to conjunctively constitute the efficient cause. Mere negligence on the one hand cannot be said to aid willfulness on the other. And hence such negligence of a plaintiff is no defense against the consequences of the willfulness of the defendant. But nothing short of the elements of actual knowledge of the situation on the part of defendant's employees, and their omission of preventive effort after that knowledge is brought home to them, when there is reassonable prospect that such effort will avail, will suffice to avoid the defense of contributory negligence on the part of, or imputable to, the plaintiff."

This doctrine is also applicable to cases like the one at bar. It being true, it more clearly appears that the burden was upon the appellees to show that appellant discovered the perilous situation of the deceased in time to have avoided injuring him, and that it failed to use ordinary care to avert the injury. The foregoing instruction was therefore erroneous, in this, that it told the jury that the burden was upon the defendant (appellant) to prove that the deceased was guilty of contributory negligence, and that it used a proper degree of care, after becoming aware of such contributory negligence, to have avoided killing him.

The circuit court also erred in instructing the jury as follows: "If you find for plaintiffs, you are instructed that in estimating the pecuniary injury, if you believe from the evidence that the widow and children of R. B. Townsend, deceased, have sustained an injury for which the defendant is liable, you have a right to take into consideration the support of the said widow and the minor children of said deceased, and the damages, if any, sustained by the minor children by the loss of the instruction and physical, moral and intellectual training of said minor children by the deceased, and also the ages of the said minor children in determining the amount of damages." It is erroneous, because it told the jury that they might take into consideration "the damages, if any, sustained by the minor children by the loss of the * * * moral and intellectual training * * * by the deceased."

These are proper elements to consider in estimating the pecuniary loss sustained by children by the death of their father in cases where there is any evidence to show that they would have had the benefit of such training in the event he had lived, but in this case there is no such evidence. "There was no proof tending to show that the deceased was fitted by nature or education, or by disposition, to furnish to his children * * * moral * * * or intellectual training." In the absence of such evidence the instruction should not have been given. *Illinois Central Railroad Company* v. *Weldon*, 52 Ill. 290; *Chicago, Rock Island & Pacific Railroad Co.* v. *Austin*, 69 Ill. 426.

Reversed and remanded for a new trial.

GIBSON v. HARRISON.

Opinion delivered June 15, 1901.

1. DOG TAX—VALIDITY.—A municipal ordinance imposing an annual tax of $1.50 on dogs, subjecting their owners to a fine for non-payment thereof, and providing for the killing of dogs upon which the tax is unpaid, is a valid police regulation, under Sand. & H. Dig., § 5138, empowering municipal corporations "to prevent the running at large of dogs, and injuries and annoyances therefrom, and to authorize the destruction of the same, when at large, contrary to any prohibition to that effect." (Page 389.)
2. AGREED STATEMENT—OPINION AS TO LAW.—An admission in an agreed statement of facts, in a prosecution for failure to pay a dog tax, that the ordinance imposing the tax "intended to tax for revenue and not to regulate the running at large of dogs" is an expression of opinion, and is not binding on the court. (Page 392.)

Appeal from Boone Circuit Court.

E. G. MITCHELL, Judge.

J. W. Story and *B. B. Hudgins*, for appellant.

The ordinance is invalid because it fails to distinctly state the object of the tax. Const. Ark. art. 16, § 11; 30 Ark. 435. The ordinance does not provide for the levy or collection of the tax

pursuant to law. Const. Ark. art. 16, § 11; Sand. & H. Dig., §§ 5184, 5181, 6422. Appellee had only such taxing power as is expressly given it by the legislature. 30 Ark. 435; 54 Ark. 509; 33 Ark. 497; Cooley, Taxation, 678. The act of March 9, 1875, § 69 (Sand. & H. Dig., § 5181), contemplates the *levy and collection* of the dog tax in the same manner as other taxes provided for in Sand. & H. Dig., §§ 5181, 6422. Dogs are property and the subjects of *ad valorem* taxation. Hence the ordinance violates art. 16, § 5, of the constitution. *Cf.* 63 Ark. 643; 86 N. Y. 365; 78 Tex. 300; 25 S. W. 779; 45 S. W. 790; 1 McArthur, 53; 61 Ga. 573. The tax is levied for revenue, and not for regulation, and is hence invalid. 63 Ark. 643; 86 N. Y. 365; 25 S. W. 729; 45 S. W. 790; 1 McArthur, 53; 61 Ga. 573. As a police regulation purely, the ordinance would be invalid, because the amount of the tax is excessive. 34 Ark. 603; 43 Ark. 82; 52 Ark. 301.

Crump & Bailey, for appellee.

The requirement of the constitution as to uniformity of taxation applies only to state taxes. 13 Ark. 752; 44 Ark. 137; 46 Ark. 478, 480. The ordinance is valid as an exercise of police power. 14 S. W. 181; 166 U. S. 698; 103 Ill. 30; 79 Ind. 9, 41 Am. Rep. 599; 27 Ind. 62; *id.* 120; 7 Bush, 487; 46 Mich. 183, 41 Am. Rep. 159; 48 Mich. 306; 82 N. Car. 175; 31 Oh. St. 340, 48 Am. Rep. 459; 3 Tex. App. 489, 30 Am. Rep. 152; 75 Ga. 444; 58 Am. Rep. 476; Cooley, Taxation, 601, 602; 40 L. R. A. 520, 523. The amount of the tax is not unreasonable. 166 U. S. 698; 7 Bush, 487. *Cf.* 52 Ark. 301; 56 Ark. 374.

J. W. Story and *B. B. Hudgins*, for appellant, in reply.

Appellee is bound by the statement in the agreed statement of facts that the ordinance was a revenue measure. 34 Ark. 603; 43 Ark. 82; 52 Ark. 301.

BATTLE, J. On the 1st day of August, 1900, Knox Gibson was arrested, under a warrant issued by the mayor of the incorporated town of Harrison, for failing to pay a tax on a dog owned by him for the year 1900, after lawful demand for the tax. He was carried before the mayor, tried, convicted, fined $5, and ordered to jail, or to be worked on the streets of Harrison until discharged in due course of law, in default of the payment of the fine and costs. He appealed to the Boone circuit court, where he was tried by the court sitting as a jury, convicted, and fined in the sum of

$5. He has appealed to this court. His offense consisted in a violation of the ordinances of the incorporated town of Harrison in respect to dogs.

On the 10th day of May, 1899, an ordinance of the town was published, which is as follows: "An ordinance to tax dogs in the incorporated town of Harrison, Arkansas.

"There shall be collected on every dog owned and kept in the town of Harrison, over the age of six months, a tax of $1.50 per annum; the year therefor ending December 31. Every person owning or keeping such dog shall apply to the recorder of said town, and on payment of the sum of $1.50 shall receive a receipt for said sum, and shall be furnished with a collar and a tag showing that said sum has been paid. Every person keeping a dog or dogs subject to this tax in said town of Harrison, without paying such tax, shall be subject to a fine of not less than $5; provided, that no person shall incur this penalty until five days after they have been notified by the town marshal of their liability to pay said tax, and a failure thereafter to pay the same."

This ordinance was amended by ordinance published June 14, 1899, as follows:

"That where dogs are found about premises in said incorporation on which no tax has been paid as required by said ordinance, it shall be the duty of the marshal of said incorporated town of Harrison to verbally notify the person in charge of the premises to come forward within three days and pay said tax, and unless said person in charge of said premises shall disclaim any ownership in said dog by himself or any member of his family when so notified, or shall fail for three days after said notification to pay tax on said dog, he shall be guilty of a violation of this ordinance, and punishable as provided by said original ordinance.

"Be it further ordained, that, if the owner of said premises or person in charge thereof shall disclaim any interest in said dog or claim thereto by himself or any member of his family when notified by said marshal, then it shall be the duty of the marshal to employ some competent person who will take charge of said dog and keep him in some convenient place in the town of Harrison for the period of twenty-four hours, and if during that time no person will pay the tax on said dog, then it shall be the duty of the person so employed to kill said dog, and remove his carcass beyond the limits of said town.

"Be it further ordained, that it shall be the duty of the said marshal to contract with said person on the best and most reasonable terms that he can with reference to said impounding and killing said dogs at not exceeding 50 cents per head."

The ordinance was further amended in June, 1900, as follows: "Be it ordained by the town council of the incorporated town of Harrison, that,

"Section 1. It shall be the duty of the recorder of said town to procure the proper number of tags and collars for the dogs subject to taxation in said town, and that he shall furnish the same to all who apply on or before the 1st day of July, 1900, for such tag and collars at and for the sum of one dollar for each dog subject to tax in said town. After the said 1st day of July all persons shall be liable to pay the full amount of tax required by the original ordinance, to-wit: $1.50 for each dog subject to tax; provided, that where a dog is brought into town or becomes of the age for which tax is required after the said 1st day of July, 1900, he shall have fifteen days after said dog becomes subject to taxation in which to pay the said $1.00, and, failing to pay in said time, he shall be required to pay said sum of $1.50.

"Sec. 2. That the marshal shall, by and with the consent of the mayor, appoint some suitable person to collect the tax from those who fail to procure from the recorder the tag and collar aforesaid, or to take charge of and kill or otherwise dispose of said dog, for which he shall be allowed the sum of 50 cents for each tax so collected or each dog so killed or disposed of according to said ordinance."

The only evidence adduced in the trial of this cause in the circuit court was the foregoing ordinances and an agreed statement of facts as follows:

"Town of Harrison,

v.

"Knox Gibson.

"It is hereby agreed between the attorneys for the plaintiff and the attorneys for the defendant that at and before the issuance of the warrant of arrest in this case by the mayor of the incorporated town, the said Knox Gibson owned and kept in the limits of the town of Harrison a dog over six months of age; that he had failed to pay the tax provided for in the ordinance of said town; that he failed to pay the same on or before the first day of July, 1900; that he had been verbally notified for more than three days to come

forward and pay the tax on said dog, which he had failed and refused to do.

"It is further agreed that the ordinance is intended to tax for revenue, and not to regulate the running at large of dogs; that the expense of procuring the collar and the tag thereon would not exceed the sum of 20 cents."

There is a discrepancy between the ordinances and the agreed statement of facts. In the agreed statement of facts it is stated that the ordinances were intended to tax for revenue, and not to regulate the running at large of dogs, and the ordinances show that they were intended to regulate, and that the $1.50 or $1.00 was imposed as a fee for the privilege of keeping a dog. This fee was not to be collected as a tax. If the owner failed to pay it after demand, he was subject to a fine of not less than $5. Upon payment of the fee, he was furnished with a receipt for the same, and a collar and tag, which was manifestly intended to be worn by the dog. It is made the duty of the marshal of the town, upon finding a dog upon any premises within the corporate limits for the keeping of which no fee has been paid, to notify the person in charge of the premises to pay the tax; and such person, unless he, for himself and every member of his family, disclaims ownership of the dog, or pays the fee for keeping him, is punishable as provided by the ordinances. All dogs for which the fees are not paid, upon certain proceedings had, are required by the ordinances to be killed. All these requirements and regulations show the object of the ordinance to relieve the town of the worthless dogs, and to limit the right to keep dogs to those which the owners find sufficiently useful to justify them in paying the fee.

These ordinances, so far as it is necessary for us to consider them, are valid as police regulations. Section 5138 of Sandels & Hill's Digest authorizes the councils of all municipal corporations in this state "to prevent the running at large of dogs, and injuries and annoyances therefrom, and to authorize the destruction of the same, when at large contrary to any prohibition to that effect." Under the power to prevent injuries and annoyances therefrom (the dogs) the town council of the incorporated town of Harrison had the authority to enact the ordinances in question.

Ordinances and statutes of the general character of those in question have been enacted in other states, and have been generally, if not universally, upheld by the courts. In the state of Kentucky the charter of the city of Frankfort delegated to its

council authority to make by-laws for the comfort and security of its citizens. "A penal ordinance for security against pestilent dogs not seeming, on trial, sufficient for the end, the council adopted the following supplemental provision: 'That all persons owning or controlling dogs within the city of Frankfort are hereby required annually, on the 10th day of April, to apply to the city clerk to register, and procure a brass collar, duly stamped, for each dog, and pay to the clerk at the time of registry a tax of $2 for every dog so owned and registered; which tax the clerk shall pay into the city treasury. Any person failing to comply with the provision of this ordinance shall, on conviction before the police judge, be fined the sum of $5 for each day of failure and for each dog owned or controlled by him not registered as aforesaid. The marshal or any police officer shall forthwith kill any dog found upon the streets without such collar so procured from the city clerk."

In *Commonwealth* v. *Markham,* 7 Bush, 486, the court of appeals, in speaking of the "tax of $2 for every dog," said: "But though called a tax, yet it is in our opinion not a revenue levy in either purpose or operation. It was obviously intended as a police regulation for reducing the number of mischievous dogs, getting clear of the worthless, and securing the owners of the most valuable and harmless against unauthorized and wanton destruction; and, thus interpreted, the ordinance is a license law, $2 the price of the license or 'tax' for the privilege, and the collar and stamp are passports for the security of registered dogs. Presuming that the owners of worthless or pestilent dogs would not pay such a tax for such a license, the expulsion or destruction of inferior or dangerous dogs, as well as protection to the useful class, was the constructive aim of this enactment by the council." *Mitchell* v. *Williams,* 27 Ind. 62; *Ex Parte Cooper,* 3 Texas Cr. App. 489.

In *Sentell* v. *New Orleans & Carrollton Railroad Company,* 166 U. S. 698, "a state statute providing that no dog shall be entitled to the protection of the law unless placed upon the assessment rolls, and that in a civil action for killing a dog the owner cannot recover beyond the value fixed by himself in the last assessment preceding the killing," was held to be within the power of the state. Mr. Justice Brown, in speaking for the court, said: "They (dogs) have no intrinsic value, by which we understand a value common to all dogs as such, and independent of the particular breed or individual. Unlike other domestic animals, they are useful neither as beasts of burden, for draught (except to a limited

extent), nor for food. They are peculiar in the fact that they differ among themselves more widely than any other class of animals, and can hardly be said to have a characteristic common to the entire race. While the higher breeds rank among the noblest representatives of the animal kingdom, and are justly esteemed for their intelligence, sagacity, fidelity, watchfulness, affection, and, above all, for their natural companionship with man, others are afflicted with such serious infirmities of temper as to be little better than a public nuisance. All are more or less subject to attacks of hydrophobic madness.

"As it is practically impossible by statute to distinguish between the different breeds, or between the valuable and the worthless, such legislation as has been enacted upon the subject, though nominally including the whole canine race, is really directed against the latter class, and is based upon the theory that the owner of a really valuable dog will feel sufficient interest in him to comply with any reasonable regulation designed to distinguish him from the common herd. Acting upon the principle that there is but a qualified property in them, and that, while private interests require that the valuable ones shall be protected, public interests demand that the worthless shall be exterminated, they have, from time immemorial, been considered as holding their lives at the will of the legislature, and properly falling within the police power of the several states. Laws for the protection of domestic animals are regarded as having but a little application to dogs and cats; and, regardless of statute, a ferocious dog is looked upon as *hostis humani generis,* and as having no right to his life which man is bound to respect."

Again he says: "Although dogs are ordinarily harmless, they preserve some of their hereditary wolfish instincts, which occasionally break forth in the destruction of sheep and other helpless animals. Others, too small to attack these animals, are simply vicious, noisy and pestilent. As their depredations are often committed at night, it is usually impossible to identify the dog or to fix the liability upon the owner, who, moreover, is likely to be pecuniarily irresponsible. In short, the damages are usually such as are beyond the reach of judicial process, and legislation of a drastic nature is necessary to protect persons and property from destruction and annoyance. Such legislation is clearly within the police power of the state. It ordinarily takes the form of a license tax, and the identification of the dog by a collar and tag,

upon which the name of the owner is sometimes required to be engraved, but other remedies are not uncommon."

We have quoted at length from opinions in cases to show that the ordinances in question are valid police regulations, and the reason why they should be treated as such. But appellant says that in the agreed statement of facts, upon which the issues in the case were tried, the parties agreed that the sum required to be paid for the privilege of keeping a dog was a tax. That is true. But this statement in that respect was manifestly an expression of an opinion, and was not binding upon the court. The ordinances show that it was a license fee.

Judgment affirmed.

MONTGOMERY v. LITTLE.

Opinion delivered June 15, 1901.

COUNTY CLERK—INCREASE OF POPULATION SINCE LAST CENSUS.—An election of a county clerk in a county whose population since the previous census has increased sufficiently to entitle it to a county clerk, held before the director of the census published the result of the census, is void, but after the result has been published the governor is authorized to fill the office of county clerk by appointment, to be in force and effect until the next general election thereafter.

Appeal from Miller Circuit Court.

JOEL D. CONWAY, Judge.

STATEMENT BY THE COURT.

The appellant, Montgomery, was appointed by the governor clerk of the county of Miller and *ex officio* clerk of the court of probate of said county of Miller on the 31st of October, 1900. The appellant, J. D. Sanderson, at and before the time of the appointment of Montgomery, held the office of circuit clerk, and *ex officio* clerk of the probate and county courts, of said county of Miller, claiming title by virtue of his election to the office of circuit clerk on September 3, 1900. At said election, Sanderson had received a majority of the votes cast.

The appellee, Little, also claims that he was elected to the office of county and probate clerk at the election in September, 1900, and on the 8th of November, 1900, filed his complaint against both Montgomery and Sanderson, asking to establish his title to said office. Montgomery filed his answer to appellee's complaint, setting up his appointment by the governor. Sanderson filed a demurrer and answer to said complaint. The court overruled the demurrer, to which Sanderson excepted. Montgomery filed his complaint against Sanderson, claiming the office by virtue of his appointment by the governor.

The cases were tried together on the same evidence, and judgment was rendered in favor of Little against Montgomery and Sanderson, and the complaint of Montgomery against Sanderson dismissed, to which judgment, as to himself, Montgomery saved exceptions. The case comes up by appeal to this court.

Appellant Montgomery, pro se.

Upon the showing made by the federal census, the offices became separate, and could no longer be filled by the same person. Const. art. 19, § 6; 14 Ark. 1; 48 Ark. 82; 172 U. S. 567. The governor had the power to appoint, to fill the vacancy. Amendment to Const. April 4, 1893; 60 Ark. 356; 32 Pac. 850; 23 S. W. 343; 61 Am. Dec. 334; 18 Mo. 333; 30 Am. & Eng. Corp. Cas. 299; 33 Am. Rep. 791; 9 Pa. St. 513; 49 Ga. 115; 44 Ga. 79; 2 Stew. 231; 5 Nev. 111; 37 Cal. 650; 7 Ind. 329; 8 *ib.* 344; 10 *ib.* 63; 20 *ib.* 169; 96 *ib.* 374; 113 *ib.* 234; 16 N. E. 384. Sanderson could not be the legal incumbent of both offices after their separation. 30 Am. & Eng. Corp. Cas. 281; *id.* 353; 44 N. W. 726; 45 *id.* 1101; 89 Pa. St. 419; 50 Mo. 317; 7 Ind. 329; 5 Nev. 111; 67 Cal. 116. The election of Little, having taken place purely in anticipation of a legal vacancy, and before the official announcement of the result of the census, is invalid. 21 S. E. 973; 101 N. C. 629; S. C. 8 S. E. 219; 10 Mass. 290, 304; 25 Wis. 416; 16 Kan. 109; 41 N. J. Law, 296; 18 Ind. 346; 91 N. Y. 616; 3 S. W. 614; 44 Mich. 89; S. C. 16 N. W. 110; Mech. Pub. Off. 108, 109, § 174.

Jno. N. Cook, L. A. Byrne and *O. D. Scott,* for appellant Sanderson.

The election under which appellee claims was invalid and unauthorized. The *"census"* referred to in the constitution means the *officially* reported census. *See* Century Dict.; Worcest. Dict.;

Webst. Dict.; Bouv. Dict.; 48 N. E. 1025. Words are to be given their usual meaning when used in like connection. 51 Ark. 540; 47 Miss. 367; 121 Ind. 70. The office was not vacant, and neither election nor appointment was proper. 106 Ind. 203; 1 Ind. 500; 4 Ind. 396; 8 Ind. 484; 20 Ind. 169; 75 Ind. 518; 38 Ind. 483; 37 Cal. 614; 18 Mo. 333; 9 Mich. 226; 25 Oh. St. 588. *Cf.* 28 Cal. 382; 37 Cal. 614; 49 Cal. 407; 66 N. W. 885; 27 Pac. 939. The old incumbent has the right to hold the office until the election of his successor in the manner prescribed by law; and the appointment by the governor was unauthorized. 44 Oh. 589; 9 Pa. St. 513; 84 Mich. 399; 116 Mich. 307; 46 Ind. 307; 113 Ind. 434; 64 N. H. 473; 18 Mo. 333; 25 Oh. St. 588; 18 Gratt. 85; 58 Ga. 512; 39 Md. 88. The third amendment to the constitution of Arkansas, giving the governor power to fill vacancies by appointment, must be construed in connection with the whole constitution, and, when so construed, does not give him any right to remove a constitutional incumbent. 9 Ark. 270; 52 Ark. 339.

Williams & Arnold, for appellee.

The census, for the purposes of the question here, was complete as soon as the official count showed the population of Miller county to be over 15,000; and in the case at bar the information upon which the special election was held was sufficient to authorize it. 64 Cal. 87; 55 Tex. 389. One disqualified under the constitution to hold office at the time of his election is eligible if the disability be removed before the issuing of certificate and taking possession of office. McCrary, Elect. § 341; 28 Wis. 96; 9 Am. Rep. 489; 26 Kan. 52; 40 Am. Rep. 301; 50 Wis. 103; 14 Wis. 497; 24 Ill. App. 609; 90 Ind. 294; 107 Ind. 374; 122 Ind. 113; 44 Ia. 639. The notice of the election was ample and legal. 50 Ark. 277; 33 Ark. 716; 49 Ark. 518; McCrary, Elect. 147.

HUGHES, J., (after stating the facts). The question is, which of these three was entitled to the office of probate and county clerk of Miller county?

Appellant Montgomery contends that there was a vacancy in the office when it was first officially shown by the last federal census that said county had a population exceeding 15,000; that this was first legally shown on the 3d day of October, 1900; that the governor had the right to fill it by appointment, and that appellee Little was not legally elected to said office; that when it was officially ascertained by the last federal census that the county of Miller had a population exceeding 15,000, the offices of circuit

clerk and county and *ex officio* clerk of the probate court of said county became and were separate, and could not be held by one person. The provision of the constitution under which this controversy arises is as follows: Section 19, art. 7: "The clerks of the circuit court shall be elected by the qualified electors of the several counties for the term of two years, and shall be *ex officio* clerks of the county and probate courts and recorder; provided, that in any county having a population exceeding fifteen thousand inhabitants, as shown by the last federal census, there shall be elected a county clerk, in like manner as a clerk of the circuit court, who shall be *ex officio* clerk of the probate court of said county." The amendment to the constitution of the state of April 4, 1898, under which Montgomery was appointed is as follows: "The governor shall, in case a vacancy occurs in any state, district, county or township office in the state, either by death, resignation or otherwise, fill the same by appointment, to be in force and effect until the next general election thereafter."

It is not our purpose to discuss at length the questions raised by this appeal, as they have recently been considered and decided in the case of *Childers* v. *Duvall, ante* p. 336, in which it is held that "on the 3d day of October, 1900, the director of the census, by the publication of a bulletin, made known that the population of Lawrence county exceeded 15,000. This was the first time it was lawfully made known, and official notice could have been taken of the fact; and soon after the governor filled the office of clerk of the county court of that county by appointing T. M. Duvall county clerk. The appointment was lawfully made." It appears in the case at bar that on the 3d of October, 1900, the director of the census, by the publication of a bulletin, made known that the population of Miller county exceeded 15,000. This was the first time it was lawfully made known, and that official notice could have been taken of the fact; and soon thereafter the governor appointed Jas. M. Montgomery county clerk. The appointment was legal. *Childers* v. *Duvall, ante,* p. 336.

The judgment of the court dismissing Montgomery's complaint is reversed, and the finding and judgment in favor of Little is reversed, and the cause is remanded, with instructions to enter judgment for the appellant Montgomery for the office of county clerk of Miller county, and to ascertain the fees and emoluments he is entitled to recover, and to enter judgment in his favor for same.

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LESSER COTTON COMPANY v. YATES.

Opinion delivered June 15, 1901.

1. FOREIGN CORPORATIONS—SERVICE OF PROCESS—REPEAL OF STATUTE.—Sand. & H. Dig., § 5672, providing that "where the defendant is a foreign corporation, having an agent in this state, the service may be upon such agent," is not repealed by § 1323, *ib.*, providing that, before any foreign corporation shall begin to carry on business in this state, it shall designate an agent upon whom process may be served, which service shall be sufficient to give jurisdiction to any of the courts of this state. (Page 398.)

2. SAME—SERVICE OF PROCESS ON AGENT.—Under Sand. & H. Dig., § 5672, process against a foreign corporation may be served upon an agent of the corporation residing within the county of the venue where such agent was in control of the business of the corporation in the county, although the corporation had designated an agent residing elsewhere in the state upon whom process might be served. (Page 399.)

Appeal from Sebastian Circuit Court.

STYLES T. ROWE, Judge.

STATEMENT BY THE COURT.

This action was instituted in the court below by appellees on an open account against appellant. The complaint, after stating a cause of action against appellant on the account, alleges "that the Lesser Cotton Company is a corporation duly incorporated under the laws of the state of Missouri, and is doing business at Fort Smith, in Sebastian county, Arkansas, and J. A. Skipwith is its agent, and only agent, at Fort Smith, Ark."

Summons was issued, on the filing of the complaint, against Lesser Cotton Company, and served upon J. A. Skipwith. The return of the sheriff on the summons is as follows:

"State of Arkansas, county of Sebastian. I have this 9th day of June, 1899, duly served the within by delivering a true copy of the same to J. A. Skipwith, who is agent for the Lesser Cotton Company, as therein commanded.

"Service .....$ .50
"Mileage ..... .10

"Total .....$ .60
[Signed] "GEO. T. HARRELL, *Sheriff.*
"By ELIAS RECTOR, D. S."

On the first day of the said October term of the court, appellant, by its attorneys, after having obtained leave to appear specially for that purpose, moved the court to quash the service of the summons, because said service was not upon the defendant or upon any agent of defendant authorized by law as the person upon whom service may be had for the defendant. This motion was by the court overruled, and defendant excepted, and thereupon the court rendered judgment against appellant.

After judgment had been rendered, appellant at the same term filed a motion to vacate and set aside said judgment. The motion is as follows: "Comes the defendant, and moves the court to vacate and set aside the judgment rendered against it in this court because said defendant is a foreign corporation, organized under the laws of the state of Missouri, being a resident and citizen of said state of Missouri; that it is not a citizen or resident of the state of Arkansas, and that none of its officers reside in the state of Arkansas; and because the service of summons in this case was not made upon the defendant, or upon any agent of this defendant who was authorized by law to be served with summons in actions brought against said defendant." To support this motion defendant read in evidence the following agreed statement of facts. "It is agreed by and between the plaintiffs, Yates Bros., and the defendant, Lesser Cotton Company, that the Lesser Cotton Company is a corporation duly created and existing under and by virtue of the laws of the state of Missouri, and that the said Lesser Cotton Company has complied with the laws of the state of Arkansas requiring foreign corporations to appoint an agent in the state of Arkansas upon whom service of summons may be had; that said corporation, prior to the institution of this suit, appointed Geo. B. Rose, a citizen and resident of Pulaski county, state of Arkansas, as an agent upon whom process might be served, pursuant to the requirements of section 1323 of Sandels & Hill's Digest, and acts amendatory thereto, and that said Geo. B. Rose is the only person whom the said Lesser Cotton Company has designated upon whom service

might be had; and that the said Geo. B. Rose was at the institution of this suit, and still is, such agent; that the Lesser Cotton Company was during the times complained of in the complant, and up to and including the date of the institution of this suit, doing business in Fort Smith, Arkansas, and that it had J. A. Skipwith as its agent in charge of its business at Fort Smith, Arkansas, and that said J. A. Skipwith managed and controlled the Lesser Cotton Company's business at Fort Smith during the times the matters and things in the complaint complained of occurred, and at the time service of process was had upon it; that the said J. A. Skipwith had not been designated by the Lesser Cotton Company as an agent upon whom service of process might be had, within the meaning of section 1323 of Sandels & Hill's Digest."

This motion was by the court overruled, and defendant excepted, and took a bill of exceptions, which was signed and filed in apt time.

Read & McDonough, for appellant.

The act of March 18, 1899, provides the only method by which a foreign corporation in this state can be served with process. 59 Ark. 583; *id.* 593; 76 Mass. 164, 168; 6 Thompson, Corp. § 8021; 82 N. W. 663.

HUGHES, J., (after stating the facts). We do not think that either the case of the *Southern Building & Loan Association* v. *Hallum*, 59 Ark. 583, or the case of *Union Guaranty & Trust Company* v. *Craddock, id.* 593, is decisive of the question in this case. In the former of these two cases, this court held that there could be no valid service upon a corporation out of the county where the suit was brought, except by serving an agent designated by the company to receive service under the statute, and that the evidence in that case did not show that the person served had been designated as such agent. In the Craddock case it is simply held, in substance, that section 4137 of Sandels & Hill's Digest provides the exclusive method for obtaining service upon a foreign insurance corporation doing business in this state. Neither of these cases hold directly or by necessary implication that section 5672 of Sandels & Hill's Digest was repealed by section 1323, Sandels & Hill's Digest (act of April 4, 1887). Section 5672 reads as follows: "When the defendant is a foreign corporation, having an agent in this state, the service may be upon such agent." Section 1323 is as follows: "Before any foreign corporation shall begin to carry on business in this state, it shall, by its certificate under the

hand of the president and seal of such company, filed in the office of the secretary of state, designate an agent, who shall be a citizen of this state, upon whom service of summons and other process may be made. Such certificate shall also state the principal place of business of such corporation in this state. Service upon such agent shall be sufficient to give jurisdiction over such corporation to any of the courts of this state."

It does not appear that this section (1323) is in conflict with section 5672, or that it repeals the same. It leaves it in force, as there seems to be no necessary conflict.

The supreme court of the United States, in the case of the *Henrietta Mining & Milling Company* v. *Johnson*, 173 U. S. 221, had before it a case involving the construction of substantially similar provisions of the statutes of the Territory of Arizona. A statute provided, in substance, that foreign corporations should file with the secretary of the territory and the county recorder in the county in which they do business the appointment of an agent upon whom process could be served. There was also a provision in the civil code of procedure that process against any incorporated company could be served upon certain designated officers, or upon the local agent representing such company in the county where the suit was brought. The service in the case was had upon the general manager of a foreign corporation in the county where it did business. There was also provision for constructive service. It was contended that no personal judgment could be rendered upon such service; that only service upon the designated agent was good in that case to warrant a personal judgment. The court said of these three sections which we have referred to: "We are of the opinion, however, that sections 348, 712 and 713, providing specially for service upon foreign corporations, were not intended to be exclusive, and were merely designed to secure a special mode of service in case the corporation had ceased to do business in the territory, or had no local or official agent appointed in pursuance of section 348. Not only is the language of section 348 permissive in the use of the words 'may be served' upon the agent appointed under the statute, but the general language of section 704, taken in connection with the general subject of the statute, 'Process and Returns,' indicates that no restriction was intended to domestic corporations; and that the words 'any incorporated company or joint stock association' are as applicable to foreign as to domestic companies." It will be noticed that one difficulty in that case is re-

moved in this, for our section 5672 expressly provides for foreign corporations. The court continues: "If, as contended by the plaintiff in error, the remedy against foreign corporations be confined to service of process upon such appointed agent, it results that, if the corporation does not choose to file such appointment, intended suitors are confined to the remedy by publication provided by section 712, which, under the decisions of this court, would be ineffectual to sustain a personal judgment." It is incredible that the legislature should have intended to limit its own citizens to such an insufficient remedy, when the corporation is actually doing business in the territory, and is represented there by a manager or local agent." Then the court called attention to the decision of this court in *Southern Building & Loan Association* v. *Hallum,* 59 Ark. 583, which had been pressed upon it as a decision to the contrary of this proposition. But the court placed upon this decision the construction which we have placed upon it in this opinion, showing that it was intended by this court to hold that service in one county upon an agent there for a suit brought in another county is not good service unless the agent be designated by the statute providing that service may be had upon such designated agent any where in the state. This decision commends itself to our judgment as sound, and, being approved, is decisive of the case at bar. We do not decide, however, that service upon any agent of a foreign corporation in this state would be good. That question is not raised by the record, and not decided herein. We mean and hold that where "the character of an agency of a foreign corporation is such as to render it fair, reasonable and just to imply an authority on the part of the agent to receive service, the law will, and ought to, draw such an inference and imply such authority, and service under such circumstances and upon an agent of that character is sufficient. *Conn. Mut. L. Ins. Co.* v. *Spratley,* 172 U. S. 602. Such was the character of the agent in this case upon whom service was had.

The plaintiff, the complaint alleged, "was doing business at Fort Smith, and J. A. Skipwith was its only agent." The court found this as a fact. The agreed statement of facts in the case shows that Skipwith managed and controlled appellant's business at Fort Smith during the time the matters complained of occurred. The service upon him as an agent who from his character as such agent was authorized to receive service was sufficient.

Judgment affirmed.

KANSAS CITY, PITTSBURG & GULF RAILWAY COMPANY *v.* PARKER. [69 401 / f69 618] [69 401 / f79 386]

Opinion delivered June 15, 1901.

GARNISHMENT—SITUS OF DEBT.—A citizen of the state can garnish a foreign railroad company operating its road within the state for a debt due to one of its employees for labor performed in the state, though the employee is a resident of a foreign state.

Appeal from Polk Circuit Court.

WILL P. FEAZEL, Judge.

Read & McDonough, for appellant.

Garnishment did not lie against appellant for the debt due in another state to a citizen of such other state. 78 Ala. 524; Ell. Railroads, § 634; 2 *id.* p. 888, note 1. There being no showing that the money was due the defendant in garnishment in Arkansas, garnishment did not lie against appellant. 8 Am. & Eng. Enc. Law, 1129.

WOOD, J. The appellee brought suit against one B. B. Gilham, obtained personal service, and recovered judgment against him. Gilham was a citizen of Missouri. Appellee also garnished the appellant for a debt due Gilham for work done for it in the state of Arkansas, and recovered judgment, from which this appeal is taken. The question is, can appellee, a citizen of Arkansas, garnish a foreign railroad corporation operating a railroad in this state for a debt due one of its employees for labor performed in the state of Arkansas, the employee being a citizen of Missouri?

There is great contrariety of judicial opinion on the question of the situs of debt for the purpose of garnishment. Prof. Minor, in his recent work on Conflict of Laws, after stating and reviewing the various theories held upon the subject, states the true theory to be that the situs of a debt, for purposes of garnishment, is not only at the domicil of the debtor, but in any state in which the garnishee may be found, provided the municipal law of that state permits the debtor to be garnished, and provided the court acquires jurisdiction over the garnishee through his vol-

untary appearance or actual service of process upon him within the state. We concur in this view. For a full discussion of the question see Minor on Conflict of Laws, p. 270, chap. 10; Waples, Debtor and Creditor, *situs of debt,* §§ 171, 174, 176, 177, and authorities cited and reviewed therein; 14 Am. & Eng. Enc. Law, p. 801, *et seq.,* and cases cited.

The court had jurisdiction of the person of the principal debtor, and also jurisdiction of the railroad company, which, under our statute (since it operates a railroad in the state, and is presumed to have complied with the law), is to all intents and purposes a domestic corporation. Sand. & H. Dig., §§ 6326, 6327. So, from any view point, the judgment is correct, and must be affirmed. So ordered.

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

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f86 291

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Opinion delivered June 15, 1901.

CARRIER—FRIGHT OF PASSENGER—EXCESSIVE DAMAGES.—Through the unintentional negligence of defendant's trainmen, plaintiff, with two small children, was put off a train on a dark night at a place separated by a fence and cattle guard from the crossing where they wished to alight. A friend saw her alight, and after the train passed assisted her across the cattle guard. She was familiar with the locality. *Held,* that nervous prostration and permanent ill health caused by fright on discovering that she had to cross the cattle guard was not the natural and probable consequence of defendant's negligence. *Held,* also, that a verdict of $1,000 for the actual inconvenience suffered was excessive.

Appeal from Nevada Circuit Court.

JOEL D. CONWAY, Judge.

STATEMENT BY THE COURT.

MRS. Emma Bragg, who lived at Gurdon, Arkansas, on the night of November 26, 1897, took passage on one of the Iron Mountain's trains from Gurdon to Beirne, a small village and station on the same road, about four miles south from Gurdon. She

was going on a visit to her father, who lived at Beirne, and had with her two children, of whom one was about three years and the other about nine months of age. After she got on the train, she walked back and took a seat with her two children in the chair car. When the train going south stopped at Beirne, the engine and front coach were opposite or near the depot, but the chair car in which Mrs. Bragg rode was several coaches away. There is a public crossing some forty or fifty feet north of the depot. North of this crossing the railroad track is enclosed by a wire fence, and this enclosed track is separated from the crossing by a cattle guard. Mrs. Bragg was assisted by the porter, and alighted from the front end of the chair car, which was standing on the enclosed track north of the public crossing. Mrs. Bragg supposed that she was getting off at the crossing, but after she got off the brakeman said to her: "Here is the cattle guard. You will have t· get across that before you get to the road." She then asked him to take her back on the train, but she did not know that he heard this request, for the train had commenced to move, and did not stop. She could see the depot by the light of the train, but after the train left she says there was no light there. On realizing that she was left in the dark, with the cattle guard between her and the crossing, she says that she was frightened very much. But in a minute or two she saw two persons approaching, who proved to be a Mr. Oglesby and his son, who knew Mrs. Bragg, and, seeing her alight from the train alone with her children, had gone to assist her. They assisted her to cross the cattle guard, and accompanied her to her father's house, about three hundred yards away. She made no complaint to them of fright or injury, but afterwards claimed that her health was permanently injured by fright from being put off the train away from the depot and crossing, and brought this action to recover $10,000 as damages. On a trial, there was a verdict and judgment in favor of the plaintiff for $1,000, from which judgment the company appealed.

Dodge & Johnson, for appellant.

There can be no recovery of damages for mere fright or mental shock, unaccompanied by any personal or physical injury. 151 N. Y. 10; 60 Fed. 552; 85 Ill. 331; 1 Cush. 451; 6 C. C. A. 432; 6 Nev. 224; 60 Fed. 557; 25 Ia. 268; 105 U. S. 249; 176 Ill. 401; 62 Ill. 313; 85 Ill. 11; 47 L. R. A. 324; 168 Mass. 485; *id.* 216; 64 Ark. 544; 65 Ark. 182; 67 Ark. 123.

Scott & Jones, for appellee.

Since the objection here raised to the appellee's cause of action —that there can be no recovery for mere mental shock—was not raised in the lower court, it cannot be considered here. But damages are recoverable for such an injury as in this case. 44 Pac. 322; 50 N. W. 1034; 94 U. S. 469; 2 W. Bl. 892; 2 Sedg. Dam. 642; 26 Exch. Div. 428, 442; 13 App. Cas. 222; 1 Strobh. 525; 29 S. E. 905; 50 N. W. 1034; 18 R. I. 791; 25 S. W. 1032; 25 S. W. 953; 47 Minn. 307; S. C. 50 N. W. 238; 111 Ala. 135; S. C. 18 So. 565.

RIDDICK, J., (after stating the facts). This is an action against a railway company by a female passenger to recover damages for being put off at a place away from the station. It is evident, though, that she was put off near the station, and only a few yards from the public crossing where she wished to alight. But she was frightened, she says, by reason of the fact that it was dark, and that a cattle guard separated her from the crossing. Now it is doubtless true that the employees of the train were guilty of carelessness in putting off the appellee and her young children at night at a place where they would have to pass the cattle guard before reaching the depot or public crossing. If she or her children had been injured in attempting to pass the cattle guard, it would have been entirely just to have held the company responsible for the damages suffered. But no such injury followed. A neighbor saw them alight, and went to them at once, and assisted them to cross the cattle guard, and to reach their destination in safety. Admitting that the plaintiff is liable for the inconvenience caused by putting the plaintiff off in the enclosed part of the railroad track, so that she was compelled to pass a cattle guard at night, this by no means justifies the judgment for $1,000 rendered in her favor, unless the company is responsible for the consequences of the fright and nervous shock which she claims to have sustained, and which, according to the testimony of her father, a physician, resulted in excessive nervous prostration, and in permanent loss of health. Plaintiff, indeed, bases her right to recover in this case, not on any immediate physical injury suffered by reason of the negligence of the defendant, but upon fright and subsequent prostration and ill health caused by the fright. But the right to recover for a physical injury resulting from fright or mental anguish

only would seem to depend on whether a recovery could he had for such fright and mental anguish.

We held in a recent case that damages could not be recovered at law for mental pain and anguish unaccompanied by physical injury and caused by unintentional negligence. *Peay* v. *Western Union Telegraph Co.,* 64 Ark. 544. And in a case where the law allows no recovery for the mental anguish or fright it would seem logically to follow that no recovery can be had for the consequences or results of the fright; such consequences, as stated by the court of appeals of New York, going merely to show the degree of the fright and the extent of the damages. *Mitchell* v. *Rochester Railway Co.,* 151 N. Y. 107; *Spade* v. *Lynn & Boston R. Co.,* 168 Mass. 285.

But we need not go into a discussion of the reasons for such a rule, for, waiving the question as to whether it would apply to the facts of this case, we think that the claim of plaintiff to recover for the sickness and loss of health alleged to have been suffered by her must be denied upon other grounds. It is a fundamental rule of law that to recover demages on account of the unintentional negligence of another it must appear that the injury was the natural and probable consequences thereof, and that it ought to have been foreseen in the light of the attending circumstances. *Scheffer* v. *Railroad Co.,* 105 U. S. 249.

Now, plaintiff was not ejected from the train. She alighted of her own volition, being assisted by the employees of the company. Through the unintentional carelessness of one of the employees of the company, she was assisted from the train, not at the crossing where she wished to alight, but a few yards away, at a place separated from the crossing by a fence and cattle guard, thus compelling her to pass over the cattle guard to get to the crossing. Plaintiff was not put off in a wilderness, but in a village where others could have been called to her aid, if needed. She was not a stranger in the village. Her father lived there, and her own home was only a few miles away, and she had been there often. She was, on this occasion, traveling to this village, and, as before stated, was put off only a few yards from the crossing where she desired to alight. She knew where the depot and the crossing were, and the only trouble was the cattle guard between her and the crossing. But there were others at or near the depot when she alighted. One of them, who testified as her witness, said

that he was only 30 or 40 feet from her when she alighted from the train; that he recognized her, and went to her immediately, so soon as he could pass the intervening fence and cattle guard. Under these circumstances, we are unable to see any reason why the plaintiff should have been so much frightened. If any fright existed, it must certainly have been over in a minute or two, when assistance arrived. We therefore feel compelled to hold that the long train of physical ills of which she complains was not the natural or probable consequences of defendant's negligence. No prudent man, knowing all the circumstances, could have foreseen such consequences; and the defendant, under the rule above stated, is not responsible for them.

It was, no doubt, inconvenient to have to cross the cattle guard. Considering that it was at night, and that plaintiff was a woman, and had with her two young children, there was probably ground for the recovery of something more than nominal damages in this case, to cover the actual inconvenience and injury sustained. But, under the view we take of the law, the verdict is clearly excessive, and based on matters for which the defendant is not liable. The judgment is therefore reversed, and a new trial ordered.

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LAWRENCE COUNTY BANK v. ARNDT.

Opinion delivered June 22, 1901.

1. PROMISSORY NOTE—FORM OF SIGNATURE—PAROL EVIDENCE.—Where the only evidence on the face of a promissory note that the persons signing did not intend to bind themselves personally was the affix to their signatures of some designation of agency, as by signing themselves, respectively, as president, vice president, secretary and treasurer, without stating for whom or for what company they were acting, they are liable personally, and cannot, as a defense, show by parol evidence that they intended to bind a certain corporation, for which they were acting. (Page 410.)

2. MUTUAL MISTAKE OF LAW—REFORMATION.—Where a note payable to a bank, given for the indebtedness of an incorporated company, was, by direction of the president and cashier of the bank, signed by the officers of such company, followed by the official designation of each officer, and the bank officials at the time represented to

such signers that they were not personally liable, and the note was executed and accepted as the obligation of the company alone, equity will reform the note, to correspond to the intention of the parties, and such intention may be shown by parol evidence. (Page 412.)

Appeal from Lawrence Circuit Court in Chancery.

FREDERICK D. FULKERSON, Judge.

Coffin & Ponder, for appellant.

The titles added to the signatures of appellees are not surplusage; and, the note not showing that the signatures were meant to bind the company as principal, the appellees are individually liable. 61 Ind. 241; 26 Minn. 43; 87 N. Y. 250; 65 Ind. 27; Tied. Comm. Pap. § 123; 98 Mass. 101; 2 Conn. 260; 2 Wheat. 56; 122 Mass. 67; 5 Denio, 517; 38 Oh. St. 442; 6 Yerg. 479; 88 Ill. 219; 1 Dan. Neg. Inst. § 305; 56 Ga. 258; 34 Vt. 402; 62 Ark. 391. The note uses the expression, "we or either of us promise to pay," and is a personal obligation. Tied. Comm. Pap. § 124; 10 Oh. St. 444; 4 Metc. (Ky.) 296; 3 W. Va. 285; 71 Ia. 581; 43 Mich. 376; 9 N. H. 263; 12 Gray, 474; 78 Me. 390; 36 Ark. 296. If appellees had intended to bind the company, they should have designated it in some way as a party to the note. 105 U. S. 416; 12 Mass. 237; 60 Ind. 119; 90 N. C. 417-421. Parol evidence is not admissible to vary the terms of the written contract sued on and to show the representative character of the makers. 1 Am. & Eng. Enc. Law (2d Ed.), 1051-3; 3 Denio, 604; 21 Wend. 101; 9 M. & W. 79; 68 Me. 87; Tied. Comm. Pap. § 123; 35 Conn. 131; 1 Cal. 365; 1 McAll. 20; 75 Ga. 56; 109 U. S. 194; 5 Gray, 567; 50 Ark. 395; 35 Ark. 156; 13 Ark. 125; 4 Ark. 179; 15 Ark. 543; 16 Ark. 511; 45 Ark. 177; 62 Ark. 391.

Joseph W. Phillips, S. D. Campbell and *Jasper N. Beakley,* for appellees.

Equity had power to correct the mistake made in omitting the name of the principal. 4 Am. & Eng. Enc. Law (2d Ed.), 210; 11 Pet. 71; 13 Ark. 139; 49 Ark. 34. Parol evidence is admissible to correct mutual mistakes. 4 Am. & Eng. Enc. Law (2d Ed.), 150, 153; 27 Ark. 512; 139 U. S. 568; 46 Ark. 131; 51 Ark. 434; 52 Ark. 65; 55 Ark. 115; 54 Ark. 97; 62 Ark. 99; 5 Wheat. 327. *Cf.,* also, 67 Ark. 551; 65 Ark. 53; Fetter, Eq. 127.

J. W. Phillips, J. N. Beakley and *S. D. Campbell,* for appellees on motion to reconsider.

Parol evidence was admissible to explain the mutual intention of the parties. Story, Eq. Jur. §§ 153-156; 3 Greenleaf, Ev. 360; 115 U. S. 634; 50 Am. St. 674. *Ignorantia juris non excusat* does not apply. Bish. Cont. § 707; 8 Wheat. 174; 141 U. S. 260; 13 Ark. 138; 49 Ark. 32; 40 Am. St. Rep. 674; 52 L. R. A. 712; 58 S. W. 207; 60 S. W. 311; Fetters, Eq. 127; 15 Am. & Eng. Enc. Law, 734; Pom. Eq. Jur. § 843. Between original parties promissory notes are subject to reformation. 4 Am. & Eng. Enc. Law, 153; 15 Ark. 15; 20 U. S. C. C. A. 287; 104 U. S. 93; 29 S. W. 882; 34 Am. St. Rep. 433; 20 L. R. A. 705; 72 Am. St. Rep. 291. Original want of consideration follows new note given in substitution. 15 Ark. 465. Want of consideration may be shown by parol. 53 Ark. 4; 26 Ark. 449; 66 Ark. 521. Appellant was estopped by representations of its officers and agents made at the time of execution of note. 65 Ark. 51; 34 Am. St. Rep. 107; 56 Am. Rep. 106; 47 Am. Rep. 182.

Chas. Coffin, H. L. Ponder and *J. C. Hawthorne,* for appellant in reply.

Mistakes of law cannot be corrected. 45 Ark. 175. To correct a written instrument evidence must be clear and free from doubt. 14 Ark. 487; 36 S. W. 122; 18 S. W. 928; 25 S. W. 1108; Kerr, Fraud and Mistake, 428; 46 Ark. 176; 2 Pom. Eq. Jur. § 843; 41 Ark. 499; 49 Ark. 429, 430. If any mistake at all, it was a mistake at law, and equity offers no relief. 56 Ark. 322; 40 S. C. 92; 15 Am. & Eng. Enc. Law, 637; 4 Rich. Eq. 342; 35 S. C. 360; 13 Ark. 135; 15 Ark. 15; 1 Am. & Eng. Dec. Eq. 138-236; 4 Am. & Eng. Dec. Eq. 480.

BUNN, C. J. This suit was instituted on a promissory note on the 16th February, 1899, and on the pleadings and testimony in the case the cause was transferred to equity, judgment was rendered for the defendants, and plaintiff appealed.

The plaintiff is an incorporated bank, doing business at Walnut Ridge, in Lawrence county in this state, and the defendants are citizens of said place, who made their promissory note to the bank, of which the following is a copy, to-wit:

"$1,540.

"Ninety days after date we or either of us promise to pay to the Lawrence County Bank fifteen hundred and forty dollars, negotiable and payable at the Lawrence County Bank, Walnut Ridge, Ark., for value received, with interest at ten per cent. per annum after maturity until paid. The drawers and indorsers severally waive presentation for payment, protest and notice of protest, and nonpayment of this note.

[Signed] "H. ARNDT, President,
"J. M. PHELPS, Vice President,
"BENJ. F. GRAFF, Secretary,
"S. C. DOWELL, Treasurer."

Payment of interest to November 1, 1898, amounting to $82, was indorsed on the note. No other payments were made, and the prayer was for judgment for the $1,540, and interest from 1st November, 1898.

The defendants answered, averring that the note was in fact but a renewal note of two pre-existing notes aggregating the same amount, which the Walnut Ridge Manufacturing Company, another corporation of the same place, owed said bank, and that the defendants executed the same for no other consideration than to take up and renew said two notes and old indebtedness, and that they did not execute the note sued on in their individual capacities, nor was it the intention of the parties to it that they should be held individually liable for the same, but that, on the contrary, as the terms set opposite their signatures indicate, they executed the same as officers and directors of said Manufacturing Company, to bind said company alone; that the note was executed at the instance and request of said J. M. Phelps, who was the president of said bank, and at the same time vice president of said company, and that it was perfectly understood among them all at the time, and so expressed, that the note was to be regarded as the obligation of the Manufacturing Company, executed by the defendants as its officers and agents, and not otherwise. The two notes, of which the note sued on is claimed to be a renewal, appear in the record as having been similar in language to the one sued on, and signed by persons designated as president and treasurer, and others writing without official designation. The testimony in the case goes to show that the consideration of all these notes was an indebtedness originally of the Manufacturing Company, evidenced by note and renewed from time to time from an indefinite time past.

The sole question necessary to be considered in this case is, whether a note expressed in the language of the one sued on, and signed as it was, is subject to be explained by parol testimony.

It will be observed that the Walnut Ridge Manufacturing Company is nowhere referred to in the body of the note as the payer or obligor; nor is it referred to, in connection with the signers of the note, as a company of which they were officers and directors, nor otherwise. There is, in fact, nothing on the face of the note, nor connected with the signatures, which has any reference to said Manufacturing Company, which is sought to be made the obligor by the defendants. Therefore a suit on the note as this is could have no reference to said company, unless by extraneous averments, as made in defendants' answer herein.

The rule, as laid down in all the works of the text writers, and supported by all the decisions (with a few exceptions, and they only apparently exceptions), is that such a note is the note of the signers, individually, and not of the body or company they claim to represent, and that parol evidence is not admissible to explain the intention of the parties, and show the same to have been different from that expressed in the language of the note itself. In stating the principle, it may be well, however, to say that any reference, however slight, to the alleged obligor company in the body of the note, or in the official designation of the signers, would be sufficient to let in proof of the real intention of the parties, but the difficulty in this case is that there is nothing on the face of the note, or connected with the signatures, to indicate that the Manufacturing Company had any connection with the transaction whatever. That being true, parol testimony to show such connection is inadmissible under the rule, however hard that rule may appear to be; and the rule is in equity the same as at law. Tiedeman, Commercial Paper, § 123, and note thereunder, and corresponding sections in Daniel, Neg. Inst.; Randolph on Commercial Paper, and all text writers on the subject.

The case having been determined in the court below contrary to this rule, the decree is reversed, with directions to render judgment for the plaintiff.

ON REHEARING.

Opinion delivered December 7, 1901.

BATTLE, J. The appellees ask for a rehearing on the following among other grounds, to-wit:

"Appellees believe the court overlooked the fact that the question of admissibility of parol testimony was brought into this case, not as a direct defense to the note, but by their cross-complaint against appellant seeking a reformation of the note sued on to accord with mutual intent of the appellant and appellees at the time of the execution of said note, and that the failure to express the words showing on the face of the note that it was the obligation of the Walnut Ridge Manufacturing Company was a clerical mistake of the appellant, as well as of the appellees; that such mistake was induced by, and was the fault of, the appellant; that appellant's officers and agents induced appellees to sign said note by expressly representing to them at the time that it was the obligation of the Walnut Ridge Manufacturing Company, and not the obligation of appellees individually; that the note has always been in the hands of the original payee, and nothing has intervened to prejudice the rights of appellant by reason of such note being reformed to express the mutual intent; that the evidence in the record, as well as the cross-complaint, shows the foregoing facts."

Appellees, in their answer filed in this cause in the circuit court, alleged that the note sued on was given in satisfaction of the indebtedness of the Walnut Ridge Manufacturing Company, and for the purpose of evidencing such indebtedness, and that they were not personally liable for the same. After answering in this manner, they filed an amended answer, making the same a cross-complaint, "alleging that, at the time of the execution of the note, it was agreed and understood between the plaintiff and the defendants, as the officers of the Walnut Ridge Manufacturing Company, that the note should be executed as the obligation of the company, and not as the obligation of the defendants individually, and at the time it was so understood by all the parties, and the note was executed by the defendants in their capacity as such officers, and as the obligation of said company, the word *as* between each individual name of the signer and the name designating his official capacity, and the words *Walnut Ridge Manufacturing Company* after the designation of the official capacity of each signer, being omitted by clerical error and mutual mistake of all the parties to the instrument."

The cross-complaint prayed that the cause be transferred to equity, that the Walnut Ridge Manufacturing Company be made a

party, and that the note be reformed so as to express the meaning and intent of the parties at the time of its execution.

The cause was transferred, without objection, and the Walnut Ridge Manufacturing Company entered its appearance.

The evidence adduced at the hearing "showed that the note was drawn in its present form by the officers of the bank, or at their instance, before presentation for signing, and was carried by J. M. Phelps, as president of the bank, and by Dolph Sloan, as its cashier, to the makers of the note, and that the bank officers directed the makers to sign for the Walnut Ridge Manufacturing Company with simply the official designation after each name, in form as the same now appears, representing to the signers at the time that they were not personally liable for it, but that it was the obligation of the company."

The court found that the note sued on was given for the indebtedness of the Walnut Ridge Manufacturing Company to the bank, that appellees did not assume the indebtedness, it being the understanding of appellant and appellees that the signing of the note by appellees was in their official capacity, and that the makers were not individually or personally liable; and rendered a decree in favor of appellees, and a decree in favor of appellant against the Manufacturing Company for the balance due on the note.

The question presented by the motion for rehearing is, was it the duty of the circuit court to reform the note?

Authors and courts have found it difficult to formulate a rule according to which courts of equity relieve against mistakes of law. Chief Justice Marshall, in *Hunt* v. *Rousmanier,* 8 Wheat. 174, 215, said: "Although we do not find the naked principle that relief may be granted on account of ignorance of law asserted in the books, we find no case in which it has been decided that a plain and acknowledged mistake in law is beyond the reach of equity."

After a review of the cases, Judge Story says: "We have thus gone over the principal cases which are supposed to contain contradictions or exceptions to the general rule that ignorance of law with a full knowledge of the facts furnishes no ground to rescind agreements or to set aside solemn acts of the parties. Without undertaking to assert that there are none of these cases which are inconsistent with the rule, it may be affirmed that the real

exceptions to it are very few, and generally stand upon some very urgent pressure of circumstances. The rule prevails in England in all cases of compromises of doubtful and perhaps in all cases of doubted rights, and especially in all cases of family arrangements. It is relaxed in cases where there is a total ignorance of title, founded in the mistake of a plain and settled principle of law, and in cases of imposition, misrepresentation, undue influence, misplaced confidence, and surprise. In America the general rule has been recognized as founded in sound wisdom and policy, and fit to be upheld with a steady confidence. And hitherto the exceptions to it (if any) will be found not to rest upon the mere foundation of a naked mistake of law, however plain and settled the principle may be, nor upon mere ignorance of title founded upon such mistake. It is matter of regret that in the present state of the law it is not practicable to present in any more definite form the doctrine respecting the effect of mistakes of law, or to clear the subject from some obscurities and uncertainties which still surround it. But it may be safely affirmed upon the highest authority, as a well established doctrine, that a mere naked mistake of law, unattended with any special circumstances as have been above suggested, will furnish no ground for the interposition of a court of equity; and the present disposition of courts of equity is to narrow, rather than to enlarge, the operation of exceptions." 1 Story's Eq. Jurisprudence (13th Ed.), §§ 137, 138.

Professor Bispham says: "The true conclusion, as to the general rule, would seem to be that equity will not interfere in the case of a pure mistake of law; but that any additional circumstances will readily be laid hold of by the court, as constituting sufficient grounds for interposition. Thus, where ignorance of the law exists on one side, and that ignorance is known and taken advantage of by the other party, the former will be relieved. More particularly will this be so if the mistake was encouraged or induced by misrepresentation of the other party." Bispham, Equity (5th Ed.), § 188, and cases cited.

In Pomeroy's Equity Jurisprudence it is said: "Whatever be the effect of a mistake, pure and simple, there is no doubt that equitable relief, affirmative or defensive, will be granted when the ignorance or misapprehension of a party concerning the legal effect of a transaction in which he engages, or concerning his own legal rights which are to be affected, is induced, procured, aided, or accom-

panied by inequitable conduct of the other parties. It is not necessary that such inequitable conduct should be intentionally misleading, much less that it should be actual fraud; it is enough that the misconception of the law was the result of, or even aided or accompanied by, incorrect or misleading statements or acts of the other party. When the mistake of law is pure and simple, the balance held by justice hangs even; but when the error is accompanied by any inequitable conduct of the other party, it inclines in favor of the one who is mistaken. The scope and limitations of this doctrine may be summed up in the proposition that a misapprehension of the law by one party, of which the others are aware at the time of entering into the transaction, but which they do not rectify, is a sufficient ground for equitable relief. A court of equity will not permit one party to take advantage and enjoy the benefit of any ignorance or mistake of law by the other, which he knew of and did not correct. While equity interposes under such circumstances, it follows *a fortiori* that when the mistake of law by one party is induced, aided, or accompanied by conduct of the other more positively inequitable, and containing elements of wrongful intent, such as misrepresentation, imposition, concealment, undue influence, breach of confidence reposed, mental weakness, or surprise, a court of equity will lend its aid and relieve from the consequences of the error. The decisions illustrating this general rule are numerous, and it will be found that many of the cases in which relief has been granted contained, either openly or implicitly, some elements of such inequitable conduct." 2 Pomeroy, Eq. Jur. (2d Ed.), § 847, and cases cited.

In *Snell* v. *Insurance Company*, 98 U. S. 85, the syllabus is as follows: "A., a member of the firm of A., B. & Co., who were owners of cotton, communicated the facts touching its ownership, situation, value, and risks, so far as he knew them, to C., a duly accredited agent of an insurance company; and thereupon the company, through C., entered into a verbal agreement with A., acting for and on behalf of the firm, to insure for a certain period the cotton for its whole value against loss by fire, at a premium which was subsequently paid to the company. A. assented that the insurance should be made in his name, upon the representation and agreement of C. that the entire interest of the firm in the cotton would thereby be fully protected. The cotton was burnt within the specified period. The policy was then issued and de-

livered to A., who, being at once advised by his attorneys that it in terms covered his interest, but not that of the firm, forthwith requested the company to correct it, so that it should conform to the agreement. The company having declined to do so, A., B. & Co. filed against it this bill, praying that the policy be reformed, and that the value of the cotton be awarded to them. *Held,* 1. That the acceptance of the policy was not such as waived any right of A., B. & Co. under the agreement covering their interest in the cotton, which A. in their behalf had made with the company, and that they are entitled to the relief prayed for. 2. That a mere mistake of law does not, in the absence of other circumstances, constitute any ground for the reformation of a written contract." In that case the court said: "In the case under consideration, the alleged mistake is proved to the entire satisfaction of the court. It is equally clear that the assent of Keith to the insurance being made in his name was superinduced by the representation of the company's agent that insurance in that form would fully protect the interest of the firm in the cotton. We assume, as we must from the evidence, that this representation was not made with any intention to mislead or entrap the assured. It is, however, evident that Keith relied upon the representation, and, not unreasonably, relied also upon the larger experience and greater knowledge of the insurance agents in all matters concerning the proper mode of consummating, by written agreement, contracts of insurance according to the understanding of the parties. He trusted the insurance agents with the preparation of a written agreement which should correctly express the meaning of the contracting parties. He is not chargeable with negligence, because he rested in the belief that the policy would be prepared in conformity with the contract. As soon as he had a reasonable opportunity to consult counsel, he discovered the mistake, and promptly insisted upon the rights secured by the original agreement. A court of equity could not deny relief under such circumstances, without aiding the insurance company to obtain an unconscionable advantage through a mistake for which its agents were chiefly responsible. In all such cases, there being no laches on the part of the party, either in discovering and alleging the mistake, or in demanding relief therefrom, equity will lay hold of any additional circumstances, fully established, which will justify its interposition to prevent marked injustice being done. *Wheeler* v. *Smith,* 9 How. 55."

In *Griswold* v. *Hazard*, 141 U. S. 260, "one Durant, a citizen and resident of New York, was arrested under a writ of *ne exeat* while temporarily at Newport, Rhode Island. To obtain a release from custody under the writ, he executed a bond, with Griswold and Bradford as sureties, the condition of which was that Durant should 'abide and perform the orders and decrees of the supreme court of the state of Rhode Island in the suit in equity of Isaac P. Hazard and others against the said Durant,' then pending in said court. In that suit a decree was, fourteen years afterwards, obtained for a very large sum; and thereupon an action at law was brought on the bond against Griswold, and a judgment recovered. Pending this common law action on the bond, bills in equity were filed by Griswold for an injunction to restrain the proceedings at law. It was alleged in these bills that Griswold 'had intended to sign, and believed at the time that he signed, a bond which simply bound him for the appearance of Durant, and that its execution in its actual form was the result of mistake. The supreme court held (reversing the decree below) that the alleged mistake was clearly established by the proofs, that under the circumstances Griswold was entitled to relief against the mistake of law, and that the action on the bond should be perpetually enjoined." The court said: "There was no mistake as to the mere words of the bond; for it was drawn by one of Hazard's attorneys, and was read by Griswold before signing it. But according to the great weight of the evidence, there was a mistake, on both sides, as to the legal import of the terms employed to give effect to the mutual agreement. In short, the instrument does not express the thought and intention which the parties had at the time of its execution. And this mistake was attended by circumstances that render it inequitable for the obligees in the bond to take advantage of it. The instrument was drawn by one of Hazard's attorneys, and was presented and accepted as embodying the agreement previously reached. Griswold was unskilled in the law, and took the word 'perform' as implying performance in the sense of Durant's becoming amenable to the process of the court. He had no reason, unless the recollection of Gray, Durant, Van Zandt and himself as to what occurred is wholly at fault, to doubt that the bond expressed the real agreement; especially if he heard Van Zandt's statement to Durant, when the latter was about to sign the bond, that it 'was, in effect, a bail bond.' A court of equity ought

not to allow that mistake, satisfactorily established and thus caused, to stand uncorrected, and thereby subject a surety to liability he did not intend to assume, and which, according to the decided preponderance of the evidence, there was at the time no purpose to impose upon him. While it is laid down that 'a mere mistake of law, stripped of all other circumstances, constitutes no ground for the reformation of written contracts;' yet 'the rule that an admitted or clearly established misapprehension of the law does create a basis for the interference of courts of equity, resting on discretion and to be exercised only in the most unquestionable and flagrant cases, is certainly more in consonance with the best considered and best reasoned cases upon this point, both English and American.' "

In the case under consideration the note sued upon was prepared by the cashier of the bank, and was signed by the makers in the manner directed by him, upon the representation made by him to the effect that they would not be individually liable, and that the note as signed was the obligation of the Manufacturing Company. They relied upon such representation, and they did not act unreasonably in so doing, because his vocation and experience were such as to enable him to better understand how such paper should be drawn and executed to accomplish the desired result, and to express the obligation the makers thereof thereby intended to assume. They and the bank believed that the note was not their individual obligation, but the note of the Manufacturing Company. As evidence of this fact, each appended to his signature the name of the office he held in the Manufacturing Company. The conduct of the agents of the bank superinduced this mistake, and they accepted the note as the obligation of the Manufacturing Company. Under such circumstances, a court of equity cannot deny relief without aiding the bank to take an unconscionable advantage of a mistake for which its agents were chiefly responsible; and it is the duty of the court to grant relief, the note still being the property of the bank.

The decree of the circuit court is affirmed.

BUNN, C. J., (dissenting). This is a suit originally on the renewal promissory note mentioned in the opinion of the majority of this court, and was at law. While pending on the law side, the defendants filed their answer, in which their defense was, mainly,

that the consideration of the note was in fact money borrowed for the use of the Manufacturing Company, by the officials thereof, who signed the two original notes in 1892, and, of course, was the consideration of the renewal note sued on. Most of the testimony in the case was for the purpose of showing this to be a fact; and, this being established, it was seemingly thought to be an easy matter to conclude that the Manufacturing Company alone was the real maker of the notes. The taking of so much proof to establish this point was a work of supererogation, for it will not be questioned that the consideration of the notes was for the use of, and was used in, the business of the Manufacturing Company. But, all that being admitted, it does not follow that appellees are not individually bound, and that they alone are bound upon the note as written. Indeed, this conclusion seems to have forced itself upon the appellees; and hence their amended answer and cross-bill, and motion to transfer, which was granted. The additional defense set up in the amended answer and cross-bill is that, in the first place, the Manufacturing Company is solvent; and then, immediately following, they say that it would be an irreparable injury to them if the courts should compel them to pay off the note sued on, and this is one of the equitable grounds upon which they are permitted to seek relief in equity.

But it will strike the disinterested reader as passing strange that, if the appellees are made to pay the note, the injury to them will be irreparable, since they are the sole managers and controllers of the company, and have it within their power to appropriate its assets (and it has sufficient assets if solvent, as they say it is) to the payment of its debts, and can thus readily indemnify themselves for any moneys they may pay out for the company. This seems to be a matter where the allegations are not only too much, but where they are conflicting with each other.

The other ground for equitable relief is set up in their answer and cross-bill, upon which they ask a reformation of the note sued on, so as to make it express the real intention of the parties, and thereby let them out of the liability which appears on the note as written. The proof they adduce goes to show that J. M. Phelps, as president of the plaintiff bank, perfectly understood that these persons who signed the note (appellees) were not personally liable, and that it was not the intention of any of the parties that they were not to be held personally liable

at all. The plaintiff bank is thus brought in to show that the mistake in signing the note as it was signed was a mutual mistake. The principal and the important evidence on this point is the testimony of J. M. Phelps himself, who, appellees say, was president of the bank, and spoke and acted for it, and bound it by his acts. The evidence of Phelps is really of little importance in itself, and moreover he was one of the obligors on the original notes, and was the vice president of the Manufacturing Company, and one of the signers of the note sued on, and, in so far as his evidence may tend to the benefit of appellees, it also tends to benefit himself personally.

He is not, therefore, the representative of the bank in a matter like this. The evidence on the part of the appellees was intended to show that the note was intended to be executed so as to make only the Manufacturing Company bound for its payment. That is, the effort is to abrogate two well-established rules; one of law, to the effect that oral testimony is inadmissible to vary a written contract, or, more properly speaking, to make this case an exception to the rule. The prayer of the appellees, also, if granted, is a violation of a business rule, which by usage has become almost as binding as law itself. That is, a note or other obligation to make payment, with only one obligor, is not bankable paper. If these appellees, who signed the note, are to be released from their individual obligations, and the obligations are thus to be cast upon the company, then the bank officials would be regarded as very careless and incompetent trustees to manage the affairs of the bank for the benefit of stockholders and depositors and other persons interested in the bank. The question is, is oral testimony admissible, on any kind of showing, to bring about such a result as this in any given transaction? It is a question, not so much what is determined by the testimony of witnesses, but whether or not (if they can say no more) they will be permitted to swear at all to accomplish such a purpose as this. The courts, in my opinion, should hold firmly to the rule, and suffer a modification or variance of it only in the extremest cases; and this case to me is far from coming in the category of the exceptions sometimes held permissible in the courts.

The complaint is not, after all, that Mr. Phelps wrote differently from what was intended, but it is that the words "as," before the respective official titles, and "of the Manufacturing Company,"

after these titles, were not inserted, and the note is asked to be reformed, so as to show the intent that would have been truly expressed if these omitted words had been included. There is no testimony whatever that Phelps, as president of the bank or otherwise, influenced the signing of the notes as they were signed. That was altogether a work of the appellees themselves. Phelps did not stand by and cause them to sign as they did. The manner of signing the note perfectly conformed to all that he said to them on the subject.

The doctrine of the courts and jurists narrows the cases in which ignorance of law may be relieved against in equity down to such a small number that it is confessedly impossible to state any general rule on the subject. This restrictive scope of the exception to the general rule—for that is all that it is—cannot be better illustrated than by a close examination of the cases cited by the court in support of its decree in this case.

In the case of *Snell* v. *Insurance Company*, 98 U. S. 85, "A., a member of the firm of A., B. & Co., who were owners of cotton, communicated the facts touching its ownership, situation, value, and risk, so far as he knew them, to C., a duly accredited agent of an insurance company; and thereupon the company, through C., entered into a verbal agreement with A., acting for and on behalf of the firm, to insure for a certain period the cotton for its whole value against loss by fire, at a premium which was subsequently paid to the insurance company. A. assented that the insurance be made in his name, upon the representation and agreement of C. that the entire interest of the firm in the cotton would thereby be fully protected. The cotton was burnt within the specified period. The policy was then issued and delivered to A., who, being at once advised by his attorney that it in terms covered his interest, but not that of the firm, forthwith requested the company to correct it, so that it should conform to the agreement. The company having declined to do so, A., B. & Co. filed against it this bill, praying that the policy be reformed, and that the value of the cotton be awarded to them. *Held,* 1. That the acceptance of the policy was not such as waived any right of A., B. & Co. under the agreement covering their interest in the cotton, which A. in their behalf had made with the company, and that they were entitled to the relief prayed for. 2. That a mere mistake of law does not, in the absence of other circumstances, constitute any ground for the

reformation of a written contract." The firm was no party to the writing purporting to express the contract between their agent, A., and the agent of the insurance company, until a delivery and acceptance of the same by the said agent, A., and it appears that, immediately upon its being nominally delivered to him, A. examined it through his attorney, and found it defective and not in conformity with their verbal agreement, and the firm requested the company to make the proper correction, which it, with right, declined to do. The written policy was never accepted, it having been rejected in a reasonable time after presentation for acceptance or rejection, for that is the meaning of it. There was therefore no mistake of law, but a simple neglect or fraud on the part of the agent of the insurance company in writing up the policy to meet the agreement of the parties, or bad faith in the company in attempting to cheat the firm by a trick,—a question of fact; for the cotton was insured for its whole value, and we infer that the full premium was paid to the insurance company.

In *Griswold* v. *Hazard,* 141 U. S. 260, "one Durant, a citizen and resident of the state of New York, was arrested under a writ of *ne exeat,* while temporarily at Newport, Rhode Island. To obtain a release from under the writ, he executed a bond, with Griswold and Bradford as sureties, the condition of which was that Durant should abide and perform the orders and decrees of the supreme court of the state of Rhode Island in the suit in equity of Isaac P. Hazard and others against the said Durant, then pending in said court. In that suit a decree was, fourteen years afterwards, obtained for a very large sum for plaintiff; and thereupon an action at law was brought on the bond against Griswold, and judgment recovered. Pending this common law action on the bond, bills in equity were filed by Griswold for injunction to restrain the proceeding at law. It was alleged in these bills that Griswold had intended to sign, and believed at the time that he signed, a bond which simply bound him for the appearance of Durant, and that its execution in its actual form was the result of mistake. The supreme court held (reversing the decree below) that the alleged mistake was clearly established by the proofs; that under the circumstances Griswold was entitled to relief against the mistake of law; and that the action on the bond should be perpetually enjoined. The court said there was no mistake as to the mere words of the bond; for it was drawn by one of Hazard's attorneys, and was

read by Griswold before signing it. But, according to the great weight of evidence, there was a mistake, on both sides, as to the legal import of the terms employed to give effect to the mutual agreement. In short, the instrument does not express the thought and intention which the parties had at the time of its execution. And this was attended by circumstances that render it inequitable for the obligees in the bond to take advantage of it. The instrument was drawn by one of Hazard's attorneys, and was presented and accepted as embodying the agreement previously reached. Griswold was unskilled in the law, and took the word 'perform' as implying performance in the sense of Durant's becoming amenable to the process of the court." In other words, he thought he was signing a bail bond for the personal appearance of Durant in the court, and not a bond to abide the judgment of the court on the matter in litigation. The attorney on the opposite side had caused him to sign a bond of the latter class, instead of a mere bail bond, either by his own want of skill, negligence or wilful fraud, but as the court, in effect, found, by the mistake also of the attorney as to the legal effect of the bond written by him. Durant was arrested on his landing at Newport on the same day the writ was issued, and hurried at once to jail. His friends, together with the plaintiff's attorneys, assembled at the jail about 12 o'clock at night of the same day, it being Saturday, and the matter was discussed as to how he could be released from jail, so as to be permitted to return to New York on urgent business. The writ from the court commanded the sheriff to make the arrest, and "to take bail from Durant in the sum of $53,735, conditioned that he would not go or attempt to go into parts beyond the state without leave of the court." The sheriff had no authority to demand from Durant any bond having a different effect. The parties at the jail had all assembled there to arrange for the release of Durant from the jail. Nothing else seems to have been contemplated. Griswold was a stranger to Durant, but was induced to sign the bond by his nephew, who was a friend of Durant. A reading of the full statement of the case and the language of the decision, alone, can give the best understanding of the real meaning of the decision. The bond, as written, did not comply with the order of the court embraced in the writ, and was not such as the sheriff was really authorized to take. His authority was to take bail and release, and not to take a supersedeas or other bond binding the bondsmen to abide the judg-

ment for the debt. Griswold signed what he supposed was the proper bail bond, written out by attorneys for plaintiff; and really there was some question that the bond was not in fact a mere bail bond for the appearance of the principal in court, and that he would not depart the state without the leave of the court. It was held that the bond be reformed according to the understanding of the parties at the time of its execution. To insist upon the liability of the bondsmen for the debt was simply an evidence of the fraudulent intent and unconscionable desire of the plaintiff. There does not appear to have been any mistake of law on the part of Griswold. He simply signed it, not dreaming it was anything but a bail bond, as to give bail was what they had all assembled at the jail at that hour of the night to do, and nothing else.

The text writers cited in the opinion all agree that a mere mistake of law cannot be relieved against, but that, in rare cases, where one is misled by the negligence, fraud or imposition of the opposite party to make the mistake of misconstruing and thereby of signing a paper not expressing his meaning at the time, he may have relief in equity.

But what is the case at bar? Is it such that any of these cited cases are applicable at all? Let us see. It is, or (since there is no testimony on the subject) it may be, the custom of banks in dealing with these weak corporations, especially when starting business, to require their notes and other obligations to be signed by the managers of such concerns; for in no other way can the rules of banking be observed. And it may be the rule to require these persons to annex their official titles respectively, not to show that it is paper of the concern, but, as to future holders, that these persons were in control of the concern's offices, and therefore would be the more likely to so manage to honor the paper when presented for payment, seeing that, if not so honored, they were liable themselves. That is probably the rule, and a more reasonable supposition on this kind of question is all that the holder is called upon to show.

The note sued on is signed by four different persons, one styling himself "president," another "vice president," another "secretary," and the fourth "treasurer." Why this string of names to bind a corporation, no one with a particle of business sense can conceive of. A corporation is generally bound by one person authorized by its charter or by-laws so to do. All the

officers are nowhere required to sign the obligations of a corporation, in order to make it the corporation's obligation.

The gravamen of the complaint of appellees is that Phelps had superior knowledge, and that they were unacquainted with the law pertaining to such matters. To admit testimony of this character from gentlemen who set themselves up as capable of managing the affairs of a manufacturing corporation is to stretch the exceptions to indefinite bounds.

There does not appear to me to be any proper application of the citations to the facts in the case at bar.

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THORNTON v. ST. LOUIS REFRIGERATOR & WOODEN GUTTER COMPANY.

Opinion delivered June 22, 1901.

1. DONATION DEED—CONSTRUCTIVE POSSESSION.—A donation deed executed by the state of Arkansas is *prima facie* evidence of title, and vests in the grantee constructive possession in the case of wild land; and this possession is actual for all the purposes of remedy until it is interrupted by an actual entry and adverse possession taken by another. (Page 426.)

2. TRESPASS—ADVERSE POSSESSION.—The occupancy that will defeat an action by the true owner of land against one having no right of possession for timber cut therefrom during its continuance, before the recovery of the land, must be actual possession by the occupant as his own property, held with a view to its permanent use for his own benefit, and not a mere temporary occupancy for the purpose of cutting and removing timber. (Page 428.)

Appeal from Clark Circuit Court.

JOEL D. CONWAY, Judge.

C. V. Murry and *J. B. Moore,* for appellant.

The second, fourth and fifth instructions given for appellee were erroneous. The evidence does not make out a case of adverse possession. 24 Ark. 394; 40 Ark. 371; 49 Ark. 274.

J. H. Crawford, for appellee.

Appellee's first instruction was correct. Adverse possession is always a question for the jury, under proper instructions. 1

Thompson, Trials, § 1410. The second instruction for appellee was correct, also. 26 Ark. 256; 40 Ark. 238; 34 Ia. 564; 56 Ia. 381; 65 Mich. 670; 32 N. W. 889-891; 156 Ill. 71; 40 N. E. 71; 66 Ia. 684; 24 N. W. 275; 23 N. Car. 56; 152 Ill. 106; 38 N. E. 747; 11 La. 432.

BATTLE, J. On the 27th day of August, 1898, Jobe Thornton brought this action against the St. Louis Refrigerator & Wooden Gutter Company and others to recover the value of certain timber converted by the defendants to their own use. He alleged that he was the owner of a certain tract of land described in his complaint; that it was heavily timbered with oak, pine and gum; and that the defendants trespassed upon the same, and unlawfully, without right or authority, cut and removed therefrom timber of the value of $450; and asked for judgment for the value of the timber so cut and removed.

The St. Louis Refrigerator & Wooden Gutter Company answered, and denied that plaintiff is the owner of the land; and alleged that J. S. Cargile and his wife, Alice Cargile, on the 13th day of September, 1886, conveyed the land to James A. Smith, who conveyed the same to the St. Louis Refrigerator & Wooden Gutter Company on the 9th of September, 1887; that Alice Cargile and the St. Louis Refrigerator & Wooden Gutter Company have each held seven years' adverse possession of the land before the commencement of this action; and denied that it cut as much timber on the land as is alleged in the complaint, and alleged that whatever was removed therefrom was cut more than three years before the commencement of this action.

In the trial before a jury the plaintiff produced and read as evidence a deed executed by the state on the 9th day of April, 1872, by which the state conveyed and donated the land in question to him, the same having been forfeited to the state on account of the nonpayment of taxes. He also adduced evidence tending to prove that the defendant, the St. Louis Refrigerator & Wooden Gutter Company, in the summer or fall of 1896, cut and removed from the land a large quantity of timber, and the value of the same. The defendants introduced and read as evidence deeds to the land from J. S. Cargile and Alice Cargile to James A. Smith, and from James A. Smith to the St. Louis Refrigerator & Wooden Gutter Company. They also proved that the company paid the taxes on the land for the year 1876 and the succeeding years down

to and including 1897, a period of 22 years; and it was shown that the only acts of ownership exercised by the defendants, or either of them, over the land in question was the payment of the taxes and the cutting of timber thereon in the summer or fall of 1896, There was no evidence that Cargile or his wife ever held adverse possession, or had any title to the land.

Upon this evidence the court instructed the jury, in part, over the objections of the plaintiff, as follows:

"1. Before the plaintiff can recover in this cause, he must show to the satisfaction of the jury that he was in the actual or constructive possession of the land which he claims was the subject of the trespass; and in this case if the jury finds that the defendant was in possession of the land, using it for the purposes for which it was designed, and the only use for which it was susceptible, they will find for the defendant.

"2. If the jury finds from the evidence that the defendant claimed title to the land in controversy by deed duly executed and recorded, purporting to convey to it said land, and under such color of title it paid the taxes thereon, and entered upon said land, and cut the timber therefrom, and exercised other acts of ownership over the same, such acts should be regarded as acts of ownership and possession, and not as trespass, and your verdict should in that event be for the defendant.

"3. This is not an action for the recovery of the land described in the complaint, and the jury is not required to determine the ownership of the same; and in this case if the jury believe from the evidence that the defendant was in the possession of the land at the time of the alleged trespass, notwithstanding they may also believe the plaintiff owned the land, they should find their verdict for the defendant, that the defendant is not guilty of trespass."

The defendant recovered a judgment, and the plaintiff appealed. Are the instructions correct?

The donation deed executed by the state of Arkansas to the appellant is *prima facie* evidence of a valid title to the land in him. The land being wild, uncultivated and unoccupied, it vested him with the constructive possession of the same, and this possession is "actual, for all the purposes of remedy, until it is interrupted by an actual entry and adverse possession taken by another," and nothing short of what constitutes an actual possession, such as

creates an ouster, will take away from the owner the possession which the law attaches to the legal title. Such possession does not consist in doing temporary acts upon the land without an intention to hold and "occupy it for residence or cultivation, or for some other permanent use consistent with the nature of the property." *Young* v. *Herdic,* 55 Pa. St. 172; *Halleck* v. *Mixer,* 16 Cal. 579; *McKinnon* v. *Meston,* 104 Mich. 642.

The true owner of land, unless ousted in the manner indicated, has a right to sue for and recover timber cut and removed from his land, or its value, in an action brought solely for that purpose. In *Brewer* v. *Fleming,* 51 Pa. St. 115, which was an action to recover the possession of timber, the court said: "A mere temporary occupancy, for the purpose of taking off timber, by one having no right of possession, is not such an actual possession as defeats the constructive possession which the law casts upon the owner. *Harlan* v. *Harlan,* 3 Harris, 507,—referring to *Wright* v. *Guier,* 9 Watts, 172, and *Elliott* v. *Powell,* 10 Watts, 454. See also *Sorber* v. *Willing,* 10 Watts, 141; *Hole* v. *Rittenhouse,* 1 Wright, 116; *Washabaugh* v. *Entriken,* 10 Casey, 74. Nor does such an entry and cutting of timber defeat the owner's right to it, but, as soon as it is severed from the freehold, his right of property vests in it. *Id.* See also the late cases of *Clement* v. *Wright,* 4 Wright, 254; and *Altemose* v. *Hufsmith,* 9 *id.* 128. * * * According to the authority of these cases, neither trover nor replevin lies against one in the actual possession of land claiming title for timber, slate, or other products severed by him from the freehold, nor even when there is a common possession, and the title is in controversy. But it does lie in favor of the owner in possession, actually or constructively, against a tort feasor, or one who has no right of possession, who enters only casually or temporarily to cut timber."

In *McKinnon* v. *Meston,* 104 Mich. 642, which was an action for the recovery of timber, the defendant held a tax deed to the land from which the timber was cut. The court held that "*bona fide* and actual possession of wild lands is not clearly established by testimony tending to show that the party making such claims occupied a shanty on the land while removing timber therefrom, it not appearing who built the shanty, nor what the purpose was for which it was built, and there being a doubt as to the shanty's being upon the land from which the timber was removed." The court said: "There was ample opportunity for the jury to find

that the alleged possession was a subterfuge, and that the defendant was a trespasser merely, if his tax title was invalid."

The occupancy that will defeat an action brought against a person cutting timber during its continuance from land solely for the possession or value of the timber, by the true owner, before the recovery of the land, must be such as to constitute that adverse possession which will set the statute of limitations in motion. In *Wright* v. *Guier*, 9 Watts, 175, Chief Justice Gibson said: "But why should there not be the same degree of possession to bar an action for the produce of the soil that is necessary to bar an action for the soil itself. Such an occupancy is indefinitely continuous, while the occupancy of a trespasser, who neither cultivates nor encloses, continues no longer than he remains in contact with the soil." Such possession as will set the statute of limitations in motion in respect to the land challenges the title of the true owner, and he will not be allowed to harass the occupant by separate suits for the recovery of the timber cut, or its value, but must bring his action for the land. Chief Justice Gibson, in the case last cited, said; "The true reason why trover or replevin lies not against an actual occupant is * * * the impolicy of suffering him to be harassed with a separate action for each bushel of wheat consumed, or stick of firewood burnt, on the premises, instead of having the matter settled at once by an action to recover the possession."

We therefore conclude that the occupancy that will legally defeat an action by the true owner against one having no right to possession, for timber cut from his land, during its continuance, or the value of the timber, before the recovery of the land, must be actual possession by the occupant of the land as his own property, held with a view to the permanent use of the same for his own benefit. The instructions in question are erroneous, because they do not embody the idea we have indicated, and because they directed the jury to return a verdict in favor of the appellees, when their possession might not have appeared to the jury to be such as was, according to this opinion, necessary to entitle them to recover.

Reversed and remanded for a new trial.

HUGHES and WOOD, JJ., absent.

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ARKANSAS CONSTRUCTION COMPANY *v.* MULLINS.

Opinion delivered June 22, 1901.

PROCESS—SERVICE ON CORPORATION.—A return of a writ directed against a corporation reciting delivery of a copy to one named therein as its agent is insufficient, since, if it was a domestic corporation, the writ should not have been served upon an agent except in the absence of the president, mayor, or chairman of the board of trustees, under Sand. & H. Dig., § 5669, and, if it was a foreign corporation, service of process should be either on an agent designated to receive service, as authorized by section 1323, or on an agent of such character that it would be fair to imply an authority to receive service, under section 5672, providing that "where the defendant is a foreign corporation, having an agent in this state, service may be on such agent."

Appeal from Little River Circuit Court.

WILL P. FEAZEL, Judge.

STATEMENT BY THE COURT.

On the 15th day of June, 1896, appellees, F. W. Mullins, J. W. Harris and T. S. Mullins, partners as the Texas Produce Company, instituted their action in the Little River circuit court against J. H. Hall and B. T. Collins, partners as Hall & Collins, upon a promissory note for $1,897, which plaintiff alleged was due and owing them by defendants, and asked for a judgment thereon.

On December 9, 1896, a writ of garnishment was issued by the clerk of said court, addressed to the sheriff of Miller county, Arkansas, reciting the institution of an action against the defendant upon a promissory note in the sum of $1,897, with interest thereon at the rate of 10 per cent. per annum, from February 2, 1896, etc., and commanding the garnishee to appear on the 1st day of the next January term of said court, which would be the 4th day of January, 1897, and answer what goods, chattels, moneys, credits and effects it had in its hands or possession belonging to said J. H. Hall, and to answer such further interrogatories as might be exhibited against it. The return of the sheriff on said writ is as follows: "State of Arkansas, county of Miller. I hereby certify that this writ came to my hands on the 14th day of De-

cember, A. D. 1896, at the hour of 1:30 p. m., and I have duly served the same, upon the same day, at the hour of 4:10 p. m., by delivering a true copy thereof to W. A. Williams, the agent of the within-named garnishee, at Texarkana, Miller county, Ark. Witness my hand this 14th day of December, A. D. 1896. James T. Dillard, Sheriff."

On January 13, 1897, judgment by default was rendered in favor of the plaintiff and against the defendants, J. H. Hall and B. T. Collins, for the amount claimed by the plaintiff. Plaintiff also on the same day took judgment by default against the following garnishee, Arkansas Construction Company, in the sum of $2,249.95.

The Construction Company brought up the cause, by an appeal granted by the clerk of this court.

Read & McDonough, for appellant.

There was no sufficient service upon appellant as a corporation, either foreign or domestic. Sand. & H. Dig., § 5669; 62 Ark. 144. If appellant is a foreign corporation, the return is not sufficent, because it does not show service upon an agent designated to receive service of process. Sand. & H. Dig., § 1323; 59 Ark. 583.

Scott & Jones, for appellees.

"Where the defendant is a foreign corporation, having an agent in this state, the service may be upon such agent." Sand. & H. Dig., § 5672; 48 Ga. 351; 33 S. E. 875. The return of the sheriff is proper and sufficient. The presumptions are all in favor of the regular discharge of duty by an officer. 4 Ark. 150; 40 Ark. 143.

HUGHES, J., (after stating the facts). The return of service on the writ of garnishment in this cause shows no sufficient service, because: (1) It does not appear from the record that the Arkansas Construction Company was a foreign or domestic corporation. If it was a domestic corporation, the return is not sufficient, because it does not show that the president of the company, mayor, and chairman of the board of trustees were absent when the service was made on an agent. Section 5669 provides that: "Where the defendant is a corporation, created by the laws of this state, the service of the summons may be upon the president, mayor, or chairman of the board of trustees, and, in case of the

absence of the above officers, then it may be served upon the cashier, treasurer, secretary, clerk or agent of such corporation." *Ark. Coal &c. Co.* v. *Haley,* 62 Ark. 144. (2) If the appellant was a foreign corporation, the return was insufficient, because it does not show that the agent upon whom service was had had been designated by the company to receive service of process. Section 1323, Sandels & Hill's Digest. (3) Because it does not appear from the return or any part of the record that the agent upon whom service was had was of such character of agent "as to render it fair, reasonable and just to imply an authority on the part of the agent to receive service and that the law will and ought to draw such an inference." *Conn. Mut. Life Ins. Co.* v. *Spratley,* 172 U. S. 602.

Under such circumstances, where the corporation is doing business in the state, service upon such an agent is good, under section 5672, Sandels & Hill's Digest, as we held in the case of *Lesser Cotton Co.* v. *Yates, ante,* p. 396. Section 5672 is as follows: "Where the defendant is a foreign corporation, having an agent in this state, the service may be upon such agent." *Henrietta Mining & Milling Co.* v. *Gardner,* 173 U. S. 124. The character of the agent nowhere appears in the record, and the simple fact that he was agent (it may be, without any representative character from which authority might and ought to be implied on his part to receive service) is not sufficient.

Judgment reversed, and cause remanded, with directions to proceed in the cause; the appellant having entered his appearance by appealing in this cause.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY *v.* WHITE SEWING MACHINE COMPANY.

69 431
76 404

Opinion delivered June 22, 1901.

VOLUNTARY NONSUIT—DISCRETION OF COURT.—Under Sand. & H. Dig., § 5791, providing that an action may be dismissed without prejudice by the plaintiff before final submission of the case, and that in all other cases, upon the trial of the action, the decision must be upon the merits, the court, in the interests of justice, may permit a plaintiff to withdraw a submission of his case, and take a nonsuit without prejudice.

Appeal from Pulaski Circuit Court.

ROBERT J. LEA, Judge.

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

The statute (Sand. & H. Dig., § 579) provides for dismissals without prejudice only *before* final submission. It was error for the court to allow such dismissal *after* submission. 8 S. E. 806; 10 Wend. 520; 20 Wend. 36; 1 T. R. 52; 11 Johns. 458; 5 Johns. 346; 2 Johns. 181, 191; 10 S. E. 807; 8 Ia. 462; 23 Ia. 216; 59 N. W. 1009; 70 Ind. 524.

J. H. Harrod, for appellee.

Appellant had the right, with leave of the court, to dismiss before the case was decided. 26 Mo. 492; 42 Mo. App. 376; 13 Mo. 588; 48 S. W. 447. The court had the power to allow the dismissal, so long as the discretion was not abused. 23 Kan. 262; 50 Kan. 49.

WOOD, J. The question is, can a court, sitting as a jury, in a cause finally submitted for decision, permit the plaintiff to withdraw the submission and take a nonsuit without prejudice? The statute is as follows: "An action may be dismissed without prejudice to a future action: *First.* By the plaintiff before the final submission of the case to the jury or to the court, where the trial is by the court. * * * In all other cases, upon the trial of the action, the decision must be upon the merits." Sec. 5791, Sand. & H. Dig. Kansas has an exactly similar statute. In *Ashmead* v. *Ashmead,* 23 Kan. 262, the court, through Judge Brewer, held that "after a case has been finally submitted to the jury or court the plaintiff has no right to dismiss the action without prejudice to a future action, but, while all legal right on the part of the plaintiff has ended, the court may, in its discretion, and to prevent injustice and wrong, permit the plaintiff to recall the submission and dismiss without prejudice, and in such case the action of the court, unless it has abused its discretion, is no ground of error." This is correct. The plaintiff, under the statute, may not demand as his right what is within the discretion of the court, in the interest of justice, to permit. The record shows that the court suggested to plaintiff's counsel that the dismissal without prejudice would be permitted, since the court did not believe that a fair trial of plaintiff's case could be had upon the record as it then stood, and believed the dismissal to be in the interest of justice.

Affirmed.

FORTENBERRY v. GAUNT.

Opinion delivered June 22, 1901.

JUSTICE OF THE PEACE—JURISDICTION—ATTACHMENT.—Under Const. 1874, art. 7, § 40, giving to justices of the peace jurisdiction in suits for the recovery of personal property where the value does not exceed $300, the circuit court, on appeal from a justice of the peace, can, upon a dissolution of an attachment, give judgment for the return of the property attached or its value, where the value does not exceed $300.

Appeal from Jackson Circuit Court.

FREDERICK D. FULKERSON, Judge.

STATEMENT BY THE COURT.

A raft of logs owned by Gaunt & Layman was allowed to strike and break a ferry rope belonging to Fortenberry & Rattan, who owned a ferry on Black river. They thereupon brought suit against Gaunt & Layman before a justice of the peace for $20 as damages, and procured the issuance of an attachment, and had the same levied upon the rafts of the defendant. On an appeal to the circuit court, there was a judgment in favor of the plaintiffs for $10, but the attachment was dismissed. Afterwards, the cause coming on to be heard upon the defendant's claim for the return of the property or its value, and it appearing that the property had been disposed of and could not be returned, the court impaneled a jury, who assessed the value of the attached property at $263. The court thereupon deducted the $10 recovered by the plaintiffs, and gave judgment against them in favor of the defendants for the balance. Plaintiffs appealed.

J. C. Yancey and *Morris M. Cohn,* for appellants.

A joint judgment against two parties cannot be appealed by one of them; and the judgment of the circuit court is void. Murfr. Jur. of Just. § 689; 4 Baxt. 378; 2 Overton, 189; 49 Kan. 313; 50 Kan. 331; 13 La. Ann. 296; 4 Dev. 217; 8 Ired. 371; *id.* 460; 6 S. & R. 315. The jurisdiction of justices of the

peace in regard to claims for damages to personal property is limited to one hundred dollars. 66 Ark. 346; Const. art. 7, § 40; 31 Ark. 219; 40 Ark. 78; 41 Ark. 477; 44 Ark. 100; 47 Ark. 100. The damages for wrongful attachment of personal property is within this rule; and it applies as well to a counter-claim or set-off as to the original action. 57 Ark. 257; 67 Ga. 515; 83 N. C. 539; Murfr. Jur. Just. §§ 127, 129; 43 Ark. 107; 61 Ark. 13. The justice court being without jurisdiction, none was acquired by the circuit court on appeal. 57 Ark. 257, 266; 48 Ark. 349, 353. This defect could not be cured by remittitur. 43 Ark. 107, 111; Murfr. Jur. Just. § 129.

Gustave Jones, for appellees.

If appellants deemed the verdict excessive, they should have saved an exception thereto. 45 Ark. 524; 28 Ark. 188. The justice had jurisdiction. *Cf.* 61 Ark. 33.

RIDDICK, J., (after stating the facts). This action was commenced before a justice of the peace by attachment. The only question presented by the appeal to this court is whether the circuit court, on appeal from a justice of the peace, can, upon a dissolution of an attachment, give a judgment for the return of the property attached or its value, where the value exceeds $100. On an appeal from a justice of the peace, the circuit court has only the jurisdiction that the justice of the peace had. But a justice of the peace has jurisdiction in suits for the recovery of personal property, when the value of the property does not exceed the sum of $300. Const. art. 7, § 40. And in an action to recover personal property, when delivery of the property cannot be had, the court may give judgment for the value thereof. Sand. & H. Dig., § 6398. A justice of the peace may render such a judgment when the value of the property does not exceed $300.

Now, in this case, when the attachment had been dismissed, the defendants claimed the return of the property or its value. If the property could have been returned, the judgment would have been for the return of the property; but, as the return could not be had, the court gave judgment for its value. As this value did not exceed the $300, we think the court had jurisdiction. The plaintiff did not ask for damages to the property, but their claim in this case, after the dismissal of the attachment, was in the nature of a suit for the property, and the judgment for the value was in

lieu of the property itself, which could not be returned. *Norman* v. *Fife*, 61 Ark. 33. The question, we admit, is not altogether clear, but we are of the opinion that the judgment is right; and it is therefore affirmed.

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EX PARTE CLARK.

Opinion delivered June 29, 1901.

LIQUORS—DISCRETION OF COURT TO REFUSE LICENSE.—The county court has a discretion in the matter of granting a license to sell liquors, both as to the personal character of the applicant and the suitableness of the place at which the sale is proposed to be made, and its decision, if supported by evidence, will not be reversed.

Appeal from Randolph Circuit Court.

JOHN B. MCCALEB, Judge.

G. G. Dent, for Clark.

Conducting a licensed saloon is not *per se* a nuisance. 11 Humph. (Tenn.), 411; Black, Intox. Liquors, § 343. The county judge cannot discriminate between parties as to licenses. 43 Ark. 61; Black, Intox. Liquors, §§ 170, 171; Sand. & H. Dig., §§ 4856, 4857, 4863, 4867, 4868, 4877.

P. H. Crenshaw, Witt & Schoonover, opposing.

Appeals lie only from final decrees, judgments and orders. 26 Ark. 452; 26 Ark. 95; 25 Ark. 420; 36 Ark. 200; 30 Ark. 665. The opinion of the judge is not final. 48 Md. 592. The judgment must be rendered and entered before it is final. 32 N. W. Rep. 42; 1 Wash. T. 153. A final judgment must give relief by its own force, without further action by the court. 61 Ky. 30.

BUNN, C. J. This is an appeal from an order of the county court refusing to issue a whisky license. The petition was denied by the county court, and on appeal to the circuit court it was denied there also, and the judgment of the county court affirmed, in the following language, to-wit: "It is considered and adjudged by the court that the county judge of Ran-

dolph county, in refusing license, exercised a sound judicial discretion, as shown by the order and judgment refusing the same, and the evidence in the cause." The county court had a discretion in the matter, not only as to the personal character of the petitioner, but as to the suitableness or unsuitableness of the place at which the sale is proposed to be made. There is not only some evidence to sustain the county judge in his findings, but his findings are supported by the evidence, and we affirm the judgment of the circuit court on its conclusions thereon.

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ALFORD v. STATE.

Opinion delivered June 29, 1901.

CONSTITUTIONAL LAW—NUMBER OF JUSTICES OF THE PEACE.—Act February 16, 1893, § 2, prescribing "that, in ascertaining the number of justices of the peace to be voted for and commissioned, the number of the votes cast in the general election next preceding shall be taken as conclusive of the number of electors in the township," is not in conflict with section 39, art. 7, of the constitution, providing that "for every two hundred electors there shall be elected one justice of the peace."

Appeal from Garland Circuit Court.

ALEXANDER M. DUFFIE, Judge.

A. Curl, for appellant.

The court erred in overruling appellant's demurrer, and in its declaration of law holding section 4309 of Sandels & Hill's Digest constitutional. Const. art. 7, §§ 38, 39; *ib.* art. 3, § 1; 32 Ark. 131; 45 Ark. 400; Const. art. 13, § 3.

BUNN, C. J. This is a proceeding, in the nature of a *quo warrranto* proceeding, to try the title of the appellant, J. W. Alford, to the office of justice of the peace of Hot Springs township, in Garland county, this state.

The respondent answered, denying that he had usurped said office. He sets forth his personal qualifications to hold the office, and claims that he was elected as such justice of the peace at the general election held September 4, 1900, and was commissioned as

such on the 31st October, 1900, and duly qualified on the same day, and then entered upon, and has since continued to perform, the duties of said office. Respondent was the ninth, in order of the votes received, of persons voted for at the general election in 1900 for the office of justice of the peace in said township. The controversy is over the number of justices of the peace to which said township was entitled at the time. The constitutional provision is af follows: Art. 7, sec. 39: "For every two hundred electors there shall be elected one justice of the peace; but every township, however small, shall have two justices of the peace." In his answer, which calls in question the constitutionality of the act approved February 16, 1893, entitled "An act to determine the number of justices of the peace in each township," the respondent shows that 1,346 votes were cast at the general election in 1898; and that 1,800 votes were cast at the general election in 1900, in said township, making a difference of 454 votes increase in the two years.

Under the provisions of the act of 1893, the township was entitled to only six justices of the peace, to be elected at the general election in 1900, as that act bases the calculation of the number upon the vote cast in 1898; but if the vote of 1900 be taken as the basis, as respondent contends, then the township would be entitled to nine justices of the peace, and he was elected among the nine, and so commissioned by the governor of the state. The relator demurred to the answer, and the question of the constitutionality of the act of 1893 was thus raised. The second section of the act is the only part of the act which affects the question under consideration, and that section reads as follows, to-wit: "In ascertaining the number of justices of the peace to be voted for and commissioned, the number of votes cast in the general election next preceding shall be taken as conclusive of the number of electors in the township."

The contention of the respondent is that this act is in violation of the constitutional provision as to the number of justices of the peace to which each township is entitled, and the reasoning is that the number of votes cast two years previously is no just criterion by which to determine the number of justices of the peace to which a township is entitled at the ensuing election, and that such a rule is in fact in violation of the constitutional provision.

It is evident that the constitutional provision is not, in the true sense, self-executing; that is to say, that it makes no provision

for determining the number of votes from which the number of justices of the peace is to be determined, or at what time the number of votes is to be cast or otherwise shown. It is evident, also, that, except by actual census immediately preceding the election at which these justices of the peace are to be elected, no exactness nor approximation thereto may be attained by any known method. Even the number of poll-tax payers, as used in cases of elections for the removal of county seats, is not or may not be approximately accurate under circumstances. It was the duty and within the province of the legislature to adopt some method of determining the number of electors in a township, in order to determine therefrom the number of justices of the peace to which it is entitled, for, without the establishment of such a method, there could be no election of certain validity. The plan adopted by the act of 1893 is certainly not accurate, for changes in the number of electors are at least liable to take place within two years; but the question really addressed to the legislature was, not to adopt a perfect method, but the most perfect available, under the circumstances. In its final conclusion on the subject it doubtless reasoned that the harm that might be done by the adoption of the best available, but inaccurate, method would be by no means equal and commensurate with the evil arising from the absence of all methods, or from the expense and inconvenience of endeavoring to make anything subservient to mere accuracy. Besides, it doubtless considered the method adopted only temporary in any evil effects it might have, if any should result therefrom in any given case. In other words, the act in question was doubtless the embodiment of the very best method the legislature could conceive of under the circumstances. This being the case, we do not feel at liberty to declare the enactment unconstitutional. The dilemma of the legislature is emphasized when it is remembered that, under our present election system then in vogue, it is absolutely necessary to determine the number of justices of the peace before the result of the ensuing election is made known.

The judgment of the lower court is therefore affirmed, and said act is constitutional.

HITSON v. SIMS.

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Opinion delivered June 29, 1901.

1. MALICIOUS PROSECUTION—PROBABLE CAUSE.—In an action for malicious prosecution it was error to instruct the jury that if, after considering all the evidence, the jury find that a reasonably prudent person would have declined to prosecute, then they might find a want of probable cause, as the question is whether all the facts known to defendant before he instituted the prosecution were sufficient to cause a person of ordinary caution, and did cause defendant, to believe that plaintiff was guilty of the crime charged. (Page 441.)

2. SAME—EVIDENCE.—In an action for malicious prosecution it is not competent to prove that defendant disposed of his property pending the prosecution. (Page 441.)

Appeal from Washington Circuit Court.

JAMES M. PITTMAN, Judge.

G. J. Crump, Watkins & Walker, for appellant.

As to what constitutes probable cause, see 63 Ark. 387; 97 Mo. 390; 53 N. Y. 14; 31 Am. Dec. 422; 11 Am. St. Rep. 193; 69 Ill. 376; 30 Ind. 457; 24 How. 544; 28 Gratt. 906; 56 Conn. 493; 30 Minn. 516; 67 Wis. 350; 4 Cush. 217. As to what constitutes malice, see 31 Vt. 189; 2 Greenleaf, § 544; Bishop, Non. Con. 232. If there is probable cause, the prosecutor is protected. 33 Ark. 316. Honesty of purpose precludes malice. 86 Ala. 250; 26 Am. St. 140; 76 Mo. 660. The defendant in a malicious prosecution suit must prove the guilt of plaintiff. Bishop, Non. Con. Law, 229; 13 R. I. 616; 57 Ia. 474; 12 Ala. 264; 68 Miss. 117; 10 Ired. 287; 28 Hun, 446; 14 Am. Dec. 572; 25 Am. Dec. 102. It was error to refuse instruction No. 13 asked by defendant and instruction No. 14. 63 Ia. 529; 76 Mo. 660; 22 W. Va. 234; 46 Kan. 550. Malice must be proved. 30 Am. Dec. 617; 67 Wis. 350; 98 U. S. 187. The court should have authorized a verdict for defendant. Bishop, Non. Con. 240; 26 Am. Dec. 141.

Pace & Pace, for appellee.

BATTLE, J. On the 2d day of November, 1898, appellee brought this action in the circuit court of the Eastern district of Carroll county, Ark., and alleged: "That the appellant falsely, maliciously, and without any reasonable or probable cause whatever, charged appellee with the crime of grand larceny; that upon said charge he caused John Sisco, a justice of the peace, to issue a warrant for the apprehension of said appellee, and the bringing of her before said justice of the peace to be dealt with according to law; that on the 21st day of July, 1898, the appellant wrongfully, unjustly, falsely, and maliciously, and without any reasonable or probable cause therefor, caused and procured the appellee's arrest, and kept her imprisoned for six hours; that on the 25th day of July, 1898, appellant falsely, maliciously, and without any reasonable or probable cause, caused and procured the appellee to be carried in custody before the said justice of the peace for examination, and that appellant falsely and maliciously procured the justice of the peace to require appellee to give bail in the sum of $500; that on said 25th day of July, 1898, appellant caused said justice of the peace to certify all of the papers and minutes used in the examination of the cause before said justice of the peace to the circuit court of Carroll county, Ark., and to lodge said papers with the clerk thereof; that on the 15th day of August, 1898, the grand jury of the Eastern district of Carrroll county failed and refused to indict the appellee, and returned the papers into the court with the word "Dismissed" written thereon; that the appellee was fully acquitted and discharged by said court, and that she was not further prosecuted on said charge; that said prosecution was wholly ended; that appellee had been damaged in the sum of $.... in arranging her defense and the sum of $.... loss of business. Total damages, $6,000."

On the 22d day of February, 1899, the appellant filed his answer, in which he admitted that he had filed the affidavit before Sisco, charging the appellee with the crime of grand larceny; that the justice of the peace had issued his warrant, and that she had been arrested; that she was held by the justice of the peace after full examination on said charge to answer the same before the grand jury; that Sisco admitted her to bail in the sum of $500, which she gave; that, after she was bound to answer the charge by the justice of the peace, the grand jury dismissed the charge against

her; and that she was discharged. He denied that he caused her arrest without probable or reasonable cause, or that the same was done maliciously, and charged that there was reasonable and probable cause for believing that the appellee was guilty of larceny as charged in the affidavit, and that what he did was done in good faith and in an honest belief of her guilt.

A jury tried the issues in the case, and returned a verdict in favor of the plaintiff and against the defendant for $620. Judgment was rendered accordingly, and the defendant appealed.

The evidence adduced in the trial as to the existence of a probable cause for the prosecution of appellee for the crime of larceny as alleged in her complaint was conflicting, and made the existence of a probable cause at least questionable.

The circuit court, among other instructions as to probable cause, gave the following: "If, after considering all the facts and circumstances in evidence connected with the transaction, and of which the prosecution complained of arose, the jury find that a reasonably prudent, dispassionate person would have declined to cause the prosecution, then you would be authorized to find a want of probable cause." This instruction was calculated to mislead the jury, and should not have been given. In cases like this, a probable cause is such a state of facts known to the prosecutor, or such information received by him from sources entitled to credit, as would induce a man of ordinary caution and prudence to believe, and did induce the prosecutor to believe, that the accused was guilty of the crime alleged, and thereby caused the prosecution. *Foster* v. *Pitts*, 63 Ark. 387. The question in this case was not whether a prudent man would have declined, but whether all of the circumstances and facts in appellant's mind, and known to him, or made known to him by creditable persons, before he instituted the prosecution, were sufficient to cause a person of ordinary caution to believe, and did cause him to believe, that the appellee was guilty of the crime charged. The two questions are different. What might be sufficient evidence to convict of a malicious prosecution without probable cause according to one test might not according to the other.

Something was said by a witness and counsel in the trial about the appellant having disposed of his property during the pendency of this action. Such testimony was inadmissible in this cause.

For the error committed in instructing the jury in this case, the judgment of the circuit court is reversed, and the cause is remanded for a new trial.

KENDALL v. J. I. PORTER LUMBER COMPANY.

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Opinion delivered June 29, 1901.

1. DEED—GROWING TIMBER—RECORD AS CONSTRUCTIVE NOTICE.—A deed conveying growing trees, and authorizing the grantee to cut and remove them within a specified time, conveys an interest in the land, and, upon being recorded, constitutes constructive notice, under Sand. & H. Dig., § 727, providing that every deed affecting the title to any property within this state, "which is or may be required by law to be acknowledged or proved and recorded, shall be constructive notice to all persons from the time the same is filed for record in the office of the recorder of the proper county." (Page 446.)

2. DEED AS CONSTRUCTIVE NOTICE.—Where land was conveyed by the United States to M., who conveyed the growing timber thereon by that name, both deeds being on record, a subsequent grantee of the timber by deed from M., who conveyed under the name of G., will be held to have had constructive notice of the prior conveyance by his grantor if he had notice that his grantor held the land under the name of M. (Page 448.)

3. PRIOR CONVEYANCE—ACTUAL NOTICE.—Where a grantor of timber told his grantee that he had previously sold the same timber to another person, the second grantee will be held to have had actual notice of the prior conveyance, though he searched the record and failed to find the deed on record. (Page 448.)

4. RAILROAD RIGHT OF WAY—GROWING TIMBER.—Where the owner of land conveyed the growing timber thereon to one, and subsequently granted a right of way across the land to a railway company, there was no incompatibility in the two grants, and the permission of the railway company to a third person to cut the timber on the right of way would vest no title therein as against the prior grantee. (Page 448.)

5. INSTRUCTION—WHEN HARMLESS.—In conversion for cutting trees, an instruction was given that if plaintiff took timber from the lands of defendant under an agreement of exchange, by which each party was to keep an account of timber taken from the lands of the other and render to the other a statement thereof, and that the

one taking the greater quantity should pay the other for the excess, before either party would be entitled to recover from the other for such excess, it must appear that such statements were rendered and a balance struck. *Held*, harmless error, where appellant's admissions show that he was not prejudiced. (Page 448.)

Appeal from Jefferson Circuit Court.

ANTONIO B. GRACE, Judge.

White & Altheimer, for appellant.

To constitute a valid sale, there must be a delivery. 63 Ark. 10. A contract for sale of standing timber carries no interest in the land. 45 Mass. 583; 9 Barn. & Cress. 561; 3 Day, 484; 7 Greenleaf, 447; 1 Metc. 313; Chitty, Contr. (5 Am. Ed.), 300 302; 1 Greenleaf, Ev. § 271. Trees, when cut and carried away, become personal property. 79 Mass. 502; 4 Metc. 580; 8 Metc. 34; 81 Mass. 444; 1 Benj. Sales, § 117; Greenleaf, Ev. § 271. The record of an instrument unauthorized is not notice of contents. 1 L. R. A. 192; 79 Mass. 502. Plaintiff had no authority to sue. 14 Ark. 431; 1 Corbin, Benj. Sales, 140. Kendall was not a proper party. Sand. & H. Dig., §§ 1577-79. The testimony of Godfrey was incompetent. 57 Ark. 297; 119 U. S. 103.

Austin & Taylor, for appellee.

The record of the instrument was notice. Sand. & H. Dig., §§ 727, 6370; Tied. Real. Prop. § 10; 1 Kerr, Real. Prop. § 56; 35 Miss. 700; 69 Am. Dec. 744; 46 Md. 509; 44 Ark. 210; 55 Ark. 307; 65 Ark. 448.

BATTLE, J. On the 27th day of March, 1899, the J. I. Porter Lumber Company, a corporation, brought this action against Frank Kendall to recover of him the value of 175 pine trees, of the total value of $175. It alleged in its complaint that it was the owner of 125 pine trees on the north half of the northeast quarter of the northwest quarter of section 2 in township 7 south and in range 11 west, and 50 pine trees on the south half of said northeast quarter of said northwest quarter of section 2, and that the defendant wrongfully and without right or authority cut and removed from the land the pine trees so owned by it; and asked for judgment against the defendant for $350,—double the value of the trees.

The defendant answered, and denied that plaintiff was the owner of the trees growing upon the north half of the northeast quarter of the northwest quarter of section 2, and alleged that he

was the owner thereof, and, under his claim of ownership, entered upon the land and cut and carried away 159 pine trees. He denied that he entered upon and cut and removed timber from the south half of the northeast quarter of the northwest quarter of section 2. He alleged that plaintiff unlawfully cut and carried away 395 pine trees, which were his property, and of the value of $395, and converted them to his own use; and asked for judgment against the plaintiff for double their value.

Plaintiff replied, and denied all the allegations in the answer which set up a cross-demand against it.

In the trial which followed, it was shown that William Godfrey, who was sometimes called William McGehee, was the owner of the north half of the northeast quarter of the northwest quarter of section 2, and that he acquired title to the same by a patent from the United States, which conveyed the land to him by the name of William McGehee, and that W. A. Godfrey was the owner of the south half of the same tract of forty acres. On the 6th of April, 1896, William Godfrey, by the name of William McGehee, conveyed to the plaintiff all the pine trees on the land owned by him in section 2, with the right and authority to cut and remove the same at any time within 6 years; and on the 8th day of November, 1898, W. A. Godfrey conveyed to plaintiff all the pine trees on the land owned by him as before stated, with the power and authority to cut and remove the same within 2 years. Both deeds were duly acknowledged, and the former was filed for record on the 5th of May, 1896. On the 11th day of March, 1899, William Godfrey, *alias* McGehee, conveyed to the defendant "the exclusive privilege for one year to cut, haul away and remove pine trees" from the north half of the northeast quarter of the northwest quarter of section 2. The deed by which it was conveyed was acknowledged, and was filed for record on the 13th of March, 1899. At the time Godfrey executed this deed he informed the defendant that he had already conveyed the same pine trees to the plaintiff. On the 14th day of March, 1899, W. A. Godfrey conveyed to the Sand Creek & Sulphur Springs Railroad Company "a right of way 100 feet wide, the middle thereof to be the center of the track of said road, through and across" the land owned by him in section 2.

The defendant admitted in his answer that he cut and carried away 159 of the trees conveyed to the plaintiff by William Godfrey, *alias* McGehee. Evidence was adduced tending to prove

that 125 of this number were worth $125; and that he cut and converted to his own use 50 of the trees conveyed to plaintiff by W. A. Godfrey, and that the same were reasonably worth $50.

Evidence was adduced in behalf of the defendant tending to prove that William Godfrey, *alias* McGehee, at the time he told him that he had already conveyed to the plaintiff certain pine trees, also informed him that the time allowed for the cutting and removing the same had expired; that he searched the records diligently for a deed from Godfrey to the plaintiff, but found none; that a part, if not all, of the timber cut by him on the south half of the northeast quarter of the northwest quarter of section 2 was on the right of way conveyed to the Sand Creek & Sulphur Springs Railroad Company by W. A. Godfrey, and was cut by permission of the railroad company; and that the plaintiff and defendant entered into a contract by which it was agreed that plaintiff should cut the timber of the defendant on certain lands, and that the defendant should cut the timber of the plaintiff on certain other lands, and that each should keep an account of the timber cut by it or him, and render a statement of the same to the other, and that the one cutting the most timber should pay to the other the difference in the quantity cut by each at the rate of 50 cents per 1,000 feet; and that plaintiff cut of the defendant's timber, under this contract, 118,000 feet and defendant of plaintiff's 110,000, making a difference in favor of the defendant of 8,000 feet, for which the plaintiff owed him, according to their contract, $4. None of the timber exchanged under this contract was a part of the pine trees sued for by the plaintiff.

Upon this evidence the court instructed the jury that tried the issues in the case, in part, over the objections of the defendant, as follows:

"No. 1. In the first case the complaint alleges that the plaintiffs were the owners of the pine timber growing on the north half of the northeast quarter of the northwest quarter of section 2, township 7 south, range 11 west, and that the defendants entered upon the said lands and took therefrom 125 trees of the value of $125. The answer admits the taking of these trees by the defendants from this land, but justifies the same under a claim of title. As to the timber on this land, you are instructed as a matter of law that the title of the plaintiff, J. I. Porter Lumber Company, to the said trees was paramount to that of the defendants, and your verdict should be for the plaintiff."

And refused to instruct, at the request of the defendants, as follows:

"The jury are instructed that the contract of sale of the timber then standing upon the north half of northeast quarter of northwest quarter of section 2, township 7 south, range 11 west, from William McGehee to J. I. Porter Lumber Company with the license in the J. I. Porter Lumber Company to cut and remove the same, is a contract that is not required by law to be recorded, and the recording of the same did not create constructive notice of the existence of such a contract. And if the jury find from the evidence that the J. I. Porter Lumber Company did not take possession of the said timber or exercise such open, visible, and notorious possession thereof as would put a prudent man upon inquiry as to their rights to the said timber, but left the same in the hands and possession of William McGehee, their vendor, then any person who purchased the said timber from the one in actual possession thereof, without actual notice of any outstanding right. is, in law, an innocent purchaser of the same, and his rights thereto are better than the rights of the J. I. Porter Lumber Company."

And the court instructed the jury, in part, over the objections of the defendant, as follows:

"8. And if you should find that plaintiff took timber from the lands of defendant in section 14 aforesaid, under an agreement of exchange, by which each party was to keep an account of timber taken from the lands of the other, and render to the other an account or statement thereof, and that the one receiving or taking the greater quantity should pay the other for the excess at the rate of 50 cents per thousand, board measure, then, before either party would be entitled to recover from the other for such excess, it must appear from the proof that such statements had been rendered, and a balance struck, showing the amount due from one to the other."

The jury returned a verdict in favor of the plaintiff for $175, on account of the conversion of the 175 trees sued for, and also returned a verdict in its favor as to the cross-demand of the defendant, and he appealed.

The first contention by appellant is stated by him as follows:

"It will be necessary to first determine the character of the contract between McGehee and the J. I. Porter Lumber Company under the contract of sale of the timber in this case. It was not an absolute sale, because *there was no delivery,* either actual or

symbolical; and, to constitute a valid sale, a delivery must be made. No special property in the trees growing upon the lands could have vested in the J. I. Porter Lumber Company until they had been severed from the soil; nor did the contract affect the real estate upon which the trees were growing, further than a license to enter thereon and cut and carry away the timber." Again he says: "This being a contract that does not affect the title or interest in real estate, there is nothing in our statute that requires it to be recorded, or make its record constructive notice to the world; and, this being true, Mr. Kendall was not affected with notice on account of the erroneous recording of the same by the clerk."

But this is error. Section 721 of Sandels & Hill's Digest provides: "Every deed or instrument in writing conveying or affecting real estate which shall be acknowledged or proved and certified, as prescribed by this chapter, may, together with the certificate of acknowledgment, proof, or relinquishment of dower, be recorded by the recorder of the county where such land to be conveyed or affected thereby shall be situate," etc. And section 6370 provides: "It shall be the duty of each recorder to record in the books provided for his office all deeds, mortgages, conveyances, deeds of trust, bonds, covenants, defeasances or other instruments of writing of or concerning any lands and tenements or goods and chattels, which shall be proved or acknowledged according to law, and authorized to be recorded in his office." And section 727 says: "Every deed, bond, or instrument of writing affecting the title in law or equity to any property, real or personal, within this state, which is or may be required by law to be acknowledged, or proved and recorded, shall be constructive notice to all persons from the time the same is filed for record in the office of the recorder of the proper county," etc.

The deeds in this case conveyed growing trees, and authorized the grantee to sever them from the soil within a definite time. During this time the trees were to stand, and derive their nourishment from the ground upon which they were standing, and the deeds therefore conveyed not only the trees, but an interest in the land; and the recorder was required to record them, and when filed for record they were constructive notice of their contents to all persons. 3 Washburn, Real Property (5th Ed.), p. 368; 1 Pingree, Real Property, § 268, and 2 *id.* § 1290; 2 Jones, Real Property & Conveyancing, § 1603; 1 Kerr, Real Property, § 56; Tiedeman, Real Property, § 10; *McLeod* v. *Dial,* 63 Ark. 10.

Appellant also had actual notice of the contents of the deed executed by William Godfrey, *alias* McGehee, to the appellee, in another way. The land upon which the trees conveyed to appellee stood was conveyed by the United States to William McGehee. The title to the land was in the name of McGehee. When appellant purchased trees upon this land, with the privilege of removing them within a specified time, he purchased with a constructive notice of the fact that the land was conveyed to William McGehee, and that his vendor held the land in that name; and this ought to have led him to search the records for the purpose of ascertaining whether Godfrey had disposed of an interest in the land in that name, which, if he had made, would have led to the discovery of the deed executed in the name of McGehee to the appellee. This being true, the law charges him with actual notice of that fact. *Gaines* v. *Summers,* 50 Ark. 322. Appellant was also informed by his vendor that the J. I. Porter Lumber Company had purchased the timber. This did actually put him on inquiry, and he searched the records for a deed from William Godfrey to the Lumber Company. Failing to find such a deed, he purchased the timber. He did not, however, prosecute the inquiry with due diligence. There was one other source of information open to him, and that was an application to the appellee. He failed to make it, and is therefore chargeable with notice of the contents of Godfrey's deed to the Lumber Company. The undisputed facts show that he had actual notice.

The court, therefore, committed no reversible error in giving the first instruction copied in this opinion, and in refusing to give the instruction asked for by the appellant.

The permission of the Sand Creek & Sulphur Springs Railroad Company to the appellant to cut the pine trees on its right of way vested him with no right or title to the trees. The owner of the land still retained the right to all the timber on the right of way, which was not needed by the railroad company in the construction of its way, for every purpose not incompatible with the right of way. *Lyon* v. *Gormley,* 53 Pa. St. 261; *Jackson* v. *Hathaway,* 15 Johns. 447; *Taylor* v. *Armstrong,* 24 Ark. 102. The trees on the land, moreover, had been conveyed to the appellee before the right of way was acquired, and there was no incompatibility between the two grants.

The last instruction copied above should not have been given. But it was not prejudicial. On the exchange of timber referred

to in the instruction, the appellant was entitled to $4. He admitted that he cut 159 trees, which the evidence and verdict of the jury show were the property of the appellee, and the verdict of the jury shows that the appellee recovered the value of only 125 of the trees, leaving 34 for which it recovered nothing, and the evidence shows that they were worth more than $4. So appellant lost nothing by the instruction, and was not prejudiced by it.

The evidence was sufficient to sustain the verdict of the jury.

Judgment affirmed.

BUNN, C. J., absent.

TERRELL v. STATE.

Opinion delivered June 29, 1901. 69 449 90 589

1. INSTRUCTIONS—REASONABLE DOUBT.—It is error to refuse to give a proper instruction as to reasonable doubt. (Page 450.)
2. JUROR—COMPETENCY OF JUSTICE OF THE PEACE.—Sand. & H. Dig., § 4302, providing that "whenever any juryman shall be presented for examination in impaneling any jury, it shall be a ground of peremptory challenge that said juror is a postmaster, justice of the peace, or county officer," means that it shall be cause for challenge that one presented for examination as a juror fills either one of the positions mentioned. (Page 450.)
3. SAME—WHEN ACCEPTANCE REVERSIBLE ERROR.—Error of the court in overruling a challenge of a juryman for cause is ground for reversal in a criminal cause where defendant exhausted his peremptory challenges. (Page 451.)

Appeal from Pike Circuit Court.

WILL P. FEAZEL, Judge.

J. O. A. Bush, J. C. Pinnix and *W. V. Tompkins,* for appellant.

Alexander was not a qualified elector. Const. 1874, art. 2, § 10; 56 Ark. 404; 45 Ark. 165; Const. 1874. art. 3, § 1. Uncommunicated threats are admissible as part of *res gestae.* 16 Ark. 569; 29 Ark. 238; 34 Ark. 473; 18 Ga. 194. When the question

as to the aggressor arises, proof of uncommunicated threats are admissible. 85 Ky. 77; 11 Ind. 557; 54 Ark. 603; 6 Baxt. (Tenn.) 493; 61 S. W. Rep. 918. The record must show that the jury were sworn. 42 Ark. 108; 34 Ark. 258; 37 Ark. 61; 45 Ark. 146. The record fails to show that the jury was instructed during recess. Sand. & H. Dig., §§ 2237, 2219; 45 Ark. 146. It was error to refuse instruction as to good character of defendant. 35 Ark. 743.

G. W. Murphy, for state.

The record recites that the jury was "duly sworn," which is sufficient. 29 Ark. 7; 34 Ark. 257. Failure to admonish the jury during recess is no error. 56 Ark. 515; 56 Ark. 4.

HUGHES, J. The appellant was indicted in the Pike circuit court for murder in the second degree, for the killing of Tom Bell by shooting him with a gun, etc. He was tried, convicted of murder in the second degree, and sentenced to eight years' confinement at hard labor in the state penitentiary. He filed a motion for a new trial, which was overruled, to which he excepted and appealed to this court. As we could not reverse the judgment for the want of evidence to support the verdict of the jury, we do not set out the testimony.

It is urged in the motion for new trial that the jury was not properly sworn to try the case. While it is not satisfactorily clear, whether they were sworn to try the case, or were sworn only as to their qualifications as jurors, we only mention this to prevent its occurrence again.

It was also made a ground of the motion that the court refused to give an instruction asked by the defendant, in approved form, defining reasonable doubt; the court having failed to give such an instruction. We think the instruction should have been given.

A juror, who was a justice of the peace, having been called and sworn touching his qualification as a juror, over the objection of the appellant for cause, based on the fact that he was a justice of the peace, was pronounced competent by the court, to which appellant excepted and peremptorily challenged the juror. The statute provides (Sand. & H. Dig., § 4302) that "whenever any juryman shall be presented for examination in impaneling any jury, it shall be a ground of peremptory challenge that said juror is a postmaster, justice of the peace or county officer." We con-

strue this to mean that the fact that a justice of the peace is a juror is cause for challenge. Of course, any juror can be peremptorily challenged; and, unless the statute means that the fact that a juror is a justice of the peace is a disqualification, if the defendant desires to avail himself of the fact, then it is meaningless nonsense. Under the decision of *Caldwell* v. *State; ante,* p. 322, this is reversible error, the defendant having exhausted his peremptory challenges.

It is also urged that another juror was not a citizen of the state, but, as this will not probably arise again, we pass it, as the case must be reversed for the error in pronouncing the justice of the peace competent, over the objection of appellant.

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

RIDDICK and WOOD, JJ., dissent.

KEMPSON v. GOSS.

Opinion delivered June 29, 1901.

1. STEP-CHILDREN—QUASI PARENTAL RELATION.—Where one voluntarily assumed the parental relation towards minor children of his wife, under circumstances that raised a presumption that he undertook to support them gratuitously, he cannot afterwards claim compensation for their support. (Page 453.)

2. RIGHT TO TERMINATE RELATIONSHIP.—Where one who had assumed the relationship of *quasi* parent towards his minor step-children moved from their home, leaving them, it will be presumed that he elected to sever the relationship, and he may recover for necessaries subsequently furnished to them by him. (Page 453.)

Appeal from White Circuit Court.

HANCE N. HUTTON, Judge.

STATEMENT BY THE COURT.

Appellant intermarried with the mother of appellees after the death of their father, and moved upon the place left them by their father, which was their homestead. Here he

lived, having voluntarily assumed the care and support of appellees, until about two months and ten days after the death of his wife, when he moved away from the place, leaving appellees living thereon. But he had planted a crop, and had rented out part of the place, and, after moving away, he continued to cultivate his crop, and gathered same, and collected the rents and profits for the year 1898.

This suit is by appellees for the use and occupation of the land for the year 1898, alleging damages at $125. Appellant denied the claim of plaintiffs, and set up by way of set-off and counter-claim an account for the board of appellees, amounting to $46.60, and a cook stove and provisions, amounting to $24.27, and other articles of provisions and furniture, not itemized.

The appellant testified as to the items set up in his counter-claim, as follows: "After the death of my wife, the mother of the plaintiffs, I remained on the premises and cultivated my crop until I moved to my own home place, on the 9th day of July, 1898, which was two and one-third months, and during that time I boarded, clothed and provided for all the plaintiffs, worth $5 per month for each of them; and when I moved I provided for them, and left with them one cook stove worth $8, 123 pounds of bacon worth $9.66, 80 pounds of lard worth $6.66, besides other provisions and household and kitchen furniture, worth at least $25 or $30." He also offered to prove these items and charges by other witnesses, which the court would not permit, to which ruling appellant duly saved his exceptions.

The court also instructed the jury as follows, over appellant's objection: "The jury are instructed that it was the duty of the defendant to provide for the plaintiffs, who were minor children of his wife and members of his family, and it was his duty to provide for and take care of them, without charging for board and the necessaries of life."

Ben Isbell, for appellant.

Appellant was not liable for rents until the death of his wife, who owned a life estate in the land. 36 Ala. 80; 47 Ark. 457; 9 Am. & Eng. Enc. Law, 843. The remarks of the court in pointing out the duty of the defendant to the plaintiffs were improper. 1 Thompson, Trials, § 218. The testimony of John W. Smith was improperly excluded. 1 Thompson, Trials, § 678. A stepfather is not in law compelled to support step-children. 14 Pick.

(Mass.), 510; 72 Ill. 545; 128 Mass. 287; 30 Me. 270; 33 Ill. 21; 113 Ill. 1161; 4 Wend. 403.

Grant Green, for appellee.

The appellant, having placed himself *in loco parentis,* must bear the burdens incident thereto. Schouler, Dom. Relations, 273; Lawson, Rights, Remedies and Pr. § 810; 2 S. W. Rep. 552; 45 Ark. 237. The children could recover rent for land from death of the mother. Sand. & H. Dig., § 4453.

WOOD, J., (after stating the facts). In the absence of a statute requiring it, one is not bound to maintain the minor children of his wife by former husband. But where he voluntarily assumes the parental relation to such children, under circumstances that "raise a presumption that he has undertaken to support them gratuitously, he cannot afterwards claim compensation for their support." *In re Besondy,* 32 Minn. 385, S. C. 50 Am. Rep. 579. And it is well settled by the authorities that where he takes such children into his family, and keeps them as a part thereof, standing *in loco parentis* to such children, he is subject to the corresponding duties and liabilities of such relation, one of which is to suitably maintain and provide for them. Rodgers, Dom. Rel. § 496, and numerous authorities cited; Schouler, Dom. Rel. § 273, and authorities cited. The duties and liabilities grow out of the relation, and cease when it ceases. The relation may end at any time by the election of either. Rodgers, Dom. Rel. § 496.

Applying these principles to the facts, if it could be said that appellant, so long as he lived with appellees and kept them as a part of his family, stood to them *in loco parentis,* this certainly was not the case after he left them and established his home at another place, and indicated his purpose thereby no longer to treat them as part of his family. The purpose not to be so treated was as clearly manifested by the appellees in the institution of this suit for the use and occupation of the premises. At least, these were questions which the court might have well submitted to the jury under proper instructions. The court's refusal to permit evidence other than that of appellant himself, as to the stove and provisions furnished appellees after appellant left them, was error, and the instruction, under the proof, was not so limited and qualified as to make a correct statement of the law.

The articles furnished appellees, it appears, were for their necessary support. As the jury was instructed that it was the

duty of appellant to provide for the appellees, the items mentioned by way of set-off and counter-claim could not have been taken into consideration. We believe that the errors herein indicated can be cured by a remittitur of $24.27, the amount of the items actually specified in the amended answer, and if this is done in ten days the judgment will be affirmed; otherwise, reversed and remanded for a new trial.

CONLEY v. STATE.

Opinion delivered June 29, 1901.

EMBEZZLEMENT—INSTRUCTIONS.—Defendant hired a team, promising to return it the next day, but kept it for six weeks, and wrote letters informing the bailor that he intended to return the team, without stating where he would be at any future time, so as to enable the bailor to locate him there. On a prosecution for embezzlement, the court instructed the jury that "to be guilty of embezzling the property, the defendant would have to do more than merely retain possession of and use it for a longer time than he had hired it for," but refused at defendant's request to charge as follows: "To embezzle the property, the defendant would have to convert it to his own use, which means that he would have to sell or dispose of the property, or do something which amounted to a holding in active dispute of the owner's right; and such acts on his part must have been with the fraudulent intent of depriving him of his property." *Held*, that the instruction should have been given.

Appeal from Conway Circuit Court.

WILLIAM L. MOOSE, Judge.

Porter Conley, pro se.

There was no criminal conversion of the property. 8 S. W. 935; 49 S. W. 387; 54 S. W. 588; Bishop, Stat. Cr. (2d Ed.) § 424; 1 Whart. Cr. Law (8th Ed.), § 1058. What constitutes larceny, see Sackett's Inst. 539; 55 Ill. 334; 2 Bish. Cr. Law (6th Ed., 372. Criminal intent must be alleged and proved. 2 Bish. Cr. Law, 379; Rapalje's Larceny, 472. A mere failure to return the property is not sufficient. 2 Bish. Cr. Law, 376; 28 N. W. 838. No venue is proved. 25 Ohio St. 168; 54 Ark. 611; Whart.

Cr. Law, § 1059; 51 Cal. 376. Embezzlement cannot be committed without a conversion and intent to deprive the owner of his property. Bish. Stat. Cr. (2d Ed.) 424; 2 Bush. Cr. Law (6th Ed.), 372; 45 N. J. L. 372; 70 Iowa, 180; 1 N. E. 214; 58 Ark. 98; 98 Mo. 482 16 Tex. App. 586; 10 Ala. 45; 6 Am. & Eng. Enc. Law, 480; 25 Pac. 325; 90 Mo. 166.

WOOD, J. The appellant was convicted of embezzlement. The proof on behalf of the state tended to show that he hired a team to go to a place called Solgohachie, about nine miles from Morrillton, in Conway county. The party from whom he hired the team expected him to return it to Morrillton the next day, but, instead of doing so, he kept the team and used it for about six weeks, traveling in various counties in the state, until he was finally arrested with the team still in his possession near Waldron, in Scott county, about 100 miles from Morrillton. The proof tended to show that, while the defendant was traveling about he wrote letters to his bailor at Morrillton, promising to return the property, but in none of the letters did he inform the bailor for hire where he would be at any future time, so as to enable the bailor to locate him there.

On behalf of the defense, the proof tended to show that the defendant expected to return the property to the owner.

The court instructed the jury "that, in order to convict defendant, you must find beyond a reasonable doubt that the defendant, in this county and state, and within three years before the finding of the indictment herein, unlawfully, feloniously, and fraudulently did convert to his own use and benefit the property of J. R. Faucett described in the indictment, with the felonious intent to deprive said Faucett of his said property. To be guilty of embezzling the property, the defendant would have to do more than merely retain possession of and use it for a longer time than he had hired it for."

The defendant asked, and the court refused, the following request for instruction: "To embezzle the property, the defendant would have to convert it to his own use, which means that he would have to sell or dispose of the property, or do some act which amounted to a holding in active dispute of the owner's right; and such acts on his part must have been with fraudulent intent of depriving him of his property." The same idea was repeated in other requests refused.

The statute provides: "If any * * * bailee shall embezzle, or convert to his own use, or make way with, or secrete with intent to embezzle, or convert to his own use, any * * * property which shall have come to his possession, * * * such bailee * * * shall be deemed guilty of larceny, and on conviction shall be punished as in cases of larceny." Sand. & H. Dig., § 1712.

The language in the court's charge, "convert to his own use," is the language used in the statute; but we are of the opinion that the lawmakers did not intend that anything short of a conversion of property by a bailee with the intent to make same his own, and thus permanently deprive the owner of the use and benefit thereof, should constitute the crime of embezzlement. They make the conversion of it "for his own use" larceny, placing it on the same grade as larceny. So far as the conversion is concerned, the essential elements of criminality are the same in embezzlement as in larceny, *i. e.*, there must be the felonious intent at the time of the conversion of the property by the bailee to make the same his own. *Fleener* v. *State,* 58 Ark. 98.

If the bailee only intends to use the property, and to return it (the specified property) finally to the owner, he is not guilty of embezzlement, although such use may be without the knowledge and consent, and contrary to the expressed wishes and directions, of the bailor. Such is the purport of the authorities. See appellant's briefs.

The issue under the proof in this case was whether or not the defendant had unlawfully converted the property to his own use in Conway county so as to constitute embezzlement; that is, feloniously to deprive the owner permanently of his property. This should have been made clear to the jury in the instructions. The instructions were susceptible of the interpretation that a use of the property by the bailee without the design of depriving the owner permanently of his property was sufficient to establish the crime. The jury were the judges of the evidence and the credibility of the witnesses, and it was for them, under all the evidence, to say what the intent of the defendant was.

For the error in refusing requests for instructions in accord with the principles above announced, the judgment is reversed, and cause remanded for new trial.

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EX PARTE WILLIAMS.

Opinion delivered June 29, 1901.

1. CHANCERY DISTRICTS—CONFLICT IN TERMS OF COURTS.—Where the legislature provided that court should be held in one of the counties of a chancery district on a certain day, and subsequently provided that court should be held by the same chancellor in another county of the same district, without changing the date for holding the former court, the jurisdiction to try chancery causes in the former county would not revert to the circuit court. (Page 458.)

2. SAME.—So much of the act of May 3, 1901, providing for a second judicial district in Woodruff county, to be held at Cotton Plant, as fixed the time for holding the chancery court in the Cotton Plant district on the day fixed by a prior act for holding the same court in St. Francis county, is inoperative, as depriving suitors of the latter county of the constitutional right to prompt redress for all injuries or wrongs. (Page 459.)

Prohibition to St. Francis Chancery Court.

EDWARD D. ROBERTSON, Chancellor.

STATEMENT BY THE COURT.

The legislature in 1901 passed an act dividing Woodruff county into two judicial districts, one called the Northern district and the other the Southern district. The act provided that the circuit and chancery courts for the Northern district should be held at Augusta, the county seat as now provided by law, and it further provided that those courts should be held for the Southern district at the town of Cotton Plant, beginning on the days named in the act. But the day named in the act for the holding of the chancery court for the Southern district at Cotton Plant is the same as that provided by the statute for the holding of the chancery court at Forrest City. The petitioner, W. E. Williams, being a defendant in an action pending in the St. Francis chancery court, and being of the opinion that the act providing for a chancery court at Cotton Plant for the Southern district of Woodruff county on the same day as that fixed by the statute for holding such court at Forrest City had the effect to take St. Francis county out

of the fifth chancery district, filed his petition in this case to prevent the chancellor of that district from taking jurisdiction of and trying said cause. To this petition a response has been filed by the chancellor.

John Gatling and *S. R. Mann,* for petitioners.

Prohibition is the proper remedy. 48 Ark. 227; 2 S. W. 843. The prior act must give way to the subsequent act. 46 Ark. 229; 49 Ark. 110. The term of court is regarded in law as one day. 12 Am. & Eng. Enc. Law, 227. The act is not unconstitutional. Const. 1874, art. 7, § 15; 49 Ark. 110.

Norton & Prewelt, for respondent.

Suggestion was the initial writ. 4 Ark. 542. Prohibition is a matter of right, where the court has no jurisdiction, and the defendant has no other remedy. 116 U. S. 167; 11 Notes, 22. Before creation of chancery districts the circuit court had jurisdiction in matters of equity. Const. 1874, art. 7, § 15. Courts of different counties in same circuit may sit at the same time. 32 S. E. 271; 6 Rand. 704; 2 Gratt. 595; 1 W. Va. 329. If not impossible in fact, it should not be in law. 25 S. E. 871; 60 Ark. 343; 30 S. W. 421. The spirit of the constitution goes for nothing. 48 Ark. 229.

RIDDICK, J., (after stating the facts). The question raised by the petition filed in this case and the response thereto is whether the provisions of the act dividing Woodruff county into two districts (Act May 3, 1901) had the effect to take St. Francis county out of the fifth chancery district, and deprive the chancellor of that district of the right to hold a chancery court for that county.

The statute creating the fifth chancery district (Acts 1897, p. 93, as amended by Acts 1899, p. 118) made the counties of Woodruff and St. Francis a part thereof, and provided that terms of the chancery court should be held in each of said counties, commencing on certain days named in the act. The days named for the convening of the court in St. Francis county are the second Mondays of May and December of each year. Now, the act afterwards passed dividing Woodruff county into two districts provided that the chancery court for the Southern district should be held at Cotton Plant on the second Mondays of May and December, the same days fixed by the former statute for the convening of the chancery court in St. Francis county. This was, no doubt, the

result of inadvertence on the part of the legislature, for it has been several times held that under our constitution two circuit courts for the same circuit cannot be convened and held on the same day. *Parker* v. *Sanders*, 46 Ark. 229; *State* v. *Williams*, 48 Ark. 227; *Ex parte Jones*, 49 Ark. 110.

If these decisions are correct, we think it follows, for the same reasons, that two chancery courts for different counties in the same chancery district cannot be convened and held on the same day when they are to be held by the same chancellor. This being so, if we hold that portion of the act dividing Woodruff county into two districts which requires a term of chancery court to be convened and held in Cotton Plant in that county on the second Mondays of May and December to be valid, then no chancery court can be held in St. Francis county, for those are the days fixed for the convening of the court in that county. *Parker* v. *Sanders*, 46 Ark. 229.

It is said that jurisdiction to try chancery cases in St. Francis county would in that event revert to the circuit court. But the legislature having created a chancery district and made St. Francis county a part of it, we do not think that the act dividing Woodruff county into two districts can be held to have restored jurisdiction to the circuit court of St. Francis county to try equity cases. To so hold would be to give an effect to the act altogether different from that intended by the legislature. As the circuit court cannot hear equity cases in St. Francis county, and as two chancery courts in different counties of the same district cannot convene and be held on the same day, we must treat the act fixing a day for holding a chancery court at Cotton Plant as void in part, or the hearing of chancery cases in St. Francis county will be indefinitely postponed, and suitors will be deprived of rights guaranteed them by the constitution.* The legislature had no power, and did not intend, to deprive suitors in the chancery court of St. Francis county of the right to have their cases disposed of and their rights adjudicated. We must therefore hold that so much of the act referred to as attempted to require the chancery court to convene at Cotton Plant on the days named in the act, without fixing some other time for the holding of the court in St. Francis county, is invalid. But we do not think it follows that the whole act is void. The main purpose of the legislature in dividing Woodruff

* See Const. 1874, art. 2, § 13. (Rep.)

county into two districts was, no doubt, to avoid the inconvenience to parties, jurors, and witnesses of having to attend sessions of the court and the trials of cases at a long distance from their homes. But in the chancery court there are no jurors, the cases as a rule are heard on depositions, and comparatively few persons besides counsel are required to attend the trial of such cases. The main purpose of the act in creating the two districts will have effect if the circuit court can be held at the places named in the act.

We therefore hold that so much of the act as fixed the day for holding the chancery court at Cotton Plant is void, for the reasons stated, and the act, so far as it applies to the chancery court of Woodruff county, cannot take effect until the legislature names a day on which the court can be lawfully held. In other words, the act as to the chancery court is inoperative, and that court for the whole of Woodruff county must still be held at Augusta until the legislature shall take further action.

It follows, from what we have said, that in our opinion the chancellor was right in holding that he had power to hear and determine the action against petitioner pending in the chancery court of St. Francis county. The prayer of the petition is therefore refused, and the case dismissed at the cost of petitioner.

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VINCENHELLER v. REAGAN.

Opinion delivered July 6, 1901.

CONSTITUTIONAL LAW—ACT EMBRACING ONE SUBJECT—OBLIGATION OF CONTRACT.—By resolution of the trustees of the University of Arkansas, the office of vice director and pomologist of the agricultural experiment station was created, and plaintiff was elected thereto for a fixed term at a fixed salary, and accepted the position. Before the term of office expired the legislature, by an act approved May 23, 1901, after making appropriations for the support and maintenance of the University of Arkansas, abolished the office of pomologist, and prohibited the board of trustees from allowing any pay therefor. *Held*, that the act was not repugnant to section 30, art. 5, of the constitution, providing that appropriations shall be by separate bills, each embracing but one subject. *Held*, further, that the act was not unconstitutional as impairing the obligation of a contract, since plaintiff was an officer, and not an employee under contract,

Appeal from Washington Circuit Court.

JOHN N. TILLMAN, Judge.

STATEMENT BY THE COURT.

Appellant filed his petition in the circuit court of Washington county for a mandamus against the appellee, as secretary of the board of trustees of the University of Arkansas, which petition (omitting the style of the court and parties) is as follows:

"The petitioner, W. G. Vincenheller, states that by the act of congress of the United States, approved March 2, 1887, entitled 'An act to establish agricultural experiment stations in connection with the colleges established in the several states under the provisions of the act approved July 2, 1862, and of the acts supplementary thereto,' it is provided 'that in order to aid in acquiring and diffusing among the people of the United States useful and practical information on subjects connected with agriculture, and to promote scientific investigation and experiment respecting the principles and applications of agricultural science, there shall be established, under direction of the college or colleges or agricultural departments of colleges in each state or territory established, or which may hereafter be established, in accordance with the provisions of an act approved July 2, 1862, entitled "An act donating public lands to the several states and territories which may provide colleges for the benefit of agriculture and the mechanic arts," or any of the supplements to said act, a department to be known and designated as an 'agricultural experiment station.'

"Said act of congress specifically designates the object and duty of said experiment station, and then provides:

" 'Section 3. That in order to secure, as far as practicable, uniformity of methods and results in the work of said stations, it shall be the duty of the United States commissioner of agriculture to furnish forms, as far as practicable, for the tabulation of results of investigations or experiments; to indicate, from time to time, such lines of inquiry as to him shall seem most important; and, in general, to furnish such advice and assistance as will best promote the purposes of this act. It shall be the duty of each of said stations, annually, on or before the 1st day of February, to make to the governor of the state or territory in which it is located a full and detailed report of its operations, including a statement of receipts and expenditures, a copy of which report shall be

sent to each of said stations, to the said commissioner of agriculture, and to the secretary of the treasury of the United States.

"'Sec. 5. That, for the purpose of paying the necessary expenses of conducting investigations and experiments and printing and distributing the results as hereinbefore prescribed, the sum of $15,000 per annum is hereby appropriated to each state, to be specifically provided for by congress in the appropriation from year to year, and to each territory entitled under the provisions of section 8 of this act, out of any money in the treasury proceeding from the sales of public lands, to be paid in equal quarterly payments on the 1st day of January, April, July and October in each year, to the treasurer, or other officer duly appointed by the governing boards of said colleges to receive the same, the first payment to be made on the 1st day of October, 1887. * * *

"'Sec. 6. That whenever it shall appear to the secretary of the treasury, from the annual statement of receipts and expenditures of any of said stations, that a portion of the preceding annual appropriation remains unexpended, such amount shall be deducted from the next succeeding annual appropriation to such station, in order that the amount of money appropriated to any station shall not exceed the amount actually and necessarily required for its maintenance and support.

"'Sec. 9. That the grants of money authorized by this act are made subject to the legislative assent of the several states and territories to the purposes of said grants.'

"The appropriation thus made by the said act of congress was accepted by the state of Arkansas by the act of the legislature, approved March 7, 1889, entitled 'An act accepting the provisions of the act of congress establishing agricultural experiment stations,' said act of the legislature expressly providing that 'said appropriation is accepted and assented to in trust for the uses and purposes expressed in said act of congress, and all moneys received by the state under said act of congress shall be and the same are hereby assigned and appropriated for use and disbursement to the Arkansas Industrial University, a college established at Fayetteville in this state, under the provisions of the act of congress approved July 2, 1862.'

"Said appropriations have been made by congress from year to year, as provided by said act of congress of March 2, 1887, and have been paid to the treasurer of the Arkansas Industrial University, now the University of Arkansas, and disbursed by him

upon warrants or orders drawn by the secretary of the board of trustees of said university, for the uses and purposes expressed in said act of congress, under the direction of said board.

"The board of trustees of the University of Arkansas, having, by virtue of said act of congress, the sole control and direction of the said agricultural experiment station, at a regular meeting held on the 8th day of January, 1894, adopted the following resolution:

" 'Whereas, the state experiment stations are maintained by the National government and placed under the Arkansas Industrial University department of agriculture for direction and suggestion as to line of work, and it is the approved policy of the United States department of agriculture in all of its scientific investigations to fix the time of office of its employees during good behavior and efficiency; and,

" 'Whereas, a longer time than one year is required to plan and complete for publication any useful line of agricultural experimentation, and for the proper continuation of scientific observations, the best interest of the Arkansas agricultural experiment station demands that the station staff be made permanent for a longer period than at present; and,

" 'Whereas, the present experiment station staff is efficient and competent, and the experimental work performed and the condition of the experiment station is satisfactory to the farmers of the state; therefore, be it

" 'Resolved, That R. L. Bennett, the present director, and present station's staff, be, and they are hereby appointed to their present positions in the experiment station for the term of four years, or during their efficiency and good behavior, subject to removal for cause at any time at the discretion of the board of directors.'

"This policy of the board of trustees was adopted upon the advice of the United States commissioner of agriculture, and has been continued ever since, in accordance with the provisions of the said act of congress establishing agricultural experiment stations, wherein the United States commissioner of agriculture is employed 'to indicate, from time to time, such lines of inquiry as to him shall seem most important; and, in general, to furnish such advice and assistance as will best promote the purposes of the act.' And in furtherance of this policy, upon the recommendation of

said director, R. L. Bennett, the board, at a regular meeting held on the 14th of June, 1889, adopted the following resolution:

"'Resolved, (1) That the office of vice director and pomologist of the agricultural experiment station be and the same is hereby created, and that W. G. Vincenheller be and he is hereby elected to fill said position for the term of four years, ending June 30, 1903, at a salary of $2,000 per annum.

"'(2) That part of the duties of said officer shall be the testing of large fruits, for their quality, adaptation to different soils, acclimation, productiveness, periods of ripening and method of culture.

"'(3) He shall also attend and hold agricultural institutes in different parts of the state.'

"Upon being notified by the secretary of said board of trustees of said action of the board, your petitioner, the said W. G. Vincenheller mentioned in said resolution, at once, in writing, accepted the said place of vice director and pomologist of said agricultural experiment station upon the terms and for the salary mentioned in said resolution, and entered upon the discharge of the duties required of him. These duties he has ever since faithfully performed to the satisfaction of said director, Bennett, and of the said board of trustees, and on the last day of each month, until the month of May just passed, he has regularly received from the defendant Reagan, as secretary of said board, a warrant or order for $166.66, being one-twelfth of the said salary of $2,000, the same being payable monthly as directed by the said board of trustees. But on the 1st day of the present month of June he demanded his usual warrant or order from said defendant for his month's pay, and the same was refused, and is still refused.

"Petitioner further states that the defendant, Hugh F. Reagan, is the secretary of the board of trustees of said University of Arkansas, and, as such secretary has no discretionary powers, but is purely and simply a ministerial officer of said university, created by the laws of the state, and charged with no statutory duties, but acts solely under the direction of the said board of trustees; that he is required to keep a record of the proceedings of said board, and to draw warrants or orders upon the treasurer of said university for the payment to teachers and employees of said university, including the director and his assistants in the agricultural experiment station, of the sums due to each of them, as fixed by said board and appearing upon the records of its proceed-

ings; that said records show that petitioner was employed as vice director and pomologist of said agricultural experiment station in the manner, for the time, and at the salary before mentioned, and that there is now due to him the sum before mentioned for his wages for the month of May just passed, and that the treasurer of said university has money in his hands for payment of the same.

"Your petitioner saith that he has thus far fully performed his part of the contract entered into between the board of trustees of the University of Arkansas and himself as aforesaid, and that he intends continuing to do so for the period of four years, or until the 30th day of June, 1903, as he has agreed to do; that said contract has not been changed, altered, modified or abrogated, and that, without his consent or misconduct, it cannot be; that it is in full force and effect, and that he does not consent to any change in it, nor has he been guilty of any misconduct; that he cannot obtain any part of his salary or compensation without a warrant or order drawn by the defendant, as secretary of the board of trustees aforesaid, upon the treasurer of the University of Arkansas, for the amount due to him; that the sum of $166.66 is now due and owing to him for pay for the month of May just passed; and that he is without remedy, other than the writ of mandamus, to obtain his rights in the premises.

"Wherefore, petitioner prays the court to cause the state's most gracious writ of mandamus to be issued and directed to the defendant, Hugh F. Reagan, as secretary of the board of trustees of the University of Arkansas, commanding him to issue and deliver to the petitioner his warrant or order as such secretary upon the treasurer of said university for the sum of $166.66, being the amount due petitioner for his wages for the month of May, 1901, as vice director and pomologist of the agricultural experiment station aforesaid, and for other relief.

"E. S. McDaniel, Dan W. Jones & Neill, for petitioner."

Appellee filed a general demurrer and an answer to the petition. The answer (omitting the style of the court and parties) is as follows:

"The defendant admits the allegations of fact of the plaintiff's petition, but says that he should not be required to issue the order or warrant therein prayed for, because the general assembly of the state of Arkansas, at its session of 1901, by the act passed by it making appropriations for the University of Arkansas, provided in express terms that the office of pomologist (the same for

the discharge of the duties of which the plaintiff seeks compensation by this procedure) should be, and was thereby, abolished, and the board of trustees prohibited from allowing any pay for same. Defendant therefore prays that the petition be dismissed."

He afterwards filed an amended answer, in which he more specifically answered and admitted the allegations of the plaintiff's petition, but made no defense, other than the act of the legislature of 1901, pleaded in his answer, except that he set up a purported resolution of the board of trustees of June 12, 1896, which was stricken out by the court on appellant's motion.

E. S. McDaniel and *Dan W. Jones & Neill,* for appellant.

The act of May 23, 1901, is void: *First,* because the legislature has no power or authority over the subject, it being vested and controlled by act of congress of March 2, 1887. 1 Supp. Rev. Stat. 550-2, §§ 9, 1, 2, 3, 5, 10. *Cf.* Acts of Ark. 1889, p. 32, accepting congressional appropriation. *Second,* because, even if the legislature had power to legislate upon the subject, the provision of the act in question is obnoxious to art. 5, § 21, of the constitution of Arkansas. *Third,* because the constitution forbids that such a provision be made in the general appropriation bill. Const. art. 5, § 30; 13 Mich. 481; 2 Ia. 280; Cooley, Const. Lim. 170, 171, 172. *Fourth,* because said act tends to impair the obligation of a contract. Const. U. S. art. 1, § 10; 6 Wall. 385; 2 Black, 96; 100 U. S. 559; 4 Wheat. 694; 103 U. S. 5, 11. Appellant was not a *public officer.* 42 N. Y. Super. 481; Burrill's Law Dict. *"officer;"* 6 Wall. 393; 2 Black, 96; 86 N. Car. 235; 1 Biss. 182; 3 S. & R. 149; 3 Wall. 93. *Fifth,* because the act itself is uncertain, because it applies in terms to only the office of pomologist," and has no application to the "office of vice director and pomologist." The language being plain and unambiguous, there is no room for construction. Endl. Int. Stat. § 24; 66 Ark. 466, 472; 166 U. S. 318. Appellant's proper remedy was mandamus. 43 Ark. 180, 182; High, Ext. Leg. Rem. §§ 100, *et seq.;* Merrill, Mand. § 126; 14 Ark. 687; 42 Ark. 233; 44 Ark. 281.

Watkins, Walker & Walker, for appellee.

The legislature had power to regulate and control the subject matter in issue. *Cf.* Sand. & H. Dig., §§ 3401, 3404. The amendment to the general appropriation bill was not prohibited

by the state constitution. Cooley, Const. Lim. 142; 2 Minn. 328; 7 Minn. 468. Nor is the law one tending to impair the obligation of a contract. The position in question was a public office. *Cf.* Sand. & H. Dig., §§ 4067-8-9, 4071-3-4-5-6-7-8-9, 4080-85. The university is a public corporation, and it and its officers are subject to legislative control. 4 Wheat. 518; 47 Mo. 220; Ang. & Ames, Corp. §§ 31-36; 8 Ired. 257; 4 Scam. 190. For definition of "office" see: 52 N. Y. App. 470; Bouv. Dict. "*office;*" and of "public office," see: And. Law Dict. 727; 46 N. Y. App. 375; 52 *ib.* 485. Appellant was a public officer. 63 Am. St. Rep. 723; S. C. 57 Oh. St. 415; 169 Mass. 534; 61 Am. St. Rep. 301. Appellant's position was entirely within the control of the legislature. 2 Beach, Contr. § 1643; Throop, Pub. Off. § 19; 100 U. S. 548; 5 N. Y. 285; 40 Ark. 100; 30 Ark. 566; 61 Ark. 25. Mandamus does not lie. High, Extr. Leg. Rem. p. 12, § 9; *id.* p. 11, §§ 78-9; *id.* p. 119, §§ 115-116; *id.* p. 31, §§ 24, 35; 47 Ark. 85.

BATTLE, J., (after stating the facts). By an act of congress, entitled "An act donating public lands to the several states and territories which may provide colleges for the benefit of agriculture and the mechanic arts," approved July 2, 1862, lands and scrips were donated to the several states, and it was provided that all moneys derived from the sale of such land and scrips "shall be invested in stocks of the United States, or of the states, or in some other safe stocks, yielding not less than five per cent. upon the par value of said stocks; and that the moneys so invested shall constitute a perpetual fund, the capital of which shall remain forever undiminished (except so far as may be provided in section 5 of this act), and the interest of which shall be inviolably appropriated by each state which may take and claim the benefit of this act to the endowment, support and maintenance of at least one college where the leading object shall be, not excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts, in such manner as the legislatures of the states may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life." 12 Stat. 503, 504.

In 1867 the state of Arkansas accepted this donation on the terms and conditions in the act provided. In 1871 the general assembly of this state provided for the location and erection of

buildings for a university for the purpose of performing the obligations the state assumed by accepting the donation by congress, and provided that a board of trustees should be elected or appointed for that purpose. The trustees were appointed, and they located the university, and caused the buildings for the same to be erected at the city of Fayetteville, in this state. The means used for that purpose were furnished by the state, assisted by donations secured from the city of Fayetteville and the county of Washington, which were made in consideration of the location of the university at Fayetteville. From this time forward, the university has been an institution of the state, maintained and supported by it. The state, of course, could not control it, except through its agents. Hence a board of trustees was appointed for that purpose by the governor, and they have been vested with the power to prescribe all necessary rules and regulations for the government and discipline of the university, and to prescribe what professors, with the president, shall constitute the faculty, and to fix their compensation, to select its secretary and treasurer, and to do other acts unnecessary to mention. The course of study in the university is prescribed by the statutes, but the board of trustees can add to it. The state has always asserted her right to, and maintained her control over, the university as a state institution, and biennially its affairs have been investigated by a committee appointed by the general assembly for that purpose; and the board of trustees has been merely an agent of the state.

In furtherance of the object of the act of July 2, 1862, congress, by an act entitled "An act to establish agricultural stations in connection with the colleges established in the several states, under the provisions of an act approved July 2, 1862, and the act supplementary thereto," approved March 2, 1887, provided:

"Section 1. That in order to aid in acquiring and diffusing among the people of the United States useful and practical information on subjects connected with agriculture, and to promote scientific investigation and experiment respecting the principles and applications of agricultural science, there shall be established, *under direction* of the college or colleges or agricultural department of colleges in each state or territory established, or which may hereafter be established, in accordance with the provisions of an act approved July 2, 1862, entitled 'An act donating public land to the several states and territories which may provide colleges for the benefit of agriculture and the mechanic arts,' or any of the sup-

plements to said act, a *department* to be known and designated as an 'agricultural experiment station.' * * *

"Section 2. That it shall be the object and duty of said experiment stations to conduct *original researches or verify experiments* on the physiology of plants and animals; the diseases to which they are severally subject, with the remedies for the same; the chemical composition of useful plants at their different stages of growth; the comparative advantages of rotative cropping as pursued under a varying series of crops; the capacity of new plants and trees for acclimation; the analysis of soils and water; the chemical composition of manures, natural and artificial, with experiments designed to test their comparative effects on crops of different kinds; the adaptation and value of grasses and forage plants; the composition and digestibility of the different kinds of food for domestic animals; the scientific and economic questions involved in the production of butter and cheese; and such other *researches or experiments* bearing directly upon the agricultural industry of the United States as may in each case be deemed advisable, having due regard for the varying conditions and needs of the respective states or territories.

"Section 4. That bulletins or reports shall be published at said stations at least once in three months, one copy of which shall be sent to each newspaper in the states or territories in which they are respectively located, and to such individuals actually engaged in farming as may request the same, and as far as the means of the station will permit." * * *

"Section 5. That for the purpose of paying the necessary *expenses of conducting investigations and experiments* and printing and distributing the results as hereinbefore prescribed, the sum of $15,000 per annum is hereby *appropriated to each* state, to be specially provided for by congress in the appropriations from year to year, * * * to be paid in equal quarterly payments, on the first days of January, April, July and October in each year, to the treasurer or other officer duly appointed by the governing board of said colleges to receive the same, the first payment to be made on the 1st day of October, 1887; *provided, however,* that out of the first annual appropriation so received by any station an amount not exceeding one-fifth may be expended in the erection, enlargement or repair of a building or buildings necessary for carrying on the work of such station; and thereafter an amount not

exceeding five per centum of such annual appropriation may be so expended."

"Section 9. That the grants of moneys authorized by this act are made subject to the legislative assent of the several states and territories to the purposes of said grants." * * *

The $15,000 per annum named in the act were appropriated to the states, that is to say, donated to the several states to be used for the purposes for which they were set apart in the act. The donation was not to become effective until the legislatures of the several states assented to the purposes of the grants, that is to say, until the states accepted the trust. The trust was to be executed through colleges established in accordance with the provisions of the act of July 2, 1862, colleges presumably under the control and supervision of the states. Under this construction of the act this state accepted the grant in these words: "The state of Arkansas hereby accepts the appropriation made to her in common with other states by the act of congress, entitled 'An act to establish agricultural experiment stations in connection with the colleges established in the several states under the provisions of an act approved July 2, 1862, and of the acts supplementary thereto,' approved March 2, 1887, and said appropriation is *accepted* and assented to *in trust* for the uses and purposes expressed in said act of congress, and all moneys *received by the state* under said act of congress shall be and the same are hereby assigned and appropriated for use and disbursement to the Arkansas Industrial University, a college established at Fayetteville in this state, under the provisions of the act of congress approved July 2, 1862." Acts 1889, p. 32.

The government of the United States impliedly disclaimed all control over the "experiment stations" and over the $15,000 after it had been paid. This is indicated by section 3 of the act of March 2, 1887, which provides: "That in order to secure, as far as practicable, uniformity of methods and results in the work of said stations, it shall be the duty of the United States commissioner (now secretary) of agriculture to furnish forms, as far as practicable, for the tabulation of the results of investigations or experiments; to indicate, from time to time, such lines of inquiry as to him shall seem most important; and, in general, to furnish such advice and assistance as will best promote the purpose of this act. It shall be the duty of each of said stations, annually, on or before the first day of February, to make to the *governor* of the

state or territory in which it is located a full and detailed report of its operation, including a statement of receipts and expenditures, a copy of which report shall be sent to each of said stations, to the said commissioner (now secretary) of agriculture and to the secretary of the treasury of the United States." Under this section the secretary of agriculture is required to furnish friendly aid and advice, but no duty is imposed upon any one to accept it, and the government which is to control is indicated by the requirement of the report to be made to the governor of the state; and this is further indicated by the "experiment station" being subjected to the direction of colleges which are institutions of the states, and under their control and management.

By accepting the trust created by the act of March 2, 1887, the states assumed the burthen of executing it, and this they could do in part through appropriate acts of the legislature. There was no reason, no necessity, for congress specifically prescribing how the trust shall be executed, the states being competent for that purpose; and it has not done so.

It appears in the petition of appellant that the board of trustees of the Arkansas Industrial University, at a regular meeting held on the 14th day of June, 1889, adopted the following resolution:

"Resolved, (1) That the office of vice director and pomologist of the agricultural experiment station be, and the same is hereby, created, and that W. G. Vincenheller be, and he is hereby, *elected* to fill said position for the term of four years, ending June 30, 1903, at a salary of $2,000 per annum.

"(2) That *part* of the duties of said *officer* shall be in the testing of large fruits, for their quality, adaptation to different soils, acclimation, productiveness, periods of ripening, and method of culture.

"(3) He shall also attend and hold agricultural institutes in different parts of the state."

And that, upon being notified of the action of the board of trustees, appellant, W. G. Vincenheller, mentioned in the resolution, at once accepted in writing the place of vice director and pomologist of the agricultural experiment station upon the terms and for the salary mentioned in the resolution, and entered upon the discharge of his duties. Thereafter, the legislature of this state, by an act entitled "An act to provide for the support and maintenance of the University of Arkansas," approved May 23, 1901,

abolished the office of pomologist, and prohibited the board of trustees from allowing the incumbent of the office any pay for his services. The appellant contends that this act is violative of section 21, article 5, of the constitution of this state, which is as follows: "No law shall be passed except by bill, and no bill shall be so altered or amended on its passage through either house as to change its original purpose;" and that it is contrary to section 30 of article 5 of the constitution, which is as follows: "The general appropriation bill shall embrace nothing but appropriations for the ordinary expenses of the executive, legislative and judicial departments of the state; all other appropriations shall be made by separate bills, each embracing but one subject." It is insisted that the act in question is unconstitutional because it embraces more than one subject.

We have already stated the title of the act. The first section of it is as follows:

"Section 1. That the following sums are hereby appropriated for the support and maintenance of the University of Arkansas for two years, beginning April 1, 1901, and ending March 31, 1903, to-wit:" Then follow the several sums appropriated and the objects of the same, and then comes section 6, as follows: "Section 6. That the office of pomologist is hereby repealed and abolished. *Provided, further,* that the board of trustees is hereby prohibited from allowing any pay for the same."

The act of congress of March 2, 1887, provides that a *department,* to be known and designated as an "agricultural experiment station," shall be established under the direction of the college designated. A department of what? We think, of the college. This department, according to the terms of the act, can not exist independently of the college, but must be under its direction. It is wholly under the control of the college, and is as much a part of it as any other department of the same.

The resolution of the board of trustees that created the office of vice director and pomologist of the agricultural experiment station made it a duty of the officer to "attend and hold agricultural institutes in different parts of the state." For this and other services the appellant was to receive $2,000 per annum, to be paid out of the annual appropriation to be made under the act of March 2, 1887. This is in violation of the act, which provides that for the purpose of paying the necessary expenses of conducting investigations and experiments and printing and distributing the results

as prescribed in the act, the sum of $15,000 per annum should be appropriated, but that one-fifth of the first annual appropriation, and thereafter five per centum of other annual appropriations, may be expended in the erection, enlargement and repair of a building or buildings necessary for carrying on the work of such station. With this exception, the whole appropriation was to be expended in payment of the expenses of original researches and experiments, as provided for in section 2 of the act, and of printing and distributing the results thereof. We find no authority in the act for paying the expenses of attending and holding agricultural institutes.

The object of the act in question was the maintenance and support of the university of the state. Anything which will lessen the illegal or unnecessary expenses of that institution will tend to its legitimate maintenance. Economy and retrenchment, when the means are limited, are as necessary to the maintenance of universities as it is of individuals. The abolition of the office of pomologist relieved the university of an expense, and in part of an unauthorized expense, and left it with a larger appropriation to accomplish the legitimate objects of one of its departments. Section 6 of the act in question, by which this was done, related to, and tended to aid in, the general object of the act indicated in its title, and is not therefore in violation of sections 21 and 30, art. 5, of the constitution of this state. *State* v. *Sloan*, 66 Ark. 575.

Appellant also insists that the sixth section of the act of May 23, 1901, was unconstitutional because it impairs the obligation of a contract. If the place filled by the appellant, under the resolution of the board of trustees, was an office, it did not impair the obligation of a contract. For the duties and obligations of an officer grow out of the law, and not out of contract, and this law is subject to amendment or repeal, and, as an incident to this power the legislature may increase or diminish the salary, or abolish the office, unless prohibited by the constitution.

In *United States* v. *Maurice*, 2 Brock. 96, 102, 103, Chief Justice Marshall said: "An office is defined to be a public charge or employment, and he who performs the duties of the office is an officer. * * * Although an office is 'an employment,' it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to do an act or to perform a service, without becoming an officer. But if the duty be a continuing one, which is defined by rules prescribed by the government, and not by contract, which an individ-

ual is appointed by the government to perform, who enters upon the duties appertaining to his station without any contract defining them, if those duties continue, though the person be changed, it seems very difficult to distinguish such a charge or employment from an office, or the person who performs the duties from an officer."

In *United States* v. *Hartwell,* 6 Wall. 393, it is said: "An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties. * * * A government office is different from a government contract. The latter from its nature is necessarily limited in its duration and specific in its objects. The terms agreed upon define the rights and obligations of both parties, and neither may depart from them without the assent of the other."

In *Dartmouth College* v. *Woodward,* 4 Wheat. 518, 629, 634, Chief Justice Marshall, in delivering the opinion of the court, said: "If the act of incorporation be a grant of political power, if it create a civil institution to be employed in the administration of the government, or if the funds of the college be public property, or if the state of New Hampshire, as a government, be alone interested in its transactions, the subject is one in which the legislature of the state may act according to its own judgment, unrestrained by any limitation of its power imposed by the constitution of the United States." Again he says: "That education is an object of national concern, and a proper subject for legislation, all admit. That there may be an institution founded by government, and placed entirely under its immediate control, the officers of which would be public officers, amenable exclusively to government, none will deny."

The Arkansas Industrial University is an institution of the state, as we have already seen, subject to its control and government, through its own agents and appointees,—is an instrument of the state in the performance of a governmental work; and this is especially true of the department in which the appellant labored. The board of trustees, vested with the control and management of the university, and with the authority to create professorships and to adopt rules and regulations for the government and discipline of the university, created the office of vice director and pomologist of the agricultural experiment station, and prescribed in part the duties of the office, and then elected the appellant to fill the same,

and he accepted and entered upon the discharge of the duties of the office. No agreement was entered into as to what the rights and obligations of the appellant should be, but the office was taken by virtue of an election, with the duties prescribed by law and the board of trustees, by virtue of the authority they believed was vested in them by law, which were annexed to the office, and would have followed it to the appellant's successor, if it had not been abolished. Under these circumstances, we think that the act of the legislature is constitutional, especially in view of the fact that the salary of the office was, in part, for the performance of service which involved a misappropriation of public funds.

The act in question is not retrospective in its operation, and does not affect appellant's right to pay for services rendered before its enactment.

Judgment affirmed.

BUNN, C. J., (dissenting). I do not think that there is any question of federal control, arising from its financial aid given to the support of the experimental stations under the management and control of the university. The state university, acting by and through the board of trustees, is the trustee of the federal fund, bound and obligated to see that it is properly devoted to the object named in the arrangement between the two governments. There could be no litigation over the matter in the state courts, because these parties are not the subjects of their jurisdiction in any case. Therefore there is no constitutional question of that kind before us.

In the opinion of the court, the rule requiring the pomologist to attend and hold institutes in different parts of the state was beyond the scope of the agreement of the state and federal government on this subject, and for that reason the federal fund could not lawfully be expended for that purpose, and, in so far, the resolution of the board of trustees creating the office and defining the duties was unauthorized. The experimental station was established for the purpose of aiding, or in order to aid, in "acquiring and diffusing among the people of the state useful and practical information on subjects connected with agriculture." I take it for granted that fruit-growing is generally considered a department of agriculture. At the time the original act of congress of 1862 and the amendatory and supplemental acts were passed, "institutes" were not in vogue in any department of learning, as they afterwards became and are now. No department of learning would be now considered

well conducted without the periodical institute, which answers somewhat the place of the normal school, when employed in this particular department. There is no department of agriculture in which the information of the average man of this state is so restricted and meager as that of fruit-growing. There is, moreover, no method of gaining information of this science and diffusing the same among the masses of the poeple, except by holding institutes, where instruction from the teacher is the beginning merely, but where the greatest benefit is found in the effort of the farmer pupil to put his acquired knowledge into practice, and to report the results in the institutes, and have his errors corrected there. This is acquiring and diffusing practical knowledge of the science in a way far superior to any other known method. This is, I think, the unanimous opinion of all educators worthy of the name. The board of trustees, under the act creating the university, is clothed with full power to determine the method of teaching and imparting instruction, and also of appointing teachers to carry out the ends in view. Shall it be said by any one that its efforts to exercise this broad discretionary power are beyond its powers? It seems to me that such exercise of power is not only lawful, but eminently wise, and ought not to be interfered with in any case except for directly assigned cause, established on proof. I am not to be understood as attempting to trench upon what is merely proper to be done in another department of the state government, but only to say what I think reasonable in refutation of the idea that the board of trustees went beyond its sphere in creating the office, for the purpose of pursuing this particular method of acquiring and imparting instruction and diffusing the knowledge thus gained.

The second contention of the plaintiff is that the act of the legislature of 1901, which abolished the office of vice director and pomologist of the experimental station, and directed that the future accruing salary should not be paid, was in the nature of an amendment presented as a clause of the original bill, making the regular biennial appropriations for the university, and was therefore passed in violation of the twenty-first section of article 5 of the constitution, which is as follows, to-wit: "No law shall be passed except by bill, and no bill shall be so altered or amended on its passage through either house as to change its original purpose." The original purpose of the bill was to make an appropriation to sustain the experimental station work. The object of the amendment was to abolish a department station work, and, the

amendment being adopted, the refusal to appropriate money for the work as asked for was thereby accomplished, not only for the ensuing two years, but for all time. A refusal to make the appropriation direct would, of course, have been germane to the subject of the bill, and an amendment increasing or decreasing the appropriation asked for in the original bill would have been germane to the subject, and therefore not in violation of the constitutional provision; but to accomplish the desired purpose by abolishing the office itself is not germane to the subject of the original bill, and therefore is, in my opinion, violative of the constitutional provision.

There has really been but one case in this court that I can find which can be made even remotely applicable to the state of facts in this case, and that is the case of *Loftin* v. *Watson*, 32 Ark. 414, where county scrip was sought to be made receivable for all debts of the county. The amendment was simply an exception of certain kind of debts, like interest and principal of the old indebtedness existing at the adoption of the constitution, etc. Now, the amendment was altogether germane to the subject of the original bill—a simple naming of the scope of it, and nothing more.

The case of *State* v. *Sloan*, 66 Ark. 575, has no application in this discussion, for no amending or altering act was involved in that case, nor was such a question raised. The discussion there was the application of sections 30 and 31, article 5, of the constitution.

I do not recall an instance where it is said that the direct control of a state educational institution by the legislature is allowable. The general rule is that such institutions are under the management and control of a board of trustees, and the legislature has a supervisory control merely. This is so for obvious reasons. But this direct control, it is said, is allowable, because the legislature, being the appropriating power, has necessarily the power to economize the appropriations. I have no disposition to controvert the position that the legislature has the power to make, or cut down, or refuse to make, appropriations, whether in the enterest of economy or not, but I am only contending that an amendment, presented on the passage of an act, however proper and rightful and authorized it may be in itself, cannot have any legal sanction when so adopted, if the constitution forbids its adoption in that way, and, from past abuses, the constitutional convention had the strongest reason for imposing the restriction it

did upon the legislative department. It has been a sort of habit among us to liberalize this class of constitutional restrictions by any sort of reasoning almost, but we have had reason to regret every instance of departure from the strict construction.

The last contention of the appellant is that his employment was a matter of contract, purely and simply, between himself and the board of trustees, who alone had power to act in the premises, and who accordingly made the contract with him; and that the act of 1901, by refusing to pay his salary for the ensuing two years and until the term of the contract expired, impaired the obligation of a contract, and was therefore in disregard of both the state and federal constitutions upon the subject. This is answered by the defendant by the contention that the employment of the plaintiff was to perform the duties of a public office, the incumbent of which was a public officer, and for that reason, the legislature could lawfully abolish the office, and refuse to provide for the salary, at any time it might choose to do so. The majority of the court sustain this view of the question, and in support of the opinion thereon cite the opinion of Chief Justice Marshall, presiding in the circuit court of the United States for the districts of Virginia and North Carolina, at its May term, 1823. *United States* v. *Maurice,* 2 Brock. 96. A definition of a public officer given in that case by Chief Justice Marshall is relied upon to support the decision in this case, and that definition is this: "An office is defined to be 'a public charge or employment,' and he who performs the duties of the office is an officer. Although an office is an employment, it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to do an act or to perform a service, without becoming an officer. But if the duty be a continuing one, which is defined by the rules prescribed by the government, and not by contract, which an individual is appointed by government to perform, who enters upon the duties appertaining to his station without any contract defining them, if those duties continue though the person be changed, it seems very difficult to distinguish such a charge or employment from an office or the person who performs the duties from an officer."

It is manifest that this definition is but an elaboration of a pre-existing definition that "an office is a public charge or employment," and also that the elaboration by the learned judge was only intended to cover the case under consideration. Now, what was

that case? The secretary of war, without express authorization of act of congress, had appointed Maurice as "agent for fortifications," and, as the duties of that office included the receiving, disbursing and accounting for public moneys, he was required to give bond for the faithful performance of his duties, which he did in the usual form of official penal bonds. The suit was for a breach of this bond, in not accounting for certain funds thus committed to his charge, and it was, of course, instituted by the government. The question was whether it was a lawful bond, and whether suit could be maintained at all on it was the main question. In the discussion it was argued by the government that, under the circumstances, the defendant was a public officer, and the contrary was argued by the defendant. The court held, in effect, that the employment of Maurice, being without express authority, and not being by necessary implication, did not constitute a public office, but that, as he had failed to account for public moneys placed in his hands by an officer of the government having control of the subject-matter, with whom he had contracted to account for it by stipulation in the bond, justice and right demanded that he and his co-obligors and co-defendants be held liable on the bond, and it was so adjudged. Whether or not Maurice was a public officer and held a public office being a point under consideration, the court gave the definition above quoted, and decided that the defendant was not a public officer; and this decision was undoubtedly upon the ground that the employment, whether continuing or not, was founded on a contract It was a public service to be rendered, and public moneys were involved; but it was yet an employment based upon contract, there being no act of the legislative department directly upon the subject. I cannot see any application of that case to the case at bar, in support of the decision of the court.

Again, the court cites the celebrated case of *Dartmouth College* v. *Woodward,* 4 Wheat. 518, 715—a case too lengthy to admit of extracts here to any considerable extent and one too familiar, in fact, to require copious extracts. Suffice it to say that the only question of first importance in the case was whether or not certain acts of the legislature which sought to bring Dartmouth College under state influence and control impaired the obligation of the contract made by the King of England with the predecessors of the plaintiffs and the founder of the institution. The court held that, under the grant of the King of England, made in 1769, Dartmouth College was a private institution, and that, the charter being a

contract, the same could not be impaired by an act of the legislature of the state of New Hampshire, which succeeded to the powers of the King of England, and none other.

That was a contest between the board of trustees appointed in due course under the old charter against certain persons acting under the provisions of said acts of the legislature, and having thereby possession of certain books and records, for which the suit was brought by said trustees of the college. Had the case been decided in favor of the defendant—that is, had it been held that the institution was a public institution—it would have mattered little in this case, as it was a suit at the instance of the governing power, the trustees, and not the mere teaching force, or any member of it; and thus there is wanting a proper application of that decision to case at bar. All the arguments and more were made by the defendant's counsel in that case which were made by defendant's counsel in this case, and yet, with the stronger state of facts in many respects, the decision was against them. So, what matters it, even had the case been decided otherwise, so far as concerns the case at bar?

These are the only two cases cited by the court to sustain their view of the case in this contention. The quoted definition of a public office is all that is left upon which to rest the decision, as I see it. The interpretation of that definition given by this court is not the interpretation of Chief Justice Marshall, for his elaboration of it did not touch upon or include the particular question here involved, for none such was involved in either of those two cases except by a process of reasoning foreign to the subject in hand. Giving the interpretation of this definition the court gives to it, every teacher of the smallest district school would be a public officer, and his employment a public office. But we have not heretofore treated it in that way, but have always recognized their employment as a subject of contract. *School District* v. *Bennett*, 52 Ark. 511; *School District No. 49 of Faulkner County* v. *Adams, ante*, p. 159. "A professor in the state university" was held by the supreme court of Wisconsin not a "public officer," "in such a sense as prevents his employment as such creating a contract relation between himself and the board of regents."

The truth is, general definitions decide little or nothing; but it is the attendant facts and surrounding circumstances that must determine the question in any case. The plaintiff was, without doubt, employed by the board on a contract, and for a longer

time than the other teachers and members of the faculty held in the other departments, and for the very soundest reasons; for no first-class instructor would ordinarily undertake the work of teaching the farming public how to plant fruit trees and to prune, dress and cultivate them to the bearing stage in a shorter period than three or four years, for that length of time does it require to reach the maturity or bearing stage. The instruction intended was a new departure, and the first instructor necessarily assumed a more than ordinary responsibility, and naturally required more than one year's tenure to prove his work as a horticulturist. His contract was, then, not an unreasonable one. But it does not appear to have been attacked on the ground of unreasonableness. In fact, we can have nothing to do with a question like that. The question is, was the plaintiff's employment based on contract, and was that contract such as is protected by the constitutional inhibition against impairing the obligation of contracts. I think I have shown that the employment of the plaintff is not a public office, in the sense of the law giving to the legislature the power to abolish it to the injury of an incumbent serving for a stipulated pay for a stipulated time. But, in order to present the case in full, it may be well to quote the record as to the method and means of engaging the plaintiff's services. "The board of trustees of the unversity, at a regular meeting, held on the 8th of January, 1894 [which, I take it, was composed of different persons from those serving as such in 1898,—in some respects, at least], adopted the following resolution, namely:

"Whereas, the state experiment stations are maintained by the national government, and placed under the Arkansas Industrial University department of agriculture for direction and suggestion as to line of work, and it is the approved policy of the United States department of agriculture in all its scientific investigations to fix the time of office of its employees during good behavior or efficiency; and, whereas, a longer time than one year (the term of employment of other employees of the University) is required to plan and complete for publication any useful line of agricultural experiments, and for a proper continuation of scientific observations, the best interest of the Arkansas agricultural experiment stations demands that the station staff be made permanent for a longer period than as at present; and, whereas, the present experiment station staff is efficient and competent, and the experimental work performed and the condition of the experimental station is

satisfactory to the farmers of the state; therefore, be it resolved, that R. L. Bennett, the present director, and present station's staff, be and they are hereby appointed to their present positions in the experiment station for the term of four years, or during their efficiency and good behavior, subject to removal for cause at any time, at the discretion of the board of directors."

And it is alleged and shown that, at a regular meeting held four years after, to-wit, on the 14th day of June, 1899, the board of directors, on the recommendation of R. L. Bennett, the director of the experiment station, adopted the following resolutions:

"*Resolved, first,* that the office of vice director and pomologist of the agricultural experiment station be, and the same is hereby, created, and that W. G. Vincenheller be, and he is hereby, elected to fill said position for the term of four years, ending June 30, 1903, at a salary of $2,000 per annum.

"*Second,* that part of the duties of said officer shall be the testing of large fruits, for their quality, adaptability to different soils, acclimation, productiveness, periods of ripening and method of culture.

"*Third,* he shall also attend and hold agricultural institutes in different parts of the state."

The petition states that the plaintiff, on being notified by the secretary of the board of trustees, accepted the said place, and has since performed the duties of same, and received his monthly pay for such up to the 1st of May last past; that on the 1st day of June, 1901, he demanded his warrant for May, and was refused same by the defendant. This suit was brought to compel the defendant to issue the warrant for that month's pay. The refusal was because of the abolition of said office and direction not to pay said salary by act of the legislature aforesaid.

Did the resolution of the board of trustees, and the acceptance of the appointments therein made, on the terms therein named, constitute such a contract as is protected by the provisions of the constitution under discussion. There seems to be but one answer to that question, and that in the affirmative. The judgment of the lower court should be reversed.

MEYER BROTHERS DRUG COMPANY *v.* MATTHEWS.

Opinion delivered July 6, 1901.

PLEDGE—UNLAWFUL ASSIGNMENT—CONVERSION.—Where a note was pledged under an agreement that it should not be assigned, and the pledgee, by an unauthorized assignment, put it out of his power to restore the note upon payment or tender of the debt secured, he is liable to an action for its conversion, without a previous demand and tender of performance by the pledgor, though the damages to be recovered by the latter will be reduced by the amount of the debt for which the note was pledged.

Appeal from Pulaski Circuit Court.

JOSEPH W. MARTIN, Judge.

STATEMENT BY THE COURT.

On the 11th day of January, 1899, Emeline Matthews brought suit against the Meyer Brothers Drug Company and the Moffitt-West Drug Company, Missouri corporations, alleging that on the 4th day of January, 1899, she was the owner of a promissory note, dated March 4, 1898, made by W. B. Williams to D. L. Cramer, or order, for $2,000, payable $50 per month on each successive month, beginning with the 4th day of April, 1898, bearing interest from date at 8 per cent. per annum, the same being secured by a mortgage on the printing plant of the "Free Press" at Stuttgart, Arkansas; that the note, indorsed in blank by Cramer, was delivered to plaintiff; and that defendants, on the 4th of January, 1899, wrongfully took the note and mortgage from her, and converted them to their own use, to her damage in the sum of $1,845, for which she prayed judgment. Defendants answered, denying the wrongful taking and conversion. Subsequently, by amendment to their answer, they further alleged that, the plaintiff being indebted to Meyer Brothers Company in a large sum, it brought suit against her, on the 10th day of January, 1899, in the circuit court of St. Louis, that being a court of competent jurisdiction, for the recovery of the debt, and sued out an attachment against her, which was levied on the note mentioned in the complaint; that judgment was obtained April 24, 1899, and the note was condemned to be

sold in satisfaction of it; that it was so sold and bought in by the Meyer Brothers Company, said proceedings being all according to the laws of Missouri. Plaintiff filed an amendment to her complaint, alleging that the defendants had trumped up the proceeding in St. Louis in the attachment suit of which plaintiff had no notice, and denying that she was indebted to the Meyer Brothers Company on the 10th of January, 1899. Then, by answer to amendment of the complaint, the defendants denied that the proceedings in St. Louis were feigned, fraudulent or collusive.

Plaintiff then amended her complaint by filing interrogatories, which elicited the following answers:

W. G. Sluter: "I am the confidential man and manager of the Moffett-West Drug Company. I know W. D. Matthews. Our company turned over to the Meyer Brothers Drug Company a promissory note, made by W. B. Williams, for $2,000, payable to the order of D. L. Cramer. Soon after that our house wrote to Matthews the following letter: 'January 7, 1899. W. D. Matthews, Springdale, Ark. Dear Sir: We have your telegram, which we answered as follows: 'Meyer Brothers Drug Company called yesterday, and paid our cashier $175, and the papers are in their hands. See letter.' After you left, Mr. Sluter, who has been on the sick list, turned the papers over to the cashier, with the memorandum that $175 was to be paid us in cash or good secured notes, and that he was to surrender the papers to the party paying us, or to the bank, after deciding the notes good which we were to be given in settlement in case the cash did not come. Our cashier did not question the transaction with Meyer Brothers, and, if you had known when you left our office that you were going to negotiate with Meyer Brothers for the $175, you ought to have said something about it. As it is now, it is impossible for us to send the papers to the Stuttgart Bank, but we telephoned Meyer Brothers the contents of your message to them. They did not say whether they would send down or not. Simply said they would write you. Yours truly, Moffett-West Drug Company.'

"Our business was with W. D. Matthews, as agent for his wife, the plaintiff, who was carrying on business under the name of the Matthews Drug Company, at Springdale, Arkansas. As the purchase was partly on credit, he turned over to us as collateral security the note of W. B. Williams. I asked him who owned the Matthews Drug Company, and he said that his wife was the owner."

T. Meyer, answering plaintiff's interrogatories, said: "I am adjuster of delinquent accounts for Meyer Brothers Drug Company. I know W. D. Matthews. The note mentioned by Mr. Williams is not in my possession. Meyer Brothers got it from Moffett-West Company. Alex Block had it the last that I knew of it. Meyer Brothers held notes signed by Emeline and W. D. Matthews, and the Moffett-West Company held the note on W. B. Williams as security for a debt due them from Emeline Matthews. Acting for Meyer Brothers, I bought this claim against her, which purchase carried with it the Williams note thus held as collateral."

Bill of exceptions was signed and filed, showing, in addition to the answers to interrogatories above mentioned, the following testimony: W. D. Matthews, for plaintiff: "I have lived in Little Rock since the 1st of January. Before that I lived in Springdale six or seven months. Before that I lived in Stuttgart four years. I went there from Nebraska. Acting as agent for my wife, I went to the Moffett-West Drug Company, in May, 1898, and told them that I was going to move to Springdale, and that we were thinking of going into the drug business, and asked on what terms I could buy a stock of goods—$700 worth. They asked me how much I could pay down, and I said so much. They asked me how I could secure the balance, and I told them that Mrs. Mathews owned this note, secured by a printing office in Stuttgart, and offered to put it up as security for $375. I told them we had lost much money; that I owed Meyer Brothers; had paid them thousands of dollars; and that when I owed them less than $500 I had given them a mortgage on our home, worth $2,500, subject to a prior mortgage of $1,000. I paid the first $50 on the debt; but business got worse, and I could pay no more. The business was closed out. When I gave the note and mortgage to the Moffett-West Company, I told them that that was all that Mrs. Matthews had, and I put them up with the express understanding that they were not to pass out of their possession, and that, if Meyer Brothers should try to cause any trouble, they were to protect me, and they said they would. They took the note under those conditions. When I decided to take the newspaper here—the store at Springdale having been sold—there were not enough funds to pay for the plant, and I corresponded with Moffett-West to learn whether the balance that was due could be arranged for, and they said that it could. They had corresponded with Williams, who had bought the printing office. I went to St. Louis to see the Moffett-West

Company. I got there on the 5th of July last. I saw Mr. West first, and he told me to see Mr. Sluter. When he came in, I told him that Williams had made new notes of $25 each, payable to the Moffett-West Company, and that Mr. Cramer and Mr. Lewis had indorsed them. Sluter said it looked all right; but, having talked with Mr. West, he said he did not not like to take the mortgage then, but that he would look into the matter, and would fix it up if they were good. He looked up his reference, and said that Cramer had no rating, but that Cramer & Co. had. I told him to wire to Stuttgart at my expense. He sent a messenger, and asked me to come back in an hour or two. When I went back, I found Mr. Meyer there. After he was gone, I asked Mr. Sluter whether he had any connection with the note, and he said no, that he was there on another matter. He said, after Meyer went away, that he had not heard from his telegram, but that, if he had heard, he would not take the note. I told him that I could presume on Cramer's friendship; that I could put up collateral with him for $175, and that, if he would send the note down there, Cramer would pay the $175. He said he would do that, and wrote an order on the bank to deliver the paper to Mr. Cramer on payment. I wrote to Cramer, asking him to make the payment, inclosing the order, and saying that when I came back I would make him safe. In the morning I asked Sluter where the note was. He said they had it. Afterwards he said it was in the bank at Stuttgart. I said that that was funny. I went home Thursday night, and telegraphed Moffett-West Saturday morning, asking whether the note had been paid, notifying them that the note was sent them on the 15th of December. They answered: 'Meyer Brothers called yesterday, and paid the $175, and the note was surrendered to them. See letter.'" (Referring to letter copied above.) On the 5th or 6th of January last the value of the Williams note was $1,845.

Rose, Hemingway & Rose, for appellants.

There is a wide difference between a pledgee and a mere factor. Edw. Bail. § 277; 24 Ark. 22; Story, Bail. § 324. The pledgee may assign his interest in the pledge, and the assignee will stand in his place. Jones, Pledg. § 418. On an assignment the pledgor cannot maintain an action of trover against the pledgee. Edw. Bail. §§ 422, 266. The pledgee may transfer his interest in the pledge. Edw. Bail. § 266; 34 N. H. 35; 23 N. H. 38; 4 Watts, 414. A pawnee has a special property in the pawn which

he may assign. 78 Ill. 449; 13 Mass. 408; 57 N. Y. 1098; 99 Mich. 121. The pledgor must first tender the amount for which goods stand pledged before he can bring suit for possession. Jones, Pledg. § 571; *ib.* 422; Edw. Bail. 267; Colebrooke, Col. Sec. §§ 444, 344; 1 Q. B. 585; 3 Exch. 299; 93 U. S. 325; 36 N. Y. 395. That he who suffers a trifling injury to property can abandon it to the wrongdoer is a doctrine long since exploded. 15 Com. Bench, N. S. 330; 17 Q. B. 937; 65 Ark. 316; 1 Q. B. 585. Damages actually sustained can be recovered. 3 Exch. 301; 32 Ark. 742; Jones, Pledg. §§ 422, 425; Edw. Bail. § 267. A creditor may assign the principal debt together with a pledge which he holds to secure payment. 31 N. Y. 75; 28 Conn. 575; 25 Md. 271. The court erred in refusing defendant's third instruction. 172 U. S. 408. The ninth instruction asked by defendants should have been given. 7 Wall. 132; 23 How. 172; 13 Wall. 464. When the husband buys property, and takes title in the name of his wife, the law presumes a gift to the wife. 47 Ark. 111; 36 Ark. 586. How a witness may be impeached: 1 Greenleaf, Ev. § 462; *ib.* 421; Rapalje, Law of Witnesses, § 178; 46 Ark. 142; Bradner, Ev. 158, 717-720; Sand. & H. Dig., § 2959.

Hill & Auten, for appellee.

There never was any right of transfer in appellants. Schouler, Bailment and Carrier, § 225. The rights and liabilities of pledgor or pledgee may be restricted or enlarged by contract. Lawson, Rights, Remedies & Pr. § 1772; Jones, Pledg. § 421. The pledgee having put the property out of his power to restore it, tender would be fruitless. Lawson, Bail. § 62; 7 Hill (N. Y.), 497; 2 Comst. (N. Y.) 443; 4 Abb. Pr. 106; 3 Tex. 119; 4 Denio, 227; Story, Bail. 2 Ed. 349; 10 Johns. 472; 7 Hill, 497. At common law the pledgee in an action for the tort had the right to have his debt recouped in the damages. 15 Mass. 389; Story, Bail. § 315-349; 3 Hill, 171; 5 Hill, 76; 22 Wend. 155. Defendants could maintain trover or assumpsit, and in the latter recover the value. 13 Wend. 139-154; 20 Ark. 583; 22 Ark. 517; 74 Am. Dec. 604; 12 Gray (Mass.), 465. The contract pledging the note was not transferable. 2 Am. & Eng. Enc. Law, 1034, 1035, 1037; 127 U. S. 379; 18 Am. St. Rep. 180. And an assignment of the same was conversion. 80 Fed. 503. Demand was not necessary. 11 Ark. 249; 15 Ark. 225; 21 Ark. 422; 23 Ark. 417; 24 Ark. 264; 35 Ark. 169; 17 Ark. 154; 57 Ark. 270

HUGHES, J., (after stating the facts). "The pledgee may assign his interest in the pledge, and the assignee will stand in his place." Jones on Pledges (2d. Ed.), § 418. "The original contract of pledge is not put an end to by repledging the thing pledged, and therefore the original pledgor cannot recover it without having first paid or secured the amount of his debt secured by the pledge." *Id.* §§ 420, 422. That this is the law in the case of an ordinary pledge of property to secure the payment of a debt without limitation, the authorities fully maintain. The pledgee may stipulate that the pledgor shall not assign the pledge, for a special reason, and a contract to that effect between pledgor and pledgee is binding. *Id.* § 421. "An unauthorized sale of the pledge by the pledgee is not of itself a conversion. * * * His cause of action does not arise until he tenders payment and demands a return of the pledge, and the pledgee neglects or refuses to return it." *Id.* § 571. "If a pledgee by an unauthorized sale puts it out of his power to restore the property upon payment or tender of the debt secured, he is liable for its conversion, without a demand and tender of performance by the pledgor." *Id.* § 571a, and cases cited.

We think that the evidence clearly shows that the note of Williams to Cramer, and indorsed by Cramer to Emeline Matthews, was her property; that, as her agent, her husband pledged it to the Moffett-West Drug Company, as collateral to his note to them, upon the express contract and agreement that they were not to assign it; and that they were not to allow it to go out of their possession; and that, in violation of this agreement, the Moffett-West Drug Company parted with the possession of the Williams note, and turned it over to the Meyer Brothers Drug Company without authority; that this was done immediately after Matthews had made what appeared to be a satisfactory arrangement with them to settle the amount of his note to them, to which it was collateral, and without notice to Matthews. We think the evidence is sufficient to warrant the belief that Meyer Brothers Drug Company were aware of the condition of the pledge; that this unauthorized sale of the pledge resulted in placing it beyond the power of the pledgee to restore the pledge, upon payment or tender of the amount of the debt to secure which it was pledged; that it is legitimate to treat this as a conversion; and that appellee was not bound to pay or tender the amount of his debt before suit, under the circumstances. But, though appellee could sue before payment or tender, he is not released from the payment of his debt, to secure payment

of which the Williams note was pledged. We are therefore of the opinion that the judgment must be affirmed as to the Moffett-West Drug Company, with this modification, that the amount of the judgment is reduced by the amount which Matthews owned on the debt the Williams note was pledged to secure, and it is so ordered. But, as to the Meyer Brothers Drug Company, the judgment is reversed, and the cause is dismissed.

BATTLE, J., dissents from so much of the opinion and judgment of the court as relates to the Moffett-West Drug Company.

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

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Opinion delivered July 6, 1901.

1. CARRIER—NEGLIGENCE.—Deceased escorted a friend to his coach, which was open for passengers, and on his return, while crossing an intervening track, was struck and killed by an engine, which was being backed at a high rate of speed without efficient lookout and without warning. *Held*, that, whether deceased was on the track as a mere licensee or by implied invitation of the company, the latter was guilty of negligence. (Page 494.)

2. CONTRIBUTORY NEGLIGENCE.—If deceased, to keep off rain, enveloped his head in the cape of his coat, so that he could neither see nor hear an approaching engine, and in this condition stepped on defendant's track, and was killed by an engine which he would have seen or heard had his eyes and ears not been covered, he was guilty of contributory negligence. (Page 495.)

3. CARRIER—LIABILITY TO PASSENGER'S ESCORT.—One who goes into a passenger coach to assist a friend, who desired to take passage and needed assistance to reach and enter the coach, goes upon an implied invitation of the carrier, which should use at least ordinary care to avoid injuring him while there. (Page 495.)

4. INSTRUCTIONS—UNDISPUTED FACTS.—Instructions should not submit undisputed facts to the jury for decision. (Page 497.)

5. CARRIER—DUTY TO LICENSEE.—One who, after having escorted a passenger to his coach, returns to such coach without any necessity therefor and for his own pleasure merely, is a licensee, and cannot be said to have returned upon an implied invitation of the carrier, which owes him no duty save to do him no wanton injury and to comply with the statutory requirements as to keeping a lookout. (Page 497.)

6. CONTRIBUTORY NEGLIGENCE—WHEN QUESTION FOR JURY.—An instruction to the effect that if deceased accompanied a departing passenger, who needed assistance, to his coach at a time when it was open for passengers, and when passengers were passing back and forth between the depot platform and the coach with the apparent acquiescence of the railroad company, then deceased was rightfully upon the premises, and it was not incumbent on him to be on the lookout for danger, if under the circumstances he had no reasonable ground to suspect that danger was to be apprehended, is erroneous where the train was not to leave for half an hour, and other trains were constantly passing; it being a question for the jury in such case whether deceased was guilty of contributory negligence. (Page 497.)

7. SAME—INSTRUCTION.—Where there was evidence that, before attempting to cross defendant's track, deceased, to protect himself from the rain, drew up the cape of his coat over his eyes and ears, so that he could see directly in front only, it was error to instruct the jury that if deceased, in attempting to protect himself from the rain, did only what a man of ordinary prudence would have done under similar circumstances, he was not guilty of negligence. (Page 500.)

Appeal from Saline Circuit Court.

ALEXANDER M. DUFFIE, Judge.

STATEMENT BY THE COURT.

Action by Regina Tomlinson, widow and administratrix of the estate of Arthur Tomlinson, against the St. Louis, Iron Mountain & Southern Railway Company, to recover damages for his death. The facts are stated in the opinion. On the trial in the circuit court the presiding judge gave to the jury the following instructions at the request of the plaintiff:

"1. If you find from a preponderance of the evidence that the defendant railway maintained a station or depot for the reception and discharge of passengers from its cars at Little Rock on July 8, 1894; that on that day it placed passenger coaches for the reception of passengers in such a manner as to make it necessary to cross its railroad track or tracks in passing to and from the coaches and station platform; that Lieutenant Tomlinson accompanied to one of these coaches a departing passenger, who needed assistance, or that he visited the coach to look after the comfort of such passenger when the coaches were open and ready for the reception of passengers, and when passengers were passing back and forth between the

platform and coaches with the apparent acquiescence of the railway, then the court instructs you that Lieutenant Tomlinson was rightfully upon the railway's premises under an implied assurance that no engine or train would be permitted to run over an intervening track, unless the railway should use ordinary care and prudence to give timely and ample warning of the approach, and that he had a right to lessen his own watchfulness; and it was not incumbent upon him to be on the lookout for danger if, under the circumstances, he had no reasonable ground to suspect that danger was to be apprehended. If you further find, from a preponderance of the testimony, that Lieutenant Tomlinson, after seasonably visiting the coaches for either of the purposes above mentioned, while returning therefrom to the station platform by the usual route, in the exercise of ordinary care and prudence, was killed by an engine operated by the defendant railway without the observance of ordinary care and caution, your verdict should be for the plaintiff.

"2. What would be due care under some circumstances would be negligence under others. Negligence is the failure to use the care which a reasonably prudent man would determine, in view of all the circumstances, that the situation demands. If you find that the railway failed to exercise such care, you should find that it was guilty of negligence.

"3. If you find from a preponderance of the evidence that the defendant railway backed one of its engines over a track between the coaches and the platform, without guard or lookout, or not having such guard or lookout, without signal or warning, which, under the circumstances, would reasonably attract the attention of a man of ordinary prudence, who was rightfully engaged in passing between the coaches and station platform, the railway was guilty of negligence, and you should so find.

"5. The burden of proving in a case like this that the deceased was guilty of negligence which contributed to his injury rests upon the railway company, unless the plaintiff's evidence proves it. If, therefore, you find that it is not proved by a preponderance of the evidence in the case that Arthur Tomlinson failed to exercise that care, caution and prudence which would be expected to be used under like circumstances by persons possessing ordinary care and prudence, you must find that he was free from negligence.

"6. If you find from a preponderance of the evidence that at the time Lieutenant Tomlinson left the coach it was raining, and that, in undertaking to protect himself from the rain, he did only

what a man of ordinary prudence would have done under similar circumstances, you will find that Tomlinson was not guilty of negligence in that respect.

To the giving of these instructions the defendant excepted. There was a judgment in favor of the plaintiff for $20,000, from which defendant appealed.

Dodge & Johnson, for appellant.

Under the evidence appellant was guilty of contributory negligence. Tomlinson was not a passenger. 96 Pa. St. 267; 5 Am. & Eng. Enc. Law (2d Ed.), 486; 48 Ark. 493; *id.* 369. Appellant owed him no duty except not to wilfully injure him. 48 Ark. 493; Thompson, Carr. Pass. 104, 105; 71 Ill. 500; 59 Pa. St. 129; 36 Ark. 50; *id.* 376; 41 Ark. 549; 46 Ark. 535. He was negligent in being where he had no right, and hence he cannot recover. 40 Ark. 322; 101 Pa. St. 258; 29 Oh. St. 367; Ell. Railroads, § 1248. But, if it be conceded that Tomlinson was a licensee by sufferance, he took his license with its incident risks. Elliott, Railroads, § 1250. Appellant's only duty to him was to refrain from wanton or wilful injury to him. 66 N. Y. 246; 102 U. S. 584-5; L. R. 4 Exch. 254. As to measure of care due by appellant, see further: 58 Wis. 656, 657; 51 Mich. 238; 34 N. J. L. 472; 10 Allen, 372; 29 Oh. St. 365; 59 Wis. 150; 10 All. 372; 99 Mass. 210; 59 Pa. St. 129; 47 Ind. 43; 111 Pa. St. 258; 84 Ga. 1. Tomlinson was guilty of contributory negligence such as to bar recovery. 154 Mass. 403; 155 Mass. 44; 165 Mass. 264; 156 Mass. 180; 158 Mass. 10; 4 L. R. A. 632; 97 Mass. 275; 135 Mass. 225; 12 W. N. C. 348; 122 Pa. St. 58; 23 W. N. C. 189; 40 La. Ann. 800; 22 Minn. 22; 74 Ia. 607; 74 Fed. 299; 44 S. W. 703; 57 Fed. 926; 73 Fed. 627; 57 Fed. 926; 61 Ark. 655; 150 U. S. 248; 12 Am. & Eng. R. Cas. (N. S.), 460. The first instruction asked by plaintiff was erroneous in that it told the jury that Tomlinson "had a right to lessen his own watchfulness, and it was not incumbent on him to be on the lookout for danger, if, under the surrounding circumstances, he had no reasonable grounds to suppose that danger was to apprehended." 48 Ark. 493; 54 Ark. 431; 55 Ark. 430; 55 Ark. 428; 56 Ark. 434; 56 Ark. 278; 59 Ark. 130; 61 Ark. 620; 62 Ark. 156, 159; 61 Ark. 549; 64 Ark. 368; 65 Ark. 67.

Cockrill & Cockrill, for appellee.

There being evidence to sustain the verdict, it will be sustained. 53 Ark. 75, 80; 54 Ark. 229, 234; 14 Ark. 21; 25 Ark.

90; 17 Ark. 385; 13 Ark. 285; 13 Ark. 694. The evidence warranted a finding of negligence on the part of the railway. 65 Ark. 235; 48 Ark. 491; 48 Ark. 366; 55 Ark. 428; Deering, Neg. 248, 251; 54 Ark. 159; 12 Am. & Eng. R. Cas. (N. S.), 370, note; 122 N. Car. 832, 840; 27 S. W. 44; 25 So. Rep. 338; 26 N. J. Eq. 474. It is not incumbent upon a passenger, who is required to cross a railroad track at a station to reach his train, to be on the lookout for danger, unless he is specially apprised that danger is to be apprehended. 59 Ark. 122; 168 U. S. 339; Hutch. Carr. § 616; Beach, Contr. Neg. § 160; Fetter, Carr. Pass. § 136; 149 U. S. 43; 78 N. Y. 338, 334; 113 N. Y. 363; 84 N. Y. 246; 60 Miss. 126; 18 Colo. 368; 72 Md. 519, 530; 60 Md. 449, 463, 465; 88 Pa. St. 327, 333, 334; 27 N. J. Eq. 550; 26 N. J. Eq. 474; 105 Mass. 203; 31 Ind. 408; 88 Fed. 455, 460; 40 N. Y. Supp. 783; 60 Ill. App. 265; 59 Ill. App. 21; 60 Ill. App. 525; 39 La. Ann. 649; 36 Kan. 769; 2 S. W. 181; 3 Tex. Civ. App. 89; S. C. 22 S. W. 242; 41 Mich. 667; 161 N. Y. 232; S. C. 55 N. E. 819; 80 Ill. App. 675; 122 N. Car. 905; 80 Ala. 600. As to duty in general to passengers and prospective passengers at depots, see: 88 Fed. 455; 12 Am. & Eng. R. Cas. 170. A passenger's escort may rely upon the railroad's implied assurance of safety, just as the passenger can. Thomp. Carr. 106; 72 Mo. 392; 64 Tex. 251; 31 S. W. 737; 113 N. Y. 383; 64 Miss. 584; 36 Kan. 769; 91 Fed. 466, 472; 54 N. Y. Supp. 766; 59 Pa. St. 129, 143; 51 Mich. 501; 65 Ga. 370, 375; 119 Ind. 542; 59 Mo. 27; 6 Gray, 64; 59 Me. 183; 42 La. Ann. 1156; 34 La. Ann. 648; 46 Ark. 182, 196; 60 Ark. 106, 110; 122 N. C. 832; 52 S. W. 7, 11. Tomlinson was under duty to look and listen. 3 Ell. Railroads, §§ 1171, 1157; 29 Atl. 258; 118 Ind. 305; 1 Exch. 21; 122 N. Y. 234; 96 N. Y. 676; 80 Me. 430; 38 Fed. 15; 45 Oh. St. 678; 175 Ill. 183; 10 Allen, 368; 24 Oh. St. 631; 54 N. Y. Supp. 766; 64 Miss. 584. Appellant impliedly invited Tomlinson to pass over the track. 54 Ark. 159; 59 Ill. App. 21; 39 La. Ann. 649. The question of contributory negligence was for the jury. 9 Am. & Eng. R. Cas. (N. S.), 166; 152 U. S. 107, 113; 168 U. S. 339, 348; 93 Fed. 384. Tomlinson was not guilty of contributory negligence, as a matter of law, merely because of the use he made of his cape. 92 Fed. 846; 163 U. S. 353, 356; 4 Am. & Eng. Enc. Law, 76, note 2; 74 Ill. App. 387, 396; 36 S. W. 319; 79 Wis. 404; 37 Hun, 295; 59 N. Y. 631; 155 Mass. 190.

RIDDICK, J., (after stating the facts). This is an action brought by the widow and administratrix of the estate of Arthur Tomlinson, deceased, to recover damages for his death, which plaintiff alleges was caused by the negligence of the employees of the defendant railway company. The death of Tomlinson took place under the following circumstances: In July, 1894, there was a meeting in Little Rock of several military companies for the purpose of a competitive drill. One of the companies, the Indianapolis Light Artillery, was scheduled to leave Little Rock on its return the evening of the 8th of July. To accommodate the members of this company, the Iron Mountain Railway Company had two passenger coaches placed on its second and third tracks from the depot in Little Rock, Arkansas. Between these coaches and the depot there was the main track of the railroad, and possibly a side track also, which passengers were compelled to cross in order to reach the coaches. Tomlinson was lieutenant of a company from Washington, D. C., which had also attended the drill, and he was acquainted with the officers of the artillery company. Late in the afternoon of the day of their departure he accompanied an officer of the artillery company to the depot, and assisted him to his coach. This officer was somewhat intoxicated by strong drink, and needed assistance, and the theory of the plaintiff is that Tomlinson accompanied him for that purpose. The time for the departure of the train had not arrived, and the coaches were not attached to the train, but they were open for the reception of passengers, and Tomlinson and his friend entered the coach, passing on their way over the intervening main track of the railway. There is some conflict in the evidence as to whether Tomlinson made a second visit to the coach in which his friend was seated, but, in any event, on his return from the coach to the depot, either the first or second time, he was struck by the tender of an engine of the company, backing along the main track, and was instantly killed. This was after 7 o'clock in the afternoon, and, though objects were visible, it was raining and rather dark for that time of day. As before stated, the coaches from which Tomlinson was returning were open for the reception of passengers, and there was evidence tending to show that about this time, with the apparent acquiescence of the company, passengers and their friends were passing to and fro between the station and the coaches. There was also evidence to show that, although this was known to the employees of the company, the engine at the time it struck Tomlinson was

being backed at a rapid speed along the main track, between the coaches and the depot; that no efficient lookout was kept, and that no warning of its approach was given by bell or whistle, or in any other way. This evidence clearly justified the jury in finding that the employees of the company were guilty of negligence in backing the engine in that manner, at such a time, between the coaches and the depot. If the facts above referred to are true, the employees of the company were guilty of negligence, without regard to whether Tomlinson be considered a mere licensee or as one on the premises of the company by an implied invitation of the company. The law requires that a lookout be kept for trespassers, and certainly it was the duty of the employees of the company to have kept a lookout in this instance, and whether they did so or not was, under the evidence, a question for the jury. If the only question in the case was whether the company was negligent, we could say without any hesitation that the evidence justified a finding in favor of plaintiff.

But, conceding that the negligence of the company contributed to the injury of Tomlinson, there is, under the evidence in this case, the further question whether he was not also guilty of negligence contributing to his injury. It is the theory of the defendant that Tomlinson, to keep off the rain which was falling at the time he left the coach on his return to the depot, enveloped his head in the cape of his coat, so that he could neither see nor hear the approaching engine, and that in this condition he stepped on the track, and was killed by an engine, which he must have heard or seen had his eyes and ears not been covered in that way. If this contention be true, it is clear that no recovery should be allowed; for, whether Tomlinson should have looked and listened for an approaching engine or not, it was certainly his duty to have exercised ordinary care, and this required that he should not put himself in a condition that he could not be warned of the approaching engine. On the other side, there was evidence to rebut this contention, and to show that Tomlinson did not wrap the cape of his coat about his head, but that he merely held it so as to keep off the rain, but not so as to obstruct his vision or sense of hearing. Now, if Tomlinson went to the cars, not out of mere idle curiosity, but to assist a friend who desired to take passage, and needed assistance to reach and enter the coach, it is evident that he was not a trespasser, and the rules that apply in a case where a trespasser is injured would not be applicable in such a case. An escort of

that kind performs a service in the common interest of the carrier and the passenger. His entry upon the premises of the company is upon an implied invitation of the carrier, which should use at least ordinary care to avoid injury to him while there. *Railway Company* v. *Lawton,* 55 Ark. 433, 18 S. W. 543.

Nor, under such circumstances, can it be said, as a matter of law, that Tomlinson was bound to look and listen for approaching trains before attempting to cross the track between the depot and the cars if this was a time when the coaches from which he was returning were open for the reception of passengers, and when passengers and their escorts were passing to and fro between the cars and the depot. The rule that one should look and listen for approaching trains before attempting to pass a railway track is often applied in cases for injuries to travelers on highways at railway crossings. In such a case, where there is no invitation on the part of the company for the traveler to cross, the courts can say, as a matter of law, that he should look and listen for approaching trains, and, if he fails to do so, and by reason of such failure is injured, he can recover nothing by way of damages; for, even if the company be negligent, his own negligence contributes to his injury. But the case is different where the injured person comes on the track by the invitation of the railway company. In such a case he must still exercise ordinary care, but, as he has the right to rely to some extent upon an implied assurance of the company that the way is safe, the courts, not knowing to what extent his acts may be influenced by the conduct of the company, cannot in such a case say as a matter of law that the mere failure to look and listen is such negligence as precludes a recovery. If, then, a passenger or his escort is injured while attempting to pass an intervening track to reach a depot or train when the circumstances justify him in believing that he is invited by the company to pass over the track, it becomes a question for the jury, after considering all the circumstances, to say whether or not he is guilty of a want of ordinary care. In determining that question the jury should no doubt consider whether he did or did not look and listen, along with the other circumstances in proof; but the mere fact, if proved, that he did not look and listen does not, under such circumstances, conclusively establish negligence, it being for the jury to say whether he should have looked or listened, and whether, under all of the circumstances, he was guilty of negligence or not. *Railway Company* v. *Johnson,* 59 Ark. 122; *Langan* v. *St. Louis, I. M. & S.*

Ry. Co. 72 Mo. 392; *Brassell* v. *N. Y. C., etc., R. Co.* 84 N. Y., 241; *Atlantic City R. Co.* v. *Goodwin,* 62 N. J. Law, 394; *B. & O. R. Co.* v. *State,* 60 Md. 449; 1 Fetter, Carr. Pass. § 136.

Now the evidence bearing on the question of whether Tomlinson was guilty of negligence contributing to his injury was conflicting. At least, the evidence of negligence on his part was not so clear and convincing as to justify the court in withdrawing that question from the jury; and, had that question been properly presented to them, we should have felt bound by their decision. But a careful consideration of the instructions given to the jury at request of the plaintiff has convinced us that some of them were erroneous and misleading. These instructions are set out in the statement of facts, and we need not repeat them here in full. The first instruction is rather long, and made so partly for the reason that it commences by submitting to the jury for decision certain undisputed questions of fact. There was certainly no reason why the question as to whether the defendant railroad company on the 8th day of July, 1894, had a passenger depot at Little Rock should have been submitted to a jury for decision; for not only was there no conflict in the evidence on that point, but it is a matter of general information that the Iron Mountain Company has maintained such a depot here for over a quarter of a century. The only effect of submitting such undisputed facts to the jury as if they were disputed is to more or less cloud and obscure the real questions of fact at issue, which the jury are required to determine. *Pacific Mutual Life Ins. Co.* v. *Walker,* 67 Ark. 147.

But, passing this matter, to which we have called attention only because the case must be retried, we will now notice some more serious objections. The instruction tells the jury that, if Tomlinson accompanied to the coaches a departing passenger who needed assistance, or if he visited the coach to look after the comfort of such passenger, when the coaches were open and ready for the reception of passengers, and when passengers were passing back and forth between the platform and the coaches with the apparent acquiescence of the railroad company, then, to quote from the instruction, "Tomlinson was rightfully upon the railway premises under an implied assurance that no engine would be permitted to run on an intervening track unless the railway should use ordinary care and prudence to give timely and ample warning of the approach, and he had a right to lessen his own watchfulness, and it was not incumbent upon him to be on the lookout for dan-

ger, if, under the surrounding circumstances, he had no reasonable ground to suspect that danger was to be apprehended." Now, there was evidence tending to show that Tomlinson made two visits to the coaches,—one to accompany and assist his friend, who intended to leave on the train; and another when he returned apparently without any necessity except his own pleasure, to have another talk with his departing friend. If Tomlinson returned to the coach a second time as a matter purely of his own pleasure, he could hardly be said to be there on an implied invitation of the company. His situation would then be that of a licensee, who must take the license with its risk. The company could, of course, do him no wanton injury, nor could they dispense with the statutory requirements of keeping a lookout, but in such a case it had the right to conduct its business in the usual and lawful way without regard to his comfort or convenience, and to expect of him that he would use due care to keep out of the way of its engines and trains. *Heinlein* v. *Boston & P. R. Co.* 147 Mass. 136.

But let us suppose that Tomlinson was killed either on his return from the first trip to the coach, made by him to assist a passenger, or on his return from a second trip, made to look after the comfort or welfare of the passenger, still we think the instruction is erroneous and misleading, for it states that in that event "it was not incumbent on Tomlinson to be on the lookout for danger, if, under the surrounding circumstances, he had no reasonable ground to suspect that danger was to be apprehended." Undoubtedly, this might be the correct rule under some circumstances. A person on a platform or in the depot or cars of the company by its invitation, express or implied, need not, as a rule, be on the lookout for danger, for such places are intended for the convenience and security of passengers and others who go there on business with the company. But a railway track, where engines and cars may be expected to pass, is a different thing, and of itself is suggestive of danger. While it can not be said as a matter of law that a person crossing the track of a railroad by invitation of the company should under all circumstances look and listen for approaching trains, neither on the other hand can it be said that they should not do so; the question, as before stated, being usually one for the jury to determine. Yet certainly a person in such situation should not lose sight of the fact that he is in a place of danger to a careless person. He should not close his eyes or stop his ears, so that warnings of danger may not reach him; for, although it is the duty of the company by

lookout, by signals and by such other means as ordinary prudence may dictate, to endeavor to protect him, it has the right to assume that he has knowledge of his surroundings, and knows that engines and trains may pass, and that he will use ordinary care himself, and be ready to detect signals of danger and act upon them when given.

This case, we should remember, is not exactly similar to a case where a train has stopped at a depot to remain only a minute or two, and where passengers discharged from the train are going to the depot, and others wishing to board the train are passing from the depot to the train. In such a case a passenger desiring to board the train has no time to lose, and must promptly get aboard the train, or he may be left. The instruction we are now considering would be more appropriate in such a case than in this, for then the passenger would have more reason to assume that during a minute or two, while the train stopped to discharge and take on passengers, the company would not permit another engine or train to pass over an intervening track between the depot and train, and thus endanger passengers coming or going to the train. Whether such an instruction would be proper in a case of that kind, we need not say. But in this case, as before stated, the coaches from which Tomlinson was returning were not attached to a train. The train to which they were to be attached had not yet arrived, and it was yet some half hour before the time of its departure. There was, therefore, no occasion for hurry, either in boarding or leaving these coaches. There was no reason for persons coming to and from the coaches to assume that traffic on the main line would be suspended until the departure of the train, and more reason why they should exercise care in crossing than there would be in the case of a train stopping for a moment only to discharge passengers. Considering the circumstances in proof, the instruction complained of does not, in our opinion, fairly submit to the jury the question as to whether Tomlinson was guilty of contributory negligence, but tells them, as a matter of law, that it was not incumbent upon him "to be on the lookout for danger if he had no reasonable ground to believe that danger was to be apprehended." We have said that this may be good law, but it has no application to this case; for, as before stated, Tomlinson, at the time he was struck, was walking across the main track of a railroad at the depot of a city, where trains and engines pass at all hours of the day, and where the circumstances were suggestive of danger. Yet under this instruction the jury were left free to say that he had no reason to apprehend danger, and

therefore was not guilty of negligence, though he exercised no care whatever. Under this instruction the jury may have concluded that he had no reason to apprehend danger, and therefore was justified in pulling his cape over his ears and eyes, and in attempting to cross the track in that condition. As there was evidence tending to show that Tomlinson did attempt to cross with his eyes and ears covered in that way, we have concluded that the instruction was, for the reasons above stated, erroneous and prejudicial to appellant. It assumes that the evidence was such that the jury might possibly conclude that Tomlinson had no reason to apprehend danger, while, as before stated, the fact that he was crossing the main line of the road at a place where engines and trains often passed conclusively shows that there was danger to one proceeding without care. In the latter clause of this instruction the presiding judge no doubt intended to convey the idea that it was the duty of Tomlinson to have exercised ordinary care himself, but the language used might, to a careless person, convey the idea that the judge was assuming that Tomlinson did in fact exercise such care. But, waiving this defect of form, and granting that the instruction had the meaning intended, it was of no avail, for the preceding portion of the instruction had laid down the rule that it was not incumbent on Tomlinson to be on the lookout for danger if he had no reason to suspect danger; leaving the jury, as before stated, at liberty to conclude that he had no reason to suspect danger, though he was crossing the main track of a great railroad line.

Again, in the sixth instruction given at the request of the plaintiff the judge told the jury that if Tomlinson, in attempting to protect himself from the rain, at the time he left the coach, did only what a man of ordinary prudence would have done under similar circumstances, he was not guilty of negligence. Now, while this may be abstractly correct, yet, under the facts as shown here, it was too broad, and left more to the jury than was necessary or proper. There can only be two views, under the evidence, as to what Tomlinson did to protect himself from the rain. Some of the witnesses stated that he only raised his cape above his head, not obstructing his vision or hearing; others stated that he pulled his cape over his head, covering his eyes and ears, so that he could see directly in front only, and plunged, in this condition, on the track, just before the tender of the backing engine. If this view was true, the finding should have been for the defendant, for there could be no difference of opinion between reasonable men concerning the

recklessness of such conduct. But the instruction given leaves the jury free to find that this was true, and yet find for plaintiff, if they found that a man of ordinary prudence would have thus acted under similar circumstances. This was improper. Whether or not Tomlinson did cover his eyes and ears in that way while attempting to cross the railway track at the time of his injury was a disputed question of fact for the jury to determine; but, that question being once determined in the affirmative, it was for the judge to say that such conduct constituted negligence, for that would follow as a matter of law.

This is an interesting and important case. While the evidence is voluminous and conflicting, the disputed facts are few, and should be clearly submitted to the jury, or their decision will be little better than guesswork. We have given careful attention to the able argument of counsel. The result is that, while we can agree with nearly all the conclusions of law urged by learned counsel for appellee, we cannot agree that the law was well stated, or the facts fairly submitted by the instructions; and for this error the judgment is reversed, and a new trial ordered.

RHODES v. DRIVER.

LOVEWELL v. BOWEN.

69	501
73	192
s75	454
69	501
86	270

Opinion delivered July 13, 1901.

1. ELECTIONS—INDORSING BALLOTS.—In counting the ballots cast at an election those ballots on which the initials of one of the judges were indorsed by another judge should be rejected, under Sand. & H. Dig., §§ 2650, 2653, providing that "before delivering a ballot to an elector at least one of the judges shall write his name or initials on the back thereof," and that "no ballot shall be received from any elector or deposited in the ballot box which does not have the name or initials of at least one of the judges indorsed on it." (Page 504.)

2. INVALID RETURNS—PAROL EVIDENCE OF VOTES CAST.—Although the failure of the election officers to perform their duty in indorsing the ballots would not deprive the electors of their right to have their votes counted, yet, where the evidence does not show how many ballots were not indorsed properly, it would destroy the integrity of the returns, and call for proof as to how the electors voted. (Page 508.)

3. WHEN RETURNS INVALID.—In a township election persons were permitted to vote who had not paid their poll taxes, votes of two persons known to one of the judges to be dead were received, twelve were recorded as voting who swear they did not vote, four were recorded as voting who were not in the township, sixteen recorded as voting could not be found in the township,—and all the above votes were cast for contestees. The officers of election were strong partisans of contestees. There was evidence that the original poll lists were destroyed and others substituted. Before the count of votes was completed, one of the judges told how many votes were cast for contestees, and said: "That's all they got, and all we are going to give them." *Held*, that the returns from such township should be thrown out. (Page 508.)

4. FRAUDULENT AND IRREGULAR VOTES—PURGING THE POLLS.—When it is necessary to cast out the vote of a township for irregular or fraudulent votes, those who voted legally at the election may show by other proof than the returns how their votes were cast. (Page 510.)

Appeal from Mississippi Circuit Court.

FELIX G. TAYLOR, Judge.

S. S. Semmes and *G. W. Thomason*, for appellants.

The court should have made appellees confine their proof to the allegations and responses. 32 Ark. 553. The fraud shown to have taken place in Fletcher township, in the absence of any attempt by contestees to purge the ballot, made it necessary to throw out the returns from that precinct. 41 Ark. 123; 61 Ark. 247; McCrary, Elections, §§ 534-7; 10 Am. & Eng. Enc. Law, 774, 5. A poll tax receipt, to entitle the holder to vote, should be issued between the first Monday in January and the Saturday preceding the first Monday in July. Acts 1895, 55; Const. 1874, Amdt. 2. And the tax must be paid within that time. 10 Am. & Eng. Enc. Law (2d Ed.), 594-5. The count of ballots in Fletcher township was fraudulent, and must be rejected. McCrary, Elections, §§ 569-571.

Rose & Coleman, for appellants also.

Fraud may be shown by circumstances in such cases as this. 6 Am. & Eng. Enc. Law, 354; 27 Ind. 206. The return of votes from men who have not paid their poll tax was a fraud by the election judges, and vitiates their return. 1 Brewst. 52; *id.* 107. *Cf.* 41 Ark. 111. The fraud in counting ballots of men who were dead, and who had not voted, is a further ground for rejection of the returns

from Fletcher township. 61 Miss. 664; 11 Kan. 308. The fact that the "voters" counted by the judges in Fletcher township could not be found when subpœnas were issued for them is strong proof of their non-existence. 40 Kan. 717; 9 Mont. 604; 55 N. Y. 534. The evidence shows also that more votes were cast for appellants than were counted in Fletcher township. This is a fraud sufficient to vitiate the return. 6 Am. & Eng. Enc. Law, 355; 3 Cong. Election Cas. 62; 6 *id.* 177 The requirement of the statute (Sand. & H. Dig., § 2653) that every ballot "have the name or initials of at least one of the judges indorsed on the back of it" is mandatory; and the act of indorsing the ballots is personal, and cannot be delegated. 183 Ill. 193; 81 N. W. 805; 59 Neb. 128; 81 N. W. 313; 9 Mont. 608; Paine, Elections, § 592. The return from Fletcher township is not evidence of the vote cast, since it was fraudulent and irregular. McCrary, Elections, § 539; 9 Mont. 611; 26 Oh. St. 558; McCrary, Elections, 476; Smith, Election Cas., 102; 55 N. Y. 536; 63 Ill. 418; 1 Brewst. 60.

W. J. Driver, L. P. Berry and *Norton & Prewett,* for appellees.

Where the evidence is conflicting, this court will not disturb the findings of a judge on questions of fact. 53 Ark. 161; 50 Ark. 308; *id.* 85; *id.* 275; 41 Ark. 111; 31 Ark. 476; 61 Ark. 247; 60 Ark. 250. The ballot is the best evidence of how the voter voted, particularly where he marks his own ballot. 31 Ark. 207. Illegal votes do not affect the result of an election, unless it appears that they were cast and counted. 54 Ark. 409. It was not necessary that two of the judges should take part in the mere manual labor of writing the ballot. 61 Ark. 247; Sand. & H. Dig., § 2652. Contestees were entitled to show frauds by contestants. 32 Ark. 553; McCrary, Elections, § 544.

WOOD, J. At the general election on the 3d day of September 1900, in Mississippi county, J. W. Rhodes was a candidate for circuit clerk, and John A. Lovewell was a candidate for sheriff, on what was called the "Independent Ticket." C. S. Driver was a candidate for circuit clerk, and Sam Bowen for sheriff on the Democratic ticket. The general election returns showed that Driver received for clerk 910 votes, and that Rhodes received 812; that Bowen received 874 votes for sheriff, and Lovewell received 841. Driver and Bowen were accordingly declared elected to the offices, respectively, of circuit clerk and sheriff of Mississippi county, and

were duly commissioned as such. On the 18th day of September, 1900, Rhodes gave notice to Driver that at the October term of the county court of Mississippi county, following, he would contest his election as clerk. Lovewell gave notice likewise to Bowen that he would contest his election for sheriff. The cases were tried in the county court, and the decision was in favor of the contestants, and on appeal to the circuit court the decision was in favor of the contestees, and the contestants are here, asking a reversal of that judgment.

The notices of contest, as a preliminary and predicate for the charge of fraud, allege that all of the officers of election of Fletcher township were strong partisans of the contestees, and charged generally that, in conducting the election, the officers permitted and committed so many "gross irregularities, violations of the election laws, frauds and corruptions" that "the returns of said election from said township *are of so uncertain and untrustworthy a nature, in ascertaining and arriving at the true and correct vote of said township, that the entire vote of said township should be cast aside and thrown out.*" The notices then specifically charge that persons were permitted to vote who had no poll-tax receipts; that the poll lists contained the names of persons as having voted who did not vote; that some 60 persons voted for Rhodes for clerk in Fletcher township, when the returns only gave him 22 votes, and gave Driver 232; that 79 persons voted for Lovewell, when the returns only gave him 25 votes, and gave Bowen 235; that the votes were taken away from the contestants, respectively, either in fraudulently marking the tickets for contestees, when the voters had directed them to be marked for contestants, or in fraudulently counting them for contestees; that only one judge was present and assisted in marking these ballots; that, after the time had expired by law for issuing poll-tax receipts for the year 1899, some 250 poll-tax receipts had been issued by the contestee, Bowen, who at the time was collector of the county, a large number of the holders of which poll-tax receipts voted for the contestees.

One of the judges of election testified: "I think, when we started out in the morning, we got it sort of mixed. All of us were putting our initials on the tickets, and I suggested that only one judge put his initials on, and they said, 'You just do that,' and along during the day some one would be making out his ticket, and I would be assisting him, and another man would come in to vote while I was busy with the first voter, and the other judges would

number his ticket and put my initials on it; but I numbered, and put my initials on, most of the tickets." The statute provides: "Before delivering a ballot to an elector, at least one of the judges shall write his name or initials on the back thereof." Section 2650, Sand. & H. Dig. "No ballot shall be received from any elector or deposited in the ballot box which does not have the name or initials of at least one of the judges indorsed on the back of it." Section 2653, Sand. & H. Dig.

Illinois has the Australian ballot law, which provides that "one of the judges shall give the voter one, and only one, ballot, on the back of which such judge shall indorse his initials in such manner that they may be seen when the ballot is properly folded," etc., and "no ballot without the official indorsement shall be allowed to be deposited in the ballot box, and none but ballots provided in accordance with the provisions of this act shall be counted." Sections 22 and 26, Laws of Illinois, 1891. In the recent case of *Kelley* v. *Adams,* 183 Ill. 193, one of the ballots was not indorsed on the back of the initial of either judge of the election. The supreme court, in holding the ballot bad, said: "The evidence shows that this ballot had no indorsement to show that it was an official ballot, provided in accordance with the law. To ignore this provision of the statute, and allow ballots to be counted which do not contain the official indorsement, would authorize the voting of ballots that might have been surreptitiously obtained or copied, and one of the purposes of the ballot law be entirely frittered away, and the door opened for fraud."

Nebraska has a similar statute, providing that upon the ballots "two of the judges shall first write their names in ink," and "no judge of election shall deposit in any ballot box any ballot unless the same is identified by the signature of two of the judges," etc., and that in the canvass of the votes any ballot which is not indorsed as provided in the act by the signature of two judges upon the back thereof shall be void, and shall not be counted." In *Orr* v. *Bailey,* 59 Neb. 128, 80 N. W. 495, the name of only one judge was indorsed. The supreme court of Nebraska, in holding such ballots void, quoted Judge McCrary as follows: "Such statutes are intended to prevent fraudulent voting, and, if the legislature is of the opinion that the general good to be derived from their enforcement will more than counteract the evil resulting from the occasional throwing out of votes honestly cast, the courts

cannot consider the mere question of policy." McCrary, Elections, § 226.

A statute of Indiana required the polling clerks to write their initials in ink on the lower left hand corner of the ballot, etc., and provided that "in the canvass of the votes any ballot which is not indorsed with the initials of the poll clerks, as provided in this act, shall be void and not counted." The supreme court of Indiana, in *Parvin* v. *Wimbery*, said: "Of course, so much of the statute as requires the ballots to be indorsed with the initials of the poll clerks is mandatory." 130 Ind. 561, 571.

A statute of Missouri provides: "It shall be the duty of judges to cause to be placed on each ballot the number corresponding with the number of the voter offering the same, and no ballot not numbered shall be counted." The supreme court of Missouri, in holding this statute mandatory, said: "In the statute now under consideration, the legislature has not only by the statute directed what shall be done, but has also declared what consequence shall follow disobedience." And, continuing, said: "This case may be a hard case, and doubtless is; but the legislative enactment is clear, and, although it may deprive a portion of the citizens of the county of their right to be heard in the election of a clerk at one election, it is better that they should suffer this temporary privation than that the courts should habituate themselves to disregard or ignore the plain law of the land in order to provide for hard cases." *West* v. *Ross*, 53 Mo. 350; *Ledbetter* v. *Hall*, 62 Mo. 422. Judge McCrary, in speaking of the Missouri decisions and statutes, says: "Although this doctrine may sometimes result in very great hardship and injustice by depriving the voters of their rights by reason of the negligence or misconduct of the officers of election, it is nevertheless difficult to see how any different construction could have been placed upon such a statute. * * * Where the statute both gives the directions and declares what the consequences of neglecting their observance shall be, there is no room for construction." McCrary, Elections, § 226. So much for the law.

But it might be contended, first, that the initials of one of the judges were indorsed upon the ballot; and, second, that there is no provision in our statute inhibiting the counting of the ballots so indorsed, or declaring them void, and hence the authorities cited *supra* have no application. Taking the two sections of our statute together, it is clear that by the first the legislature intended to provide for the indorsement, and how it should be made. There is a

well-settled rule of law that where a statute simply provides that certain things shall be done within a particular time or in a particular manner, and does not declare that their performance shall be essential to the validity of an election, they will be regarded as mandatory if they affect the merits of the election, or as directory only if they do not affect it. McCrary, Elections, § 225. *Barnes* v. *Board of Supervisors,* 51 Miss. 305. Under this rule, if the above first section stood alone, it might possibly be held only directory. But when we take the other in connection with it and in connection with all the other sections, as we must in getting at the purpose of the legislature, we cannot escape the conclusion that these provisions were intended to be mandatory. For the other section above quoted virtually declares what the result of a failure to indorse the ballot is by saying that no ballot shall be received from any elector or deposited in the ballot box which does not have the name or initials of one of the judges indorsed on it. How indorsed? Of course in the manner provided in the other section, *i. e.,* by the judge himself. The language of our statute, "no ballot shall be received or deposited in the ballot box," though using fewer words, conveys the same idea, and was intended to subserve the same purpose, as that of the statutes of the several states quoted. That purpose was to provide an effectual means for the identification of each particular ballot; that, too, by living witnesses, if possible, and the particular ones upon whom the law put the duty and the responsibility. There is good reason why the judge should be required to indorse his own name. Then he can swear to his own signature, and, if he be dead, or out of reach, in case of contest, and the ballot be called in question, other witnesses can be called to identify his signature. But if each judge indorses the other's initials and not his own, then there are no indorsements as the law provides, and no witnesses of identification to the actual signature, and the very purpose of the law—to prevent spurious ballots, to prevent conspiracies and combinations among the judges themselves, to make each a check upon the other,—is frustrated. The statute requires that each judge shall be able to read and write. Then why should any judge write another man's initials in preference to his own? Ordinarily, it would be supposed that he could write his own easier and better than that of another, and why should there be any arrangement that the initials of only one judge should be indorsed upon the ballot, no matter what judge furnished the ballot? If the stat-

utory mode is not pursued, then there can be no compliance with the provision at all. It is a dead letter. For, if one judge could write the other judge's name, in departure from the statutory requirement, why not the sheriff, or his deputy or any one of the clerks do the same? The rule of *facit per alium facit per se* does not apply to election officers. Each must perform his own duty, and in default answer for his own derelictions, for which, in most instances, ample penalty is provided. While this failure of the election officers to perform their duty could not deprive the electors of their constitutional rights to have their votes counted (sec. 11, art. 3, Const; *Govan* v. *Jackson*, 32 Ark. 553), it would, and does, where the evidence does not show how many of the ballots were illegally indorsed, destroy the integrity of the returns, and call for the proof as to how the voters voted.

There is no proof in this record as to how many ballots were not indorsed as the statute requires. This, however, if the ballots be still preserved, can easily be shown.

We will not enter upon a discussion of the evidence bearing upon the various other charges of irregularity and fraud. The proof showed that a considerable number of persons voted who had not paid their poll tax. This is shown by a comparison of the poll lists with the official list of voters furnished the judges of election and evidence of witnesses upon the subject. The number, however, is not near so large as that claimed by contestants, but too large to be consistent with that strict vigilance which the law requires of election judges in order to prevent illegal voting.

The proof shows that there were two votes in the names of men who had been dead for sometime; that these dead men were known in their lifetime by one of the judges of election; that there were not known to be any other men by the same name in the township. The proof tends to show that some eighteen persons were put upon the poll lists in Fletcher township as having voted who did not in fact vote. Concerning twelve of these it might be said that the evidence was conflicting; they swearing that they did not vote, while the returns, and the testimony of the judges of election as to their regularity, were to the contrary. Concerning the two dead men there could be no mistake, and as to the four claimed to be absent from the township the testimony is reasonably certain. The most singular fact about all these alleged illegal votes is that not one of them was returned as having been cast for contestants. It is not impossible, to be sure, for such a thing to occur; but the

fact that it does occur with so large number of votes in any contest case is a most cogent circumstance to be considered as tending to establish the charge of fraud. The proof shows that sixteen names were upon the poll books returned as having voted for appellees, for whom subpœnas issued but who could not be found in the township. This was a mere circumstance to be considered, in connection with all the evidence, as tending to show that parties might have been returned as voting who were not in the township. Of itself, it would amount to but little. There was evidence tending strongly to show that the poll lists made by the clerks on the day of election might have been destroyed or abstracted, and new ones substituted. Lentz, one of the clerks, testified that he was unable to identify either of the poll lists of Fletcher township as being his handwriting, because of the fact that he writes so many different ways; knew that he made one of the lists that was kept during the election, but cannot say that either of the lists shown him was written by him.

L. B. Hart testified: Was one of the clerks of election in Fletcher township. Says one of the poll lists shown him was in his handwriting; that the other one was written by Mr. Lentz. Witness writes a little heavier than Lentz. Tried to write like Lentz that day, as he was in front of him, just to see if he could, and did it very effectually. Question. "You say you were sitting at the table with the judges of election; a man would come in there and vote, and give his name, the judges would call it out, and you were there, looking over Mr. Lentz's shoulder, and trying to ape him in copying his handwriting, in writing out that list?" Answer. "Yes, sir." Question. "That is the reason for the similarity?" Answer. "Yes, sir." Witness writes samples of his handwriting, which are attached to the poll lists by the court. So far as the testimony of Hart is concerned, it is enough (and bad enough) to say that the original poll lists, identified by him as having been made by him, and specimens of his handwriting brought into this record show conclusively, even at a glance, that they could not have been made by the same person. We are of the opinion that it would be impossible for one writing as Hart is shown by the original specimens to write to so disguise his handwriting as to have ever produced the handwriting as it appears upon the poll lists which he says he wrote. The testimony of this witness shows that, for some purpose, there must have been tampering with the poll lists. The testimony of the witness Lentz,

to say the least, was peculiar. It rarely occurs that a man would fail to recognize his own handwriting, although he might at times write in different ways. When a man fails to identify a writing as his own, it is not unreasonable at all to conclude that the reason for his so doing is not from lack of memory or power of identifying that which he produced, but because it was the writing of another.

There was proof that the officers of the election in Fletcher township were strong partisans of the contestees. This alone would amount to nothing. Every man who votes is, in a certain sense, a partisan; but it was proper to show it as a predicate for the proof of fraud or irregularity.

One of the judges of the election, while the count was being made, and before it was concluded, upon being asked how the vote stood, told how many there were for Rhodes and how many there were for Lovewell, and, upon being asked how the vote was for the others, replied: "They were not through counting yet." Upon then being asked how he knew what was the vote of Rhodes and Lovewell, replied, "That's all they got, and all we are going to give them." Explained as it was by the judge himself and others, we are inclined to think there was no more of gist than jest, perhaps, in this remark of the judge of the election. Still, it was a circumstance entirely proper to be shown.

For authorities on all these points, see brief of counsel for appellants.

Upon the whole, we are of the opinion that the conduct of the officers of election in Fletcher township was such as to make the returns from that township entirely unreliable. Unless the candidates themselves be honest in the first place, and the voters in the second place, and the officers of election in the third place, it is, of course, impossible to have any honest elections. But the object of our Australian ballot law was to compass, as far as possible, this desirable end. That it is the best plan which human ingenuity has yet been able to devise to leave the voter untrammelled in the exercise of his sovereign will at the polls, and to ascertain and enforce that will, is attested by the numerous states which have adopted its main features in their election laws. But, if such flagrant indifference to some of its admirable provisions as is shown in the conduct of the election of Fletcher township be tolerated, it will but encourage a repetition of like practices in the future, and bring unmerited reproach upon the law itself. The election returns from Fletcher township being thus discredited, in the

absence of any proof showing how each and every qualified elector voted, it is impossible to purge the ballots of that township here. The contestees, if they depend upon the vote in that township, would have to show by proof, other than the returns themselves, as to how the votes were cast. We believe they should yet have this privilege. It was contended by the contestees that many votes received by contestants in other townships were by persons whose poll tax had been paid by some one else, without being first requested so to do by the voter, and without any expectation or promise of reimbursement, thus bringing them within the doctrine announced in the recent case of *Whittaker* v. *Watson*, 68 Ark. 555. Also other illegal votes were claimed to have been cast for contestants. The contestees have shown that several hundred electors of Mississippi county had their poll tax paid by others, and that they were not qualified voters. But they have only shown that about 116 of these voted, and these are all that we could consider in the count. The proof shows that of these Rhodes received 107, while Driver received 9, and that Lovewell received 106, while Bowen received 8. So that, if the result of the election depended upon the other townships, with Fletcher excluded, the contestants would be elected.

We are not satisfied from this record as to who was really elected clerk and sheriff, respectively, in Mississippi county. Therefore we think a new trial should be had, and additional proof taken, if desired.

For the error in not discrediting and disregarding the returns of Fletcher township, the cause is reversed and remanded for a new trial, with directions to the circuit court to allow the parties litigant to take additional proof, if they so desire, and to proceed in a manner not inconsistent with this opinion.

BUNN, C. J., (dissenting). These are election contest cases for the offices of sheriff and clerk of Mississippi county, growing out of the general election of September 3, 1900, and both, being upon the same pleadings and the same evidence, substantially, only differing in some minor details, are both heard together.

The contestants narrow their allegations of contest down to Fletcher township only, while the contestees filed responsive allegations, but nevertheless took testimony showing fraudulent votes cast in favor of the contestants in the other townships than Fletcher, to the extent of 114 votes for sheriff and 116 for clerk, and of these

there were received and counted for Lovewell 106 and for Bowen 8, which leaves 96 to be deducted from Lovewell's majority of 177, received otherwise in these townships, making his majority only 81 instead of 177. And in the clerk's election making the 112 majority of Rhodes only 14. If Fletcher township is to be thrown out, as held by the court, both contestants are elected,—Lovewell by a majority of 81, and Rhodes by a majority of 14.

I do not think the circumstances justify the annulment and consequent throwing out of the entire vote of Fletcher township, because I find from the pleadings and the evidence adduced by the contestants, without considering the counterproof of the contestees, that the true vote cast in that township can be ascertained with reasonable certainty—at least approximately, which is all that can be required in a contested election, when all the evidence is derived from the bias of partisanship.

Voters whose votes are not challenged, and against whom there is no charge of fraud, or complicity therein, or of irregularities, ought to have their votes counted, if practicable, notwithstanding the fraudulent conduct of others, and thus be allowed a participation in the election of their county officers; and this right does not admit of carrying latitudinous and merely theoretical rules beyond the necessity which called them into action.

In McCrary, Elections, § 523, the author says: "The question, under what circumstances the entire poll of an election division may be rejected, has been much discussed, and conflicting views have been expressed by the courts. The power to reject an entire poll is certainly a dangerous power, and, though it belongs to whatever tribunal has jurisdiction to pass upon the merits of a contested election case, it should be exercised only in an extreme case, that is to say, a case where it is impossible to ascertain with reasonable certainty the true vote."

The true vote in this case, in my opinion, is easily determined in that township, without resorting to the *dernier ressort* of throwing out the returns and the whole polls. And thus the true vote can approximately be determined, if not with mathematical certainty, which can seldom be ascertained in such cases.

The contention of contestants is that 110 fraudulent votes were cast in Fletcher township that should not have been cast for any one. The returns show by name that 271 votes were cast. This leaves 161 legal votes cast. There were no votes cast except for the candidates named as parties in this contest. Contestant

Lovewell claims, and he shows by proof which he had to make, that he received 40 of these. This leaves 121 for Bowen, making a majority in that township for Bowen of 81 votes, which would leave Lovewell in the whole county a tie vote or at most a bare majority of one. By the same calculation, Driver would have a majority of 65 or 64 in the whole county.

I think the judgment should have been affirmed; but since the case has been remanded on reversal, I do not dissent from this disposition of it, for I think the contestants, or at least one of them, is not elected, by any kind of concession of facts to them.

CONLEY v. JOHNSON.

Opinion delivered July 13, 1901.

STATUTE OF FRAUDS—ORAL AGREEMENT—ESTOPPEL.—An oral agreement altering a written lease for a term of years, though unenforceable as a contract, under the statute of frauds, will operate as an estoppel, as against the lessor and his grantee, where the lessor by his conduct led the lessee to act upon such oral agreement, and the grantee took with notice thereof.

Appeal from Boone Circuit Court in Chancery.

E. G. MITCHELL, Judge.

Action by T. W. Johnson and others against W. P. Conley and others. Judgment for plaintiffs, and defendants have appealed. The facts are stated by the court as follows:

This suit was to cancel the lease of a certain tract of land. The lease was to continue twenty-five years. The purpose, as set forth in the written contract of lease, was to have lessee prospect and search for mineral and fossil substances, and to conduct mining and quarrying operations to any extent he might deem advisable, but he was not to hold possession of any part of the land for any other purpose. The lessee, his heirs or assigns, were to pay the lessor, his heirs or assigns, a royalty or rent of one-tenth part of all the ore to be extracted from the premises during the term of the lease. The lessee was to begin prospecting or mining within six months from the date of the lease, and was to continue work

thereon during the term of the lease. It was agreed "that, if no mineral or fossil substances be mined or quarried within the period of five years from the date" of the lease, then the same was to be null and void. It was alleged in the complaint that the conditions of said lease had been broken because there were no mineral or fossil substances mined or quarried upon the land within five years from the date of the lease, which was executed on the 6th day of November, 1883.

The answer denied the alleged breach, and set up that the lessor and lessee entered into the following agreement as part of said original lease, to-wit: "State of Arkansas, county of Boone. This additional article of agreement, made and entered into on this 4th day of October, 1884, by and between John H. Patton, of the first part, and O. E. Hines, of the second part, witnesseth, that it is hereby agreed and understood that when the said party of the second part shall have struck and found mineral in paying quantities in three several places on said demised premises, and if such time is before there are adequate means of transportation for shipping the same to advantage, then and in that case it shall not be incumbent on the said party of the second part to further prosecute his mining and explorations of said premises for mineral until the proper transportation can be had for shipping the same to advantage, but, so soon thereafter as transportation can be had as will justify the shipping of ores or metals in quantity, then the active and continuous work as specified in the original agreement to which this is annexed shall again be commenced and prosecuted." And the answer further set up that within the time mentioned in the lease the lessor examined the work done on the land by the lessee, and agreed with him that the prospecting and mining done on the premises by said lessee showed mineral in paying quantities, and was a compliance with the terms of the lease, and that no further work under the lease and additional agreement would be required of the lessee, and that what he had done would be, and was, accepted as satisfactory under the lease; and the answer averred that appellees (the plaintiffs) had no greater rights than the lessor, to whose rights they succeeded, and were bound by the agreement between him and the lessee, and were estopped to assert anything to the contrary.

J. W. Story, for appellants.

The original lease and the subsequent agreement are one contract, and should be interpreted together. 16 Ark. 240; Bish.

Cont. §§ 643, 554, 59; 65 Pa. St. 483; 52 Wis. 205; 58 Ala. 296; 9 Ark. 489; 12 Ark. 489; 15 Ark. 444. The lessor agreed to and adopted the acts of the lessee as a compliance with the terms of the lease, and he is estopped to deny it now. Bish. Cont. 663; 21 Cent. L. J. 27; 12 Ark. 149; 15 Ark. 444; 9 Ark. 489; Big. Estop. 538, 539.

G. J. Crump, for appellees.

The subsequent agreement was a *nudum pactum,* and not binding. 8 Cent. L. J. 352; 72 N. Y. 141.

WOOD, J., (after stating the facts). We need not consider the question as to whether the additional written agreement, executed nearly a year subsequent to the lease, was based upon a consideration, and therefore to be considered and construed in connection with the lease. If it be conceded that the latter agreement controlled the clause of the lease requiring mineral or fossil substances to be mined or quarried within the period of five years from the date of the lease, still, under the terms of the latter agreement, there was to be suspension of work (or the requirements of the five-year clause), only, to use the language of the agreement, "when the party of the second part shall have struck and found mineral in paying quantities in three several places on said demised premises." It was purely a question of fact as to whether the mineral had been found in compliance with the terms of this latter agreement. We will not encumber the record by setting out and discussing in detail the evidence. In our opinion the preponderance of the evidence shows that the lessee had not "struck and found mineral in paying quantities in three several places on the demised premises." But it is contended that this provision of the latter agreement, as well as the five-year clause of the lease, was waived by the lessor in a subsequent verbal agreement by which he accepted what had already been done as a compliance with the terms of both instruments.

While it is true that a lease or written contract concerning the leasing of lands for more than one year cannot be altered or destroyed by any subsequent verbal agreement under the statute of frauds (Sand. & H. Dig., § 3469), yet "it is a settled doctrine of equity"—as was said by Judge Cockrill in *Bazemore* v. *Mullins,* 52 Ark. 207—"never to lend its aid to one who invokes it for the purpose of perpetrating a fraud." The uncontroverted proof of Patton, the lessor, under whom appellees claim, is as

follows: "I recollect he (Hines, the lessee) commenced immediately after the lease was made, and worked continuously on that fall, next spring, and until the next fall and winter, when we made this agreement,—worked right on until we had an agreement by which he was permitted to quit work until a railroad was built so as to furnish transportation. I accepted the work which Mr. Hines had done as a compliance with the terms and the additional article of agreement filed herein, and relieved him from further work until there should be such transportation as was provided for in such lease and additional agreement. I was satisfied from what I saw, and from what Mr. Hines told me, that mineral in paying quantities had been discovered. At the time I sold the land to Mr. Dennis I told him that I had given Mr. Hines what he called 'a lay off' until the transportation comes near enough to ship the mineral off. He said that was all right—that he and the old man would fix that all right. I mean by the 'old man,' Hines, and by 'lay off,' that he was not to do any more work until the transportation comes near enough to ship the ore out."

This proof furnishes the basis for the doctrine of estoppel *in pais* against the lessor and all claiming under him with notice of these facts. This court, in *Shields* v. *Smith,* 37 *Ark.* 47, quoted approvingly from *Union Mutual Ins. Co.* v. *Mowry,* 96 U. S. 544, as follows: "The doctrine of estoppel is applied with respect to representations of a party to prevent their operating as a fraud upon one who has been led to rely upon them. They would have that effect if a party, who, by his statements as to matters of fact, or as to his intended abandonment of existing rights, had designedly induced another to change his conduct or alter his condition in reliance upon them, could be permitted to deny the truth of his statement, or enforce his rights against his declared intention of abandonment." Bigelow, Est. 557.

Mr. Bishop says: "Though the statute of frauds binds the equity the same as the law tribunals, it does not abrogate the prior equity jurisdiction over fraud." And, continuing, he says: "It is a palpable fraud for one man to entice another with promises to change his course of action and to his injury part with his effects or his services, then fall back on the statutes to avoid doing what he had led the other to expect." Bishop, Contr. (Enlarged Ed.) § 1237. Under this proof, to permit appellees to cancel the lease on the ground alleged in the complaint would be to enable them to take advantage of conditions which were brought

about by the conduct of the lessor, and which neither he nor they could avail themselves of without perpetrating a fraud upon the rights of the appellants. The decree of the learned chancellor is therefore reversed, and the cause is remanded, with directions to dismiss the complaint for want of equity.

EX PARTE MORRISON.

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Opinion delivered July 13, 1901.

STATUTES—IMPLIED REPEAL.—The act of March 28, 1899, entitled "An act to provide for the confirmation of titles to real estate," does not impliedly repeal Sand. & H. Dig., ch. 25, relating to the confirmation of tax and other titles, since the two acts do not relate to the same thing.

Appeal from Pulaski Chancery Court.

THOMAS B. MARTIN, Chancellor.

Ex parte application by B. Morrison for the confirmation of a tax title to land. From an adverse decision of the chancellor he has appealed.

Marshall & Coffman, for appellant.

The act of 1899 repeals the former statutes on "Confirmation of Titles." When the legislature takes up an entire subject anew, and covers the whole ground by a new act, the former one is thereby repealed. 10 Ark. 588; 27 Ark. 419; 31 Ark. 19; 43 Ark. 425, 427; 46 Ark. 450; 47 Ark. 491; Am. Dig. 1900 *A,* 4186*bb*. The two statutes are so repugnant that the latter one necessarily repeals the former. 50 Ark. 132; 51 Ark. 559; 53 Ark. 417; *ib.* 339; 54 Ark. 237; 60 Ark. 59, 61; Am. Dig. 1900 *A,* 4190*a*.

WOOD, J. The legislature of 1899 passed an act, entitled "An act to provide for the confirmation of titles to real estate" (Acts 1899, p. 133), which provides for the confirmation of land that is "wild or improved or in the actual possession of the petitioner or those claiming under him," and prescribes the manner of procedure. The last section of the act provides for the repeal

of all acts or parts of acts in conflict with it. We are asked by this appeal to say whether the above act repeals the provisions of chapter 25, Sand. H. Dig., relating to the "Confirmation of Titles." The provisions of chapter 25, Sand. & H. Dig., have reference solely to the confirmation of tax titles and the other titles specifically named, and we think the learned chancellor properly held that the act of March 28, 1899, had no reference whatever to the confirmation of tax titles. Repeals by application are not favored. There are several provisions in chapter 25, Sand. & H. Dig., not contained in the act of 1899, and *vice versa*. But, as we construe it, since the two acts do not relate to the same thing, there is no necessary repugnance or inconsistency. One is a special law pertaining exclusively to the titles specifically named therein; the other relates to all other titles. Affirmed.

GATES v. HAYES.

Opinion delivered July 13, 1901.

1. CERTIORARI—OTHER ADEQUATE REMEDY.—A judgment enforcing an attachment of land, based upon constructive service, will not be quashed on certiorari because the sheriff's return on the attachment was defective, if the judgment-defendant had an adequate remedy under Sand. & H. Dig., § 5882, allowing parties against whom judgment is rendered on constructive service two years in which to come into the same court and move to have the action retried. (Page 519.)

2. SAME—ALLEGATION OF DEFENSE.—A petition for a writ of certiorari to review a judgment rendered on a note and account should be denied when it alleged no valid defense thereto. (Page 519.)

Appeal from Lonoke Circuit Court.

GEORGE M. CHAPLINE, Judge.

On petition of W. L. Hayes the circuit court quashed a judgment obtained against him by Ferdinand Gates in the court of common pleas. Gates has appealed. The case is stated by the court as follows:

This appeal is from a judgment setting aside a judgment of the court of common pleas. The proceeding in the circuit court

was by writ of certiorari. The petition for the writ showed that a judgment was rendered against petitioner in the court of common pleas on a note and open account, amounting to $68.38; that the petitioner was a nonresident, and that service was had upon him by warning order; that a writ of attachment was issued, and pretended to be levied upon his lands, but in fact was not levied at all; that personal judgment was rendered against him, which was without jurisdiction, and a judgment condemning and ordering for sale his land, which was also *coram non judice,* and was void, because the return of the sheriff did not show that the land was properly levied upon, etc. The judgment of the court of common pleas was rendered on the 6th day of December, 1897, and the application for the writ of certiorari was made on the 6th of December, 1898.

J. E. Gatewood, for appellant.

The return of the sheriff was sufficient. 12 Ky. 395; 63 Ky. 481; 72 Ky. 113; 2 B. Mon. 253; 68 N. Y. 528; 56 N. Y. 385; Murf. Sher. 865; 62 Miss. 184; 60 Miss. 234; 59 Miss. 358; 17 Atl. 1079; 92 N. Car. 292; 94 N. Car. 497; Drake, Attach. § 205; 10 L. R. A. 504. Appellee was guilty of such laches as to deprive him of the benefits of certiorari. 54 Ark. 372; 52 Ark. 213.

Trimble & Robinson, for appellee.

The court had no jurisdiction. The return of the sheriff was sufficient. 3 Am. & Eng. Enc. Pl. & Pr. 62, 63, 64; 15 Ill. 266; 5 Ark. 422; 3 Ark. 509; 50 Miss. 489; 43 Cal. 577; 3 B. Mon. 579; 28 N. J. L. 149; 43 Miss. 225; 1 Am. & Eng. Enc. Law, 921. The judgment is void because it is a personal judgment, on constructive service. Sand. & H. Dig., § 5887; 54 Ark. 137; 21 Ark. 364; 47 Ark. 131; 52 Ark. 87.

WOOD, J., (after stating the facts). Our statute allows parties against whom judgment is rendered on constructive service two years in which to come into the same court and move to have the action retried. Sand. & H. Dig., § 5882. It is clear, under this statute, that appellee (petitioner) had an adequate remedy to correct the errors of which he here complains by moving the court to retry the cause, and, on refusal, to appeal. He gives no valid excuse for not pursuing this course.

Moreover, the aid of the writ should never be granted except to do substantial justice. *Burgett* v. *Apperson,* 52 Ark. 213. Although not strictly applicable to proceedings by certiorari, sec-

tion 4200, Sand. H. Dig., shows the policy of the law to be not to vacate judgments unless there is some defense to the action in which the judgment was rendered. This is the principle applicable here, independent of the statute. Counsel assert in their brief that the "defendant insists that he does not owe F. Gates one cent." If that be true, he should have set it up in his petition. Unfortunately for him, his petition alleges that the suit was on a note and open account, and he does not charge anywhere that the note was not given, or that it was not due, or that it had been paid. Nor does he say that the account was unjust, or that it had been paid; nothing, in fact, to show that his lands should not have been subjected to the payment of his debt.

We think, upon the showing made in the petition, the circuit court should have quashed the writ, and dismissed the petition, in so far as it affected a sale of the lands to pay petitioner's debt. Reversed and remanded, with directions to enter judgment accordingly.

BATTLE, J., (concurring). The writ of certiorari is not a writ of right, but it lies in the sound judicial discretion of the court to grant it, as justice may require.

In the case before us, the judgment *in personam* which the petitioner seeks to set aside was rendered upon constructive service, and is void; the defendant not having appeared in the action. The judgment sustaining the attachment and ordering the land levied upon sold is alleged by the petitioner to be void, obviously for the reason that the return of the sheriff, upon which it was in part based, was defective. The return indorsed upon the order of attachment is as follows: "This came to my hands at 3 o'clock p. m., September 30, 1897. W. A. Holcomb, sheriff. I have this, the 7th day of July, 1897, duly served the within by levying upon the following described land, to-wit, northwest quarter of section 27, township 4 north, range 8 west. Said party is a nonresident, living in Texas. W. A. Holcomb, sheriff, by J. H. Bryant, deputy sheriff." The return shows that the land was levied upon, but does not state in what manner. It is true that petitioner avers that there "was, in point of fact and law, no levy at all." But this was clearly a conclusion of law as to the sufficiency of the return. The allegation follows after a statement of what was done, and is clearly based upon the facts stated before the averment.

He does not deny that there was any seizure, and, if there was, does not show how it was made, or allege that the return of the sheriff was false. The petition, in this respect, to say the least of it, is uncertain, deficient, and unsatisfactory. It is also wholly deficient because it wholly fails to show that the alleged debt upon which the judgment was based did not exist, was illegal, unjust, paid, discharged, or barred by the statute of limitations, or that he had any defense against it, or that the petitioner was without adequate remedy. It is wholly insufficient to call forth the exercise of the sound judicial discretion of any court in the granting of the writ of certiorari as to the judgment against the land attached, and in this respect is not aided by the record or evidence. I therefore concur in the judgment of the court.

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WOODSON v. STATE.

Opinion delivered October 26, 1900.

1. CONSTITUTIONAL LAW—CLASS LEGISLATION.—The act of April 10, 1899, § 1, which makes it the duty of "every corporation, company or person engaged in the business of mining and selling coal by weight or measure, and employing twenty or more persons, to procure and constantly keep on hand at the proper place the necessary scales and measures, and whatever else may be necessary, to correctly weigh and measure the coal mined by such corporation, company or person," is not unconstitutional as discriminating in favor of small coal operators, in not requiring them to keep scales and measures on hand. (Page 524.)

2. DOMESTIC CORPORATION—POWER TO ALTER CHARTER.—The act of April 10, 1899, § 2, which provides that "all coal mined and paid for by weight shall be weighed before it is screened, and shall be paid for according to the weight so ascertained, at such price per ton or bushel as may be agreed on by such owner or operator and the miners who mined the same," being prospective in its operation and interfering with no vested rights, in so far as it relates to domestic corporations engaged in operating coal mines, is a valid exercise of the power reserved, by Constitution 1874, art 12, § 6. to the state "to alter, revoke or annul" corporate charters. (Page 526.)

3. FOREIGN CORPORATIONS—POWER TO REGULATE.—Under Const. 1874, art 12, § 11, providing that "foreign corporations may be authorized to do business in this state under such limitations and restrictions

as may be prescribed by law, provided * * * they shall be subject to the same regulations, limitations and liabilities as like corporations of this state," foreign corporations engaged in the business of mining coal in this state are subject to the provisions of the act of April 10, 1899. (Page 528.)

4. CORPORATIONS—REGULATION OF AGENTS' ACTS.—Where the state has the right to forbid the performance of certain acts by corporations, it may enforce such law by imposing a penalty upon the agents of corporations who may perform the forbidden acts. (Page 529.)

5. CONSTITUTIONAL LAW—INFRINGEMENT OF POWER TO CONTRACT.—The act of April 10, 1899, in so far as it regulates corporations engaged in the business of mining and selling coal, is not an abridgment of the right of laborers in coal mines to enter into contracts with their employers. (Page 529.)

Appeal from Sebastian Circuit Court, Greenwood District.

STYLES T. ROWE, Judge.

STATEMENT BY THE COURT.

C. C. Woodson, the agent and manager of the Central Coal & Coke Company, a corporation engaged in the business of mining and selling coal in this state, was indicted for failing to weigh coal before it was screeened and pay for it according to the weight so ascertained. Upon a trial of such charge in the circuit court, Woodson was convicted and fined $25. From this judgment he appealed.

W. C. Perry, of Kansas City, Mo., for appellants; *Ira D. Oglesby,* of counsel.

The act of April 10, 1899 (Acts 1899, p. 165) is unconstitutional. 51 S. W. 638; Const. Ark. art. 2, §§ 2, 3, 8, 29; Const. U. S. Amdt. xiv, § 1. The statute is void because, without just cause or distinction, it imposes unequal burdens upon those whom it arbitrarily classifies. Cooley, Const. Lim. (5th Ed.), 484, 486; 142 Ill. 380; 42 N. J. L. 435, 440; 1 Thompson, Corp. § 593; Cooley, Const. Lim. (6th Ed.), 429, 482, 483; 44 N. J. Eq. 427, 435; 82 Fed. 257; 13 Fed. 722, 723; 165 U. S. 150, 165; S. C. 17 Sup. Ct. Rep. 255; 40 Fed. 126; 40 N. E. 156-7; 59 N. W. 362, 364; 71 Fed. 931; 22 S. W. 350, 351; 31 S. W. 781; 29 Atl. 646; *ib.* 734; 118 U. S. 356; S. C. 6 Sup. Ct. Rep. 1054, 1070; 154 U. S. 362; S. C. 14 Sup. Ct. Rep. 1047; 164 U. S. 578; S. C. 17 Sup. Ct. Rep. 198, 204; 48 Minn. 236; 38 Pac. Rep. 500; 43

N. E. 490; 26 La. Ann. 671; 22 Atl. 120; 26 N. E. 1069; 32 Kan. 431, 434; 55 Pac. 878; 134 U. S. 232; S. C. 10 Sup. Ct. Rep. 533; 45 N. W. 156; 113 U. S. 27; 58 Ark. 407; S. C. S. W. 75; 55 Pac. . . ; 49 Ark. 291; S. C. 5 S. W. 294; 51 N. W. 136; 51 N. E. 872; 43 S. W. 513. The evidence in the case fails to sustain the charge of fraud. The statute was not valid as an exercise of police power. Tied. Lim. Pol. Pow. 572, 233, 234, 289, 290; 2 Hare's Am. Const. Law, 450; 16 S. E. 459; 19 S. E. 458, 470; Cooley, Const. Lim. (5th Ed.) 706; Potter's Dwarris, Stat. 458; 16 Pick. 121; 7 N. E. 631, 634; 31 N. E. 395, 399; 98 N. Y. 98, 107, 110; 17 N. E. 343, 346; 39 Ark. 353; Dill. Mun. Corp. (3d Ed.) 142; 66 Ill. 37; 77 Wis. 288; 60 N. W. 355, 357; Black, Const. Prohib. 62, 82; 55 Cal. 550; 86 Tenn. 272; 98 N. C. 778; 98 Cal. 73; 24 L. R. A. 226; 47 N. E. 302; 71 N. W. 400; 46 Pac. 255; 44 Pac. 803; 2 Wils. Works, 393; 9 Mich. 285, 309; 115 U. S. 650; Suth. Stat. Const. 370; 27 Vt. 154; 153 N. Y. 188; 137 U. S. 90. The act is void, as violative of both state and federal constitutions, because it restricts the right to contract, attempts to take property without due process of law, and denies to certain citizens the right of civil liberty and to the pursuit of happiness. 25 S. W. 77; 111 U. S. 746; 53 Tex. 172; 32 N. E. 274; 118 U. S. 369; 1 Coke's Inst. ch. II, 81a; 2 Yerg. 260, 269; *ib.* 599, 605; 1 Dev. Law (N. C.), 15; 2 Tex. 250; 5 Mich. 25; 11 Mass. 405; 40 N. E. 454, 455. The right to contract in a lawful private business, on terms satisfactory to the parties, is a part of the natural liberty of the citizen. 2 Story, Const. § 1950; 4 McLean, 489; 6 N. Y. 341; 53 N. Y. 245; 2 Wilson's Works, 300, 302; Cooley, Prin. Const. Law, 255; Mill on Liberty, 27, 28; Lieber, Civ. Lib. 270; Spencer, Social Statics, 36, 45, 55; Spencer, Ethics, 45, 46, 47, 58, 59. The act is void because it takes from a man the result of his labor without due process of law. 95 U. S. 714; 92 U. S. 480; 111 U. S. 701; 24 U. S. 511; 4 Hill, 140, 143; 35 Kan. 271, 277; 1 Fed. 481; 111 U. S. 746. The act is void as an attempt to regulate wages. Tied. Lim. Police Power, 509, 569, 572, 233, 234; 53 Pac. 371; 51 N. E. 853; 8 Pa. Sup. Ct. 339.

Jefferson Davis, Attorney General, Charles Jacobson and *Morris M. Cohn,* for appellee.

Foreign corporations have no absolute rights beyond those given by the legislature, which may dictate the terms on which

they may do business in the state. 155 U. S. 648, 652; 13 Pet. 519; 18 How. 404; 6 Wall. 594; *ib.* 611; *ib.* 632; 8 Wall. 168; 10 Wall. 410; 15 Wall. 284; 18 Wall. 5; *ib.* 206; 92 U. S. 575; 122 U. S. 326; 127 U. S. 1; 134 U. S. 594; 142 U. S. 217; 153 U. S. 436, 445; 66 Ark. 466; S. C. 51 S. W. 693; 62 Ark. 63, 69; 125 U. S. 181, 190; 4 Thomp. Corp. § 7898; 15 Pet. 519, 588. No one, not interested in or affected by it, can question the constitutionality of a statute. 85 Ky. 557; 20 S. W. 285; 23 Miss. 600; 7 Nev. 223; 24 N. J. L. 266; 72 N. Y. 211; 89 N. Y. 75; 90 N. Y. 498; 49 Hun, 466; 47 Ohio, 478; 3 R. I. 64; 47 S. C. 75; 22 Gratt. 833; 25 W. Va. 427; 3 Wy. 719; 48 Ala. 540; 110 Ala. 308; 24 Fla. 55; 145 Ind. 439; 73 Ky. (10 Bush), 681, 691; 79 Ky. 22; 47 La. Ann. 568; 51 Me. 449; 18 Neb. 416; 3 S. Dak. 29; 4 Blatchf. 263; 3 Mackey, 32; 48 Ala. 540; 6 Allen, 360; 3 S. W. 580; 8 Cow. 543; 25 W. Va. 427. If appellant had been a domestic corporation, the legislature still had power to bind it by the act in question. 58 Ark. 407, 428; 25 Atl. 246. The act was a valid exercise of the police power of the state. 165 U. S. 165; 169 U. S. 366, 391, 392, 395, 397; 165 Mass. 462; 113 U. S. 703; 65 Cal. 33; 113 U. S. 27; 39 Oh. St. 651; 84 Ala. 17; 76 Tex. 559; 53 Ga. 613; 56 Conn. 216; 127 U. S. 678; 81 Ia. 642; 38 N. H. 426; 45 Hun, 41; 36 W. Va. 82; 55 Ind. 74; 16 Wall. 36; 76 Ala. 60; 104 N. C. 714; 32 W. Va. 802; 23 N. E. 253; 53 Pac. 371; 147 U. S. 449; 143 U. S. 110; 164 Pa. St. 306; 113 U. S. 703; 113 U. S. 27; 169 U. S. 366. *Cf.* Sand. & H. Dig., §§ 1513, 1515, 1510, 1517, 1539, 1584, 1586-1590, 1627. Doubts respecting the constitutionality of a statute are to be resolved in its favor. 56 Ark. 485, 495; 59 Ark. 513; 58 Ark. 407; 11 Ark. 481; 36 Ark. 171.

W. C. Perry, for appellants, in reply; *Ira D. Oglesby,* of counsel.

Corporations are persons within the fourteenth amendment. 18 Fed. 385, 398, 402, 404; 164 U. S. 578, 592; *id.* 686, 689.

RIDDICK, J., (after stating the facts). The only question that we are asked to determine on this appeal is whether the act of April 10, 1899, upon which the prosecution and judgment in this action are based, is a constitutional and valid statute. The first section of the act makes it "the duty of every corporation, company or person engaged in the business of mining and selling coal by weight or measure, and employing twenty or more persons,

to procure and constantly keep on hand at the proper place the necessary scales and measures, and whatever else may be necessary, to correctly weigh and measure the coal mined by such corporation, company or person." The second section is as follows: "All coal mined and paid for by weight shall be weighed before it is screened, and shall be paid for according to the weight so ascertained, at such price per ton or bushel as may be agreed on by such owner or operator and the miners who mined the same; *provided,* that nothing in this act shall be so construed as to prevent said owner or operator from having the right to deduct the weight of any sulphur, slate, rock or other impurities contained in the car and not discoverable until after the car has been weighed." Another section provides a punishment for failure to comply with the provisions of the act on the part of persons, corporations and their agents and employees.

It is said by counsel for appellant that this is class legislation, that it is an arbitrary and unreasonable attempt on the part of the legislature to divide the operators of coal mines into two classes, that it permits such an operator employing less than twenty men to pay for digging his coal according to the weight of screened coal produced, while the operator employing twenty men must weigh his coal before screening it, and pay according to the weight thus ascertained. But we do not so understand the statute. The first section, it is true, requires only those operators of coal mines that employ twenty or more persons to keep on hand certain weights and measures, but the second section, for a violation of which the defendant is being prosecuted, applies, it seems to us, to all operators of coal mines. The language is, "all coal mined and paid for by weight shall be weighed before it is screened," etc. This includes the small as well as the large operator, though by the first section the operator employing less than twenty men is not required to procure and keep on hand the weights and measures mentioned. He can, if convenient, use the scales or measures belonging to others, but if there are none such convenient he must necessarily keep them, or he cannot pay for his coal by weight. The obvious reason for the distinction in the first section is that it might be very burdensome to require the small operator to keep on hand an expensive set of scales and measures, when his situation might make this unnecessary; whereas the large operator would usually need such scales and measures, and the requirement as to him would usually be less burdensome

than it would be upon the small operator. This, it would seem, furnishes a justification for the distinction made by the legislature in the first section, while as to the second section, the one involved here, there is no distinction made. All operators are by it treated alike, and required to weigh before screening all coal mined and paid for by weight. It therefore seems to us that the contention that this statute is an example of arbitrary and unreasonable class legislation cannot be sustained.

It is next said that the act violates the constitution of the state and of the United States "by restricting the right of contract by taking property without due process of law, and by denying to certain operators and workers in coal mines the right of civil liberty and the pursuit of happiness." In support of this contention, counsel for appellant has favored us with an able and entertaining brief, in which they discuss at considerable length the question of the right of the citizen to make contracts and acquire property. But that is a field into which we need not enter in this case; for, if we concede the contention of counsel that "the right to contract in a lawful private business on terms satisfactory to the parties is a part of the natural liberty of the citizen which the legislature cannot take away," it does not follow that a corporation is equally exempt from legislative control in that respect. The citizen does not derive his right to contract from the legislature. The corporation does, and it possesses only such powers as may be conferred upon it by the legislative will, and these, under our constitution, are liable to be altered, revoked or annulled by the power that granted them. Art. 12, § 6, Const. of Ark. The plain purpose of this constitutional reservation was to keep corporations under legislative control. The only limitation on this power of the legislature contained in our constitution is that the alteration, revocation or annulment of the corporate powers must be made "in such manner that no injustice shall be done to the corporators." Speaking for myself only, it seems to me that this limitation that "no injustice shall be done to the corporators" is nothing more than would have existed, in the absence of such words, from general rules of law. In the absence of such words, the courts would have implied the limitation that no injustice should be done the corporators, for the legislature cannot confiscate the property of the corporation. This power to alter, revoke or annul "cannot be used to take away property already acquired under the operation of the charter, or to deprive

the corporation of the fruits actually reduced to possession of contracts lawfully made." *Sinking Fund Cases,* 99 U. S. 700, 720; *St. Louis, I. M. & S. Ry. Co.* v. *Paul,* 173 U. S. 409.

But it cannot be said to be unjust to the corporators for the state to exercise this reserved power by taking away either a part or all of the corporate powers of domestic private corporations organized since the adoption of the constitution above referred to, for the constitutional provision reserving such power to the state enters into and forms a part of the corporate charters of such corporations. When the state alters or revokes the charter, when it takes away part or all of the corporate powers, it is only acting within the contract made with the corporators in the beginning. But, in exercising the power to alter or revoke, the constitution requires that the property rights of the corporation shall be protected, and that the legislature shall not, under the pretense of altering or revoking the charter, deprive the corporation of its property or of the benefit of contracts lawfully made. To do so would be manifestly unjust, and the law would not permit it. The alteration or revocation of the corporate powers must be effected in such a way as to work no injustice to the corporators. "Personal and real property acquired by the corporation during its lawful existence, rights of contract, or choses in action so acquired, and which do not in their nature depend upon the general powers conferred by the charter, are not destroyed by such a repeal; and the courts may, if the legislature does not provide some special remedy, enforce such rights by the means within their power." *Greenwood* v. *Freight Co.* 105 U. S. 13.

Whether injustice has been done the incorporators depends upon the facts of each case in which an alteration or revocation of corporate powers has been attempted. But we do not see that the statute under consideration here is open to any such objection. It was made to take effect ninety days after its passage, and was prospective in its operation. It did not interfere with vested rights or existing contracts, or deprive such corporations of any property possessed by them. The purpose of the act, as shown in the title and in the act itself, was to protect a class of laborers against certain frauds which the legislature supposed might be perpetrated upon them in the process of screening, when coal was not weighed until after it had been screened. The act does not require the coal to be weighed when the laborer or miner is paid by the hour or day, or when he is paid by measure and not by

weight. Even when the laborer is paid by the weight of the coal mined, it does not attempt to regulate the price to be paid, but expressly leaves that to be settled by the agreement of the parties.

There may be difference of opinion as to the wisdom of such legislation, or as to whether this law will have the effect intended by the legislature. Yet, even if we were convinced that the law was unwise, that would furnish no grounds for refusing to enforce it; for "it is not the province of the courts to supervise legislation, and keep it within the bounds of propriety and common sense." Sutherland, Stat. Const. § 238. The question of the expediency of such a law is left alone to the legislature. Being satisfied that this control of these corporations engaged in the business of mining coal in this state is authorized by the power reserved in the constitution to "alter, revoke or annul" their charters, we must hold this statute to be valid. A full discussion of this question of the legislative authority to control corporations under this reserved power in the constitution can be found in the following cases: *Leep* v. *Railway Co.* 58 Ark. 407; *St. Louis, I. M. & S. Ry. Co.* v. *Paul,* 64 *ib.* 83; *St. Louis, I. M. & S. Ry. Co.* v. *Paul,* 173 U. S. 404. Also in 4 Thompson, Corporations, §§ 5408-5419; 2 Tiedeman, State & Fed. Control, 950.

It is said in the argument that the Central Coal & Coke Company, for whom the defendant was acting when he committed the acts complained of in this prosecution, is a non-resident corporation, organized under the laws of Missouri, and that consequently the provision in the constitution of this state in reference to the alteration, revocation and annulment or charters of domestic corporations does not apply. And this is no doubt true; but, as we said in the cases against the insurance companies, and as the supreme court of the United States has often held, the legislature has power entirely to exclude foreign corporations from doing business in this state, and can, of course, dictate the terms upon which such companies, may do business here. *State* v. *Lancashire Ins. Co.* 66 Ark. 466; *Waters-Pierce Oil Co.* v. *Texas,* 177 U. S. 28; *Paul* v. *Virginia,* 8 Wall. 168, 181.

Such a corporation, to quote the language of the supreme court of the United States in the case last cited, "having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows as a matter of course that such assent may be granted upon such terms and conditions as those states may think proper

to impose. They may exclude the foreign corporations entirely; they may restrict its business to particular localities; or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."

Our state constitution recognizes this right of the state by providing that foreign corporations may be authorized to do business in this state under such limitations and restrictions as may be prescrbed by law. "Provided that * * * they shall be subject to the same regulations, limitations and liabilities as like corporations of this state, and shall exercise no other or greater powers, privileges or franchises than may be exercised by like corporations of this state." Const. 1874, art. 12, § 11. It will be seen from this section of our constitution that the legislature has no power to give a foreign corporation greater powers, privileges or franchises than may be exercised by like domestic corporations. "The power of a state," says the United States supreme court, "to impose conditions upon foreign corporations is certainly as extensive as the power over domestic corporations." "That which a state may do with corporations of its own creation it may do with foreign corporations admitted into the state." *Orient Ins. Co.* v. *Daggs*, 172 U. S. 566.

We are, therefore, of the opinion that this act is a valid law, so far as it affects corporations, either foreign or domestic.

It is said that the defendant in this case is not a corporation, but a natural person. But he was acting for a corporation, and, if the state has the right to forbid certain acts on the part of corporations, it can enforce such law by imposing a penalty upon the agents of corporations who may commit the forbidden act.

The contention that this law unlawfully abridges the right of the laborer to contract cannot be sustained. The right to contract upon the part of the citizen is not unlimited. One has no right to complain that the law will not permit him to make valid contracts with an infant or insane person, or that it will not allow him to make usurious or other forbidden contracts. It is equally plain that, if one deals with a corporation, he can only make such valid contracts with it as the law may authorize it to make. He cannot complain that the powers of such company to contract are limited and less than those of a natural person. If this law is valid as to corporations, the laborers who deal with such corporations have no right to complain, and much less does the corporation

have the right to complain that the law infringes upon the contractual powers of its employees. We are not called on in this case to decide whether this statute is valid as against owners and operators of coal mines other than corporations. It is sufficient to say that we are of the opinion that so much of the statute as is questioned in this case is valid as to corporations owning and operating coal mines in this state. That being the only question presented on this appeal, the judgment of the circuit court must be affirmed.

WOOD, J., not participating.

BATTLE, J., (concurring). Section 2 of article 12 of the constitution of this state ordains: "The general assembly shall pass no special act conferring corporate powers," etc.; and section 6 of the same article provides: "Corporations may be formed under general laws; which laws may from time to time be altered or repealed," etc. Under these sections the general laws under which a corporation is formed constitute its charter. *People* v. *Chicago Gas Trust Company,* 130 Ill. 268, 285; Morawetz, Private Corporations (2d. Ed.), § 318. The constitution specially provides that these general laws can be altered or repealed. As they form a part of the charter, the amendment or repeal of them operates as an amendment or repeal of the charter. *Durand* v. *New Haven, etc., Co.* 42 Conn. 211; 1 Thompson, Corporations, § 94.

There is, however, a limitation upon the power to amend or revoke the charter of a corporation. Section 6 of article 12 of the constitution further provides: "The general assembly shall have power to alter, revoke or annul any charter of incorporation now existing and revocable at the adoption of this constitution, or any that may hereafter be created, whenever, in their opinion, it may be injurious to the citizens of the state; in such manner, however, that no injustice shall be done the corporators." The last clause of this section, in my opinion, applies to the amendment, as well as the repeal. I can see no reason why injustice should be prohibited in the one case and not in the other. The limitation is not confined by the section to the power to repeal.

In the absence of such a limitation, learned judges have held that there is a limit upon the reserved power to amend or repeal the charter, and that it must be exercised upon terms that are just or reasonable. In *Lothrop* v. *Stedman,* 42 Conn. 590, Mr. Justice Shipman, in delivering the opinion of the court, said:

"When a charter itself or a general statute provides that the charter is subject to repeal by the legislature, at its pleasure, without restrictions or conditions limiting the power of repeal, the legislature has the right to exercise its power summarily and at will, and its action, being a legislative and not a judical act, cannot be reviewed by the courts, unless it should exercise its power so wantonly and causelessly as palpably to violate the principles of natural justice, and in such a case a repeal, like other legislative acts which do thus palpably violate the principles of natural justice, may be reviewed by courts."

In *Miller* v. *State,* 15 Wall. 498, Mr. Justice Clifford, in delivering the opinion of the court, and in speaking of the power to amend or repeal reserved in the charter of a private corporation, said: "Power to legislate, founded upon such a reservation in a charter to a private corporation, is certainly not without limit, and it may well be admitted that it cannot be exercised to take away or destroy rights acquired by virtue of such a charter, and which, by a legitimate use of the powers granted, have become vested in the corporation, but it may be safely affirmed that the reserved power may be exercised, and to almost any extent, to carry into effect the original purposes of the grant or to exercise the due administration of its affairs so as to protect the rights of the stockholders and of creditors, and for the proper disposition of the assets."

In *Shields* v. *Ohio,* 95 U. S. 319, 324, Mr. Justice Swayne, in delivering the opinion of the court, says: "It is urged that the franchise here in question was properly held by a vested right, and that its sanctity, as such, could not be thus invaded. The answer is, *consensus facit jus.* It was according to the agreement of the parties. The company took the franchise subject expressly to the power of alteration or repeal by the general assembly. There is, therefore, no ground for just complaint against the state. Where an act of incorporation is repealed, few questions of difficulty can arise. Equity takes charge of all the property and effects which survive the dissolution, and administers them as a trust fund, primarily for the benefit of creditors. If anything is left, it goes to the stockholders. Even the executory contracts of the defunct corporation are not extinguished. The power of alteration and amendment is not without limit. The alterations must be reasonable; they must be made in good faith, and be consistent with the scope and object of the act of incorpora-

tion. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration."

In *Sinking Fund Cases,* 99 U. S. 721, Mr. Justice Waite, in delivering the opinion of the court, after quoting the last two sentences of the last quotation, said: "The rules as here laid down are fully sustained by authorities."

Mr. Cook, in his work on Corporations, says: "The extent of the power of the legislature to amend a charter, where it has reserved that power, is not yet fully settled, and is full of difficulties. There is a strong tendency in the decisions, and a tendency which is deserving of the highest commendation, to limit the power of the legislature to amend a charter under this reserved power." 2 Cook, Corp. (4th Ed.) § 501. But there is a contrariety of opinion on this subject. 4 Thomp. Corp. §§ 5409, 5411. Finding the law upon this question unsettled, the constitutional convention of 1874, in reserving the power to amend or repeal the charters of corporations, provided that it should be exercised on terms that are just to the corporators, adopting the view of those who hold that the power to amend or repeal shall be exercised in that manner.

Does section 2 of the act of April 10, 1899, exceed authority of the general assembly to legislate as to corporations by limiting their rights in an unjust manner? It does not prohibit the screening of coal, nor does it interfere with the right of the parties to agree upon the price to be paid for mining coal, but merely provides that "all coal mined and paid for by weight shall be weighed before it is screened, and shall be paid for according to the weight so ascertained." The object of the act seems to be to secure to the miner pay for all coal mined by him, and in this manner to prevent his employer depriving him of a just reward for his labor. There is nothing in the act prohibiting the employer and miner from agreeing that coal shall be paid for in conformity to its weight before screened, according to the proportion that so much of the coal as shall pass through a screen shall bear to the whole amount weighed, that is to say, agreeing that so much (the price stipulated) shall be paid according to the total weight, if one-third, one-fourth, one-fifth, or whatever proportion of it passes through a screen after it has been weighed. Construed in this manner, section 2 of the act is just and reasonable, the object of it is accomplished, and it is constitutional, so far as it applies to corporations.

I concur with Mr. Justice Riddick in the opinion delivered by him, in so far as it does not conflict with what I have said in this opinion.

HUGHES, J. I concur in this opinion.

BUNN, C. J., (dissenting). The main question in this case is the constitutionality of the act of the general assembly entitled, "An act to prevent fraud in weighing and measuring coal, and requiring the same to be weighed before screening, and for other purposes," approved April 10, 1899. What the "other purposes" may mean, we have no means of ascertaining, for no "other purposes" are indicated in the act. I take it therefore that to "prevent fraud against" the miner is the sole purpose of the act.

I desire to say in the outset that an act having that particular end in view is or may be entirely unobjectionable from a constitutional standpoint if it be a general act, subject however to the inalienable rights of the parties concerned; for instance, subject to the inalienable rights of the parties to acquire and hold property, and consequently to make their own contracts which do not injure the public or others. Such an act is or may be good where no private contract between the parties touching the subject has been made. In other words, it is only where such an act seeks to restrict the individual inalienable rights of the parties that it can be called in question.

What are the inalienable rights of the citizens of this state in respect to making contracts? The second section of the bill of rights of our present constitution reads: "All men are created equally free and independent, and have certain inherent and inalienable rights, amongst which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness. To secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed." All men, it is said, are created, not only free, but equally free. The succeeding section declares the equality of all persons before the law. It is also declared as a principle of government, in the section quoted above, that to secure these inherent and inalienable rights, not to fritter them away, governments are instituted. They have no other real purpose, and all details must lead up to that, or else they are subversive of the true theory of government.

It is well settled by all the courts, from the highest to the

lowest, that, coming within the meaning and scope of "acquiring, possessing and protecting property," and other kindred inherent and inalienable rights, is the right to contract; for without this right the right to acquire property would be mainly cut off, and be nugatory. I need not therefore cite authorities to sustain that position.

The twenty-second section declares the right of property to be "before and higher than any constitutional sanction even, and, while in the next succeeding section (23) the right of eminent domain is fully conceded to the government of the state, yet no private property can be taken under the mere pretense of mere superiority of the public demand and exigency, but the same must be paid for in advance. And, to make assurance doubly sure against the encroachments of government on private rights, the twenty-ninth section of the bill of rights declares that the enumeration of rights in preceding sections shall not be construed to be a denial or disparagement of other rights retained, and so forth. In the federal constitution provisions of similar import are to be found. So sacred are these inherent and inalienable rights, not only in this country, but among English speaking people everywhere, that no man in all the race, however humble he may be, if once informed of the real question before him, would voluntarily surrender one of them, or one iota of any one of them.

But the opinion of the court, while conceding the foregoing to be true, propounds the doctrine that an individual who has become a member of a domestic corporation in some way has surrendered the inalienable right in so far as the corporate enactments have restricted his inalienable right. To admit the soundness of such a doctrine would be to admit that the legislature could so provide by enactment that one could waive or surrender any of these inalienable rights, in consideration of being endowed with the privilege of managing his affairs in conjunction with others in corporate capacity. The natural freedom of the citizen is a more costly thing than that. Not only cannot the legislative department provide law general or special for the citizen to sell himself in this way, but this court has said that the legislature could not amend the bill of rights, as was attempted to be done, by the formulary of amending the constitution, given in the constitution of 1836, by which such amendment was in effect submitted to the people. See *Eason* v. *State,* 11 Ark. 481.

The opinion in that case forcibly expresses the sentiment of our southern forefathers on the relative rights of government and the private citizen. Moreover, that generation held to the doctrine that when once civil and political rights were recognized in a man, he was thenceforth the equal of any other man before the law, and for that reason what is now known as paternal government had no place in their notions of government. I think it is well to adhere to these old notions as to fundamentals.

But the opinion of the court makes a distinction between the citizen when he assumes to act alone, and when he acts as a corporator, under the incorporation laws of the state. I do not deem it essential to this discussion to do more than note the distinction between corporations and public and *quasi* public corporations, for the case before us involves a private corporation only. In so far it is distinguished from the case of *Leep* v. *Railway Company,* cited in brief of counsel;* and upon different grounds it is distinguished from the case of *St. Louis, Iron Mountain & So. Railway Company* v. *Matthews,* 64 Ark. 398.

Whether there be any distinction between the citizen acting in an individual and in a corporate capacity is well worthy of inquiry.

The constitution, article 12, section 6, reads: "Corporations may be formed under general laws; which laws may, from time to time, be altered or repealed. The general assembly shall have the power to alter, revoke or annul any charter of incorporation now existing, and revocable at the adoption of this constitution, or any that may hereafter be created, whenever, in their opinion, it may be injurious to the citizens of the state; in such manner, however, that no injustice shall be done to the corporators."

It is more convenient and more logical to consider first the latter clause of this section.

In order to get at the real meaning of constitutional provisions and statutory enactments, it is allowable to take into consideration the circumstances surrounding their adoption and enactment. It will be observed from the clause now under consideration that all charters of incorporation which had become revocable at the time of the adoption of the constitution, and all such as might thereafter be created which in the opinion of the legislature might be injurious to the public, might be altered, revoked or annuled

* 58 Ark. 407.

by the legislature. Until the adoption of the constitution of 1868, corporations in this state were created only by special act of the legislature. Under the constitution of 1868, all corporations were formed under general laws, and not otherwise. Under the present constitution, corporations could be formed under general laws, but the legislature was not confined by the plan of incorporating by general laws, but might still incorporate by special act, unless there is something in the language of section 18 of the bill of rights which restricts the legislature in this regard.

When the present constitution was being adopted, there were possibly some charters granted by special act, which the corporators had not entitled themselves to by neglecting or refusing to comply with the conditions precedent therein named. These were, in the language of the constitution, revocable for that cause. It is well known also that many paper corporations had been formed under the general laws enacted under the constitution of 1868, in which the corporators had failed to comply with the law, in order to entitle them to the privileges of being incorporated. These were for that reason held to be revocable, and the constitution conferred upon the legislature the power so to declare, and thereby revoke or annul. Or, if so asked by the corporators, the legislature might alter the terms so as to give new life to them. In none of these provisions was it ever intended to confer upon the legislature any judicial power, or to affect the judicial rights of the incorporators; for whenever corporators should consider themselves injured by the exercise of this annulling and revoking power of the legislature, they could have their day in court, under section 13 of the bill of rights. All questions such as of non-user and mis-user are judicial questions, and are not the subject of legislation, for they do not come under the head of legislation. Forfeitures for non-compliance with conditions are more of the nature of ministerial acts, and are most frequently left to the executive, but may be left to the legislature. But the fact that no injury shall be done to the corporators makes all such acts of reservation and annulment subject to the determination of the courts, if grounds exist therefor. That is all there is in this second clause of the section, and it evidently has no application to rights under a going charter.

The first clause of the section, the only one having any application here, reads: "Corporations may be formed under general laws; which laws may from time to time be allowed or repealed." It is inconceivable that an amendment to a law which is derogatory

of some right guaranteed elsewhere in the constitution, like the right to contract, can be considered as a valid amendment. All amendments must be within the scope of existing constitutional provisions, or they are to be considered unconstitutional; for amendments must stand on the same footing in this respect as original acts, and no original act could stand the test which denied the right of property or the right to contract.

It is unnecessary to consider how far all certificates and charters of incorporation are to be considered in the nature of contracts between the state and the corporators. That the state may, through its legislature, alter or repeal charters, to affect the incorporations for the future, in matters not determined by the constitution itself, will not be denied, but legislation, whether original or by amendment, must respect rights under the constitution, especially those rights which, from the essential principles of government, are inherent and inalienable. I do not think a citizen surrenders, or is required to surrender, any of these rights in consideration of the paltry and sometimes questionable privilege, and merely temporary advantage, of becoming a member of a corporation.

With my way of thinking on such subjects, in so far as the act of the legislature seeks to restrict the right of the miner or operator of the coal mine to enter into, between themselves, a contract otherwise lawful, it is unconstitutional. *Re Preston*, 52 L. R. A. 523, and notes and citations therein.

BYRD *v.* STATE.

Opinion delivered July 13, 1901.

1. EVIDENCE—RES GESTAE.—Where there was evidence in a murder case that deceased was killed in a quarrel with defendant and his brother, it was error to exclude evidence that defendant's brother struck deceased the first blow given. (Page 538.)

2. INSTRUCTION—REASONABLE DOUBT—MORAL CERTAINTY.—An instruction that the jury might convict if satisfied "to a moral certainty" of the truth of the charge, and that "a moral certainty" signifies only a very high degree of probability, is erroneous, as the jury might think there was a high degree of probability that the defendant is guilty, and yet think there is reasonable doubt as to his guilt. (Page 538.)

Appeal from Scott Circuit Court.

STYLES T. ROWE, Judge.

A. C. Brewster and *J. Wythe Walker,* for appellant.

George W. Murphy, Attorney General, for appellee.

HUGHES, J. The appellant was indicted for murder in the first degree, was tried, convicted of voluntary manslaughter, and sentenced to imprisonment at hard labor for seven years in the state penitentiary. He filed his motion for a new trial, which was overruled, to which he excepted, and appealed to this court.

As the judgment must be reversed for an error in instructing the jury, we will not discuss the testimony in the case further than to say that the following testimony offered by the state was excluded erroneously, as we think. It occurs in the testimony of A. P. Walker, and is as follows: "Wm. J. Byrd struck at him [Hayes, the deceased] with his fist." From the testimony in the case this seems to have been a part of the *res gestae,* and the first blow struck. George Byrd, the appellant, and Wm. J. Byrd were brothers, were under the influence of liquor, and a quarrel seems to have arisen between them and the deceased, which led finally to the killing of Hayes by George Byrd. We thought it proper to mention this, as the state has failed to brief the case.

In instructing the jury in the case, defining "reasonable doubt," the court said: "By 'reasonable doubt' is not intended to be excluded every merely possible doubt. If, after a careful consideration and comparison of the evidence in the case, you are satisfied to a moral certainty of the truth of the charge, you may convict the defendant. If you are not satisfied, you should acquit the defendant. A moral certainty signifies only a very high degree of probability." This instruction was erroneous, and calculated to lead the jury to believe that a strong probability was sufficient to convict, though they might have a reasonable doubt as to defendant's guilt upon the whole case. The jury must be satisfied from the evidence, to a moral certainty, that the defendant is guilty, before they can convict; and if they entertain a reasonable doubt as to his guilt, after consideration and comparison of all the evidence in the case, they must acquit. A high degree of probability is not sufficient; for the jury might think there was a high degree of probability that the defendant is guilty, and yet think there is a reasonable doubt as to his guilt, from the evidence in the

case. There are many grounds urged in the motion for new trial that we do not think it necessary to notice here. For the error indicated, the judgment is reversed, and the cause remanded for a new trial.

BATTLE, J., absent.

MORROW v. JAMES.

69 539
74 87
76 150

Opinion delivered July 13, 1901.

1. TAX TITLE—WHO MAY ACQUIRE.—One who has undertaken and is under obligation to redeem land from taxes can not acquire title thereto at a tax sale. (Page 540.)
2. GUARDIAN'S SALE—CONFIRMATION.—Where a guardian never reported a sale of his ward's land to the probate court, but four years after the sale the purchaser presented his deed to the court, by which it was approved, neither the guardian nor the ward being present, there was no confirmation of the sale, and the statute of limitation of five years, applicable to judicial sales, would not begin to run. (Page 540.)
3. LIMITATION—REMAINDERMAN.—Where land was devised to plaintiff's mother for life, with remainder to the heirs of her body, plaintiff's right to recover her interest therein would not be barred until seven years after her mother's death. (Page 541.)

Appeal from Crittenden Circuit Court in Chancery.

FELIX G. TAYLOR, Judge.

STATEMENT BY THE COURT.

This suit is in ejectment by appellant for certain lands described in the complaint. There was judgment for the appellee, from which appeal was taken to this court. The appellant claimed by virtue of the eighth clause of the will of his grandfather, George S. Fogelman, which reads as follows: "Item 8. As to the balance and remainder of my estate, real, personal and mixed, after paying off my debts and the above specified legacies, I do hereby will, give and bequeath to my beloved daughter, Mississippi Morris, wife of Charles S. Morris, of said county, to be hers during her natural life, and then to belong to the heirs of her body; it being

my intention to settle the same upon my said daughter and the heirs of her body." The appellant is an heir of the body of Mississippi Morris, and claims one-third of the land in controversy.

The appellee answered, denying the title of the appellant, and setting up title in himself. He alleges that the interest of the appellant was sold by her guardian, under orders of the probate court of Crittenden county; that he was the purchaser; and that the sale was approved by said court. He next alleges that appellant had no interest in the land to be sold; that, under the will, Mississippi Morris took an absolute estate. The answer relies upon seven years' adverse possession, and avers that he purchased 147 acres of fractional section three, on November 3, 1879, and the balance of said section on June 30, 1880, under tax sale, and avers that he has had adverse possession since said dates. Pleads the statute of limitations of seven years, of five years and of two years. The answer also alleges that after the appellant became of age she ratified and confirmed the sale of said lands as made by her guardian, B. I. Olmstead.

Norton & Prewett, for appellants.

The order of confirmation is void as to appellant, because the record shows that neither she nor her guardian was before the court. 1 Black, Judg. § 242; 55 Ark. 562; 56 Ark. 419; 2 How. 43.

F. H. Heiskell, of Tennessee, for appellee.

As the lands were not purchased at tax sale, the defendant is protected by the statute of limitations of five years. Sand. & H. Dig., § 4818; 53 Ark. 400; 60 Ark. 167; 72 Ia. 24; 75 Ia. 253. The order of the probate court is not open to such collateral attack as is here attempted.

HUGHES, J., (after stating the facts). We are of the opinion that there is no sufficient evidence to show that appellant had ratified and confirmed the sale of her interest in the land in controversy by Olmstead, her guardian. We think that the record shows that appellee undertook and was obliged to redeem the land from taxes, and could not therefore set up the tax purchase in bar of plaintiff's right of action.

Before the statute of limitations of five years could apply, there must have been confirmation of the sale made under the order of the probate court. Without confirmation, there was no sale.

Maxwell v. *Campbell*, 45 Ind. 360; *Titman* v. *Ricker*, 43 N. J. Eq. 122; *Mulford* v. *Beveridge*, 78 Ill. 455; *McVey* v. *McVey*, 51 Mo. 406; *Watts* v. *Cook*, 24 Kan. 278; *Flemming* v. *Roberts*, 84 N. C. 432; *Wells* v. *Rice*, 34 Ark. 346; and Arkansas cases *passim*. It appears that no report of the sale was made by the guardian; that about four years after the sale Stephen James, the purchaser, presented to the court the two deeds made to him by the guardian, and asked their approval; and that the deeds were approved by order of the probate court. Neither the guardian of appellant nor appellant herself was present, or was represented in the court at the time, as the record shows. Wherefore there was no confirmation of the sale, and therefore no sale. The statute of limitations of five years could not apply, because there was no sale. Mississippi Morris, appellant's mother, had a life estate in these lands, and she died in November, 1885. This suit was brought to the July term of the court for 1889, about three years and eight months after the death of appellant's mother, when the right of appellant accrued, the life estate being then determined. It follows, therefore, that the seven years' statute of limitations had not barred the appellant's right of action when her suit was commenced. The judgment of the lower court is reversed, and the cause is remanded for a new trial. The appellee should be allowed for any amount he paid to redeem the land from taxes.

MADDOX *v.* REYNOLDS.

Opinion delivered July 13, 1901.

1. REPLEVIN—FRAUDULENT CONVEYANCE—NOTICE.—Where the defendant in a replevin case admits that plaintiff purchased the goods from a vendee of the former owner, and alleges that such purchase was made with notice that the first sale was a fraud upon creditors, the burden is on defendant to show that such vendee and his subvendee both knew the fraudulent nature of the first sale, or had notice of facts which would have put a reasonably prudent man upon inquiry. **(Page 542.)**

2. FRAUD—PURCHASING EXCESSIVE AMOUNT OF DEBTOR'S GOODS.—The necessity which will justify a creditor in purchasing more of his debtor's goods than is necessary to discharge his demand, when

he has notice that the debtor intends to defraud other creditors, is a necessity growing out of the nature, situation or condition of the property, and not one created by the debtor's unyielding demand for cash. (Page 543.)

Appeal from Van Buren Circuit Court.

BRICE B. HUDGINS, Judge.

Replevin by J. W. Reynolds against W. S. Maddox, as sheriff. The goods sought to be recovered constituted part of a stock of goods which had been purchased by Reynolds from Dr. Steel, who purchased from Mrs. Neely, as surviving member of the insolvent firm of J. M. Bradford & Co. Through her husband as agent, Mrs. Neely had sold her entire stock of goods and her accounts to Dr. Steel for a sum not stated, but estimated to be about fifty cents on the dollar. The goods afterwards invoiced at $1,700, and the accounts amounted to $400. The consideration of the sale was the surrender of a note for $250 held by Dr. Steel, and the payment of the remainder of the purchase money in cash. A portion of the stock was sold by Dr. Steel to Reynolds, and was seized by the sheriff under writs of attachment sued out by creditors of J. M. Bradford & Co. There was a verdict for plaintiff, and defendant has appealed.

Carroll Armstrong and *J. F. Sellers,* for appellant.

The sale was fraudulent. The refusal of the debtor to sell less than the whole stock was notice to the creditor of the fraud. 64 Ark. 373; 47 Fed. 758; 6 S. W. 560; 4 S. W. 562; 16 S. W. 1012; 30 Kan. 693; 40 Kan. 18; 49 Kan. 23; 83 Mo. 518; 3 McCrary, 638. The first instruction for appellee was erroneous. 50 Ark. 292; 53 N. Y. 465; 8 Am. & Eng. Enc. Law, 841; 1 Rice, Ev. 123; 132 S. W. 376. The second instruction for appellee is also erroneous. 60 Ark. 425; 64 Ark. 373; 47 Fed. 758; 34 N. J. Eq. 188; 32 S. W. 367; 25 Ill. App. 445.

J. H. Harrod, for appellee.

The instructions as to the purchase of goods by creditor are correct. 60 Ark. 433. The verdict, being supported by the evidence, will not be disturbed here. 19 Ark. 684.

WOOD, J. We find no error in the first instruction given by the court on the motion of the plaintiff (appellee). It fairly covers the issues made by the pleadings and proof. It is as follows: "Gentlemen of the jury: The plaintiff, Reynolds, brings

this suit for replevin against W. S. Maddox for certain goods and merchandise, claiming to be the owner thereof. The defendant admits that the plaintiff was in possession of the goods in question, claiming title thereto by reason of a sale of said goods to said Reynolds by Dr. Steel. Defendant further admits that Dr. Steel bought said goods of and from Mrs. Neely, but avers that said sale of goods by Mrs. Neely to Dr. Steel was fraudulent, and therefore void, and that plaintiff, Reynolds, had knowledge of such fraud, or such knowledge as to put a reasonably prudent person on inquiry, and that he (plaintiff) could have learned by reasonable inquiry of such fraud before paying for said goods. These admissions and averments in defendant's answer, and the statements of counsel here in open court, place the burden of proof on the defendant. Now, if you find from a preponderance of the evidence that Mrs. Neely, or her agent, sold these goods to Dr. Steel with the fraudulent intent to cheat, hinder or delay the creditors of the firm of J. M. Bradford & Co. in the collection of their debts, and that Dr. Steel, at the time of said sale, had knowledge of said fraudulent intent, or had such knowledge of facts as would put a reasonably prudent man upon inquiry, and that, by making proper inquiry, he could have learned of such fraudulent intent on the part of Mrs. Neely, or her agent, and that Dr. Steel sold said goods to the plaintiff herein, J. W. Reynolds, and that the said Reynolds had knowledge of such fraudulent intent on the part of Mrs. Neely, or her agent, or knowledge of such facts as would put a reasonably prudent man upon inquiry, and that upon making inquiry he could have learned of such fraudulent intent upon the part of Mrs. Neely, or her agent, at or before paying for the goods, you will find for the defendant, Maddox; if you fail to so find from a preponderance of the evidence, you should find for the plaintiff."

The second instruction given by the court on motion of appellee was not the law. It is as follows: "The court further instructs you that although you may find that Mrs. Neely, or her agent, sold said goods with fraudulent intent to cheat, hinder, or delay the creditors of J. M. Bradford & Co. in the collection of their debts, and that Dr. Steel had sufficient knowledge to put him upon inquiry, or even if he had full knowledge of this fraudulent intent, still this would not authorize you to find for the defendant, Maddox, provided you should further find that Dr. Steel made the purchase in good faith, and paid a reasonably fair price therefor, in order to collect a debt due him from the said Mrs. Neely for

money loaned her, to be used in the business carried on by the firm of Bradford & Co., of which she was a member, and that Dr. Steel believed that it was necessary to make such purchase in order to collect said debt, and that a reasonably prudent man, situated as he was, would have so believed, and that he made said purchase for this purpose alone, and that, too, after trying to collect said debt without purchasing more of said goods than was necessary to extinguish his claim."

Steel testified: "I tried to get Mrs. Neely to let me have enough goods to pay her note to me, but she would not do so; and I was compelled by her to take the entire stock, in order to collect my debt, but suppose she would have let me have the amount of my debt in goods, if I had bought as another customer. The goods were susceptible of a division if she had consented." The necessity which compels the purchase of more goods than necessary to satisfy the creditor's demand, spoken of in *Wood* v. *Keith,* 60 Ark. 425, is not a necessity "created by the debtor's unyielding demand for cash, but a reasonable necessity, arising from the nature, situation, or condition of the property." *Levy* v. *Williams,* 79 Ala. 171. This court, in *Christian* v. *Greenwood,* 23 Ark. 258, through Judge Fairchild, said: "Although the law will not restrict a creditor from buying enough property from a failing or fraudulent debtor to pay the whole debt, or from buying all the debtor's property, and applying it to the extinguishment of the debt, as far as it will go, the buyer must allow a fair price for the property, and must not buy more than is necessary for his own protection." And again, through Judge Riddick, in *Carl & Tobey Company* v. *Beal & Fletcher Company,* 64 Ark. 373: "If, having notice of his debtor's dishonest purpose, he [the creditor] purchases property largely in excess of his own demands, paying therefor in cash, when the nature of the property does not make it necessary that he should purchase more than the amount of his own claim, the law will not uphold the transaction."

The instruction given contravenes this doctrine. It would allow the creditor to act on his own belief, superinduced by the conduct of the debtor in refusing to pay unless the creditor purchased the entire stock of goods, when the nature and condition of the goods themselves did not make such purchase necessary at all for the payment of the debt. The law does not give the dishonest debtor such power as that. For the error indicated, reversed and remanded for a new trial.

BUSSEY v. STATE.

Opinion delivered July 13, 1901.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE.—Where defendant was convicted of rape almost entirely upon the testimony of the prosecuting witness, who after the trial made an affidavit retracting her testimony, it was error to refuse a new trial upon the ground of newly discovered evidence.

Appeal from Ouachita Circuit Court.

CHARLES W. SMITH, Judge.

STATEMENT BY THE COURT.

On the 20th day of May, 1901, the grand jury of Ouachita county returned an indictment against Will Bussey, charging him with having, on the 16th day of the same month, committed the crime of rape upon one Clara Watson. Attorneys were appointed by the court to assist the defendant, Bussey, on his trial. The defendant, through his attorneys, asked the court to postpone the trial in order to give him time to prepare for the defense, and, further, on the ground that public sentiment was so inflamed against defendant that he could not receive a fair and impartial trial at that time. This motion was overruled, and on the 21st day of May, 1901, the defendant was placed on trial. On this trial the jury were unable to agree and were discharged; and on the 24th day of the same month, defendant was re-tried before another jury, and was convicted of the crime of rape, and on the next day, after a motion for new trial had been overruled, was sentenced to be hanged. Before the sentence was carried into effect, and before the final adjournment of the court, the defendant filed a second motion for new trial on the ground that the court erred in refusing to postpone the trial, and on the ground of newly-discovered evidence that the prosecuting witness had made a written statement, sworn to by her, before the clerk of the circuit court, in which she retracted the statements made against the defendant on the trial, and admitted that those statements were false, that she had made them under coercion of her husband,

and that her testimony was the result of a scheme devised and concocted by her hansband to punish the defendant, Bussey. This motion was supported by the affidavit of the prosecuting witness, Clara Watson, and the affidavits of other persons. The motion was overruled, and defendant appealed.

T. W. Hardy and *John T. Sifford,* for appellant.

George W. Murphy, Attorney General, for appellee.

RIDDICK, J., (after stating the facts). The defendant in this case was tried and convicted of the crime of rape. The conviction rests almost entirely on the testimony of the prosecuting witness, Clara Watson, and the only question we need consider on this appeal is whether the circuit court erred in refusing to grant a new trial on the ground of newly discovered evidence to the effect that the prosecuting witness had since the trial made a written retraction of her testimony against the defendant, and admitted that it was false, and the defendant innocent. It is now well settled that courts do not, as a rule, grant new trials on newly-discovered evidence that is merely cumulative, or that simply tends to discredit or impeach one or more of the witnesses of the adverse party. And even a confession of perjury on the part of a material witness does not necessarily call for a new trial, when, eliminating his evidence, there is still other evidence sufficient to support the judgment. The rules upon which the courts act in refusing new trials in such cases are founded on reason, and intended to avoid the uncertainty and delay in the administration of justice that would result from frequent and unnecessary trials. But these rules are not so arbitrary as to prevent the courts from granting a new trial when the party complaining is without fault, and when it is made probable by the newly-discovered evidence that the judgment is wrong, and that great injustice will result unless a new trial be granted.

The newly-discovered evidence set up by the motion in this case cannot be said to be altogether cumulative, for it is not a mere repetition of other evidence adduced at the trial. It brings in new facts, and throws a new light on the case, and, when taken in connection with other facts in the case, tends to show that the testimony of the prosecuting witness, Clara Watson, given at the trial, was not only false, but that it was the result of a conspiracy on the part of her husband, herself and possibly others to convict the defendant of rape, in order to punish him for other acts which the law does not make criminal.

Now, as before stated, the prosecution and conviction were based almost entirely upon the testimony of this witness, for she was the only person who testified that a crime had been committed, and the only one who connected the defendant with it. Even with her testimony as it stood at the trial, the evidence was not entirely convincing, and on the first trial the jury failed to agree. So it is clear that, with her testimony eliminated or discredited, the result of another trial would be an acquittal of defendant, unless the prosecution can produce other evidence of the crime. While the effect of this newly discovered evidence is to impeach and discredit the testimony of the prosecuting witness in this case, it goes beyond the mere impeachment of a witness, and overthrows the essential portion of the evidence upon which the conviction of the defendant rests; for, even if she should, on another trial, testify the same as on the former trial, certainly no judge or jury would place much reliance on such testimony when it was shown that she had voluntarily made affidavit that it was false, and the defendant innocent.

If it be said that to permit a witness by a confession of perjury to overturn a judgment based on her testimony would license her to trifle with the courts, we must reply that such a witness undoubtedly deserves to be punished, but this furnishes no reason for the refusal of justice to the defendant. It is the witness, and not the defendant, that has trifled with the court, and she, and not the defendant, should suffer for such contempt. The court and jury, relying on the testimony of this witness as that of a truthful and trustworthy woman, have convicted the defendant, and sentenced him to be hanged; but, if her affidavit is true, her testimony is false, and the judgment wrong. The circumstances under which she made this written retraction of her former testimony are such as to raise the belief that the retraction, and not the testimony, is true, and that, if this judgment is enforced, the defendant will suffer death for a crime of which he is not guilty.

But, whatever the truth may be, whether the defendant be guilty or innocent, it can be established by another trial; and certainly it is better that this case should be retried than to enforce a judgment for the extreme penalty of death, when the newly-discovered evidence that could not be produced at the trial makes it seem probable that this judgment was wrong.

We are therefore of the opinion that the motion of the defendant should have been granted by the circuit court, and for the refusal to do so the judgment is reversed and a new trial ordered.

STATE v. HUNTER.

Opinion delivered October 12, 1901.

CONSTITUTIONAL LAW—EXTENSION OF PROVISIONS OF STATUTE BY TITLE.—Section 4588, Sand. & H. Dig., which provides that no donee shall cut or remove any timber from donated land, except for its specific improvement, until the necessary proof of improvement shall have been filed and the deed issued therefor, and that for any violation of this section such donee "shall be prosecuted in the manner prescribed by law for depredating on the timbered lands of the state," is not void within the Const. 1874, art. 5, § 23, which provides: "No law shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only, but so much thereof as is revived, amended, extended or conferred shall be re-enacted and published at length.

Appeal from Jackson Circuit Court.

HANCE N. HUTTON, Judge.

George W. Murphy, Attorney General, for appellant.

Even if that part of Sand. & H. Dig., § 4588, which provides that the offender "shall be prosecuted in the manner prescribed by law for depredating on timber lands of the state" is violative of § 23, art. 5, of the constitution, still the indictment is good under § 1774, Sand. & H. Dig. 159 U. S. 491; 167 U. S. 191. The land belonged to the state. *Cf.* Sand. & H. Dig., §§ 4573, 4575, 4577, 4579.

BUNN, C. J. This is an indictment for the larceny of timber from state lands, which reads as follows, to-wit:

"The grand jury of Phillips county, in the name and by the authority of the state of Arkansas, accuse Samuel H. Hunter of the crime of a felony committed as follows: The said Samuel H. Hunter on the 1st day of May, 1898, in the county of Phillips

aforesaid, then and there having previously, to-wit: On the 12th day of December, 1896, donated from the state of Arkansas the southwest quarter of section 20, in township 4 south, range 2 east, containing 160 acres, in Phillips county, Arkansas, said lands being the property of the state of Arkansas, then and there beginning on the 1st day of May, 1898, and continuing at divers times and [on] divers days until the 1st day of September, 1899, 100 trees, of the value of $200, the property of the state of Arkansas, unlawfully, wilfully, knowingly, feloniously and without lawful authority, did cut down, take and carry away, and cause to be cut down, taken and carried away, with the felonious intent to convert the same to his own use, the said trees not having been cut down, taken and carried away for the specific improvement of said donation, and the necessary proof of improvement not having been filed with the commissioner of state lands, and the deed issued therefor; against the peace and dignity of the state of Arkansas."

A demurrer was interposed on the alleged grounds: "(1) That it charged more than one offense; (2) that it charged him with an offense under the law which was in violation of section 23, art. 5, of the constitution."

The court overruled the demurrer as to the first ground, but sustained it as to the second, and the state excepted and appealed.

It is not clear what statute is referred to in the statement of the second ground of demurrer. The attorney general evidently treated it as referring to section 4588, Sand. & H. Dig., which was section 10 of an act entitled "An act for the donation of forfeited lands," approved April 4, 1887. It appears to be an original act; at least, an act which treated the whole subject, and expressly repealed all conflicting laws. It is not in any sense a criminal statute, but a statute defining the property rights of the state in timber on donated lands between the time of filing of the application for donation and the proof of improvement and making of the final deed. The state being thus declared to be the owner of the timber, except such as is used in making the improvement, the provision of the section merely goes to the extent of directing that "in addition (in the land office contest procedure) such donee and any accessories thereto shall be prosecuted in the manner prescribed by law for depredating on the timbered lands of the state," that is, lands belonging unqualifiedly to the state. The prosecution for such depredations at the time were authorized by what is now sec-

tion 1774, Sand. & H. Dig., which was section 1 of the act entitled "An act to protect state lands, and for the regulation and protection of the timber and timber interest of the state," which also appears to be an original act, and expressly repeals all conflicting acts, and was approved March 17, 1883, long prior to the passage of section 4588, as aforesaid. Neither one of these acts, nor any other which can in anywise relate to the indictment in this case, seems to be such as is affected in any way by section 23, art. 5, of the constitution, which reads as follows: "No law shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only; but so much thereof as is revived, amended, extended, or conferred shall be re-enacted and published at length."

In this view of it, which is the only view to take of it, the judgment of the court below was erroneous, and is reversed, and the cause is remanded, with directions to overrule said demurrer as to the second ground also, and to proceed not inconsistently herewith.

FORD v. STATE.

Opinion delivered October 12, 1901.

CONSTITUTIONAL LAW—CONTEMPTS.—An act of the legislature prescribing the punishment for a contempt committed by disobedience of a court's process is in violation of art. 7, § 26, of the constitution, which provides that "the general assembly shall have power to regulate by law the punishment of contempts not committed in the presence or hearing of the courts, or in disobedience of process."

Certiorari to Mississippi Chancery Court.

EDWARD D. ROBERTSON, Chancellor.

Will J. Driver, for petitioners.

Under our statute the punishment for contempt cannot exceed a fine of $50 and an imprisonment for ten days. Sand. & H. Dig.,

§ 686; 22 Ark. 151; 44 Cal. 475; 44 Ia. 580; 24 Kan. 214. Certiorari is the proper remedy when the court has exceeded its jurisdiction. 29 Ark. 173; 52 Ark. 213; 30 Ark. 17; 23 Ark. 107.

G. W. Murphy, Attorney General, for respondent.

The legislature has no power to impose limitations upon the authority of the courts to punish contempts by disobedience of process. *Cf.* art. 7, § 26, Const. Ark.; 16 Ark. 384; *id.* 151; 78 Am. St. 157; S. C. 111 Ga. 168.

WOOD, J. Petitioners, Ford and Beatty, were each adjudged guilty of contempt of court by the chancery court of Mississippi county; said contempt consisting in disobedience to a process of injunction issued by said court. One was fined in the sum of $500, and the other in the sum of $100. This proceeding is by certiorari to quash the judgment, on the ground that the punishment imposed was in excess of the court's jurisdiction. Art. 7, § 26, of the constitution is as follows: "The general assembly shall have power to regulate by law the punishment of contempts not committed in the presence or hearing of the courts or in disobedience of process." This constitutional provision is couched in such strong affirmative terms as to clearly evince a purpose to limit the power of the legislature to regulate the punishment of contempts to cases where the contempt is not committed in the presence or hearing of the courts, or in disobedience of process. Therefore the legislature, in attempting to prescribe punishment for a contempt committed by disobedience of the court's process, passed the bounds set by the fundamental law.

Affirmed.

NOE v. LAYTON.

69 551
s76 583

Opinion delivered October 12, 1901.

1. LANDLORD'S LIEN—SUPPLIES—REPLEVIN.—Where a landlord, having a lien for supplies furnished on a crop raised by a share-cropper, with the latter's consent took possession of the crop under an agreement that he might sell it and credit its value on the account for

supplies, neither such share-cropper nor any one holding under him can maintain replevin for the crop against the landlord without first paying or offering to pay the price of the supplies for which the crop was held. (Page 553.)

2. INNOCENT PURCHASER—GINNER'S RECEIPT.—Under Sand. & H. Dig., § 4798, the purchaser of a ginner's receipt for cotton in the possession of such ginner is not considered an innocent purchaser of such cotton against the landlord's lien for supplies furnished. (Page 554.)

3. LANDLORD'S LIEN—ESTOPPEL.—A landlord will not be estopped to enforce his statutory lien on his tenant's crop of cotton by reason of the fact that he has accepted from the tenant in part payment of his claim money paid in consideration of the tenant's assignment of the ginner's receipt for such cotton, if it does not appear that at the time he accepted the money he knew the consideration for which it was paid. (Page 555.)

Appeal from Marion Circuit Court.

E. G. MITCHELL, Judge.

STATEMENT BY THE COURT.

In 1899 T. S. Noe made a contract with Alex and Andy Davis by which Noe agreed to furnish land, farm implements, work-animals and feed for same. The Davis brothers were, on their part, to cultivate the crop, and they were to have one-half of the crop raised, which half of the crop was to stand good to Noe for any supplies furnished by him to the Davis brothers during the crop season. The crop was raised by the Davis brothers on Noe's land under this contract. Noe furnished supplies, which were not paid for, and, when the cotton was gathered, it was, under direction of Noe, placed in his crib. Afterwards it was hauled to Hurst's gin by Noe and Andy Davis, and placed by them in the gin in the name of the two brothers, and was afterwards ginned and the cotton put in one bale. Though placed in the gin in the name of the two brothers to distinguish it from other cotton, the evidence shows that it was really under control of Noe, and held for his supplies, he having agreed that he would ascertain the highest market price for the cotton, and allow a credit for same on the account due him for supplies. While the cotton was still at the gin, Alex Davis, with the consent of his brother, sold the cotton to Baker, the agent of A. S. Layton, exhibiting to him the following receipt or memorandum signed by the ginner Hurst, to-wit:

"Gin No. 65, Wt. 466; bagging and ties not settled for. [Signed] H. C. Hurst."

Baker inquired of Davis whether there were liens on the cotton, and was told that there were no liens on it, and Baker, without making further inquiry, paid him for the cotton. Noe refused to surrender the cotton, and Layton brought this action of replevin for it. The other facts are sufficiently stated in opinion. There was a verdict and judgment in favor of Layton, from which Noe appealed.

Appellant pro se.

The court erred in refusing to instruct the jury that the relation of employer and employee existed. 32 Ark. 436; 34 Ark. 179; *id.* 678; 39 Ark. 286; 48 Ark. 204; 54 Ark. 346. *Cf.* Sand. & H. Dig., § 4795. The tenant or employee could not dispose of his interest in the crop so as to defeat appellant's lien, without his consent in writing. Sand. & H. Dig., §§ 4793, 4795; 54 Ark. 346. There was no sale of the cotton to appellee, as against appellant's interest. Sand. & H. Dig., § 4798.

S. W. Woods and *J. C. Floyd,* for appellee.

The record fails to bring the instructions before the court in such a way as to justify the review. 36 Ark. 491; *id.* 74; 21 Ark. 422; 2 Ark. 415; 60 Ark. 250; 54 Ark. 16; 38 Ark. 528; 32 Ark. 223; 46 Ark. 207; 28 Ark. 548-9; 111 U. S. 148; 69 Ala. 524. If the relation of landlord and tenant existed, appellant's sole remedy would have been by enforcing his landlord's lien, under the statute. 31 Ark. 131; 24 Ark. 545. Appellant is estopped to claim the ownership of the cotton, by his own acts and declarations. 55 Ark. 296; 33 Ark. 465; Bish. Cont. 1203, 1103, 1110, 1109, 1114; 7 Am. & Eng. Enc. Law, 18. Appellant ratified the sale. 31 Ark. 131; 35 Ark. 196; 44 Ark. 306. There being evidence to support the verdict, it will not be disturbed, though it is not clear that it is supported by a preponderance of the evidence. 57 Ark. 577; 13 Ark. 306; 15 Ark. 540; 33 Ark. 811; 51 Ark. 467.

RIDDICK, J., (after stating the facts). This is an appeal by Noe from a judgment of the circuit court rendered against him in favor of Layton for the possession of a bale of cotton. It is said by counsel for Layton that the objections and exceptions made by defendant Noe to the instructions given by the circuit judge to the jury were too general, and do not raise the questions concerning such instructions which are presented by Noe in his brief. We

may admit that this is true, but the question of the sufficiency of the evidence to sustain the verdict is raised, and on that point, even though the instruction be considered as correct, we think the judgment must be reversed. It is very clear from the evidence that Noe had furnished supplies to the Davis brothers to enable them to make a crop on his land, and that he had not been paid for such supplies. Under our statute giving the landlord a lien on the interest of the tenant or employee in the crop for the payment for supplies furnished by him to the tenant or employee to enable him to make the crop, it is immaterial whether the relation of the Davis brothers to Noe be considered that of tenants or employees; for in either case "the act applies, and the lien exists." *Tinsley* v. *Craige,* 54 Ark. 346; Sand. & H. Dig., § 4795.

Take either view of this matter, and still Noe had a lien on the cotton in controversy for the price of the supplies which he had furnished the Davis brothers to enable them to make the crop. It is equally plain that he had, with the consent of the Davis brothers, taken possession of this cotton with the understanding that he should sell it and credit its value on the account for supplies. On these points there is really no conflict in the evidence, as we see it, and it is clear, under this state of facts, that neither the Davis brothers nor one holding under them could maintain replevin for the cotton against Noe, without first paying or offering to pay the price of the supplies for which he held the cotton. *Buck* v. *Lee,* 36 Ark. 525; *Roth* v. *Williams,* 45 *ib.* 447.

But counsel for Layton contend that he was an innocent purchaser, and bought the cotton without notice of the lien for supplies. At the time he purchased the cotton it was at the gin where it had been left by Noe and one of the tenants. The cotton itself was not delivered to Layton. He bought on the statement of the tenant that there was no lien on the cotton, and received from the tenant, not the cotton, but a ginner's memorandum or receipt for the same. It seems from Layton's own testimony, in which he states that these same parties had made a crop on Noe's land the previous year, that he and his agent knew they were tenants, and yet bought on their statement and the ginner's receipt only, without inquiring either of the ginner or the landlord as to the existence of liens. Now, the statute, which seems to cover cases of this kind, expressly provides that a purchaser or assignee of such a ginner's receipt shall not be considered an innocent purchaser against the lien of a landlord for supplies, and we conclude under

the facts of this case that Layton was not in law an innocent purchaser. Sand. & H. Dig., § 4798; act of April 6, 1885.

Again, it is said that Noe is estopped from claiming the cotton in this case because one of the tenants paid him a part of the money received for the cotton. But there is nothing in the evidence, as brought here, to show that Noe, at the time he accepted this money on his debt, knew that it was part of the proceeds of the cotton. Counsel for appellee assert that he did know it, but the record here does not sustain this assertion. We see nothing in the other facts alleged sufficient to constitute an estoppel against Noe, and our conclusion is that the evidence, as set out in the bill of exceptions, does not support the verdict and judgment.

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

LYNCH v. STATE.

69 555
188 578

Opinion delivered October 19, 1901.

FISH—DAMS.—The erection or maintenance of dams in the waters of this state for the purpose of catching fish is in violation of the act of June 26, 1897, unless the waters are wholly on the premises of the person or persons using such dams.

Appeal from Arkansas Circuit Court.

GEORGE M. CHAPLINE, Judge.

Petit & Erwin and *Ratcliffe & Fletcher,* for appellants.

The evidence shows that there was no obstruction to the the free and easy passage of fish. It was error to allow witnesses Dobbins and Bogy to express their opinions as to the effect of the dam. 24 Ark. 251; 56 Ark. 612; 57 Ark. 387; 67 Ark. 375; 62 Ark. 510; 47 Ark. 497; 59 Ark. 110; 66 Ark. 498, 499.

G. W. Murphy, Attorney General, for appellee.

BATTLE, J. J. W. Lynch and R. E. Lynch were accused of catching fish on the 10th day of March, 1900, in the stream known as Bayou Meto, in Arkansas county, in this state, by means of a dam and fish trap. The evidence clearly proved that the defendants

constructed and maintained a dam in Bayou Meto, in this state, for the purpose of catching fish, and, by means of a fish trap and the dam, for a long time caught fish in large quantities. One witness testified that he had seen as much as ten thousand pounds of fish taken out of the trap. Defendants attempted to prove that the trap and dam did not obstruct the free and easy passage of the fish in said stream.

The court instructed the jury as follows: Gentlemen of the jury, you are instructed that it is unlawful for any one to build a dam across any of the waters in this state for the purpose of catching fish, and if you should find from the evidence in this cause that the defendant within this county and state, and within one year prior to the finding of the indictment in this cause, did build a dam across the Bayou Meto, and that it is an unnavigable stream, for the purpose of catching fish, you will find them guilty."

The defendants asked, and the court refused to give, an instruction as follows: "You are instructed that, before you can convict the defendants of the offense charged in the indictment, you must first find that the trap and dam, with which the catching of fish is alleged to have been done, so obstructed the stream in which it was placed as to prevent the free and easy passage of the fish in said stream, either ascending or descending said stream, and if you should find that there were sufficient openings in said trap or dam attached, conveniently placed, and sufficiently large and accessible to fish, to permit of their free and easy passage, either ascending or descending, you must acquit the defendants."

The defendants, having been convicted and fined, appealed to this court.

Did the court err in refusing the request of the defendants?

So much of the act under which the defendants were indicted as is applicable to this case is as follows: "That section 3421 of Sandels & Hill's Digest be amended so as to read 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, or in front of the mouth of any stream, slough or bayou, any seine-net, gill-net, trammel-net, set-net, bag-weir, bush-drag, any fish trap or dam, or any other device or obstruction, or by any means to take or catch any fish in the waters of this state. *Provided,* the prohibition of this section shall not apply to waters wholly on the premises belonging to such person or persons using such device or devices." Act June 26, 1897, § 1.

Section 3422 of Sandels & Hill's Digest makes a violation of these provisions of the act a misdemeanor, punishable by fine of not less than $5 nor more than $200.

Under this act, the act quoted, no person has a right to place, erect, or maintain a dam in the waters of this state, to be used in connection with a trap for the purpose of catching fish, except in waters wholly on his own premises.

It is true that an act entitled "An act to amend section 3429 of Sandels & Hill's Digest of the statutes of the state of Arkansas," approved May 8, 1899, reads as follows: "Any person owning or controlling any dam or other obstruction across any river, creek or other water course is required to keep such dam or other obstruction open sufficiently to admit of the free and easy passage of all fish, either ascending or descending such river or other water course, from the 1st day of March until the 1st day of June of each year; *provided,* this section shall not apply to dams constructed for the accommodation of water power for mills or manufactories; *provided,* further, that all persons owning or controlling any dam constructed for the accommodation of water power for mills and manufactories are required to construct and keep open a chute over such dam or obstruction, sufficient for the passage of all fish either ascending or descending such river or water course." Acts 1899, p. 332.

But these acts were amendments of different sections of Sandels & Hill's Digest, and the latter was not intended to repeal the former. Both were intended for the protection of fish; and neither was intended to authorize the erection or maintenance of dams to be used for the purpose of catching fish, and thereby defeat the object both were intended to accomplish.

The erection or maintenance of dams in the waters of this state for the purpose of catching fish is therefore in violation of law, and a misdemeanor, provided the waters are not wholly on the premises of the person using the dam.

The instruction which was asked for and refused should not have been given.

Judgment affirmed.

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BLAIR v. STATE.

Opinion delivered October 19, 1901.

1. EVIDENCE—DIAGRAMS.—The exclusion of diagrams shown to be correct is not prejudicial error where other testimony was sufficiently explicit to enable the jury to understand clearly what the diagrams were intended to show. (Page 559.)

2. HOMICIDE—EVIDENCE—FORMER ASSAULT.—Where the defendant in a murder case had committed an assault on a third person which caused the deceased to make remarks offensive to defendant, and the latter testified that he went to deceased's room for the purpose of explaining why he had made the assault, and that while there a rencounter occurred in which he slew deceased, it was not error to refuse to allow him to prove why he made the previous assault. (Page 560.)

3. EVIDENCE—RES GESTAE.—Statements of defendant made an indefinite time after the killing, and after defendant had gone a distance of one hundred and twenty-five yards from the scene of the killing, are inadmissible as part of *res gestae*. (Page 560.)

4. SAME—ORDER OF ADMISSION.—It is in the discretion of the circuit court to permit the state to introduce original evidence in rebuttal after defendant has closed his testimony. (Page 560.)

5. HOMICIDE—INSTRUCTION—PROVOCATION.—It was not error to refuse to instruct that, although the defendant went to the room of deceased for the purpose of bringing on a difficulty, and such difficulty was brought on by defendant, and such fight ensued, still, if deceased engaged in such fight with a chair, the same being a deadly weapon, or one calculated to inflict great bodily injury upon the defendant, and defendant, after being set upon with a chair, drew his pistol and fired the fatal shot, he should be acquitted of murder in the second degree. (Page 561.)

6. INSTRUCTION—CREDIBILITY OF DEFENDANT.—*Vaughan* v. *State*, 58 Ark. 353, as to the credibility of accused as a witness for himself, approved. (Page 561.)

7. SAME—WHEN ERROR CURED.—The error of giving a misleading instruction may be neutralized by other instructions given. (Page 561.)

Appeal from Newton Circuit Court.

E. G. MITCHELL, Judge.

De Roos Bailey and *Pace & Pace,* for appellant.

The evidence does not sustain the verdict. The court erred in not allowing the diagram to be introduced in evidence. Rice, Ev. (Cr.) 154; Rice, Ev. (Civil) 170, 1171; 6 L. R. A. 768; 4 *id.* 21, 22; 45 N. Y. 224; 125 N. Y. 147-8; 106 N. Y. 603. The discretion of the trial court as to the admission or rejection of such evidence is reviewable. 82 N. Y. 41; 83 N. Y. 464; 106 N. Y. 598; 118 N. Y. 88; 125 N. Y. 147. The court erred in not admitting evidence as to appellant's statements made directly after the killing. These statements were admissible as part of the *res gestae.* 43 Ark. 104; 2 Bing. 99; 1 Q. B. 61; 29 Tex. 201; 30 Tex. 619; 60 S. W. 143; Whart. Cr. Ev. § 262. It was error to admit, on rebuttal, evidence confirmatory of the state's contentions in the original case. 3 Rice, Ev. § 218. The court erred in refusing to give the twenty-third instruction asked by appellant, as to voluntary manslaughter. 9 S. W. 567; *id.* 573; 25 L. R. A. 746. The court also erred in giving the thirteenth instruction asked by the state, as to the weight to be attached to defendant's evidence in his own behalf. 58 Ark. 353; 61 Ark. 88. The court erred in giving the tenth instruction. 67 Ark. 594; 41 S. W. 1044.

G. W. Murphy, Attorney General, for appellee.

It was not error to reject evidence as to appellant's statements after the killing. 66 Ark. 494. The thirteenth instruction was correct. 58 Ark. 353; 61 Ark. 88.

BATTLE, J. John Blair was indicted in the Boone circuit court for murder in the first degree, committed by killing Charles Miller. The venue was changed to Newton county. He was tried there, and convicted of murder in the second degree; his punishment was assessed at thirteen years in the penitentiary; judgment was rendered accordingly; and he appealed to this court.

He assigns eight reasons why the judgment of the circuit court should be reversed:

First. He says it is not sustained by evidence. We have carefully read the testimony of witnesses contained in the bill of exceptions filed in the case, and find it sufficient to sustain the verdict of the jury.

Second. He insists that the court erred in not permitting him to introduce a plat or diagram of the room where the killing occurred, and in refusing to permit a witness to explain his testi-

mony by setting a table against a wall to represent the bed in the room where the deceased was killed and show where the balls fired from the appellant's pistol at the time of the killing struck the wall with reference to the bed. Such diagrams and illustrations, when shown to be correct, are admissible for the purpose of explaining the testimony of witnesses. But the exclusion of them in this case was not prejudicial, because the testimony of witnesses was sufficiently full and explicit to enable the jury to clearly understand what the diagram and the table were intended to show.

Third. He contends that the court erred in not permitting him to read as evidence the deposition of Aurora Smith, and in refusing to permit Annie Davis, Dennis Heflin and Loyd O'Daniels to state what he expected to prove by them. By the testimony of these witnesses he sought to prove the cause of his assault upon some one, who was not the deceased, which occurred several days before the killing of Charles Miller. It seems that the deceased had made remarks about such assault which were offensive to the appellant. He was allowed to testify that he visited the room of the deceased for the purpose of explaining to the deceased why he had made said assault, and while there a rencounter occurred in which he slew the deceased. The testimony that was offered and excluded was incompetent. It could not have thrown any light upon what occurred at the time of the killing, and was not admissible for the purpose of showing an excuse or palliation.

Fourth. He says that the court erred in refusing to admit the testimony of George Dillsworth, James Gibson, Lee Martin and Joe Weaver, as to statements made by him at the Deshazo saloon soon after the killing. The saloon was a little more than one hundred and twenty-five yards from the place of the killing. How long after the killing the statements were made the testimony offered does not show. The statement was to the effect that Miller struck appellant over the head, and that appellant shot him. This testimony was not admissible as a part of the *res gestae,* according to the rule laid down in *Little Rock Traction & Electric Company* v. *Nelson,* 66 Ark. 494, and cases cited therein.

Fifth. He insists that the court erred in permitting the state to introduce original evidence in rebuttal, after the close of his testimony. Assuming that it was original, it was within the discretion of the court to admit it; and this discretion does not appear to have been abused. *Evans* v. *Rudy,* 34 Ark. 383.

Sixth. He contends that the circuit court erred in refusing to instruct the jury as asked in instruction numbered 23, which is as follows: "Although you may believe that the defendant, John Blair, went to the room of Charles Miller, deceased, for the purpose of bringing on a difficulty and fighting said Charles Miller, and that such difficulty was brought on by the defendant, and that such fight ensued, still, if you believe from the evidence that the deceased, Miller, engaged in such fight with a chair, the same being a deadly weapon, or one calculated to inflict great bodily injury upon the defendant, and that defendant, after being set upon with a chair, drew his pistol and fired the fatal shot, you will acquit the defendant of the charge of murder in the second degree." This request is not a correct statement of the law in this case, and the court did not err in refusing it. *Stanton* v. *State,* 13 Ark. 317, 325; *Palmore* v. *State,* 29 Ark. 265; *Ex parte Nettles,* 58 Ala. 268; *Slaughter* v. *Com.* 11 Leigh, 681; 1 Wharton, Criminal Law (10th Ed.), § 476.

Seventh. He says the court erred in giving an instruction in words as follows: "The court instructs the jury that under the law the defendant, John Blair, has the right to testify in his own behalf, but the credibility and weight to be given his testimony are matters exclusively for the jury. In weighing the testimony of the defendant in the case, you have a right to take into consideration his manner of testifying, the reasonableness or unreasonableness of his account of the transaction, and his interest in the result of your verdict, as affecting his credibility. You are not required to receive blindly the testimony of the accused as true, but you are to consider whether it is true, and made in good faith, or only for the purpose of avoiding conviction." Such instructions have been repeatedly held by this court to be correct. *Vaughan* v. *State,* 58 Ark. 353; *Jones* v. *State,* 61 Ark. 88; *Hamilton* v. *State,* 62 Ark. 506.

Eighth. He contends that the court erred in instructing the jury as follows: "Justifiable homicide is the killing of a human being in necessary self-defense, or in defense of habitation, person or property, against one who manifestly intends or endeavors by violence or surprise to commit a known felony. A bare fear of the offense, to prevent which the homicide is alleged to have been committed, shall not be sufficient to justify the killing. It must appear that the circumstances were sufficient to excite the fears of a reasonable person, and that the party killing really acted under

their influence and not in a spirit of revenge." He says: "The vice in this instruction consists in the fact that the jury were instructed that, before the defendant would be justified in killing Charles Miller, it must appear that the circumstances were sufficient to excite the fears of a reasonable person. This sets up an ideal person as a standard, and every defendant must be tried by this standard whether he is the ideal person or not. We think that the correct rule is that a person is justified in acting in his necessary self-defense when the circumstances surrounding him at the time are sufficient to excite his fears, whether he is a person that reaches this ideal standard or not." Assuming that this criticism is correct, but not deciding to that effect, the vice complained of was cured by the instructions given and numbered 25 and 26.

We find no prejudial error in the proceedings of the circuit court.

Judgment affirmed.

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

Opinion delivered February 2, 1901.

1. CONVEYANCE FOR RAILROAD PURPOSES—NONUSER—FORFEITURE.—Where a railway company purchased a tract of land for railroad purposes only, and used a portion of it, but failed to use the remainder for more than seven years, during which time it was cultivated by the grantor and those holding under him, such nonuser will not, as to such remainder, operate as a forfeiture. (Page 565.)

2. ADVERSE POSSESSION—VENDOR AND VENDEE.—Proof that land sold to a railway company for railroad purposes only remained in the possession of the vendor and those holding under him, and was cultivated by them, is not, of itself, sufficient to show a holding adverse to the railroad company. (Page 566.)

3. EJECTMENT—RIGHT OF WAY.—A right of way conveyed to a railway company, though an easement merely, gives to the company a right to exclusive possession for railroad purposes, which will support an action of ejectment against one wrongfully in possession. (Page 568.)

4. CONVEYANCE FOR RAILROAD PURPOSES—CONSTRUCTION.—A deed to a railway company which, after describing the right of way, depot grounds, sidetracks, switches and "Y", as laid out, conveyed the right of way and depot grounds so described, "with the right to enter upon said lands for the construction of said railway through and upon the same, to have and to hold the same to the said party of the second part so long as said lands are used for the purposes of a railroad, and no longer," carries a perpetual easement merely, and not the fee in the land. (Page 569.)

5. EJECTMENT—DAMAGES.—Land conveyed to a railway company for railroad purposes only, with the railway company's acquiescence, remained in the possession of the grantor and of those claiming under him, and was cultivated by them for a number of years until they notified the railway company that they were holding adversely, when the railway company at once brought suit to recover possession. *Held*, that a verdict for substantial damages in favor of the railway company will be reversed unless a remittitur of all in excess of nominal damages is made. (Page 570.)

Appeal from St. Francis Circuit Court.

HANCE N. HUTTON, Judge.

STATEMENT BY THE COURT.

The facts in this case, as far as it is necessary to state them, are as follows: C. C. Graham and W. H. Howes were owners of a tract of land in St. Francis county. The St. Louis, Iron Mountain & Southern Railway Company in 1882 purchased a portion of this land to be used as depot grounds, side tracks and a "Y." The deed to the company recites that whereas the company is engaged in constructing a railroad through the county of St. Francis from the south to an intersection with the Memphis & Little Rock Railroad and also to a connection with the Iron Mountain & Helena railroad, and then, after minutely describing the right of way, depot grounds, side tracks, switches and "Y," as laid out, proceeds as follows: "And, whereas, said parties of the first part are the owners and are seized and possessed of all that part of the right of way and depot grounds hereinbefore described which lies in the west half of section 28 aforesaid, and have agreed to convey the lands so owned and possessed by them to the said party of the second part for the purpose of constructing and maintaining its proposed railroad, which tract of land so to be conveyed contains 38 acres of land, more or less. Now, therefore, the said parties of the first part, for and in consideration of the premises and of

the sum of $950 to them paid by the said party of the second part, do by these presents give, grant, bargain, sell and convey to the said party of the second part the right of way and depot grounds hereinbefore described, with the right to enter upon said lands for the construction of said railway through and upon the same. To have and to hold the same to the said party of the second part so long as said lands are used for the purposes of a railroad, and no longer."

This deed was executed in July, 1882. Shortly afterwards the company constructed its railroad across the land mentioned in the deed, and has ever since continued to operate said railroad and to use the greater portion of the land for the purposes named in the deed. But a part of the tract which it obtained for the purpose of constructing a "Y" it has not used. This part of the land conveyed lay in the grantor's enclosure, and was allowed to remain in that condition for several years. After the execution of the deed C. C. Graham obtained the interest of Howes, the other grantor, and thus became the sole owner of the tract of land of which that described in the deed to the company was a part. He died in 1886, and left a will devising the land across which the right of way was conveyed to his son, W. S. Graham, who now owns it, and who is also in possession of a part of the land conveyed to the company.

This action was commenced by the company in 1897, to recover possession of that portion of the land held by Graham. Graham, for defense, set up that the land had been forfeited by failure of company to comply with the condition in the deed, and also set up adverse possession of over seven years. On a trial there was a verdict and judgment for the plaintiff, from which Graham appealed.

Norton & Prewett, for appellant.

A grantor may acquire title by adverse possession against his grantee. 11 Pac. 778; 28 Cal. 180; 86 N. Y. 57; 57 Me. 268; 11 Tex. 24; Maupin, Marketable Titles, 495; 17 N. H. 536; 33 Barb. 491; 37 Barb. 244; 9 Cush. 497; 57 Am. Dec. 65; 57 Me. 330; 99 Am. Dec. 772; 79 Tex. 310; 7 Jones' L. 616; Sedg. & W. Tr. of Tit. 606; 86 N. Y. 68; 47 Cal. 485; 2 Dembitz, Land Titles, 1399. *Cf.* 16 Ark. 122; 44 Ark. 452; Wood, Lim. 219; 43 Ark. 504. Evn if there was a mistake of boundary, the plea of adverse possession was good. 59 Ark. 626. Possession of part of the land

by appellee does not prevent the running of the statute as to the part adversely held. 2 Pet. 212. There was a forfeiture for nonperformance of conditions subsequent. No time being fixed for the performance of the condition subsequent, a reasonable time therefor is allowed. 3 S. W. 23; 2 Wash. Real Prop. 11. The grantor in possession is presumed, after breach of condition subsequent, to hold for the purpose of enforcing the forfeiture. 7 S. W. 19.

Dodge & Johnson, for appellee.

Conditions subsequent must be created by express terms or by clear implication, and will be strictly construed. 36 Am. & Eng. R. Cas. 425. Mere nonuser did not work a forfiture. 51 Am. & Eng. R. Cas. 426. The attitude of the parties negatives the idea of adverse possession. Adverse possession by a vendor against his vendee must be evidenced by unequivocal acts of hostility brought to the knowledge of the vendee. 1 Am. & Eng. Enc. Law (2d Ed.), 818; 152 Pa. St. 444; 84 Mich. 346. Constructive possession always follows the legal title. 4 S. & R. 456; 4 Wheat. 213. It cannot arise against the true owner in possession of any portion of a tract as to other portions of the tract not in adverse possession, in favor of a mere claimant under color of title in possession of another portion of the same tract. 102 U. S. 113, 133; 50 Cal. 26; 4 Pa. St. 254; 25 S. W. 458.

RIDDICK, J., (after stating the facts). This is an action of ejectment brought by the railway company to recover twelve acres of land which the ancestor of defendant had sold and conveyed to the company for railway purposes. The defendant contends that all the right and interest in this land conveyed to the company by the deed of his father was forfeited by reason of a failure to comply with a condition in the deed. The clause of the deed referred to is as follows: "To have and to hold the same to the said party of the second part so long as said lands are used for the purpose of a railroad, and no longer." The proof shows that the railroad was built, and that the company has continuously used the greater portion of the land conveyed for the purposes mentioned, but because it has not built upon and occupied the twelve acres of the tract in controversy the contention is made that it was forfeited by virtue of the provision in the deed above quoted.

In determining the meaning of this clause in the deed, we can look to the circumstances under which the deed was made.

The land was conveyed to the company before it had constructed its road on the land to be used for depot grounds, right of way, side tracks and "Y," which it expected to construct in the future. The proof shows that the company, looking to the probable future needs of the road, purchased and paid for more land than it needed for immediate use, though not more than it would probably need in the future. Construing the language of the deed in the light of these circumstances, we think there was no forfeiture. The condition was complied with on the part of the company by constructing its railroad upon and across the land conveyed and putting so much of said land as its immediate needs required to use for depot grounds and side tracks, that being the greater part of the tract, and by holding the remainder for the future needs of its railroad; in the meantime not putting it to another or different use.

This land was not given to the company to secure the erection of shops or something of that kind. It was purchased and paid for by the company, which afterwards constructed its railroad as set out in the deed. If the construction of the road was a part of the consideration of the deed, the grantors have secured that advantage. They were not in any way interested in the construction of the "Y" or side tracks for which the company now wishes to use the land in controversy. The delay in constructing it did not operate to their injury, but, on the contrary, they were thus permitted to use and cultivate the land several years longer, and thus gained an advantage by the failure of the company to put the whole tract to immediate use.

Conditions subsequent are not favored, and must be strictly construed, and we see nothing in this deed that required that the whole tract should be at once used for railroad purposes. We think the ruling of the circuit judge on this point was correct, and the contention of appellant must be overruled.

The next question is raised by defendant's claim of title by adverse possession. On this point the circuit judge held that a vendor could not defeat the right of his vendee by adverse possession, and that the same rule would apply to the defendant who holds under the will of his father, one of the vendors. He therefore directed the jury to find for the company on the issue of adverse possession. Considered abstractly, this statement of the law as given by the trial judge was not correct. Though the continued possession of the land by the vendor after conveyance executed

is not, of itself, sufficient to show a holding adverse to the vendee, yet there is nothing in their relations which will prevent the vendor from acquiring a title by adverse possession. But before the vendor or those claiming under him can acquire title in that way against the vendee the intention to hold adversely must be manifested by some unequivocal act of hostility, such as to give notice to the vendee of the intention of the vendor to deny his right and hold adversely to him. Until this is shown, the statute does not commence to run. 1 Am. & Eng. Enc. Law (2d Ed.), 818, 819; *Connor* v. *Bell,* 152 Pa. St. 444; *Paldi* v. *Paldi,* 84 Mich. 346; *Sherman* v. *Kane,* 86 N. Y. 68.

The distinction between a vendor and a stranger in such a case relates to the character of evidence necessary to show that the possession was adverse. If the parties are strangers in title, possession and the exercise of acts of ownership are, in themselves, in the absence of explanatory evidence, proof that the holding is adverse; whereas if the vendor, after having executed deed, continues to remain in possession, the natural and reasonable inference, in the absence of evidence to the contrary, would be that he holds in recognition of the rights of the person to whom he has conveyed; it not being supposed, from mere acts of possession and ownership not inconsistent with the rights of the vendee, that the vendor intends to deny the title he has conveyed.

Now, in this case we see no evidence of any unequivocal act of hostility on the part of the defendant against the rights of the company, sufficient to put it upon notice of an adverse claim, until shortly before the commencement of this action, when the defendant, speaking to an agent of the company, denied that it owned a right of way across his field. This was notice to the company, but previous to that the evidence shows no act of defendant so inconsistent with the right of the company as to bring to it notice of an adverse claim. So far as the land in controversy is concerned, there was no change in possession after the execution of the deed to the company. While the company was using other portions of the tract conveyed, it had no immediate need for this part, and suffered it to remain within the enclosure of the grantor, and to be cultivated by him. After the death of the grantor, his son, the defendant, took possession, and continued to cultivate it, and to clear and put in cultivation a small portion that was in timber. The company had no right to farm the land, or to use it for other purposes than those named in the deed, and

until it was actually needed for the purposes of the railroad there was no reason why it should object to the use of it by defendant. This use of it did not injure the company. On the contrary, such cultivation, by removing timber, stumps and other obstructions, would naturally tend to its benefit. The possession of the vendor and his son was to the mutual benefit of the company and themselves, and was not in any way inconsistent with the rights of the company under the deed. We are therefore of the opinion that the circuit judge did not err in holding that there was no evidence of an adverse holding shown.

But counsel for defendant earnestly contends that the judgment should be reversed because, as he says, the instructions given by the trial judge prevented him from being heard on the facts. We cannot agree with this contention. Defendant admitted that his ancestor had conveyed this land to the railway company, and pleaded a forfeiture and adverse possession as defenses; but, as before stated, he showed no forfeiture nor any overt act of hostility to the title of the plaintiff calculated to put it upon notice of an adverse claim until only a few days before the action was commenced. There was, therefore, in our opinion no question of fact to submit to the jury, and it was totally immaterial what the form or language of the instruction was by which the trial judge directed a verdict for plaintiff. The evidence making it plain that a direction to find for the plaintiff was proper, whether that was accomplished by a simple direction to so find, or by an instruction which effected the same result, is quite unimportant, for no prejudice resulted to defendant from the form of the instruction. Courts do not sit to settle abstract questions of law, but to determine rights of parties involved in the litigation, and when it is clear that those rights have been correctly adjudicated by the trial court the judgment should be affirmed, notwithstanding there may have been formal defects in the charge to the jury. The substance of the instructions in this case was that there was no adverse holding, and this we think was correct.

Under the peculiar language of this deed, we are not sure that the company took more than an easement in the land, but a railroad right of way, though an easement, gives the company the right to exclusive possession, and it may maintain ejectment against one wrongfully holding possession of its right of way. *Tenn., etc., R. Co.* v. *East Ala. R. Co.* 75 Ala. 524.

Though it is doubtful whether the company had any right to recover for the value of the use and occupation of the land prior to the notice to quit, still that question does not seem to be raised or presented in the brief. On the whole case, we think the judgment should be affirmed, and it is so ordered.

ON REHEARING.

Opinion delivered December 7, 1901.

WOOD, J. The complaint alleges that plaintiff is the owner and entitled to the possession of the land in controversy; *that the land was conveyed to it for right of way and depot purposes by deed.* The deed is exhibited. The complaint then alleges *that the defendant is in possession of the land, and is unlawfully withholding same from the plaintiff.* The answer alleged that plaintiff had lost all right and title to the land by forfeiture for noncompliance with the condition subsequent contained in the deed, *i. e.,* that it should use the land for railroad purposes. It further alleged the adverse possession of defendant for more than seven years. The issue fairly and squarely raised by the complaint was whether the appellee was the owner and entitled to possession of the land in controversy under its deed, which, the complaint declared, conveyed the land *for right of way and depot purposes.* No more specific declaration was necessary to show that the appellee was suing for the land for railroad purposes. This issue was joined by the answer setting up that the plaintiff had forfeited its right under the deed, and by claiming adverse possession for the appellant; thus setting up affirmatively title in himself, and thereby denying title and the right of possession in the appellee for *any purpose.* In *Morgan* v. *Moore,* 3 Gray, 319, it is said: "The right to a fee, and the right to an easement in the same estate, are rights independent of each other, and may well subsist together, when vested in different persons. Each can maintain an action to vindicate and establish his right; the former to protect and enforce his seizin of the fee, the latter to prevent a disturbance of his easement." Giving force and meaning to every word and clause in the deed, the most reasonable construction is that deeds of the kind under consideration convey a perpetual easement in the land, or an easement in the nature of a fee. Neither the intention nor the effect of such instruments could be the conveyance of an estate in fee, but only an incorporeal heredita-

ment—an easement. *Robinson* v. *Missisquoi R. Co.* 59 Vt. 426; *Flaten* v. *City of Moorehead,* 53 N. W. Rep. 807; *Barlow* v. *Chicago, etc., Ry. Co.* 29 Iowa, 276; *Big Mountain Imp. Co.'s Appeal,* 54 Pa. St. 361; *Blakely* v. *Chicago, Kan. & Neb. Ry. Co.* 46 Neb. 272; *Williams* v. *Western Union R. Co.* 50 Wis. 70.

The deed itself contains no limitations or conditions upon the investment or enjoyment of the easement. The easement having been acquired by deed, in the absence of statutory provisions, or some stipulations in the deed itself, prescribing the time when the grantee should exercise its right by constructing and using its road, no mere nonuser could have the effect of defeating the right. But adverse possession by the owner of the fee for the statutory period would extinguish the right granted. Washburn, Serv. & Eas. 717; Elliott on Railroads, § 931; *Kansas City & S. E. Ry. Co.* v. *Kansas City S. W. Ry. Co.* 129 Mo. 62; *Roanoke Investment Co.* v. *Ry. Co.* 108 Mo. 50. In the case at bar mere nonuser by the appellee is all that is claimed. No affirmative act of abandonment, such as misuser, conveyance for other uses, etc., is insisted upon as a cause of forfeiture.

On the question of adverse possession we do not wish to add to our former opinion. The possession of appellant was perfectly consistent with that of appellee until he gave actual notice to appellee of his adverse holding. From that moment appellee had a cause of action to protect its right of easement; not before.

It follows, from what we have said, that the instructions of the court were based upon an erroneous construction of the deed. The law applicable to the issues raised by the pleadings and proof was not given. The judgment for any amount beyond mere nominal damages was inconsistent with the views we have expressed, because the proof showed that adverse possession did not commence until just before the suit was instituted.

But, notwithstanding the erroneous views of the law announced, it is obvious that, under a proper construction of the deed, and a correct announcement of the law applicable to the undisputed facts, the verdict and judgment could not have been different as to appellee's right of possession. The judgment giving appellee the right of possession for railroad purposes will therefore be affirmed, to that extent only. As to the damages, all possible prejudice to appellant growing out of the judgment for damages can be removed by a remittitur of all in excess of a merely nominal amount. If the appellee will therefore remit, within ten days,

all except one dollar, the judgment for damages will be affirmed; otherwise it will be reversed, and the cause remanded for a new trial as to the damage.

Opinion delivered January 11, 1902.

BUNN, C. J., (dissenting). I think an erroneous construction has been put upon the deed from the ancestor of appellant to the appellee company, and that that construction grows out of an idea that the company has only an ordinary easement in the land, with all the restrictions incident to such a holding.

A railroad being a *quasi* public institution, it is not clear but that it would be contrary to public policy for a railroad to purchase property, and take a deed therefor which might at any time be virtually nullified by conditions subsequent, to say nothing of conditions precedent.

The theory of the court seems to be that, in purchasing this land and accepting the deed in question therefor, the railroad company bought land, its purchase to take effect on the happening of an event in the future—its assertion of a desire to use it as for railroad purposes. The very purchase and sale between the parties was an assertion of the purposes of the deed, and the right to the possession of the railroad accrued *eo instanti* and *ipso facto,* without further claim, and the holding the possession by the grantor for the time was, of course, under and by permission of the grantee, and not that of tenant in common with the grantee, and on equal footing with it.

From all we can determine from the evidence, the railroad company paid the full price of the land, and, if there were other consideration than the sum named in the deed, it could only be in the nature of a benefit accruing to the grantor, or to accrue to him, by the construction of the "Y" track or other railroad appliances. It is to my mind evident that the delivery of the deed was a constructive delivery of the possession of the land, and the grantor, his heirs and assigns, could not controvert the title or right of possession of the grantee on this state of case alone. Now, if a reasonable time had elapsed, and the grantee had yet failed to make use of the land for railroad purposes, then, if any injury had accrued to the grantor or his heirs or assigns, he or they could bring suit for a forfeiture, and the land would revert on a successful termination of the suit. But the grantor in such case, or those holding under him, would probably have to show that the failure

to use the land for railroad purposes had caused an injury to him or them or to the public. At all events, the grantor, like any other tenant at will, must first deliver up possession before he can contest his landlord's title, and in such a case as the one at bar he must assume the affirmative, and show that the railroad has forfeited its grant.

If this be not the true theory, then the judgment of the circuit court should have been reversed outright; for, the complaint being based on the deed, if the latter was operative only on a contingency, like that of an assertion of the plaintiff of its present use for the land for railroad purposes, then the suit was prematurely brought, or else the plaintiff failed to make out its whole case in its complaint. In either case the circuit court's judgment as to the title was wrong if the opinion of this court be correct. No mere claim of adverse possession on the part of the grantor, or those holding under him, could justify a suit by the grantee before it had placed itself in a position to enjoy the possession of the land, for, under the ruling of the court, it had no right to the possession by reason of holding the deed merely.

Our statutes, inferentially, at least, give a construction to these right of way deeds which may throw light on the subject, for it is stated that when a railroad company and the owner of land over which the road is to run can not agree, a suit for condemnation may be instituted. The inference is that the agreement is that the owner shall convey just such right and interest in the land as will pass on the judgment in condemnation proceedings. Now, what is that interest? In the concluding words of section 2777: "Whereupon it shall and may be lawful for such railroad company to enter upon, and have the right of way over, such lands forever." In the one case the use of the land is ascertained and determined by the courts, and in the other it is conceded to be a legitimate and proper use by the grantor, and, more than that, that the railroad company has the right to acquire the lands by condemnation proceedings, and he choses to make his own terms of sale, rather than to entrust that matter to the courts and juries.

Now, I am of the opinion that the theory of the court that this deed grants an ordinary easement or a right with all the restrictions of a common-law easement is erroneous. From the very definition of easement, it appears that it is quite a different thing from the right acquired by a railroad for a right of way. And this is so patent to the courts that the most, or many, of them

believe, hold and define the right of a railroad thus acquiring land to be not an easement in fact, but in the nature of an easement—that is, possessing some of the elements and incidents of a technical easement, but not all. Holding these views, I think this case should be affirmed, or at least determined as originally decided by this court.

GILLESPIE v. STATE.

Opinion delivered October 19, 1901.

ASSAULT—SELF-DEFENSE—NECESSARY FORCE.—Where it was sought to convict a peace officer of an aggravated assault by proof that he used more violence in making an arrest than was necessary, and the court charged the jury that if "defendant used greater force or violence in making the arrest than was apparently necessary, he would not be justified," it was error to refuse a further instruction asked by defendant to the effect that defendant had a right to use whatever means appeared to him at the time to be necessary to protect himself from serious bodily injury, even though it subsequently appeared that he used more force than was actually necessary.

Appeal from Monroe Circuit Court.

GEORGE M. CHAPLINE, Judge.

C. F. Greenlee, for appellant.

Evidence of a previous offense is competent, where it discloses a motive for the act which is the subject of the investigation. 49 Ark. 449; 2 Ark. 229; 17 S. W. 358. The court erred in refusing to give the instructions asked by appellant upon the law of self-defense. 67 Ark. 594. The third instruction asked by appellant should have been given. 57 S. W. 820, 825.

G. W. Murphy, Attorney General, for appellee.

The instructions asked by appellant on the law of self-defense were properly refused. 64 Ark. 613.

HUGHES, J. The appellant, Perry Gillespie, who was the city marshal of the city of Brinkley, was indicted by the grand jury of Monroe county, under section 1476 of Sandels & Hill's Digest,

for an aggravated assault upon one T. C. Bull; pleaded not guilty; was tried and convicted of an assault and battery; was fined $50; and appealed to this court.

The evidence tends to show that T. C. Bull was drunk, and was a dangerous man, of a violent temper, and in the habit of going armed; that he was boisterous, cursing and swearing, and had made threats against a negro. The appellant expostulated with Bull, tried to quiet him and get him to leave, more than once. The appellant testifies that he afterwards saw Bull raise a chair, as if to strike Mr. E. C. Brown, as he thought, and that he struck with it, and he thought at the time he struck at Brown, who was standing between Bull and his (Bull's) horse. But it appeared afterwards that Bull struck over Brown's head at the horse. At this juncture Gillespie stepped up, and told Bull to consider himself under arrest, and took hold of Bull's wrist, and told Brown to take hold of him. Bull said: "You are a God damned lying son of a bitch! You cannot arrest me!" and quickly put his hand to his hip pocket, when Gillespie struck him at once with his stick, called a policeman's "billy," and says in his testimony, "at the first blow, I thought he was coming on me, and hit him again when he fell." The stick weighed thirteen ounces. He testified that he not only knew Bull's reputation as being a dangerous man of violent temper, and as one who carried arms, but knew his character from his personal knowledge.

It was admitted that Bull was drunk, and violating a city ordinance by being drunk and disorderly, and that the appellant as city marshal had the right at the time to arrest him.

At plaintiff's request the court instructed the jury as follows: "The court instructs the jury that under the law an arrest may be made by a peace officer, in obedience to a warrant of arrest delivered to him, or without a warrant where a public offense is committed in his presence, or where he has reasonable grounds for believing that the person arrested has committed a felony; and the court tells you that a marshal is a peace officer. The court further tells you that an arrest is made by placing the person in restraint, or by his submitting to the custody of the person making the arrest; but in making the arrest no unnecessary force or violence shall be used, and in this case, although the jury may believe from the evidence that the defendant was a peace officer, and as such was undertaking to arrest the prosecuting witness, Bull, still, if you further believe from the evidence, beyond a reasonable doubt,

that the defendant used greater force or violence in making the arrest than was apparently necessary, he would not be justified or excusable under the law, and you will find him guilty."

This instruction is not quite correct,—not full enough in this, that it reads: "If you further believe from the evidence, beyond a reasonable doubt, that the defendant used greater force or violence in making the arrest than was apparently necessary, he would not be justified or excusable under the law, and you will find him guilty." "Apparently necessary" to whom? If it appeared to the appellant to be necessary, and if he had reasonable grounds for such belief, it was enough, whether or not it might appear to others to be necessary. He was the person who was to act upon the emergency as it appeared to him.

To cover this phase of the case the appellant asked, but the court refused, the following instruction, to which he excepted: "3. If T. C. Bull, at the time of the assault complained of, was violating a city ordinance, or was committing a misdemeanor, the defendant, as city marshal, had a right, and it was his duty, to arrest him, and to use force, if necessary to do so. He was not obliged to call any one to his assistance. It is not the law that all other means must be resorted to, before using force to make the arrest. The court instructs you that, if defendant struck T. C. Bull, while making the arrest, and at the time that said Bull was attempting to strike defendant, or to do him injury, or if it reasonably appeared to defendant, viewed from his standpoint alone, by words or acts, or by words and acts, that Bull was about to make an unlawful attack upon him, then and in that event the defendant had a right to use whatever means was necessary to protect himself from serious bodily injury. And this is the case, although it subsequently appeared that the defendant used more force than was actually necessary to protect himself from serious bodily injury or to make the arrest. In other words, the defendant had a right to act upon danger or reasonable appearance of danger." This instruction, taken with the other, fully states the law, and the court erred in not giving it. *Magness* v. *State,* 67 Ark. 594. In this case Mr. Justice Battle said in the opinion of the court: "A man, when threatened with the loss of life or great bodily injury, is compelled to act upon appearances, and determine from the circumstances surrounding him at the time as to the course he shall pursue to protect himself. When the danger is pressing and imminent, his own safety demands immediate and prompt

action. Delay may involve the loss of life or great bodily injury. In such cases he is from necessity the judge of his own action. * * * 'A contrary rule would make the law of self-defense a snare and a delusion. It would become but a mockery of the sacred right of self-preservation.'"

For the error in refusing to give the third instruction, the judgment is reversed, and the cause is remanded for a new trial.

BERGER v. LUTTERLOH.

Opinion delivered February 9, 1901.

TAX SALE—VOID LEVY.—A sale of land for nonpayment of taxes is void where the levying court which levied the county taxes convened on the third, instead of the first, Monday in October.
Hillard v. *Bunker*, 68 Ark. 340, followed.

Appeal from Craighead Circuit Court.

FELIX G. TAYLOR, Judge.

J. C. Hawthorne, for appellant.

N. F. Lamb, for appellee.

RIDDICK, J. This is an action of ejectment, in which the plaintiff bases his right to recover upon a sale of the land in controversy for nonpayment of taxes and deed executed to him as a purchaser at such sale. The circuit court declared the deed void, for the reason, among others, that it was not based on a valid levy of taxes. The levying court, composed of the county judge and justices of the peace, levied the taxes for the nonpayment of which the land was sold on the third Monday in October, whereas the first Monday of that month is the day fixed by law for the convening of the levying court. *Hilliard v. Bunker,* 68 Ark. 340, 58 S. W. 362.

But counsel for appellant contends that there is nothing to show that the court did not meet on the day provided by law and adjourn to the third Monday of the month, the day on which the taxes were levied. We have examined the opening order of the court and the order levying the taxes, and we think they show

affirmatively that the court was not holding an adjourned term, but that it convened in the first instance on the third Monday in October, the day on which the taxes were levied. The court not having met on the day fixed by law, the levy was invalid. *Hilliard* v. *Bunker,* 68 Ark. 340, 58 S. W. 362.

It results that, in our opinion, the judgment of the circuit court holding the tax sale and deed void was correct, and it is therefore affirmed.

HUDGINS v. BEAVERS.

Opinion delivered October 26, 1901.

COSTS—MOTION TO RETAX.—A deputy sheriff instituted an independent action in a justice's court on a claim *ex contractu* against the plaintiff in an attachment suit for his fees in taking care of the attached property. On appeal to the circuit court, relief on the contract was refused, but the suit was treated as a motion to retax the costs in the attachment proceeding, and judgment was rendered for plaintiff. *Held,* error, because the costs involved did not accrue in the proceeding at bar, and because neither the sheriff nor any of the parties in the attachment proceeding had moved therein for a retaxing of the costs.

Appeal from Polk Circuit Court.

WILL P. FEAZEL, Judge.

Pole McPhetridge, for appellant.

No amendment will be allowed on appeal to circuit court which changes the cause of action tried in the justice's court. Sand. & H. Dig., § 4447; 35 Ark. 445; 44 Ark. 375; 46 Ark. 354.

BUNN, C. J. This was a suit before one of the justices of the peace of Polk county for services rendered in taking care of personal property, taken under an order of attachment, during the pendency of the attachment proceedings. The plaintiff, Bob Beavers, laid his claim first at $75 for the services, and then afterwards at $105 by way of amendment to his complaint for the thirty-five days which he had the goods in his charge. Judgment for plaintiff in justice's court, and defendant appealed to the circuit court.

The evidence shows that Bob Beavers, the plaintiff, was a regular deputy of D. B. Joplin, sheriff of the county, who had attached the property in question through another deputy. The proof by the plaintiff was to the effect that his services were worth $3 per day, and that he kept the goods thirty-five days until they were released to the defendant in the suit, as exempted property, and the costs adjudged against Hudgins & Bro., the plaintiffs also in that suit.

It was shown by the defendant, on the other hand, that plaintiff's services were only worth $15 or $20, or, at least, that the same goods might have been kept for the same time in a safe place for that amount. This was the testimony of the sheriff himself. No claim for these services as costs in the original suit was ever presented by the sheriff, but the deputy sues for the same in this independent suit, as per contract between himself and the defendants. In the circuit court it was suggested that it is contrary to public policy for a deputy sheriff to make a claim of this kind, as the goods were in the custody of his principal, and could not be taken from the sheriff's custody by any arrangement between him and one of the parties to the suit. The circuit court took this view of it, and dismissed the suit as on contract, and permitted it, over the objection of defendant, to progress, treating it as a motion to retax the costs, and rendered judgment in favor of plaintiff for the sum of $25 and costs. From this judgment the defendant appeals to this court. There is no appeal from the judgment of the circuit court dismissing the contract suit, the cause appealed from the justice of the peace court, and all parties seem to have acquiesced in that.

The circuit court was without jurisdiction to adjudicate the matter as on a motion to retax the costs, for the costs involved had not accrued in this proceeding, and neither the sheriff nor any of the parties in the attachment proceeding had moved for a retaxing of the costs. Nor was there ever any motion for that purpose. The judgment is therefore reversed, and the cause dismissed without prejudice.

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WOODY v. BERNARD.

Opinion delivered October 26, 1901.

MINES AND MINING—LABOR AND IMPROVEMENTS.—Under Rev. Stat. U. S., § 2324, providing that "the miners of each mining district may make regulations not in conflict with the laws of the United States, * * * subject to the following requirements: * * * On each claim located after the 10th of May, 1872, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year," a regulation of a local mining association that twenty days' labor on a mining claim shall be counted as worth $100 is void.

Appeal from Newton Circuit Court.

E. G. MITCHELL, Judge.

Appellants, pro se.

The local law is binding, unless it conflicts with section 2324, Rev. Stat. U. S. There is no statute in Arkansas upon the subject. *Cf.* 15 Am. & Eng. Enc. Law, 559; 7 Fed. 336.

Crump & Bailey, for appellees.

Any rule, regulation or custom which attempts to make the manual labor on a mining claim less than $100 in actual value is void. Rev. Stat. U. S. § 2324; Morrison's Min. Rights (10th Ed.), 86, 6; Barr. & Ad. Mines, 267, 274; 7 Col. 443; 6 Sawy. 299; S. C. 22 Meyer's Fed. Dec. 645, § 113; 97 Fed. 386.

BUNN, C. J. The appellants on the 22d of February, 1897, located a mining claim, under the laws of the United States, on the land in controversy, the same being land of the United States. In 1898, appellants, in order to comply with the laws, and thus acquire title to said lands, performed twenty days' labor on said claim for the purpose of developing the same. In June, 1899, appellees, claiming to have purchased the interest of Murray & Sparks, former locators, took possession of the lands without the knowledge or consent of appellants, and commenced work thereon, and in July of the same year re-located the same, and subsequently made application for patents for the same. The appellants protested

against the issuance of the patent, and brought this suit for possession. It was contended by appellants in the circuit court that they were allowed, under the mining laws, until the end of the year 1898 in which to make their assessment work, and that twenty days' work was equal to one hundred dollars' worth of work. This was denied by appellees, who contended that twenty days' work was not sufficient, and that the location of appellants expired at the end of the year 1898, and that the land was afterwards subject to relocation, and that they had re-located, as they had a right to do, by posting their location notice in June, 1899. Whether the claim of Murray & Sparks had been abandoned does not appear to have been a matter of controversy, and seems not to have been considered important, to determine the question at issue.

Verdict and judgment for defendants, and plaintiffs appealed to this court.

The testimony shows that the miners of Newton county had organized a "miners' association," which association had established rules and regulations, or, as the appellants say, had "enacted laws" to govern the amount of work necessary to hold a mining claim, and to fix the price of labor per day, as follows: "Section 8. In doing all assessment work in this district there shall be allowed $5 per day." It was shown in testimony that during the years 1897 and 1898 it was customary in that locality to perform twenty days' work, and count it $100.

If the local law is to be absolutely upheld, appellants should prevail in this action; otherwise, not.

The statutes of the United States on the particular subject is as follows, to-wit: "The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws or the state or territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: * * * On each claim located after the 10th of May, 1872, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year." Rev. Stat. U. S. § 2324.

The proof on the part of the plaintiffs in this case was that they had performed twenty days' work on the claim, which, according to the rate fixed by the local "mining association," would amount in the aggregate to $100, the required amount of labor. On the

part of the defendant, the labor performed was shown to have been really worth an amount greatly less than $100, to have been worth not exceeding $10. No effort was made to prove otherwise, except by the rate established by the mining association, which, of course, was an arbitrary rate.

The case of *Bradley* v. *Lee,* 38 Cal. 362, is cited by appellants in support of their contention that a rate fixed by the local miners' association is absolutely controlling. Quoting from the syllabus in that case, the court said: "The true interpretation of the mining usage in the county of Nevada is that work to the value of $100, or twenty days of faithful labor performed on a claim or on any one of a set of adjoining and contiguous claims owned by the same party, is sufficient to hold the same for one year." It will be seen that the labor must really and actually be of the value of $100, and not merely to be counted as $100. In the case at bar the proof fails to show that the labor was really worth $100, or anything like it. The work done was therefore not that required by statute, and the claim on that account was in conflict with the laws of the United States. The regulations established by the miners' association did not, of themselves, render the claim void, but the condition upon which a patent would issue was never performed.

Judgment affirmed.

BIGHAM *v.* CROSS.

Opinion delivered October 26, 1901.

LANDLORD'S LIEN—WAIVER.—The fact that a landlord agreed that a firm, who were furnishing supplies to his tenant, and held a mortgage on the latter's crop, should receive and dispose of such crop, on condition that they would protect him in his landlord's rights, would not be a waiver of the landlord's lien as to any part of the crop which did not come into the firm's hands, either in favor of the firm or of another holding a lien prior to the firm's mortgage.

Appeal from Crittenden Circuit Court.

FELIX G. TAYLOR, Judge.

F. H. Heiskell, for appellant.

A landlord, having a lien on the whole crop for his rent, can seize any part thereof, and cannot be deprived of his right thereto by any inferior conflicting claims of other persons upon said crop. 35 Ark. 225.

L. P. Berry, for appellee.

BUNN, C. J. This is a suit by attachment for rent, brought before A. B. Reeves, one of the justices of the peace of Jasper township, Crittenden county, this state, on the 8th day of December, 1898, by W. M. Bigham as landlord against Joe and Lewis Cross, as his tenants for that year. The debt claimed was $255, and the order was levied on 2,000 pounds of seed cotton in pens, and about twenty bales in the field, and 200 bushels of corn in the crib, on the 9th day of December, 1898; and on the 29th day of December, 1898, one S. I. Newman filed his interplea, claiming the property levied on as his property by virtue of a mortgage which said Joe and Lewis Cross had given him on said crop of cotton and corn to secure a debt dated December 29, 1898.

The judgment and findings of the court were to the effect that the lien of said landlord was superior to the mortgage lien of the interpleader, and that the debt claimed by the plaintiff was due, and therefore that the plaintiff recover against defendants and interpleader; from which judgment both the defendants and the interpleader appealed to the circuit court. In the circuit court, the cause was tried by a jury, and the verdict was for the interpleader, and motion for new trial was overruled, and the plaintiff, Bigham, appealed to this court.

The facts, in brief, are as follows: W. M. Bigham, the landlord, rented his plantation, or a portion of it, to the defendants, Joe and Lewis Cross, for the year 1898, for $225, for which they executed and delivered to him their promissory note. He also furnished them farming implements to the amount of $30. A. R. McNees & Co., merchants of Memphis, Tennessee, were furnishing supplies to these tenants, and sometime in the early part of the year Bigham agreed with them that they might receive and handle the crop of cotton raised on the plantation by these tenants, and at the same time they agreed to protect him in his rights as landlord. A. R. McNees & Co. had taken a mortgage from Joe and Lewis Cross on the crops in the early part of the year, but it was afterwards discovered that there was some defect in its acknowledgment,

which, whether a fact or not, seems to have been conceded by the parties. At least, it is not an issue here. Be that as it may, McNees & Co., under their agreement with Bigham, had received seventeen bales of the cotton before the execution of the mortgage to Newman, and the lien of the latter was inferior to the possessory rights of them in respect to said seventeen bales, at least, and the only controversy is over the cotton and corn levied on, and which had not yet come into the possession of McNees & Co. under the said agreement with Bigham.

The question was as between Bigham and the interpleader as to the crop levied on. Bigham had authorized McNees & Co. to bring suit for his rents in his name, and they really brought this suit under that authority. The interpleader claimed that McNees & Co. had received enough cotton to pay Bigham's rent, and that, by his arrangement and agreement with McNees & Co., Bigham had waived his lien on the portions of the crop delivered to McNees & Co., and that by so doing he lost his lien upon the other portion of the crop—that is, the portion levied on. Bigham however testified that he did not waive his lien on the cotton delivered to McNees & Co. He also testified that, after the institution of the suit, Lewis Cross, one of the defendants, had paid his portion of the rent, amounting to the sum of fifty-five dollars, and eight dollars on his open account. The balance had not been paid. As we understand it, the contention of the interpleader is that the balance of the rent account should have been paid by McNees & Co. out of the proceeds of the cotton in their hands, and that Bigham has no right to look to the other crop for the payment of such rent balance.

Evidence was taken on this issue, and on that the court instructed the jury as follows, to-wit: "The case depends upon the transaction between Dr. Bigham, the plaintiff, and A. R. McNees & Co. If Dr. Bigham, the plaintiff, waived his lien upon the cotton shipped by Cross to McNees & Co. before the mortgage of the interpleader, S. I. Newman, was executed, then he (Dr. Bigham) could go upon the remainder of the crop, and you will find for the plaintiff; but if Dr. Bigham did not waive his lien for rent upon the cotton in the hands of McNees & Co., then he cannot hold the cotton attached in this cause against the interpleader, Newman, but must subject the cotton that was shipped to McNees & Co. to his claim for rent; and if you find that Dr. Bigham did not waive his lien for rent on the cotton that was shipped to McNees

& Co., and that said cotton was sold for enough to pay the rent due Dr. Bigham, then you will find for the interpleader, Newman." In addition, on its own motion, the court instructed the jury that "if A. R. McNees & Co. had agreed to protect Dr. Bigham, and Dr. Bigham had not waived his lien to A. R. McNees & Co., and Joe and Lewis Cross had shipped sufficient cotton to pay the amount due Dr. Bigham for rent, McNees & Co. were acting as his agents, and were bound under the law to pay the rent to Bigham, or hold the same for him." To both of which instructions the defendant saved exceptions.

The court's instructions were erroneous; for, whether Dr. Bigham had waived his lien to McNees & Co. on the seventeen bales or not, he had the right to resort to any other portion of the crop. The mere fact that Bigham consented that McNees & Co., who were to, and did, furnish the supplies to the tenants to make the crop, should receive, handle, and dispose of the same, on condition that they would protect him in his landlord's rights, did not waive his (Bigham's) lien on the portion of the crop that did not go into the possession of McNees & Co., nor was it a waiver of his lien on the cotton which did come into their possession. Nor is there anything in the testimony to estop Bigham from resorting to any portion of the crop to secure the payment of his rents. The question of priority between Newman and McNees & Co. as to the crop attached, on the state of case made, did not affect Bigham, the landlord.

Reversed and remanded.

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ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY v. CARL LEE.

Opinion delivered October 26, 1901.

CARRIER—FAILURE TO FURNISH CAR—SUFFICIENCY OF COMPLAINT.—A complaint against a railway company which alleges that plaintiffs placed for shipment near defendant's side track a large quantity of timber, and requested one of the defendant's freight conductors and two of its station agents to furnish a car for its shipment, and that defendant neglected to furnish a car until, by exposure to

worms and weather, the timber was destroyed, is insufficient in that it fails to allege a tender of the property for shipment, or its receipt by defendant for shipment, or a tender to or receipt by one of defendant's authorized agents for shipment, or an application for a car to an agent of defendant authorized to furnish cars.

Appeal from Woodruff Circuit Court.

HANCE N. HUTTON, Judge.

Francis Johnson and *Dodge & Johnson,* for appellant.

The court should have sustained the demurrer to the complaint. The freight conductor had no control over the moving of freight, and a request to him to furnish a car was not a request to the company. 40 Ark. 309. If he had such authority, it should have been alleged. 46 Ark. 103; 29 Ark. 501. Nor did the agents at McCrory and Wynne have such authority. 51 Ark. 155.

J. F. Summers and *E. M. Carl Lee,* for appellees.

As to who shall be entitled to the benefits of Sand. & H. Dig., §§ 6193-4, see 61 Ark. 563. Appellant should have resorted to motion to make more specific, rather than demurrer. 52 Ark. 378; 58 Ark. 138.

BATTLE, J. The complaint in this action is as follows: "Come the plaintiffs, Ed S. Carl Lee and P. L. Fakes, and for cause of action herein against the defendant state: That in July, 1899, the St. Louis, Iron Mountain & Southern Railway Company was a corporation, organized and existing under the laws of the state of Arkansas; that said corporation was then, and is now, engaged in the transportation of freight between Woodruff, Ark., and Wynne, Ark., as a common carrier; that on or about July, 1899, this plaintiff placed for shipment on or near this defendant's side track, at Woodruff, Ark., five cords heading bolts and six hundred and seventy-one spokes; that this plaintiff requested one of the defendant's freight conductors, who was operating one of defendant's freight trains, to furnish a car in which to ship this plaintiffs' heading bolts and spokes as aforesaid to Wynne, Ark.; that afterwards, to-wit, on or about July 20, 1899, this plaintiff made application to this defendant's agent at McCrory to furnish a car at Woodruff, Ark., in which to ship this plaintiffs' heading bolts and spokes as aforesaid to Wynne, Ark.; that afterwards, to-wit, on or about August 10, 1899, this plaintiff made application to this defendant's agent at Wynne, Ark., to furnish a car at Woodruff,

Ark., in which to ship this plaintiffs' heading bolts and spokes as aforesaid to Wynne, Ark.; that neither this defendant's freight conductor, nor its agent at McCrory, nor its agent at Wynne, Ark., nor any one else for said defendant furnished a car at Woodruff, Ark., to this plaintiff in which to ship said heading bolts and spokes as aforesaid; that this defendant negligently failed to furnish a car at Woodruff, Ark., in which to ship said heading bolts and spokes as aforesaid to Wynne, Ark., until, by reason of exposure to worms and weather, plaintiffs' heading bolts and spokes as aforesaid were damaged to the extent of their full value; that said heading bolts and spokes as aforesaid were of the value of $33.71; that by reason of this defendant's failure to furnish said car at Woodruff, Ark., as aforesaid, this plaintiff has been damaged in the sum of $33.71. Wherefore these plaintiffs pray that they have and recover of and from this defendant the sum of $33.71, and all costs of this action."

To this complaint defendant filed a demurrer, which was overruled, and, the defendant having refused to plead further, and the cause having been submitted for the assessment of damages, the court heard the evidence adduced, and rendered judgment in favor of the plaintiff for $33.75; and the defendant appealed.

The court erred in overruling the demurrer. It should have been sustained, because the plaintiffs did not allege or show in their complaint that they or either of them tendered the property described therein to defendant for shipment, or that the property was received by it for shipment, or that it was tendered to or received for shipment by any of defendant's agents who were duly authorized to ship the same, or that they or either of them applied for a car or cars for the shipment of the property to any one of its agents who were authorized to furnish cars.

The judgment of the circuit court is therefore reversed, and the cause is remanded, with instructions to sustain the demurrer and to allow the plaintiffs to amend, if they desire.

GRINSTEAD v. WILSON.

69 587
73 606

Opinion delivered October 26, 1901.

CERTIORARI—ORDER ESTABLISHING ROAD WITHOUT NOTICE.—Certiorari is the proper remedy to quash an order of the county court laying out a road over the land of one who had no notice of such proceeding, and who lost his right of appeal therefrom without his fault.

Appeal from Independence Circuit Court.

JAMES W. BUTLER, Special Judge.

STATEMENT BY THE COURT.

On the 21st day of August, 1899, the appellant filed his petition, asking that the record of the county court in the matter of changing the road of road district No. 3 be certified up, and that the order making the change of the road over the land of petitioner be quashed. The substance of the petition is as follows, to-wit: Your petitioner states that he is a resident of the city of Louisville, Ky.; that he is the owner of the south half of section twenty-nine (29), township twelve (12) north, range four (4) west; that on the 6th day of April, 1899, at the April term of the Independence county court, W. E. Ferguson, road overseer of road district No. 3, presented his petition to said court, stating that, by reason of the caving of the bank of White river, the road which runs adjacent to the land aforesaid, being known as the "Jacksonport and Oil Trough Road," had become almost impassable; that, if the road was not changed immediately, it would be almost wholly destroyed. Praying for the appointment of viewers to lay out another road and to appropriate such land as might be necessary to be appropriated for road purposes. Moore, Johnson and Cook were by the court appointed viewers, ordered to meet on the 20th day of April, 1899, or within five days thereafter, to view and lay out said road. That afterwards, and without notice to petitioner, viewers proceeded to meet and view said road on the 24th day of April, 1899, and located a new road described in said petition, making award of damages, and filed said report with the clerk on the 30th day of May, 1899. That afterwards, on the 5th day of July, 1899, at the July term

of said court, was presented the petition of Andrew Allen, excepting to the report of the viewers, and asking for review for the reason that it was wholly unnecessary to make said change, and that the viewers appointed were interested in changing said road on account of said report. Thereupon on said day the court granted said petition, and appointed Jackson, Erwin and Robinson as viewers, who were ordered to view said road, and meet for that purpose on the 13th day of July, 1899, and on the 17th day of July, 1899, said commissioners, having viewed said road, made and filed report, recommending the following change in said road. (Here follows description of the change.) "That no notice whatever was given petitioner of the review of said road; that thereafter said road was ordered to be established as reviewed and reported by said reviewers. That said last mentioned order of said court in laying out said road is wholly void * * * *Fourth.* Because no notice was given to this petitioner, by publication or otherwise, of the laying out of said road nor of the meeting of the said viewers, when the fact was well known that petitioner was a nonresident of this state. * * * *Seventh.* Because said report of said viewers was filed on the 17th day of July, 1899, and immediately acted upon by said court, and was not published and publicly read on the second day of the next succeeding court, and no opportunity was given to any one to appear in said court and object to and contest said order. * * * *Ninth.* That said review was wholly unauthorized and without authority of law, is void, and the reviewers had no authority in law to change the road from where it was located by the viewers; that this petitioner is now, and has been, and was at the time of the filing of the said former petition of said view and review, a non-resident of this state, and had no notice whatever of the proceedings in said matter; that by the establishing of said road he is greatly damaged; (1) By the taking of his land without practically any compensation. (2) That for the greater portion of the distance of said road he will have to maintain two strings of fence. (3) That the road, as laid out and established now, within a few years will be destroyed by the caving of said bank; that the bank has had for years a tendency to cave at several places along said road, and for the past three years the said bank has caved now up to the old road, and destroyed the same, necessarily causing a change in said road to be made, and that the hauling of heavy freight has had a tendency to weaken the same and render it more liable to the encroachment of the river. Petitioner

prays that a writ of certiorari issue to said court, commanding the clerk to certify to this court the proceedings aforesaid; that said order establishing the said road be held void for injunction, and for all other proper relief."

The several petitions, orders, etc., are made exhibits to the petition for certiorari.

In support of said petition the plaintiff filed the affidavit of J. M. Stayton, which is in substance as follows:

He is the agent of W. E. Grinstead, who is a resident of Louisville, Ky. Sometime in the spring of 1899 there had been complaint about the condition of the road along the river bank, which was adjacent to the lands of Grinstead, and the overseer, whenever the bank caved, had been in the habit of setting the fence back without authority. He was notified to stop it, and before the fence should be moved any more he was to consult him. The overseer came down in the spring, and asked what steps he should take to change the road. It was suggested to him that the statute provided that where the road was injured or destroyed the overseer might apply to the county court to change the road. At the request of the overseer and for him Stayton drew the first petition for changing the road, which was filed in April in the county court. No further attention was paid to the matter until he learned that Cook, Moore and Johnson were appointed viewers. They advised him verbally that they were going to lay out the road. He did not go out there, and understood afterwards that the changes made by them were adopted by the county court. He never knew, nor was there ever any notice given him, of the petition of Allen, and he did not know that any change had been made until about two weeks before the petition of certiorari was filed. A copy of the order was sent down to him at his request, and he immediately went to Batesville, and found the county court had adjourned. He had no opportunity to appeal or to give notice of appeal. He had no notice of review, nor was there any publication made of it, and was in absolute ignorance of the change until he received the copy of the order, when he immediately took steps to file a petition of certiorari, as the time for giving notice of appeal had passed, the court having adjourned in course, as he was informed by attorney of Allen, whom he consulted upon his arrival in Batesville.

To the petition of appellant appellees demurred. Upon the hearing of the petition, exhibits thereto and the demurrer of the defendant, and testimony on the part of the petitioner, the argu-

ment of counsel, the court sustained the demurrer, and dismissed said petition, and awarded costs against said petitioner. Whereupon the plaintiff excepted, presented his bill of exceptions, which was signed, sealed and ordered filed, and prayed an appeal to this court, which was granted.

James M. Stayton and *Neill & Neill,* for appellant.

The court had no jurisdiction, because of the failure to comply with section 2817, Sand. & H. Dig. 10 Ark. 241. Appellant had a right to notice of the contemplated changes. 66 Ark. 292. If the statutes were construed as authorizing the proceeding without notice to the land owner, it would be a taking of property without due process of law. 5 Ark. 409; 9 Ark. 337; 9 Ark. 362; 10 Ark. 225; 24 Ark. 161; 43 Ark. 545. Certiorari is the proper remedy. 21 Ark. 265; 52 Ark. 222; 13 Ark. 355; 15 Ark. 43.

Yancey & Reeder, for appellee.

Section 2817, Sand. & H. Dig., applies to those cases only where application is made for the "reviewing" of a road after the *final order has been made and the road established.* 10 Ark. 241. The mere irregularity as to notice to appellant cannot be raised on certiorari. 47 Ark. 441. There being no want of jurisdiction shown, certiorari was not the proper remedy. 17 Ark. 580; 37 Ark. 318. Errors of this kind can only be corrected on appeal. 17 Ark. 44; 28 Ark. 87; 30 Ark. 148; 47 Ark. 511; 43 Ark. 341; 50 Ark. 34; 51 Ark. 281; 25 Ark. 476; 43 Ark. 33. Certiorari can not be used as a substitute for appeal. 39 Ark. 347; 39 Ark. 399; 43 Ark. 341; 47 Ark. 511; 52 Ark. 213; 43 Ark. 33. Nor will certiorari be granted when the right of appeal was lost through the fault or neglect of the one seeking the writ. 25 Ark. 218; 52 Ark. 213.

HUGHES, J., (after stating the facts). It appears from the copies of the record and proceedings of the county court in the matter of the change of the public road, as therein set out, that the petitioner for certiorari herein had no notice of any of the same; and that the land of the petitioner, W. E. Grinstead, was ordered to be taken and appropriated for a public road, without any notice to him of the proceedings and order under which the same was to be done. Section 4190 of Sandels & Hill's Digest provides that all judgments, orders, sentences and decrees made, rendered or pronounced by any of the courts of this state against any one without

notice, actual or constructive, and all proceedings had under such judgments, orders, sentences or decrees shall be absolutely null and void." What more need be said? The orders and proceedings in this case were absolutely null for the want of notice. The party whose land was to be taken had no notice of the proceedings whatever, and the whole are absolutely void. Without doubt all these proceedings were void. Should they be quashed on certiorari? Should petitioner have appealed?

The proof on the hearing of the application for certiorari is that petitioner lost his right of appeal without his fault; that he had no notice of the proceedings or orders of the court till after the time had expired when he could have appealed. Besides, it is shown that the proceedings and orders of the court are absolutely null and void. Wherefore certiorari is the proper remedy to quash these void proceedings and orders. Where there is a want of jurisdiction below or an excess of it apparent on the record, certiorari is the appropriate, if not the only, remedy. *Baxter* v. *Brooks,* 29 Ark. 173. "Errors in assumption of jurisdiction are properly correctable on certiorari." *Flournoy* v. *Payne,* 28 Ark. 97. The assumption of unauthorized jurisdiction will be corrected by writ of certiorari. *Ex parte Pearce,* 44 Ark. 509; *Baskins* v. *Wylds,* 39 Ark. 347. It cannot be used for the correction of mere errors, as a substitute for an appeal. *Id.; Pettigrew* v. *Washington County,* 43 Ark. 33.

Finding that the court below had no jurisdiction of the person of the appellant in this case for the want of notice to him, and that its proceedings and judgment in this cause are void, the judgment is quashed.

McMAHAN *v.* SMITH.

Opinion delivered October 26, 1901.

69 591
71 322

1. PUBLICATION—UNKNOWN HEIRS.—Under Sand. & H. Dig. § 5681, authorizing a warning order against unknown heirs where it appears by the complaint that the names of such heirs are unknown to the plaintiff, it is not sufficient to make such allegation in a separate affidavit or in the caption of the complaint. (Page 593.)

2. SAME.—A complaint which alleged that the plaintiff complained of "the unknown heirs" of R., that he had a right to have the equity of redemption of the unknown heirs of R. foreclosed, that one claiming to be the heir of R. was dead, and that his heirs were unknown, did not authorize the issuance of a warning order against the heirs of R. as unknown. (Page 594.)

3. SAME.—Whether it is sufficient to allege that the heirs of R. are unknown, without alleging that the names of such heirs are unknown, *quaere.* (Page 595.)

Appeal from Garland Chancery Court.

WM. H. MARTIN, Special Chancellor.

STATEMENT BY THE COURT.

This was originally an action of ejectment brought in 1873 by W. H. Smith and John M. Harrell against Mary J. McMahan and the administrator of the estate of John A. Riley, to recover of them the possession of a lot in the city of Hot Springs. The plaintiffs relied for title upon a patent from the United States conveying the lot in question to Riley, a mortgage from Riley to plaintiff Smith to secure a note for $232, and a foreclosure sale and conveyance under a power contained in the mortgage to John M. Harrell as agent for Smith. The defendant appeared, and answered, and set up, among other things, that the foreclosure sale to Harrell was void.

The case was transferred to the equity docket, and several amendments to pleadings were filed by each party. Finally, on the 4th day of February, 1898, an amended complaint was filed, in which the parties are set out in the caption as follows: "W. H. Smith, plaintiff *v.* Mary J. McMahan and the heirs of John A. Riley, deceased, who are unknown to the plaintiff." In the amended complaint, plaintiff Smith recites the fact of the execution of the mortgage by Riley and the sale of the lot under the power contained in the mortgage to Harrell as agent of plaintiff. The prayer is, in part, that the equity of redemption of John A. Riley and his heirs and legal representatives in said premises be foreclosed, and that the same be sold under the decree of the court in satisfaction of the mortgage to plaintiff. John M. Harrell does not appear as a plaintiff in this complaint, but his name is signed to it as the attorney of Smith. This complaint superseded the former complaints filed in the case, and the case was heard

upon it, the answer thereto and the evidence. There was a decree in favor of plaintiff for a foreclosure of the mortgage. Defendant Mary J. McMahan appealed.

Wood & Henderson, for appellants.

The heirs and administrator of John A. Riley were necessary parties to the suit in the chancery court. 32 Ark. 297; *ib.* 307; 34 Ark. 302; 39 Ark. 65; 39 Ark. 307; 33 Ark. 250; 23 Ark. 477. The constructive service upon the heirs of John A. Riley was insufficient, because there is no showing or allegation that the names of said heirs were unknown. Sand. & H. Dig., §§ 5149, 5681. *Cf.* Notes, Ky. Code of Practice, § 88, p. 303. The law as to constructive service of process must be strictly complied with. 11 Ark. 120; 23 Ark. 510; 25 Ark. 60; 30 Ark. 719; 51 Ark. 34; 22 Ark. 280.

J. M. Harrell, for appellees.

RIDDICK, J., (after stating the facts). This is an action to foreclose a mortgage on land, executed by John A. Riley. Riley was dead when the action was commenced, and the first question that arises on the appeal is, whether his heirs were properly brought before the court, and whether the court had jurisdiction over them. There was no actual service of summons upon them, but the attempt was made to have them constructively summoned as unknown heirs.

The statute which permits a constructive summons by warning order in such case is as follows: "Where, in an action against the heirs of a deceased person as unknown heirs, or against other persons made defendant as unknown owners of any property to be divided or disposed of in the action, it appears by the complaint that the names of such heirs, or any of them, or of such other persons are unknown to the plaintiff, a warning order, as directed in the last section, shall be made by the clerk against such unknown heirs or owners." Sand. & H. Dig., § 5681.

It will be noticed that the statute requires that it must appear from the complaint that the names of the defendants are unknown. We understand from this that, before a warning order can be legally made against heirs as unknown parties, it must appear from an allegation in the complaint that the names of such heirs are unknown to the plaintiff. It is not a sufficient compliance with the statute to make the allegation in a separate affidavit, or to make it in the style or caption of the complaint; for it was intended that

this allegation should be made and verified by affidavit, as other allegations of the complaint are verified. Now, the parties to this action, as set out in the style of the action, are "W. H. Smith, plaintiff, against Mary J. McMahan and the heirs of John A. Riley, who are unknown to plaintiff, defendants." But in the body or stating part of the complaint there is no such allegation. The the complaint commences by alleging that "the plaintiff complains against Mary J. McMahan and the unknown heirs of John A. Riley, deceased," and in another part of the complaint the plaintiff avers that he has the right to have the equity of redemption of the unknown heirs of John A. Riley foreclosed, but he does not allege, and it does not appear from the complaint, that all of the heirs of John A. Riley and their names are unknown to him. The only direct allegation in the body of the complaint as to the heirs of Riley being unknown is as follows: The plaintiff states "that Hugh Riley was at one time a party to the suit of M. J. McMahan against plaintiff, claiming to be the brother and heir of John A. Riley residing in Chicago in the state of Illinois; that said Hugh Riley has now been dead for several years, and, if any heirs survive him, they are unknown to plaintiff." But this statement that the heirs of Hugh Riley are unknown to plaintiff is not sufficient to authorize a warning order against the heirs of John A. Riley as unknown. At most, it would only authorize a warning order against the heirs of Hugh Riley, for the statement might be true, and still there might be other heirs of John A. Riley known to plaintiff.

The complaint was not verified either by the plaintiff or his attorney, but there was filed with the complaint the affidavit of John M. Harrell, which stated that the heirs of John A. Riley were his brothers, Hugh and Peter Riley, who are reported dead, and that any and all descendants of said brothers are nonresidents of this state, and are unknown to plaintiff and affiant, and all the unknown heirs of said John A. Riley are nonresidents of the state of Arkansas. Now, this affidavit was not a part of the complaint, but, even if it be so treated, it was not sufficient, for it affirmatively shows that the heirs of John A. Riley were known, that his heirs were his two brothers, Hugh and Peter. The mere fact that these brothers are, as the affidavit alleges, reported dead, and that their descendants are unknown, does not, we think, authorize a warning order against the heirs of John A. Riley as unknown. At most this would only authorize a warning order against the

heirs of Hugh and Peter Riley, who are unknown. So, it does not appear from any direct allegation, either in the complaint or affidavit, that the heirs of John A. Riley were unknown to the plaintiff. On the contrary, taking the two together, it does appear that the heirs of John A. Riley were Hugh and Peter Riley, whose names were known to plaintiff. For these reasons, we are of the opinion that there was no authority to issue the warning order against the heirs of John A. Riley as unknown in this case, and that the chancellor erred in so holding.

Again, as we have said, the statute quoted above provides for a warning order against unknown parties only when it appears from the complaint that the names of such heirs or persons are unknown to the plaintiff. In speaking of a similar provision of the Kentucky code, Mr. Newman says: "It must also be observed that it will not be sufficient to allege that the heirs or owners of the property are unknown. Both the former law and the code require that the allegation should be that their *names* are unknown, and not merely that the plaintiff is unacquainted with or does not know the heirs or owners of the property." Newman, Plead. & Prac. 295. This statement of the law is supported by citation of decisions of the supreme court of Kentucky, and seems to me to be a correct interpretation of the statute. The rule at the common law was that a defendant must be sued by his true name. The statute in actions against unknown heirs or unknown owners of property permits a constructive service on such persons by publication when it appears by the complaint that the names of such heirs or other persons are unknown to the plaintiff. It is well settled that in such deviations from the common law the statute must be strictly pursued. *Gardner* v. *Krafl,* 52 How. Pr. 499; Bliss, Code Pleading, § 147. But nowhere in this proceeding was there any allegation that the names of the heirs of John A. Riley were unknown to the plaintiff. This, in the opinion of Mr. Justice Hughes and myself, furnishes another reason why the court erred in holding that the heirs of John A. Riley had been properly warned to appear in this action.

For the error indicated the judgment is reversed, and the cause remanded for further proceedings.

Mr. Justice HUGHES concurred, and Mr. Justice BATTLE also concurred in the judgment and in the opinion, on the ground that there was no allegation in the complaint that the heirs of John A. Riley were unknown to plaintiff. He dissents from so much of

opinion as holds that there must be an allegation in the complaint that the names of the heirs are unknown; he being of the opinion that it is sufficient if the complaint alleges that such heirs are unknown to the plaintiff.

BUNN, C. J., dissented; WOOD, J., not participating.

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69 596
84 364
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GILL v. GILL.

Opinion delivered October 26, 1901.

HOMESTEAD—OCCUPANCY.—Where the owner of a house, being a resident of this state and a married man, moved part of his furniture into it, with intention to occupy it as a homestead, but was taken sick and died before the moving was completed, and before any of his family had actually resided therein, and after his death his wife completed the moving and took up her residence therein, the house was "occupied as a residence," within art. 9, § 5, of the constitution, so as to entitle his wife and minor children to claim the same as a homestead.

Appeal from Pulaski Chancery Court.

THOMAS B. MARTIN, Chancellor.

Hill & Auten, for appellant.

There was never such an occupancy as impresses the homestead character on property. Mere intention to occupy is not sufficient. 31 Ark. 466; 22 Ark. 400. The occupancy must be by the husband, in his lifetime, and as a residence. Const. Ark. § 5, art. 9; 33 Ark. 399.

James Coates, for appellees.

The fact that the homestead claimant is only a co-tenant with another does not deprive him of his right to claim his homestead. Freeman, Cot. & Part. § 54; 35 Ark. 50; 27 Ark. 659; 41 Ark. 95. While mere intention to occupy a homestead is not alone equivalent to possession, yet it, in connection with other circumstances, may constitute such a constructive occupancy as to form a sufficient basis for the claim of homestead. 9 Kan. 475; *id.* 425; 35 Ia. 410; 40 N. H. 282. *Cf.* Freeman, Cot. & Part. § 54; 42 Ark. 541; 59 Ark. 213.

WOOD, J. R. G. Gill, a resident of this state, and a married man, purchased a half lot in the city of Little Rock, valued at $1,050 for a homestead. Gill and his wife packed up some of their household goods, preparatory to moving. He and she went over to the house, where they expected to live, and fixed a lock on the door. He was taken sick, but he directed his wife to hire some one to assist her in moving. She did so, and cleaned up the new house. Then, with the hired help, whom Gill paid for the work, she packed up some household goods and kitchen furniture, such as bed, bedstead, carpets, cooking stove, cooking utensils, etc., and moved same into the new house, Before the moving was completed, Gill, who had taken to his sick bed at his mother's, died. After his death, his wife continued the moving into the new house, and she and the minor children were occupying the same as the homestead at the time of the institution of this suit. Gill had no other lands.

The only question on this appeal is: Was the land in controversy "owned and occupied by Gill as a residence," in the sense contemplated by art. 9, § 5, Const., so as to entitle his wife and minor children to claim same as a homestead? "The chief reason," says Mr. Thompson, "why actual occupancy is insisted upon as a condition to the exemption of a homestead is that it may serve to notify the world that it is the place claimed by the owner as exempt." Thompson, Homest. § 245.

This court has held that occupancy is necessary; that a mere intention to occupy is not sufficient. The principle has been settled and announced in cases where the facts showed nothing more than a mere intention to occupy as a homestead, unaccompanied by any acts of actual occupancy. *Tumlinson* v. *Swinney,* 22 Ark. 400; *Johnston* v. *Turner,* 29 Ark. 280; *Williams* v. *Dorris,* 31 Ark. 466; *Hoback* v. *Hoback,* 33 Ark. 399; *Patrick* v. *Baxter,* 42 Ark. 175. But here the *bona fide* intention to occupy is manifested by some of the usual constituents and concomitants of occupancy, such as repairing and cleaning the house, and moving in household goods and kitchen furniture.

In Iowa there is an unbroken line of decisions holding that occupancy, the use of the house by the family as a homestead, is an essential requirement to impress the property with the character of a homestead; that the "mere intention to occupy it, though subsequently carried out, is not sufficient." *Charless* v. *Lamberson,* 1 Iowa, 435; *Christy* v. *Dyer,* 14 Iowa, 438; *Elston* v. *Robinson,*

23 Iowa, 208; *Givans* v. *Dewey,* 47 Iowa, 414; *First National Bank* v. *Hollingsworth,* 78 Iowa, 575. This court, in announcing the same doctrine, quoted the identical language of some of the Iowa cases. *Williams* v. *Dorris,* 31 Ark. *supra,* at page 470. In the case of *Neal* v. *Coe,* 35 Iowa, 407, the defendants used the house on the place claimed as a homestead for holding a portion of their furniture as early as March the 15th. On April 1st the family came to the town where the house was situated, expecting to possess the house, but, the repairs not being completed, they did not actually sleep and eat in the house until twelve weeks thereafter. The plaintiff, who was seeking to subject the premises to the payment of his debt, had knowledge of the above facts, and of the intention of the defendants to occupy the premises as a home as soon as they were made fit. The supreme court of Iowa, in holding that the homestead character had been impressed upon the premises under the above facts, said: "While the intention is not alone sufficient to impress the homestead character, yet it may be considered in connection with the circumstances. Some time usually intervenes after the purchase of property before it can be actually occupied. Even after the process of moving begins it frequently takes days before the furniture can be arranged, and the house placed in comfortable condition for actual occupancy. Under such circumstances great inconvenience might arise if the homestead character was made to depend upon the actual personal presence of the members of the family. Law is entitled to and can command respect only when it is reasonable, and adapted to the ordinary conduct of human affairs." So say we.

Affirmed.

NOTE.—If I had known that the learned chancellor had written an opinion upon this question before I had prepared and read this, the court consenting, I should have been glad to have adopted it in full, for it is a more elaborate and learned discussion of the subject than I have been able to give it. His opinion will be found at page 40, Martin's Chancery Decisions.

WILLIAMS v. STATE.

Opinion delivered November 2, 1901.

1. CONFESSION—PROMISE OF PROTECTION—ADMISSIBILITY.—Where the accused confessed his guilt to the person who arrested him, under a promise that he would not get hurt, and within a short time thereafter repeated his confession before the examining court, it will be presumed, in the absence of evidence to the contrary, that the influence of the promise of protection extended to the subsequent confession, and rendered it inadmissible. (Page 602.)

2. EVIDENCE—ENTIRE CONFESSION.—Where, in a murder case, the court admitted proof that defendant confessed the killing, it was error to exclude so much of the confession as gave defendant's reasons for the killing. (Page 602.)

Appeal from Mississippi Circuit Court.

FELIX G. TAYLOR, Judge.

Appellants pro se.

The allegation that the name of the deceased was unknown to the grand jury was a material one, and should have been proved. 13 Ark. 718; 30 Ark. 162; 34 Ark. 720. Proof of the killing of the father was incompetent on a trial for killing the sister, unless it tended to show a motive for killing the latter. 34 Ark. 370; 13 Ark. 239; 14 Ark. 555; 43 Ark. 367; 1 Bish. Cr. Prac. 628. The whole of the alleged confession should have been admitted, if any of it at all. 1 Greenleaf, Ev. § 201. When a confession is once improperly obtained, all others made thereafter are deemed to be tainted with the same improper influence. 22 Ark. 340; 50 Ark. 312; Whart. Cr. Ev. § 650; 1 Bish. Cr. Prac. § 1239; 61 Miss. 256.

George W. Murphy, Attorney General, for appellee.

BUNN, C. J. This is an indictment for the murder of a girl named Williams, whose Christian or first name is alleged in the indictment to have been unknown to the grand jury which found the indictment. (The defendant in the course of the trial introduced evidence tending to prove that the Christian name was in fact known to the grand jury. The testimony of grand jurymen,

however, sustained the allegation of the indictment as to this, and we will not disturb the judgment on that account.) Trial and verdict of guilty, and judgment accordingly, and the defendant appeals to this court, assigning several causes for reversal.

The evidence in the case, briefly stated, is as follows: The defendant, together with his father, Charles Williams, and his sister, Ora Williams, resided in a house in Mississippi county, where they were all seen late in the afternoon of the 7th October, 1900. On that night the house was burned to the ground, and in it the bodies of Charles Williams and Ora Williams, as nearly as could be identified, were found the next morning, although burned beyond recognition, so that the identity was necessarily left to be determined much by circumstances.

The defendant, shown to be then a boy of about 15 years of age, and stupid and weak minded, from thence traveled all night and reached the residence of M. L. Sanders, in Poinsett county, about eighteen miles away. After the news of the burning had got abroad, the neighbors gathered at the scene, and discovered what they conceived to be, from circumstances, the remains of the bodies of Charles and Ora Williams, although both were burned beyond recognition. At once H. S. Sanders, a brother of M. L. Sanders, but of no relationship otherwise to the defendant, went to his brother's in Poinsett county, to carry the news to the family. He testified as follows: "I live near Wordell in Mississippi county, Arkansas. I knew old man Charles Williams, the father of the defendant, and Ora, a girl, whom the defendant is charged with killing. I knew where they lived at the time they were killed. No one lived with them except the defendant. The three lived together. The house where they lived was in Mississippi county, Arkansas. On the 8th of October last, I heard that old Charles Williams and his daughter, Ora, were murdered, and the house burned down on them the night before. The neighbors gathered around, and thought that Nelson, the defendant, had crawled off in the weeds and died. I started to Tyrona, about eighteen miles away, in Poinsett county, to notify my brother and his wife, whose wife is the sister of the defendant, of their death. When I got there I asked them, had they seen Nelson, and they said, "No." I then told them that his father and little sister, Ora, were murdered, and burned up in the house. They then called Nelson, and he came out of the next room. I arrested Nelson, and started back with him. As we went along, I said to him: 'Nelson, did

you kill your father and sister?'" At this point the defendant objected to this testimony, and the court caused the jury to retire, and in their absence the witness, continuing, said: "Nelson did not answer. I said again: 'Why don't you tell me what I asked you? Did you kill your father and sister? You tell me all about it, and I will see that you get justice, and don't get hurt. You might as well tell me, for you will have to tell it in court.' He then confessed." The court sustained the objection, and refused to allow the confession to go to the jury.

W. L. Sanders testified as follows: "I am the defendant's brother-in-law. I live in Poinsett county. The defendant came to my house the morning after the killing. I asked him how he got away from the old man. He said that he killed him." Defendant, on cross-examination of this witness, offered to prove what he said was his reason for killing his father, and, when the court refused to permit him to do so, excepted.

R. M. Parker testified: "I am a justice of the peace of Mississippi county, Arkansas, and as such held the examining trial in this case. The defendant was charged with the murder of his father, Charles Williams, and his sister, Ora Williams. I read the charge to him, and also stated to him verbally that he was charged with killing them and burning them up, and asked him if he was guilty. He replied that he was guilty. He is stupid and weak minded. The house that was burned was in Mississippi county. I was there, and saw the remains of the bodies. They were beyond recognition." Defendant excepted to the ruling of the court permitting the testimony of this witness to go to the jury.

Insanity of the defendant was not pleaded in the case, but weakness of mind, to the extent that "he had just sense enough to do whatever he was told to do," was shown, and this, of course, was proper to be shown, in order to determine the character of his confession. As argued by the attorney general, and according to the theory of the state, it may well be said that whoever killed the father killed the sister of defendant, as they were killed about the same time and in the same house, which was burned down over them, and, according to state's theory, without doubt, the house was burned to destroy the evidence of the crime; but the connection of the defendant with the crime can only be established certainly with the aid of his confession.

The court excluded the confession made to H. S. Sanders, the person who arrested the defendant and so held him when the

confession to him was made. This was proper, for the promise to the defendant that his custodian would see that he was not hurt may well have influenced the confession of such a person as the defendant is shown to have been. Then the question is also raised whether the influence of this confession was still on the defendant when he appeared in the examining court and pleaded guilty to the charge of having murdered both Charles and Ora Williams. The rule on this subject is as stated in *Love* v. *State,* 22 Ark. 340: "We are clearly of the opinion that the confessions made at Fayetteville ought to have been excluded from the jury; and for the reasons assigned by the defendant that the first confession was made under the influence of fear and the hope and promise of protection, and that such influence was presumed to continue to the time of the subsequent confessions, unless shown to have been removed, and that there was no evidence tending to show the removal of such previous influence." So it was in the case at bar. The time between his confession to H. S. Sanders and his plea of "guilty" in the examining court was only one day, at farthest. It does not appear that he was warned of the consequences of a voluntary confession of his guilt by any one, not even by the court. There does not appear to have been even a circumstance occurring within the time from which we could say that the impression made by the promise of H. S. Sanders could have been removed in the least degree from the mind of the defendant. To the same effect are the decisions in the case of *Corley* v. *State,* 50 Ark. 312, and all the authorities to which our attention has been called. The confession made in the examining court, and testified to by witness Parker on the trial, should not have been admitted.

It is objected also by the defendant that the court, having admitted the testimony of M. L. Sanders that the defendant confessed to him that he killed old man Charles Williams, should also have admitted the statements of defendant to witness giving his reasons for killing the old man, and its refusal to admit this testimony was error. In this, also, we are of the opinion that defendant's contention should be sustained. There has been much discussion among jurists as what part of a confession should be offered in evidence by the plaintiff, and what part by the defendant, and at what stage of the trial each part should be presented; but there is no difference among them on the proposition that the whole of the confession should be admitted,—at least so much

of the statement including it as is relevant. On this question, Greenleaf (Ev. vol. 1, § 218, 15th Ed.) says: "In the proof of confessions, as in the case of admissions in civil cases, the whole of what the prisoner said on the subject, at the time of making the confession, should be taken together. This rule is the dictate of reason, as well as of humanity. The prisoner is supposed to have stated a proposition respecting his own connection with the crime; but it is not reasonable to assume that the entire proposition, with all its limitations, was contained in one sentence, or in any particular number of sentences, excluding all other parts of the conversation."

In cases of this kind we can readily see that reasons, more or less plausible, may be assigned for the homicide. If so, whether the effect of such a reason would be to acquit the defendant entirely, or only to lessen the degree of his punishment, matters not, and the jury should have been permitted to consider a statement of it for what it was worth.

Other questions are presented for our consideration, but the two we have discussed are sufficient for the disposal of this case.

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

GARRETSON v. WHITE.

Opinion delivered November 2, 1901.

MORTGAGEE IN POSSESSION—WHEN TITLE QUIETED.—Where a mortgagee of land was placed in possession under an agreement that he would satisfy the mortgage and note if the mortgagor would release his interest in the land, and subsequently, but before executing the release to such mortgagee, the mortgagor executed a second mortgage to another, who brought suit to foreclose his mortgage after the remedies upon the senior mortgage were barred, the senior mortgagee is entitled to a decree quieting his title.

Appeal from Jefferson Chancery Court.

JOHN M. ELLIOTT, Chancellor.

D. H. Rousseau, for appellant.

The agreement between appellant and the mortgagor as to the release of the equity of redemption was valid and binding. 52 Ark. 207. The mortgagor must plead and prove that the mortgaged property is his homestead, in order to be entitled to the benefit of the formalities necessary to a transfer thereof. 53 Ark. 182; 55 Ark. 139; 57 Ark. 179.

BATTLE, J. H. King White and W. G. Streett brought an action on the 11th day of October, 1898, to foreclose a mortgage that Moses Crawford and wife executed to them on the 11th day of January, 1894, to secure the payment of a note for $100. The property mortgaged was certain land described in their complaint.

Mrs. Kate S. Garretson, one of the defendants, filed a separate answer and cross-complaint, alleging that Crawford, on the 9th day of February, 1889, executed to her a prior deed of mortgage on the same land to secure the payment of a note of that date for $662.50 and 10 per cent. per annum interest thereon from date until paid; that this mortgage was recorded in the recorder's office of Jefferson county, where the land lies, on the 26th of February, 1889; that Crawford, on the 24th of December, 1893, was unable to pay any part of the debt and interest; that she agreed with him that, if he would deliver the possession of the land, and release his interest therein to her, she would satisfy her mortgage and note, and deliver them to him; that Crawford, pursuant to this agreement, delivered the possession of the land on the 1st day of January, 1894, and she thereafter rented and used it as her own until the commencement of this suit; that Crawford and wife executed the deed agreed upon on the 1st day of January, 1897, having failed, through mere neglect, to do so on an earlier day; that thereupon she cancelled the note and mortgage, and delivered them to Crawford; and that she knew nothing of the plaintiff's mortgage at the time of such delivery. She asked that the mortgage executed by Crawford to the plaintiffs be cancelled, and that her title be quieted.

The allegations in the answer and cross-complaint were substantially sustained by the evidence.

The court found that the land in controversy was, on the 9th day of February, 1889, the homestead of Crawford and his wife; that on that day he executed to Mrs. Garretson a mortgage on

the same to secure a note for $666, but his wife did not join in its execution and acknowledgment; that he and his wife, on the 11th of January, 1894, executed and delivered to plaintiffs a mortgage on the same land to secure a note for $100, the wife relinquishing her dower and homestead therein and acknowledging the deed; that on the 1st day of January, 1897, Crawford and wife executed a deed to Mrs Garretson, and thereby conveyed the land to her, and the wife thereby relinquished her dower and homestead; that the mortgage executed to Mrs. Garretson, being upon his homestead, was void and passed no title; that the mortgage executed to White and Streett on the 11th of January, 1894, "is a valid and subsisting lien upon the property" therein described; and that there was due thereon the sum of $153.35; and rendered judgment in favor of the plaintiffs for the amount so found due, and ordered the land to be sold to pay the same; and Mrs. Garretson appealed.

We fail to find in the record before us any evidence showing that the land in controversy constituted the homestead of Moses Crawford at the time he executed the mortgage to Mrs. Garretson, or that he was a married man at that time; and, if there was, the defects in the execution and acknowledgment of the mortgage were cured by a subsequent act of the legislature. Sand. & H. Dig., § 743.

The evidence shows that the mortgagor, Moses Crawford, being unable to pay the debt secured by the mortgage that he executed to Mrs. Garretson, agreed to release to her his interest in the land, in consideration of her agreement to cancel his mortgage and note, and in December, 1893, delivered to her the possession of the land. On or about the 1st day of January, 1897, he performed his contract by conveying the land to her, and his wife relinquished her dower in the same, and Mrs. Garretson cancelled the mortgage and note. Both parties to the agreement have treated it as valid, and Mrs. Garretson has remained in adverse possession under the agreement until her remedies upon the mortgage or note were barred by the statute of limitations. No one has taken advantage of, or pleaded, the statutes of fraud. On the contrary, Moses Crawford and Mrs. Garretson have fully performed their agreement; and appellees did not attack its validity. Under these circumstances, we think that Mrs. Garretson is entitled to the land. *Guynn* v. *McCauley,* 32 Ark. 97; *Heard* v. *Knights of Honor,* 56 Ark. 263; *Bazemore* v. *Mullins,* 52 Ark. 207.

The decree of the chancery court is therefore reversed, and the cause is remanded, with instructions to the court to enter a decree in favor of Mrs. Garretson, quieting her title to the land as against the mortgage executed by Moses Crawford to the appellees.

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RHODES v. DRIVER.

Opinion delivered November 2, 1901.

INJUNCTION—POSSESSION OF DE FACTO OFFICER PROTECTED.—Chancery will enjoin a claimant of a public office out of possession from assuming to exercise the functions of the office during the pendency of a contest. Thus a complaint states a case for relief which alleges that plaintiff was duly elected clerk of the circuit court; that he was duly commissioned and qualified, and is now acting, as such clerk; that defendant contested his election in the county court, which adjudged that defendant was elected; that plaintiff appealed to the circuit court, which adjudged in plaintiff's favor; that defendant thereupon appealed to the supreme court, which reversed and remanded the case for a new trial; that the case is still pending and undisposed of; that plaintiff is in possession of the records, and discharging the duties of the office; that, pending the appeal to the supreme court, the governor revoked plaintiff's commission, and issued a commission to defendant, who, after qualifying thereunder, is holding himself out to the public as circuit clerk, and exercising the functions of such office.

Appeal from Mississippi Chancery Court.

EDWARD D. ROBERTSON, Judge.

Rose & Coleman, for appellant.

The judgment of the county court established Rhodes' election, and he was entitled to possession pending appeal. 29 Ark. 85; Sand. & H. Dig., §§ 2699-2701; 17 Minn. 90; 63 Ia. 711; S. C. 17 N. W. 433; 17 Ark. 407; 38 Tex. 70. The judgment of the county court was self-executing, and *eo instanti* divested appellee of all official authority, and removed him from office. 7 How. Pr. 282; 6 Abb. Pr. 222; 80 N. Y. 185; 64 Ind. 493; 59 How. Pr.

106; 40 Ga. 164; 98 Mich. 218; High, Extr. Leg. Rem. § 756; 128 Mo. 497; 112 Kan. 204; Mechem, Pub. Off. § 497. It had the further effect of investing appellant with the title to and the possession of the office. 15 Wash. 346; 63 Ia. 715; 6 Abb. Pr. 222; 80 N. Y. 185; 98 Mich. 218; 17 Minn. 296; 121 N. Car. 480. The judgment of the county court could not be superseded, so far as the possession of the office is concerned. *Cf.* Sand. & H. Dig., § 1044. As a supersedeas affects only the process issuable upon a judgment, but leaves the judgment in full force and effect, it can not affect a self-executing judgment of ouster or removal. 20 Enc. Pl. & Pr. 1244; 126 Cal. 183; Ell. App. Proc. § 392; 98 Mich. 218; 19 Neb. 444; 28 Neb. 103; 44 N. W. 90; 64 Ind. 493; 15 Wash. 346; 63 Ia. 715; 96 Mo. 56; 14 Ga. 162; 44 Ark. 178; 52 Ark. 340; 37 Ark. 318. Chancery will not use injunction as a means of trying title to public office, but will leave the claimant to his remedies at law. 2 High, Inj. § 1312; 52 Ala. 66; 9 Pa. Ch. 509; 7 Hill, 259; 100 Pa. St. 5; 57 Miss. 437; 22 Fla. 198; 47 Pa. St. 103; Mechem, Pub. Off. § 994; 10 Am. & Eng. Enc. Law, 818; 5 Abb. Pr. 171; 171 U. S. 366; 52 Ala. 66. Where one claimant has already been adjudged to be entitled to an office, chancery will not retry his title or entertain injunction proceedings to prevent his taking possession of the office. 52 Ala. 66; 28 Neb. 103; S. C. 44 N. W. 90. Chancery has no jurisdiction in such matters. 43 Ark. 62; 29 Ark. 174; 124 U. S. 210. The injunction issued in this case is a nullity. 43 Ark. 62; 28 Neb. 103; 78 Ill. 261; 57 Miss. 437. As the allegations of the bill show that appellee is without title or authority, the bill should have been dismissed for want of equity. 17 Enc. Pl. & Pr. 159; 52 Ala. 491; 62 Ala. 596; 44 Ga. 501; 30 Fla. 492; 35 Fla. 2.

Norton & Prewett, for appellee.

The constitution gives a right of appeal in such a case as this "*on the same terms and conditions* on which appeals may be granted to the circuit court in other cases." Const. (1874) art. 7, § 52. Appeals, by the statute, are grantable "as a matter of right from all final orders and judgments of the county court * * * *with or without supersedeas.*" Sand. & H. Dig., § 1264. Injunction will lie to protect the actual incumbent of an office in his possession, pending a contest as to who is entitled. 2 High, Inj. § 1315; 5 Am. & Eng. Dec. Eq. 527; S. C. 150 Ind. 203;

S. C. 49 N. E. 1047; 5 Am. & Eng. Dec. Eq. 549; 26 N. E. 717; 48 Pac. 741.

W. J. Driver and *L. P. Perry,* also for appellee.

The chancery court had jurisdiction. High, Inj. § 1315; 41 La. Ann. 333; 48 Pac. 741; 79 N. W. 668; Beach, Inj. § 1380; 6 So. 507; 8 So. 880; 49 N. E. 1047; 48 N. E. 1025; 13 Kan .41. Appellee is a *de facto* officer. 5 Wait's Actions & Defenses, 7; 15 Mass. 180; 56 Pa. 436; 25 Ohio, 588; 17 Kan. 468; 28 Kan. 286; 27 Minn. 292. The judgment of the county court may be superseded, so far as the possession of the office is concerned. 62 Conn. 478; 58 Pac. 813; 112 U. S. 204; 17 S. W. 433; 22 How. 174.

BATTLE, J. This action was instituted by Charles S. Driver against J. W. Rhodes, in the chancery court of Mississippi county, to enjoin and restrain the defendant from exercising the functions of the office of circuit clerk of that county. The plaintiff alleged in his complaint, substantially, as follows:

"The petitioner, C. S. Driver, was duly elected clerk of the circuit court of Mississippi county at the general election held on the 3d day of September, 1900; that he was duly commissioned, qualified, and is now acting as such clerk; that J. W. Rhodes contested his election before the county court of said county, and that court, on the 24th of October, 1900, rendered a judgment declaring that the said Rhodes was duly elected to said office, and that the petitioner was not elected; that petitioner appealed to the circuit court, and filed a supersedeas bond; that the circuit court found in favor of the petitioner, and Rhodes appealed to the supreme court, which latter court reversed the judgment of the circuit court, and remanded the cause for a new trial, and the case is still pending and undetermined in the circuit court; and that the petitioner is in possession of the records and paraphernalia, and is discharging the duties, of said office. That on the 18th day of July, 1901, the governor of the state of Arkansas issued to Rhodes his commission as circuit clerk of said county, and issued and caused to be published a proclamation revoking and annulling the commission theretofore issued to the petitioner; that Rhodes, after qualifying under said commission, demanded the possession of the office, which the petitioner refused to deliver; that he is occupying an office in the court house of said county, and is holding himself out to the public as circuit clerk; that he is receiving deeds and other

instruments of record, and is exercising the functions of a circuit clerk, to the irreparable loss and injury of the petitioner and the public, and that there is no adequate remedy at law. Prayer that Rhodes be restrained from acting as circuit clerk of Mississippi county, and from interfering with the exercise of the functions of said office by the petitioner until the final determination of the contest proceedings."

Rhodes demurred to the petition on two grounds: First, because it did not state facts sufficient to constitute a cause of action; second, because it did not state a cause of action within the jurisdiction of a court of chancery. The demurrer was overruled, the defendant refused to answer or plead further, and a final decree was rendered in accordance with the prayer of the bill. Rhodes appealed.

Was appellee entitled to the injunction? Section 24 of article 19 of the constitution of this state says: "The general assembly shall provide by law the mode of contesting elections in cases not specifically provided for in this constitution." In obedience to this section of the constitution, the legislature passed an act providing that the contest of the election of any supreme judge or commissioner of state lands shall be before the circuit court of Pulaski county; and that the contest of the election of any circuit judge, prosecuting attorney, chancellor, or judge of the county and probate court shall be before the circuit court of the county where the defendant or contestee resides, or the county where the contestant resides and the contestee may be found. The act further provides that all actions or proceedings for such contests shall be by complaint filed in the circuit court as in other actions at law, in which the contestant shall plainly and fully set forth the grounds upon which the contest is founded; and provides that, "if the contestant shall succeed in his action, he shall not only have a judgment of ouster, but for damages, not exceeding the salary and fees of the office durng the time he was excluded therefrom, with costs of suit; provided, either party shall have the right of appeal, with or without supersedeas, as in other cases at law." Sand. & H. Dig., §§ 2693, 2695, 2696.

This act also provides that, "when the election of any clerk of the circuit court, sheriff, coroner, county surveyor, county treasurer, county assessor, justice of the peace, constable, * * * shall be contested, it shall be before the county court, and the person contesting any such election shall give the opposite party notice

in writing ten days before the term of the court at which such election shall be contested, specifying the grounds on which he intends to rely, and if any objections be made to the qualifications of voters, the names of such voters, with the objections, shall be stated in the notice, and the parties shall be allowed process for witnesses." *Id.* § 2697.

In the latter class of contests, the contests before the county court, the act says:

"Sec. 2699. If the court shall be of the opinion that the person proclaimed elected is not duly elected, and the person contesting is elected, an order shall be entered to that effect, and a copy thereof shall forthwith be transmitted to the governor, who shall commission the person declared duly elected by such order."

"Sec. 2700. If the person proclaimed duly elected shall have been commissioned previous to making the order annulling his election, it shall be the duty of the governor to cause such person to be notified that his commission is revoked." Sand. & H. Dig.

In both classes of contests the courts derive their jurisdiction from the act, the constitution having expressly authorized the general assembly to provide by law the mode of contesting such elections, with the express limitation "that in all cases of contest for any county, township, or municipal office, an appeal shall lie, at the instance of the party aggrieved, from any inferior board, council or tribunal to the circuit court." (Sec. 24, art. 19, and sec. 52, art. 7.) In defining the jurisdiction of the two courts the act authorized the circuit court, in the event the contestant succeeded, to render a judgment of ouster, and for damages and costs, and in that event limited the county court to an order declaring the contestant elected, and, incidentally, to a judgment for costs. In the latter class, if the contestee refuses to yield possession of the office, the contestant is left to the remedy provided by the statutes for the possession of an office unlawfully held. Sandels & Hill's Digest, §§ 7364-7372.

In *State* v. *Johnson,* 17 Ark. 407, in which it appeared that the contestant of the election of Johnson for mayor, in a contest before a board of commissioners duly authorized by an ordinance of the city of Fort Smith to hear and determine such contests, was declared elected, the court held that a writ of *quo warranto* was the legal remedy for the possession of the office if the contestee held the same and refused to surrender it after the board

so decided. In that case the ordinance under which the election was contested, which this court held to be valid, in part provided:

"4. That upon the application of either party, seeking to contest such election, the said commissioners, or a majority of them, shall immediately set a day and place to hear such contest, * * * and shall, in every respect, constitute a corporation court, etc. * * *

"6. If the election of mayor shall be contested, and the order of said commissioners shall be that the person so contesting is duly elected, it shall be the duty of the recorder to forward a certified copy of such order, so filed with him, together with a certified copy of this ordinance, to the governor of the state of Arkansas, within three days after filing such order with him as aforesaid.

"7. The decision of said board of commissioners shall be conclusive, and the party so declared to be elected shall be entitled to such office, and upon being duly qualified, as prescribed by law, may enter upon the duties thereof."

The last two sections of the ordinance copied above and section 2699 of Sandels & Hill's Digest, under which appellant was declared elected circuit clerk, are substantially the same in legal effect. Neither authorizes the contestant, when declared elected, to forcibly eject the contestee, or the issuance of process upon the judgment thereunder to place him in possession.

Appellee is in possession of the office in controversy, is in possession of its records and paraphernalia, and is discharging the duties of the same. He holds under a claim that he was legally elected to fill the office. The contest of his election is still pending in the Mississippi circuit court. Can appellant be lawfully enjoined by a court of equity from interfering with the exercise of the functions of the office by appellee until the final determination of the contest of his election, or he is ousted by due process of law?

"No principle of the law of injunctions, and perhaps no doctrine of equity jurisprudence, is more definitely fixed or more clearly established than that courts of equity will not interfere by injunction to determine questions concerning the appointment or election of public officers or their title to office, such questions being of a purely legal nature, and cognizable only by courts of law. A court of equity will not permit itself to be made the forum of determining the disputed questions of title to public offices, or for the trial of contested elections, but will in all such cases leave the

claimant of the office to pursue the statutory remedy, if there be such, or the common law remedy by proceedings in the nature of a *quo warranto.*" 2 High, Injunctions (3d Ed.) § 1312.

But, as said in High on Injunctions, "while * * * courts of equity uniformly refuse to interfere by the exercise of their preventive jurisdiction to determine questions relating to the title to office, they frequently recognize and protect the possession of officers *de factor* by refusing to interfere with their possession in behalf of adverse claimants, or, if necessary, by protecting such possession against the interference of such claimants. * * * Upon the other hand, the actual incumbents of an office may be protected, pending a contest as to their title, from interference with their possession, and with the exercise of their functions. * * * And the granting of an injunction in such case in no manner determines the question of title involved, but merely goes to the protection of the present incumbents against the interference of claimants out of possession, and whose title is not yet established." 2 High, Injunctions (3d Ed.), § 1315, and cases cited.

We think that appellee was entitled to the injunction.

Decree affirmed.

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CLARKE v. TAYLOR.

Opinion delivered November 2, 1901.

RATE OF INTEREST—PLACE OF CONTRACT.—The place of payment controls the rate of interest, in the absence of contract.

Appeal from Garland Chancery Court.

LELAND LEATHERMAN, Chancellor.

STATEMENT BY THE COURT.

The plaintiff alleged that the American Building & Loan Association was incorporated as a mutual building and loan association in 1887 under and virtue of the laws of the state of Minnesota, having its office and principal place of business in the state of Minnesota. On the 26th of July, 1892, its corporate name was

changed to the American Savings & Loan Association, without changing, altering or affecting any of its rights, privileges or liabilities. That the association carried on the general business of a building and loan association from the date of its incorporation until the 14th of January, 1896. That the general nature of its business was, as expressed in article 2 of its articles of association, as follows: "To assist its members in saving and investing money and in buying and improving real estate and procuring money for other purposes by loaning or advancing, under the mutual building society plan, to such of them as may desire to anticipate the ultimate value of their shares, funds accumulated from the monthly contribution of its stockholders, and also such other funds as may from time to time come into its hands." That in a certain proceeding in the district court of Hennepin county, Minnesota, on the 14th of January, 1896, said association was declared insolvent, and Wm. D. Hale was appointed receiver thereof; said case was appealed to the supreme court of Minnesota, and the decision affirmed, and Hale appointed as permanent receiver, and duly qualified as such, and has since acted as such. That the laws of the state of Wisconsin required, as a condition precedent for a foreign building and loan association to do business therein, that a deposit with the state treasurer of $100,000 in securities be made, and to keep said deposit good. That said association complied with the said law, and deposited with the treasurer of the state of Wisconsin $100,000 in securities, payable to said association, among others the bond and mortgage of the defendants, Mary L. and D. T. Taylor. That, after the insolvency of the association had been declared by the district court of Hennepin county, Minnesota, a certain proceeding was had in the circuit court of Dane county, Wisconsin, in an action wherein L. V. Lewis was plaintiff and said association and the treasurer of the state of Wisconsin were defendants, in which M. C. Clarke, this plaintiff, was appointed receiver of the association in the state of Wisconsin, and received all the securities deposited by said association with the treasurer, among others, the note and mortgage of the defendant. That this action is brought by leave, and under the order and direction, of the circuit court of Dane county, Wisconsin. [Then follows a statement of the obligation sued upon and the mortgage securing the same, which it is not deemed necessary to abstract. It is an ordinary form of building and loan bond and mortgage of this association, which has been before this court in the case of *Roberts* v.

American B. & L. Association, 62 Ark. 572, and in the recent case of *Hale* v. *Phillips,* 68 Ark. 382.] The facts were that on the 25th of June, 1889, Mary L. Taylor made application for membership in the association, and subscribed for and became the owner of 60 shares of its capital stock of the par value of $6,000, and on the 2d of July, 1889, the association issued and delivered to her a certificate for said 60 shares of stock, which said certificate was issued to and accepted by the said defendant upon the terms and conditions therein set forth and subject to the provisions of the by-laws of the association. That on the 28th of July, 1889, the said Mary L. Taylor made application to the association for a loan or advancement of $3,000 by way of anticipation of the value of said shares of stock at their maturity, and, in accordance with the laws of Minnesota and the by-laws of the said association, bid the sum of $50 per share, or $3,000, as and for a premium for the privilege of obtaining such advancement, which said application and bid were duly accepted and approved by the board of directors, and the amount applied for, the sum of $3,000, was duly paid to the defendant, Mary L. Taylor; and, in order to secure the due performance of the bond given by the said defendant, a mortgage was executed upon certain property situated in Hot Springs, fully described in the complaint, which mortgage was duly recorded. That the said defendants have paid as dues upon the said stock the sum of $1,764, the same being dues for the months of August, 1889, to August, 1893, both inclusive, and have paid as interest the sum of $705, and that the legal rate of interest of the state of Minnesota was 7 per cent. That the insolvency of the association cancelled and rescinded the contract, and caused the principal sum of said loan of $3,000 to become presently due and payable with 7 per cent. interest thereon from the date of its advancement to the defendants, less the amount of interest paid thereon with interest upon the said interest payments. And judgment was prayed accordingly. To the complaint were attached copies of the bond and mortgage.

Wm. D. Hale, receiver of the association, appointed by the district court of Hennepin county, asked to become a party plaintiff, stating that he was receiver of said association for all of its assets except such as were within the state of Wisconsin, of which plaintiff, M. C. Clarke, was receiver. That there had been litigation between him and receiver Clarke as to which should receive and control the assets of said association which were deposited with

the state treasurer of the state of Wisconsin; that said litigation has resulted so far in favor of receiver Clarke having the control and administration of the assets of the association which were deposited with the said state treasurer. That he and receiver Clarke had entered into an agreement, which had been duly approved by the respective courts appointing them, under which agreement receiver Clarke was entitled to recover upon the bonds and mortgages which were turned over to him by virtue of his appointment; and that he joined in this suit for the purpose of having all parties having any possible or contingent interest in the litigation being before the court, and not for the purpose of in any way disputing or contesting said agreement or the right of the receiver Clarke to recover herein. And further stated that, should there be a recovery herein, the proceeds of recovery will be received by receiver Clarke under and subject to the agreement and ultimately to be disposed of as directed by the courts appointing the receivers. For the sole purpose of having all parties properly before the court, he entered his appearance in furtherance of the rights set forth by receiver Clarke.

The petition was granted, and receiver Hale made a party plaintiff.

The defendants deny that receiver Clarke is the lawful holder and owner of the bond and mortgage sued on, but admit the allegations of the complaint as to the manner in which he came into possession thereof. They allege that the association was organized and incorporated as a mutual building and loan association, and as such carried on a general business of a building and loan association for the purpose of assisting its members in saving and investing money and in buying and improving real estate and procuring money for other purposes by loaning or advancing money upon the mutual building society plan to such of its members as desired to anticipate the ultimate value of their shares from funds accumulated by the monthy contribution of its stockholders and from such other funds as might from time to time come into its hands. That the association had no authority of law, and it was contrary to its by-laws and constitution, and the purpose for which it was created, to place a deposit with the treasurer of the state of Wisconsin of $100,000 of bonds and mortgages, and especially the bond and mortgage of defendants, in trust for the benefit and security against all loss of persons who might become members of said association in the state of Wisconsin. That, the association

being mutual, all of its members should share their *pro rata* of the losses and profits thereof, and the transfer and deposit of the bonds and mortgages belonging to said association, and especially of the defendants, with the treasurer of Wisconsin for the benefit of the Wisconsin stockholders was a fraud on the rights of the defendants and all other stockholders of the association residing out of the state of Wisconsin, and such deposit was contrary to the rights and equities of other members of the association, and in violation of the purpose of its organization. That, if the members of the association in the state of Wisconsin are permitted to receive the proceeds arising from said securities, they will be paid in full for all sums paid by them to the association, and these defendants and other creditors of the association will be deprived of their *pro rata* share and interest therein, and that the defendants have an interest in all the assets of the association, to the extent of their *pro rata* share thereof of their $6,000 of stock, on which they have paid $1,764. That the efforts of the plaintiff to require the defendants to pay upon securities, not for the benefit of all the creditors of the association, but for the Wisconsin stockholders is a fraud on their right and void as to them; and that the plaintiff obtained no title or interest therein by virtue of said transfer to him; and that the defendants were not parties to the suit of Lewis against the association in the circuit court of Dane county, Wis., and are not bound by any orders or decrees of said court. Then follows a further allegation, alleging usury, but that defense was decided against the defendants in the lower court, and they saved no exceptions to the ruling of the chancellor, and have not sued out a cross-appeal, and have no exceptions upon which to base a cross-appeal, and moreover, took no evidence to sustain said plea.

The chancellor found the defendant should be charged with the amount advanced her, $3,000, with interest at the rate of 6 per cent., and should be credited with all payments of interest, and also for all dues paid on collateral and premium stock, less the amount of dues paid in each month appropriated for expenses, and that the stock be cancelled.

Hill & Brizzolara, for appellant.

Erdall & Swansen, of Wisconsin, and *Greaves & Martin,* of counsel.

There was no usury in the contract. 62 Ark. 572. The Minnesota law should govern as to interest.

HUGHES, J., (after stating the facts). The questions involved in this case, except the question as to the rate of interest, seem to have been determined in the recent case of *Hale* v. *Phillips,* 68 Ark. 382. As to the defenses of *ultra vires* and usury pleaded in this case, the decree was adverse to the defendant, and there were no exceptions and no cross-appeal in the case. These questions are therefore not presented here.

As to the rate of interest, the court is of the opinion that it is seven per cent., instead of six per cent., as found by the chancellor, because the contract is a Minnesota contract, made and to be performed in Minnesota. The place of payment controls the rate of interest. *Bank of Harrison* v. *Gibson,* 60 Ark. 269. The rate of interest, according to the law of Minnesota, is seven per cent, Besides, in this case it seems equitable that the rate of interest should be uniform between the stockholders; as there were stockholders in thirty-five different states, mortgages in twenty-nine states, and real estate in nineteen states. The rates of interest are not the same in all the states, and that the rate may be equal as to all, it should be uniform, and ought therefore to be the rate of the state where the payments are to be made.

Let the interest be calculated in accordance herewith, and the mortgage foreclosed.

Reversed and remanded.

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JOHNSON *v.* FOSTER.

Opinion delivered November 2, 1901.

JURISDICTION—NONRESIDENT DEFENDANT—GARNISHMENT.—By publication of a warning order against a nonresident defendant and service of a writ of garnishment upon a resident who was indebted to defendant, the court acquired jurisdiction to ascertain the amount due from defendant to plaintiff, and to adjudge that the money due from the garnishee to defendant should be applied toward the satisfaction of plaintiff's claim.

Appeal from Boone Circuit Court.

E. G. MITCHELL, Judge,

STATEMENT BY THE COURT.

Appellants filed in the Boone circuit court their complaint against appellee James A. Foster, defendant below, to recover $260

for breach of contract, and at the same time filed affidavit, bond, and interrogatories for garnishment against appellee C. L. Scott, and caused a writ of garnishment to be issued and personally served upon him. The defendant, Foster, was duly summoned by warning order, and an attorney was appointed to represent him.

At the January term, 1900, the trial court of its own motion, and over the objection of appellants, dismissed appellants' complaint and cause of action, both as to the defendant below, appellee Foster, and as to the garnishee, appellee Scott, for want of jurisdiction.

G. J. Crump and *J. W. Story,* for appellants.

The record shows the presence of every required jurisdictional fact. 66 Ark. 582; 4 Ark. 198; 48 S. W. 1060; 19 Ark. 334; 13 S. W. 978; 45 S. W. 770; 175 U. S. 396; Waples, Att. & Garn. 594, 595. Garnishment is in the nature of a proceeding *in rem.* 4 Ark. 198; 19 Ark. 334; 66 Ark. 582; Drake, Att. § 452.

WOOD, J., (after stating the facts). The court erred. Appellants had met every requirement of jurisdiction under the act of April 19, 1895. Service of the writ creates a lien in favor of the plaintiff upon the money due from the garnishee to the defendant. *Little Rock Traction & Electric Co.* v. *Wilson,* 66 Ark. 586. The proceeding is analogous to that of the attachment of property of a nonresident defendant. Here the *res,* so to speak, is the money due from the garnishee to the defendant. Service of the writ seizes that in the hands of the garnishee, and holds it subject to the payment of the claim of the plaintiff against the defendant, to the extent only that it may go, and, after constructive service upon the defendant and personal service of the writ, the court may proceed to ascertain the amount due from the defendant to the plaintiff and to adjudge that the money due from the garnishee to the defendant shall go *pro tanto,* if necessary, in satisfaction of the plaintiff's claim. *Chicago, R. I. & P. R. Co.* v. *Sturm,* 174 U. S. 710, and cases cited; *King* v. *Cross,* 175 U. S. 396; *Berry* v. *Davis,* 13 S. W. 978; *Spalding* v. *Wayne,* 45 S. W. 770. See also *Kansas City, P. & G. R. Co.* v. *Parker, ante,* p. 401.

Of course, personal judgment can not be rendered against the defendant, and the bond fully protects him.

Reversed, with directions to reinstate the cause.

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ARKANSAS & LOUISIANA RAILWAY COMPANY v. SANDERS.

Opinion delivered November 9, 1901.

1. STOCK KILLING—OBSTRUCTION ON TRACK.—An instruction, in an action for a horse killed by a train, "that, if there was any hindrance or impediment in the way of the horse getting off or across the track at the point from whence he was standing, and the persons in charge of the train might have seen it by ordinary diligence, and they did not stop the train to avoid the injury," the jury should find for the plaintiff, is erroneous, as implying that a railroad company is under obligation to keep its right of way cleared of obstacles, so that animals can pass over and across its track freely. (Page 622.)

2. SAME—DUTY TO STOP TRAIN.—An instruction that if the trainmen saw that the horse in his fright would attempt to cross the track, and failed to stop the train to prevent the injury, if it could be done, the railroad company is liable, is erroneous, as it was not necessary to stop the train if the trainmen reasonably believed that the horse would leave the track in time to avoid injury. (Page 622.)

Appeal from Howard Circuit Court.

WILL P. FEAZEL, Judge.

Dodge & Johnson and *W. C. Rodgers,* for appellant.

The court erred in giving the second instruction asked by plaintiff. 48 Ark. 366. It was also error for the court to declare it to be the duty of all persons running trains to keep a constant lookout. 62 Ark. 182; 65 Ark. 619. The court should have given the third instruction prayed by appellant, to the effect that persons in charge of a train are not required to keep a lookout "for stock on the right of way or elsewhere, not on the track." 48 Ark. 366; 69 Minn. 90; 6 S. Dak. 100; 52 Ark. 162; 81 Ill. App. 616; 50 S. W. 1036.

D. B. Sain, for appellee.

There being evidence to sustain the verdict, the judgment will not be reversed merely upon the facts. 51 Ark. 467; 46 Ark. 142; 56 Ark. 314; 47 Ark. 467; 49 Ark. 122. The *prima facie* case of negligence, under the statute, was not overcome. 56 S. W. 270. The fourth instruction given for appellee was correct. 65 Ark. 624.

BUNN, C. J. This is a suit, originally before W. P. Craig, one of the justices of the peace of Howard county, by R. J. Sanders, the appellee, against the appellant company for $60 damages for

wounding and crippling a horse so as to necessitate its killing. Trial and judgment for the sum claimed by plaintiff, from which judgment the defendant appealed to the circuit court of said county.

In the circuit court on the 15th day of February, 1900, the cause was tried by a jury under the instructions of the court, and the verdict was for the same amount as in the justice's court, in favor of the plaintiff, and the defendant appealed to this court.

It appears from the evidence that on November 4, 1899, the plaintiff's horse was struck by defendant's train at point on the track about 166 yards southeast of where the railroad cuts through a small hill or mound, about twenty feet deep. There was nothing to obstruct the view of the engineer and fireman after turning the curve to where the horse was struck, a distance of 156 yards. From the horse's track, he was standing on the railroad right of way, on the north side of the railroad and about thirty feet from the track, and twenty feet from a wire and plank fence to the northward, and thence the horse seemed to have gone "angling," as the witness expressed it, towards the railroad, and reached the track about seventy-five feet from its starting point, and was struck by the engine. It seemed to be running before it reached the track, and in the direction the train was running. This is the testimony of the plaintiff, who was not present, and did not see the occurrence. He further testified that he was about a quarter of a mile away, and that the defendant did not ring a bell or sound a whistle on approaching the horse; that it was worth $60 to him; that he had assessed it for taxation at $20, and that it was over twelve years old. The evidence on the part of the plaintiff also showed that there was no obstruction on the north side of the track—the left side as the train was going—to prevent the trainmen from seeing the horse standing where it was said and appeared to have been when the train came through the cut. None of the plaintiff's witnesses saw the accident, and all testified from an examination of the locality.

On the part of defendant, the evidence shows that the train was made up of the engine and tender and four freight and two passenger cars, and carried passengers, freight and express, and was running on schedule time, at the rate of twenty-five miles per hour, and could not have been stopped within 250 yards, at that place in the road, although on a perfectly level track it could have been stopped within 150 yards. The fireman testified as fol-

lows: "We left Nashville that afternoon on time, and were running about twenty-five miles an hour, and when about a mile from Nashville, as we rounded a curve where the road goes round a small hill, I saw a horse to the left about thirty-five or forty feet from the track. He began running in an angling direction towards the track just as I saw him. I was and had been keeping a constant lookout for persons and property on the track, and saw this horse as soon as he was visible from my position on the engine, which was on the left side of the cab. The road makes a curve around this elevation, which is about twenty feet high, and it obstructs the view on the left side. Just as soon as I saw the horse I signalled the engineer to hold up, stating, 'Here is a horse over here.' He at once applied the air, shut off the steam, and proceeded to bring the train to a stop. But before the train stopped, the horse attempted to cross the track right in front of the engine, and was struck, three of his legs being broken. He was nearly half way across when hit, and the force of the train carried him two or three rail lengths, and dumped him over on the side from which he attempted to cross. It was about 100 yards from where the horse was first seen to the place of collision. He did not get upon the track until the train was right on him. We had very little time in which to do anything. We did not ring the bell or sound the whistle. My experience shows that it is more dangerous to frighten stock which is not upon the track by these methods than to omit such signals. The horse was on the right of way when I saw him. There is a plank and wire fence on north side of track about fifty feet distant."

The engineer's testimony is to the same effect, and further that on that part of the track he could stop such a train, composed and loaded as that one was, in about 250 yards, but that on a perfectly level track he could stop it in about 150 yards. He was on the opposite side of the cab, and acted mainly on the information given him by the fireman, as he was on the side next the horse, and could see the better, and the engineer did not see the horse because he could not from his station. He corroborates the fireman in other particulars.

Except as to the distance between the point where the train emerged from the cut and the trainmen could see down the straight track to where the horse was struck, there is no material difference in the testimony of witnesses. Where the horse was struck, the speed of the train had been reduced about half. The value of

the horse was shown to be $35 by the evidence of W. L. Wiggins, a farmer living in the vicinity, who was one of the appraisers.

The court, at the instance of the plaintiff, gave the second instruction as follows, to-wit:

"The court instructs the jury that if there was any hindrance or impediment in the way of the horse getting off or across the track at the point from whence he was standing, and the persons in charge of the train might have seen it by ordinary diligence, and they did not stop the train to avoid the injury, or that the horse in his fright would attempt to cross the tracks, and if they failed to stop the train to prevent the injury, if it could have been done, you will find for the plaintiff." Whatever error there is in this instruction, it was not cured by any other given in the case. There was no hindrance or impediment to free passage over the railroad track by the horse, and, if there had been evidence of such, the railroad company is under no obligation to keep its right of way cleared of obstacles, so that animals can pass over and across its track freely. Furthermore, it is not the absolute duty of persons running a train to stop it in order to avoid an injury, even if it can be done. *L. R. & F. S. Ry. Co.* v. *Trotter,* 37 Ark. 593. All the evidence on the subject adduced in the case is to the effect that the train could not have been stopped after the horse came in view of the fireman, who was keeping the watch on that side, and before the horse was struck.

Besides, this instruction was confusing to the jury, and for reasons should not have been given, and was prejudicial, especially in a case so close as to the facts.

The fourth instruction asked by plaintiff, and given by the court, in terms, requires all the employees of the company to keep the lookout required by statute, and makes the company liable for the neglect of any of them to do so. That is not the law, but this error was cured by the giving of the second instruction asked by the defendant, the latter being in the nature of an explanation of the former, rather than in absolute contradiction of it.

The third instruction asked by the defendant† might have been given, with the modification given by this court, in construing the

† The third instruction asked by defendant is as follows: "No. 3. The statute of this state requiring the persons in charge of a train to keep a constant lookout for persons and property upon the track does not require any lookout to be kept for stock on the right of way or elsewhere not on the track."

lookout statute, to the effect that in stock cases objects on the right of way which naturally fall within the vision of the keeper of the lookout are to be regarded as the subjects of the lookout.* But this is as far as this court has gone in widening the scope of the required lookout.

Mainly for the error in giving the second instruction asked by the plaintiff, and above referred to, the judgment is reversed, and the cause remanded for a new trial.

DESHAY v. STATE.

Opinion delivered November 9, 1901.

CRIMINAL LAW—WRIT OF ERROR—LIMITATION.—Under act of March 6, 1899, providing that an appeal or writ or error shall not be granted except within one year next after the rendition of the judgment, order or decree sought to be reviewed, etc., a writ of error sued out in a criminal case after the year had expired will be quashed on motion.

Appeal from Jackson Circuit Court.

FREDERICK D. FULKERSON, Judge.

Gustave Jones and *M. M. Stuckey*, for appellant.

G. W. Murphy, Attorney General, for appellee.

BATTLE, J. The final judgment in this cause was rendered on the 17th day of January, 1900, and a writ of error was issued on the 1st day of April, 1901. The state, by her attorney general, moves this court to quash the writ because it was issued more than one year after the rendition of the final judgment.

Section 859 of the "Code of Practice in Civil Cases" in this State provides: "The mode of bringing the judgment or final order of an inferior court to the supreme court for a reversal or modification shall be by appeal, which shall be granted as a matter or right." The "Code of Practice in Criminal Cases" provides that a final judgment may be brought by appeal before the supreme court for review in the mode prescribed by it. But this court held, in *Harrison* v. *Tradee*, 27 Ark. 59, that the legislature could not,

* *St. Louis S. W. Ry. Co.* v. *Russell*, 64 Ark. 236.

and the code did not, abolish writs of error, because the constitution of 1868 ordained that this court should have the power to issue such writs, and that "final judgments in the inferior courts may be brought by writ of error, or by appeal, into the supreme court in such manner as may be prescribed by law." And it was further held in that case that so much of chapter 134 of Gould's Digest as has not been repealed by subsequent legislation was still in force, the codes not having provided for the issuance of writs of error.

Sections 1, 2 and 3 of that chapter are as follows:

"Sec. 1. Writs of error upon *any final judgment* or decision of any circuit court shall issue of course in all cases out of the supreme court in vacation as well as in term time, subject to the regulations prescribed by law.

"Sec. 2. All writs of error upon *any judgment* or decision of any of the circuit courts of this state shall be brought within three years after the rendition of such judgment or making of such decision, and not after.

"Sec. 3. If any person who may be entitled to a writ of error shall be within the age of twenty-one years, a married woman, of unsound mind, imprisoned, or absent from the United States, such person may sue out such writ of error at any time within three years after such disability is removed."

These sections are a part of the Revised Statutes of the state of Arkansas. The same statutes regulated the practice in the supreme court in cases in which the final judgment in criminal causes were taken to that court by writs of error, to the extent such cases required a practice which was not provided for by chapter 52 of Gould's Digest. But the time within which the writ should be issued was not prescribed by any statute except as we have stated. The statute providing that all writs of error upon any judgment should be issued within three years after the rendition of such judgment, and not after, was sufficiently broad to include all judgments and writs, and was not limited or confined by the Revised Statutes to any class of cases, civil or criminal. There was no reason for prescribing a period of limitation in the former class and none in the latter; and, there being no reason for such discrimination, we conclude none was intended.

By an act approved March 21, 1871, the legislature authorized the governor of this state to appoint one suitable person to revise, rearrange and digest the statute laws of this state, both civil and criminal, which were in force, and authorized such person, when

appointed, to omit from his digest redundant enactments, and to so arrange and digest the statutes as to present but one law upon any subject, and in so doing to reject superfluous words, and to condense "into as concise and comprehensive a form as may be consistent with a full and clear expression of the will of the legislature any circuitous, tautological or ambiguous phraseology."

Among the statutes to be digested were sections 1, 2, and 3 of chapter 134 of Gould's Digest, copied above, and sections 859 and 867 of the Code of Practice in Civil Cases, which are as follows:

"Sec. 859. The mode of bringing the judgment or final order of an inferior court to the supreme court for a reversal or modification shall be by an appeal, which shall be granted as a matter of right, either by the court rendering the judgment, on motion made during the term at which it is rendered, or by the clerk of the supreme court in term time or in vacation, on application of either party.

"Section 867. An appeal shall not be granted, except within three years next after the rendition of the judgment or order, unless the party applying therefor was an infant, married woman, or of unsound mind at the time of its rendition, in which cases an appeal may be granted to such parties, or their legal representatives, within one year after the removal of their disabilities, or death, whichever may first happen."

The digester was appointed, and he entered upon the discharge of his duties, as defined by the act of March 21, 1871. He digested sections 1, 2 and 3 of chapter 134 of Gould's Digest and sections 859 and 867 of the code as follows:

"Section 1056. The mode of bringing the judgment or final order of an inferior court to the supreme court for a reversal or modification shall be by appeal or writ of error.

"Section 1057. The appeal shall be granted as a matter of right, either by the court rendering the judgment or order, on motion made during the term at which it is rendered, or by the clerk of the supreme court in term time or in vacation, on application of either party."

"Section 1066. An appeal or writ of error shall not be granted, except within three years next after the rendition of the judgment or order, unless the party applying therefor was an infant, married woman, or of unsound mind at the time of its

rendition, in which cases an appeal or writ of error may be granted to such parties, or their legal representatives, within one year after the removal of their disabilities, or death, whichever may first happen." Gantt's Digest.

These sections, 1056, 1057 and 1066, have been incorporated in all subsequent digests of the laws of this state, and are, respectively, sections 1017, 1018 and 1027 of Sandels & Hill's Digest. The last section, which fixed the time within which appeals or writs of error shall be granted, was amended by an act entitled "An act to regulate the time in which appeals and writs of error may be taken to the supreme court," approved March 16, 1899. It amended that section by saying: "That section 1027 of Sandels & Hill's Digest be amended so as to read as follows: An appeal or writ of error shall not be granted except within one year next after the rendition of the judgment, order or decree sought to be reviewed," etc.

We have seen that section 2 of chapter 134 of Gould's Digest fixed the time in which writs of error can be granted in civil and criminal cases. It and section 867 of the code were consolidated by the digester under the act of March 21, 1871, and form section 1027 of Sandels & Hill's Digest, which, by force of the consolidation, prescribes the time within which writs of error can be sued out in criminal cases, and that time, under the section as amended, is one year next after the rendition of the judgment sought to be reviewed.

In the case before us the writ was sued out after the one year had expired, and should be quashed; and it is so ordered.

SAXON v. FOSTER.

Opinion delivered November 16, 1901.

JURY—VERDICT—RECONSIDERATION.—It is error to refuse to a jury permission to retire and reconsider their verdict where, on hearing it read by the clerk, they state to the court that it is not their verdict.

Appeal from Union Circuit Court.

CHARLES W. SMITH, Judge.

Thornton & Thornton, for appellants.

Until a verdict is received and recorded, it is without force or validity. Thompson, Trials, § 2635; Proffatt, Jury Trials, § 449; 33 Kan. 145; 31 Ark. 198. The verdict must be returned as the law directs. Sand. & H. Dig., § 5828. If a juror dissent, there is no verdict. 31 Ark. 199; 110 Pa. St. 387. And the entire jury should be sent back for deliberation. 63 Ala. 97; 31 Ga. 641; 41 Kan. 345; 3 Johns. (N. Y.) 255; 2 Wend. (N. Y.) 352; 20 Tex. 320; 52 N. Y. 437; 52 Pac. Rep. 391; 24 Hun (N. Y.), 181; 7 Johns. (N. Y.) 32; 6 Johns. 68; 2 Ala. 744; 70 N. W. Rep. 332. The jury have full power over the verdict, and may amend it or recede from it at any time before it is recorded, and they are discharged from the case. 49 Ark. 195; 30 Ark. 511.

BUNN, C. J. This is suit in the Union circuit court by the appellee against appellant for the value of timber cut and sold off of her land by him. Judgment for $93.29 against defendant, and he appeals to this court.

The only question for our consideration in this case is as to the verdict of the jury and the judgment thereon. The suit was for $885, but the proof as to the quantity and value of the timber sold by defendant showed that he had sold in all $278.65 worth of timber. It also showed that defendant had paid out to redeem the land for plaintiff the sum of $284, and that plaintiff had repaid him $109 of this latter sum. Defendant claimed $35 for his services, which plaintiff refused to pay, and alleged she did not owe, and that, if she did owe it, it was an offset to her account, but was barred by the statute of limitations of three years. On the other hand, defendant claimed that he had tendered plaintiff the sum of $103.65 less the set off of $35, that is, the sum of $68.65, and this tender was admitted to have been made and refused, the $35 being the matter in dispute. If this $35 was really due the defendant, and was not barred by the statute of limitations, the tender was sufficient to settle the just claim of plaintiff exactly, and as the tender seems to have been made before suit was brought, this would leave the cost to be paid by plaintiff. Otherwise, the cost would follow the judgment, which in such case would be against the defendant.

Such, substantially, is the case as made out by the evidence pro and con. The court instructed the jury by eight instructions, as asked by plaintiff, five as asked by defendant, and modified one as asked by defendant. Among the instructions given the court gave the following on his own motion: "The jury must find for the plaintiff in the sum of $93.29, less any amount they may find that plaintiff was due defendant."

The jury, after being out some time, returned into court and informed the court that they had agreed on a verdict, and handed to the clerk a paper upon which was written their verdict, which the latter read as follows: "We, the jury, find for the plaintiff $93.29, the amount tendered by the defendant. [Signed] P. F. Mathews, Foreman."

"It is therefore considered, ordered and adjudged by the court that the plaintiff, Packard E. Foster, have and recover of and from the defendant, E. F. Saxon, the sum of ninety-three and twenty-nine one-hundredths dollars, together with all costs in and about this cause expended." "To which the defendant excepts."

The defendant filed his motion for new trial, as follows, to-wit: "(1) That the verdict returned into this court is not the verdict of the jury. (2) That the court erred in refusing to let the jury retire for the purpose of amending their verdict, when they requested to be allowed to do so before the verdict was recorded or the jury discharged. (3) That the court erred in refusing to let the jury return to further consider of their verdict, when informed by them, before the verdict was recorded or they discharged, that the paper held by the clerk, and claimed to be the verdict in this cause, was not their verdict, and that they desired to return to their room for the purpose of rendering a different verdict, as is shown by the affidavit of said jurors hereto attached, and made part of this motion. (4) The court erred in refusing instruction No. 1, asked by defendant," etc.

These statements of this controversy were the occasion of two bills of exceptions, as touching the subject, one certified by the judge and the other by bystanders. But they are not materially different for the purposes of determining the question involved.

The record of the bill of exceptions, as signed by the judge, recites: "After the same (the verdict) was read by the foreman and by him handed to the clerk, the court directed the clerk, on motion of the plaintiff, to enter a judgment against the defendant

for $93.29 and the costs. Whereupon one of the jurors said: 'That is not our verdict. It is our intention that Mr. Saxon should pay the costs,' and asked the court that the papers be handed back to them, and that they be permitted to retire and further consider of their verdict. This request the court said it was willing to grant; but on account of objections by Col. H. P. Smead, attorney for the plaintiff, it was denied. The judge adds this, as we take it: "I am not certain whether the jury had then been told to go. The court refused permission to the jury to return another verdict. This was all before the verdict was recorded."

The rule is that the jury should, under such circumstances, be permitted to return to their room and reconsider their verdict. Sand. & H. Dig., § 5828. In fact, this is a privilege accorded all deliberate bodies, so far as we can find. There may be something in this instance which induced the learned judge to withhold his permission, on his attention being called more particularly to the subject by objections on the part of plaintiff's counsel. It may be that it appeared to him that the jury could not have changed the verdict without violating some rule of practice. Of this we cannot know. If any such difficulty was in the way, however, it would have been best to first let the jury reconsider and revise their verdict, and the question of their power to do so could then be raised, on the return of the revised verdict. At all events, we are of the opinion that the court should have granted the request of the jury, and for failing to do so the judgment is reversed, and the cause remanded for a new trial.

GOODWIN v. PARNELL.

Opinion delivered November 16, 1901.

ADVANCEMENT—PRESUMPTION.—A voluntary conveyance of land by a father to his son will, in the absence of evidence to the contrary, be presumed to be an advancement.

Appeal from Union Circuit Court.

CHARLES W. SMITH, Judge.

Smead & Powell, for appellant.

Money expended in the maintenance and education of a child is not deemed an advancement unless the same clearly appears to have been the parent's intention. 104 N. Y. 74; 80 Am. Dec. 555; 12 L. R. A. 566; 1 Am. & Eng. Enc. Law (2d Ed.), 760; 41 U. S. 769. Declarations of the purchaser before or at the time of the purchase may be shown as throwing light on the question of intent of the grantor. 169 U. S. 397; 1 Perry, Trusts, § 147; 2 Pom. Eq. Jur. § 1041; 45 Ark. 451; 40 Ark. 62; 12 Ark. 782; 1 Greenleaf, Ev. § 108. Declarations reasonably connected with the execution only considered. 71 Ga. 544; 63 Ga. 705; 70 Am. Dec. 85; 76 N. Car. 445. An existing indebtedness from parent to child raises a presumption of an intention to pay, rather than an advancement. 66 N. Car. 345; 6 Rand. 176; 18 Am. Dec. 710.

Thornton & Thornton, for appellee.

Surrounding circumstances, as a part of *res gestae,* may always be shown. They must be contemporaneous with the main fact, and illustrate its character. 1 Greenleaf, Ev. § 108.

BATTLE, J. Pearl Parnell instituted an action against Leon Goodwin, and alleged in her complaint therein, substantially, as follows: That she and the defendant were the only children of G. P. Goodwin; that G. P. Goodwin died intestate on or about the 25th day of July, 1895, and left them his only heirs him surviving; that at the time of his death he was seized in fee simple of certain lands, amounting to 800 acres, more or less; that G. P. Goodwin, in his life time, by deed of gift, conveyed to the defendant and to Knox Andrews, his step-son, each, an undivided half interest in certain other 480 acres, described in her complaint; that the undivided half interest was conveyed to the defendant as an advancement, which should be accounted for in the division of his estate between his children after his death; and asked that the lands of the estate of their father be divided between them, and that the real estate conveyed to the defendant be charged against him in the division, and that land of equal value be allotted to her, and that the remainder be equally divided between them.

"Defendant answered, admitting that he and the plaintiff were the only children and heirs at law of G. P. Goodwin, and that G. P. Goodwin, during his lifetime, had conveyed to him and Knox Andrews, a step-son of deceased, each, a one-half undivided interest in the land described in plaintiff's bill, and that defendant was then the owner of said one-half undivided interest. He

denied that said transfer was intended as an advancement to him, to be accounted for in the final distribution of the estate, but stated that said conveyance was based upon a valuable consideration."

The evidence adduced at the hearing of the cause clearly proved that the land conveyed to the defendant was a gift, but was conflicting as to the intention of the grantor to convey it as an advancement.

The court, having heard the evidence, found that G. P. Goodwin died intestate, and left plaintiff and defendant his sole heirs; that at the time of his death he was the owner in fee simple of certain lands described in the decree; that prior to his death he gave to the defendant an undivided half interest in certain other lands, also described in the decree, as an advancement; and that the lands so given were of the value of $1.25 per acre; and ordered and decreed "that the prayer of the petitioner be granted, as to the partition and division of the estate of G. P. Goodwin, deceased, between plaintiff and defendant, and that in the partition and division of the estate the defendant be required to place said undivided one-half interest, given him by his father, into said estate, or, in lieu thereof, at his election, to be charged with the same at the rate of $1.25 per acre," and appointed commissioners to carry the decree into effect; and the defendant appealed.

The conveyance of land by G. P. Goodwin to his son, Leon Goodwin, being voluntary, in the absence of evidence to the contrary, is presumed to be an advancement, the presumption being that a parent intends "that all his children shall equally share in his estate, not only in what remains at his death, but equally in all that came from him." The doctrine of advancement is invoked to effectuate this intention. 2 Woerner, Administration (2d Ed.), §§ 552, 555, and cases cited.

The preponderance of the evidence adduced at the hearing of this cause sustains the presumption as to the intention of Goodwin as to the advancement.

Decree affirmed.

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McGEE v. SMITHERMAN.

Opinion delivered November 16, 1901.

1. INSTRUCTION—LIMIT OF DAMAGES.—The failure of an instruction to limit the amount of recovery to the sum claimed was not prejudicial if the amount of damages allowed by the jury did not exceed that claimed in the complaint. (Page 637.)

2. SAME—DAMAGES GOVERNED BY EVIDENCE.—An instruction that if the jury find for plaintiff they will allow him a fair compensation for the loss sustained is not objectionable for failure to state that the jury were to be governed by the evidence. (Page 637.)

3. SAME—GENERAL AND SPECIFIC.—Appellant cannot complain that an instruction was too general if he did not ask for one more specific. (Page 637.)

4. SAME—ASSUMING UNDISPUTED FACTS.—An instruction, in a personal damage suit, that, if the jury find for plaintiff, they "will allow" him damages for his loss of time, for his loss of capacity to work, for the disfigurement of his person, and for the pain and suffering resulting from the injury, is not prejudicial if the undisputed evidence shows that the injuries mentioned were sustained. (Page 637.)

Appeal from Pulaski Circuit Court.

JOSEPH W. MARTIN, Judge.

J. J. Williams and *J. A. Watkins,* for appellants.

No one can recover for an injury which he brought upon himself. 41 Ark. 542; 45 Ark. 318; 46 Ark. 388; 36 Ark. 371; 36 Ark. 41; 62 Ark. 245; 56 Ark. 271. The engineer and appellee were fellow servants. The appellee cannot recover if his injuries were caused by the engineer. 39 Ark. 21; 42 Ark. 417; 61 Ark. 302.

Marshall & Coffman, for appellee.

J. J. Williams and *J. A. Watkins,* in reply, for appellants.

The instruction as to measure of damage is erroneous in that it does not limit the amount of recovery. 61 Mo. 19; 57 Mo. App. 335; 20 Ill. 449; 4 Col. 353; 10 Col. 535; 19 Mo. App. 107; 39 Ill. 164; 60 Ark. 481. If the instruction is erroneous,

the case must be reversed. 99 Mo. 347; 39 Hun, 107; 57 Iowa, 23; 64 Cal. 272; 10 Pa. St. 145. The language of the instruction clearly imports a requirement by the court, which is error. 79 Ill. 594. The instruction gives the jury a roving commission to assess damages. 8 Am. & Eng. Enc. Law, 651; 177 Pa. St. 1; 24 S. W. Rep. 299; 15 Ind. App. 69. Loss of capacity must be considered. 87 Texas, 539; 8 Am. & Eng. Enc. Law, 651; 98 Ala. 378; 79 Texas, 371. The right of recovery should have been limited to appellee's expectancy. 65 Ark. 627; 51 Ark. 515; 60 Ark. 560; 57 Ark. 321.

Marshall & Coffman, for appellee, in reply.

Instruction No. 2 states the law. 58 Ark. 136; 70 Md. 328; 76 Mo. 408; 97 Mo. 253; 104 Ind. 429; 72 Ind. 202; 67 Cal. 319. The jury were not misled by the instruction. 39 Ill. 164; 4 Col. 363; 35 Ark. 494; 37 Ark. 522; 48 Ark. 344; 60 Ark. 538; 57 Ark. 314; 67 Ark. 209; 118 U. S. 546; 5 Am. & Eng. Enc. Law (1st Ed.), 41.

BATTLE, J. This action was brought by Smitherman against McGee, Kahman & Co. to recover the damages he sustained by reason of personal injuries which he received while in defendant's employment. He alleged, in his complaint, that the defendants were, on the 6th day of June, 1899, bridge contractors, and had a contract with the Little Rock Bridge Company to construct what is known as the Choctaw and Memphis Bridge across the Arkansas river at Little Rock, Ark.; that on that day he was in the employment of defendants as a carpenter, and engaged in building caissons for the construction of the bridge, under the control, superintendence and direction of H. P. Lee, who was then employed by the defendants, and was acting as foreman for them; that on that day he was directed by Lee, as foreman, to aid in the elevation of several large pieces of timber, and placing them on top of one of the caissons as deck plates, by fastening derrick hooks in the middle of each and holding one end thereof until it was sufficiently elevated to be swung around and let down upon the caisson; that, after a number of plates had been raised and placed, plaintiff, according to the directions of Lee, fastened the derrick hooks upon one of the plates, which was twelve inches square and twenty feet long, and held on to the end thereof while the same was being elevated, and that, before the same had reached a sufficient height for him to turn it loose, so that it might be let down upon the top

of the caisson, the foreman, well knowing the dangerous and exposed position of plaintiff, negligently gave a signal to the engineer, who had control of the engine running the derrick, to slacken the rope by which said plate was suspended, which he did, causing the said plate to fall suddenly upon plaintiff, without giving him any time or opportunity to protect himself, crushing and breaking his left leg at and below the knee in several places and making a cripple of him for life, also injuring him about the breast and other parts of the body; that he has, on account of his injuries, suffered great mental and bodily pain, and has lost much valuable time, and incurred large expenses for medical and surgical attention and other expenses growing out of said injuries, and he is permanently disabled from earning a living by his labor, to his damage in the sum of $10,000.

The defendants, answering, said: "It is true that they compose a firm doing business under the firm name and style of McGee, Kahman & Co., as contractors, and on the 6th day of June, 1899, were engaged in constructing what is known as the Choctaw and Memphis Bridge across the Arkansas river at Little Rock, Ark. It is true that on said day plaintiff was in their employ as a carpenter, and engaged in the construction of caissons for such bridge, but deny that he was under the control, superintendence and direction of H. P. Lee, who, they admit, was one of the foremen employed by the defendants, and further deny that said H. P. Lee was acting for them in the construction of said caissons. They admit that it was part of plaintiff's duties, and he was directed by said H. P. Lee, to aid in the elevation of several large pieces of timber intended to be placed on top of one of said caissons, as derrick plates, by fastening the hooks in the middle of each; but it is not true that he was directed by said H. P. Lee, or any one else acting for defendants, nor was it part of his duties, to hold one end of said timbers until they were sufficiently elevated to be swung around and let down upon said caissons. It is true that, after a number of said timbers had been thus raised and placed, plaintiff, as was his duty, fastened the derrick hooks upon one of said plates or timbers; but they deny that he held on to the end thereof while the same was being elevated, and that before the same had reached a sufficient height for him to turn it loose, so that it might be let down upon the top of the caisson, the foreman, well knowing the dangerous and exposed position of plaintiff, negligently gave a signal to the engineer who had control of the engine running said

derrick to slacken the rope by which said plate was suspended, which he did, causing the said plate to fall suddenly upon plaintiff without giving him any time or opportunity to protect himself, crushing and breaking his left leg at and below the knee in several places, and making a cripple of him for life, also injuring him about the breast and other parts of the body. Defendants say that if plaintiff received injuries from the falling of or coming in contact with said timber, at the time alleged in his said complaint, said injuries were the result of his own negligence in disobeying his duties and the instructions of his employers, and but for his contributory negligence said injuries would not have resulted to him. They deny that, on account of said injuries, plaintiff suffered great mental and bodily pain and lost much valuable time and incurred large expenses for medical and surgical attention and other expenses growing out of said injuries, or that he is permanently disabled from earning a living by his labor, to his damage in the sum of $10,000 or any other amount."

Considerable evidence was adduced by both parties, tending to sustain the allegations in the pleadings of the party adducing the same as to negligence, and proving that the plaintiff received the injuries as alleged in his complaint.

The jury, having heard the evidence and the instructions of the court, returned a verdict in favor of plaintiff in the sum of $1,850; and the defendants appealed. They (the appellants) insist that this verdict should be set aside for two reasons: First. Because the court erred in refusing to grant their third request for instructions to the jury. Second. Because the court erred in giving the second instruction given at the instance of appellee.

The third request is as follows: "3. If you find from the evidence that plaintiff received the injuries complained of by reason of disobeying the instructions or warnings of his superior foreman, which he heard, or by giving proper attention to his duties could have heard, then he cannot recover in this action, and your verdict may be for the defendants."

All of this request that should have been granted was given in instructions numbered 4 and 5 at the request of appellants, and are as follows:

"4. If you find from the evidence that the foreman, Lee, prior to the accident, warned the plaintiff to get away from the place where he was, and that such warning was given loudly enough and distinctly enough to have been understood by a person of

ordinary hearing at the place where the plaintiff then was, and Lee then had reasonable grounds to believe that such warning would be heard by plaintiff, and if you further find that, after giving such warning, there was time enough for plaintiff to get away by exercising reasonable care and speed before the timber dropped, then your verdict may be for the defendants.

"5. The defendants were not insurers of the plaintiff against accident while in their employ. On the contrary, the plaintiff assumed all the ordinary and usual risks and hazards incident to the employment in which he was engaged. And if you find that he was injured while at work in the employ of the defendant, still your verdict should be for the defendants, unless you further find from the evidence that such injury was caused by the negligence of the foreman, Lee, in failing (if he did fail) to warn the plaintiff that the timber was about to be dropped in time for a prudent man of ordinary activity, placed as plaintiff then was, to remove beyond danger before it fell."

Second. The second instruction given at the request of appellee is as follows:

"2. If you find for the plaintiff, you will allow him a fair compensation for the loss of time from his business or occupation, his loss of capacity, if any, for the performance of the kind of labor for which he is fitted, the disfigurement of his person, if any, and for the pain and suffering resulting from said injury."

The objections urged against this instruction are as follows:

1. "It does not limit the amount plaintiff might recover to the amount claimed in the petition.'

2. "It does not require that the 'fair compensation,' the amount which plaintiff might recover, should be fixed and determined from the evidence."

3. "The measure of damages is a question of law, and the court should inform the jury with accuracy what the rule is."

4. "The jury are told that if they find for the plaintiff 'you will allow him,' etc. This language clearly imparts a requirement by the court and an obligation upon the jury."

5. "The jury are given a 'roving commission,' not limited by the evidence, to assess a fair compensation for his loss of capacity, if any, for the performance of the kind of labor for which he is fitted."

6. "The jury are further told to allow plaintiff for the 'loss of time' from his business or occupation, it being assumed that there was such loss."

We shall consider these objections in the order they are stated:

First. As the amount of damages allowed by the jury did not exceed that claimed in the complaint, the appellants were not prejudiced by the failure of the instruction to limit the amount of recovery to the sum claimed.

Second. There was no means by which the jury could determine what would be a fair compensation for the loss sustained by the appellee, except the evidence, and it was, therefore, plainly implied, and every intelligent juror is presumed to have understood, that the jury were to be governed by the evidence.

Third and fifth. If the instruction of the court was too general, the appellants could not complain. They did not ask for a more specific instruction. "That the court's charge was general in its terms is no ground for reversing a judgment, if no request was made for a more specific charge." *Fordyce* v. *Jackson,* 56 Ark. 394.

Fourth. No prejudicial error was committed by the use of the words "will allow" in the instruction. The undisputed evidence shows that the injuries mentioned in the instruction were sustained, and there is nothing in the words objected to which indicate to the jury what amount of damages they should allow.

Sixth. The instruction to the jury to assess damages for the "loss of time" from business or occupation was not prejudicial because the court thereby assumed that there was such loss. The undisputed evidence shows that appellee lost time from his business or occupation.

Judgment affirmed.

KATZ *v.* GOLDMAN.

Opinion delivered November 16, 1901.

ESTOPPEL—REPRESENTATION.—Where the husband and agent of a landlord, acting within the scope of his agency, directed her tenant to say to a firm of merchants that the rent would not exceed $50, and said firm, relying upon such statement, furnished supplies to the tenant, and took from him a mortgage of his crop as security, the landlord will be estopped, as to said firm, to claim that her lien as landlord exceeded the sum mentioned.

Appeal from Arkansas Circuit Court.

GEORGE M. CHAPLINE, Judge.

H. A. Parker and *J. R. Parker,* for appellants.

The appeal was properly taken. Sec. 12, acts of 1887, pp. 74-79. This case is unlike the case in 33 Ark. 663. An application for an order is a motion. Sand. & H. Dig., § 5889; 41 Cal. 650; 3 Estee, Pl. & Forms, 146; 15 Am. & Eng. Enc. Law, 892. An affidavit must be filed to get attachment. 47 Ark. 31; 50 Ark. 444. The county and common pleas court is a superior court. 53 Ark. 476.

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

A principal is bound by the acts of his agent within the scope of his apparent power. 49 Ark. 320; 46 Ark. 214; 42 Ark. 97; 37 Ark. 47; 29 Ark. 99; 25 Ark. 261. Moses Katz was the general agent of his wife, and his false representations to Goldman & Co. are binding on her. 47 Ark. 148. No lien could be claimed by her in excess of that so represented to appellees. 60 Ark. 357; 31 Ark. 131; 52 Ark. 152; 1 Jones, Liens, § 579.

BATTLE, J. Mrs. Ernestine Katz leased a tract of land to Wesley Cartwright for the year 1894, and the lessee agreed to pay therefor $150, and she hired to him for the same year four mules and one wagon for $100. On the 1st day of November, 1894, she instituted an action against Cartwright to recover $193.38, the balance alleged to be due on the $150, $100, and $49 which she claims to be due for supplies furnished by her in 1894; admitting that she had received five bales of cotton, of the value of $107.62, in part payment of his indebtedness. At the same time she sued out an order of attachment against the crops raised on the land in 1894, and caused it to be levied upon 3,103 pounds of seed cotton and 175 bushels of corn of such crops and the cotton and corn still growing upon the land. Goldman & Co. filed in the action a complaint in which they claimed the property attached by virtue of a mortgage executed to them by Cartwright on the 5th day of March, 1894, to secure the payment of moneys that would be due them for supplies to be furnished to enable him to raise the crops attached. During the pendency of the action, Mrs. Katz died, leaving a last will and testament, by which she devised and bequeathed all her property of every description to her husband, Moses Katz, except $20, which she bequeathed to her adopted

children. The action was revived in the name of Moses Katz, and he managed by some means to get possession of the property levied upon, and converted it to his own use.

The lease of the land, the hire of the mules and wagon, and the execution of the mortgage to Goldman & Company are undisputed. The only question before the circuit court for decision was, was the plaintiff estopped from disputing the priority and validity of the mortgage and the right of Goldman & Company to be paid the amount due them for supplies out of the proceeds of the sale of the crops before any amount, except $50 for rent, should be paid to plaintiff? Evidence was adduced in the trial of the action which tended to prove the following facts: Moses Katz was the husband of Mrs. Katz, and had as complete control and management of her property and business as he had of his own. Cartwright was indebted to her. He was unable to make a crop without assistance in the way of supplies. She could not furnish him. Moses Katz, as her agent, sent him to Goldman & Company for the purpose of securing their assistance, and directed him to say to them that he had four head of cattle and two horses, and that his rent for 1894 would be only $50, and that, if they would agree to furnish him with supplies, he would mortgage to them his stock and his crops of 1894 to secure them in the payment of any debt he would owe for the supplies furnished according to the agreement. He did as he was directed. They relied and acted upon his representations, accepted his proposition, took a mortgage on his stock and crops of 1894, and furnished him with supplies, as they agreed to do, of the aggregate value of $246.51. Cartwright paid the plaintiff, in cotton raised on the land he leased from her, at least $145.42.

According to this evidence, Moses Katz was authorized to do as he did. Cartwright was indebted to Mrs. Katz, and the arrangement made with Goldman & Company was the most practicable means that could have been adopted to collect the money that Cartwright was or would be owing her, he being poor and unable to raise a crop without assistance in the way of supplies, and she being without the means to furnish them. The effect of sending Cartwright to Goldman & Company and the directions to him was to authorize him to execute a mortgage to them, prior and paramount to her lien for rent and supplies, except as to the $50. Cartwright having executed the mortgage, and Goldman & Company having accepted his representations as true, and, believing they were true,

furnished the supplies, without which Cartwright could not have raised the crops of 1894, Moses Katz and his wife are and were estopped from setting up her lien as superior to the mortgage, the $50 having been paid.

But the evidence referred to was contradicted by other evidence, and a question of fact was thereby raised, and it was submitted to the jury for decision upon the following instructions, which were given at the request of Goldman & Company:

"1. The acts and statements of an agent pertaining to the business of his principal are the acts and statements of the principal, if made within the scope of the agency, and in law are as binding upon the principal as if made by him.

"2. The jury are instructed that if they believe from the evidence that Moses Katz was the agent of Ernestine Katz, and, as such agent, and as an inducement to have Goldman & Company extend credit to the defendant, Wesley Cartwright, stated that he, the said Cartwright, as a tenant of Ernestine Katz, would not be required to pay more than $50 rent for the land in 1894, and that, by reason of said statement, the interpleaders, relying upon the truth thereof, sold to and furnished to the defendant goods and merchandise upon a credit, the plaintiff cannot deny the truth of said statement, and you will find for the interpleaders.

"3. If the jury believe from the evidence that Moses Katz, the husband and agent of Ernestine Katz, directed the defendant, Wesley Cartwright, to represent to the interpleaders, Goldman & Company, that he would not owe the plaintiff exceeding $50 as rent for 1894, and that Cartwright did make said statements to W. L. Jefferies, a member of the firm of Goldman & Company, as an inducement to said firm to furnish him supplies and money on a credit during said year, and that Goldman & Company, acting and relying upon said statements and representations, took a mortgage upon the cotton and corn in controversy, the interpleaders, Goldman & Company, would be entitled to a verdict in this action, and the jury will so find.

"4. The court instructed the jury that the interpleaders are entitled to recover if you believe from the evidence that the credit was extended and goods, wares and merchandise were sold to the defendant, Wesley Cartwright, by said interpleaders because of the statements and conduct of the plaintiff, Ernestine Katz, or her agents, and it is immaterial whether the defendant, Wesley Cartwright, owes a balance of rent or not.

"5. Plaintiffs admit in the pleadings that they have received more than $50 from the defendant out of the crop raised on the land rented to the defendant, and the jury are instructed not to take into consideration any question of rent due plaintiffs, provided they believe from the evidence that Ernestine Katz, or her duly authorized agent, Moses Katz, represented to the interpleaders that only the sum of $50 would be due the plaintiffs for rent for the year 1894.

"6. A general agent is one having authority to act in a certain capacity, and, unless it is restricted to a small limit, and the restrictions are known or ought to be known to third parties, carries with it all the ordinary powers incident to that character. It is a delegation to do all acts connected with the particular trade, business or employment; and if the jury believes from the evidence that Moses Katz bought and sold goods and property, signed his wife's name to contracts, checks, drafts, receipts, etc., made contracts in her name and for her in the leasing and renting of her land and stock, passed upon the sufficiency of her security offered to be given by persons indebted to her or to become indebted to her, took notes and mortgages for her, collected rents therefrom, executed receipts therefor, and fixed the dates at his own pleasure for the payment of the rents due her, and other matters, and to do and perform such general acts as he might deem proper in the transaction of his wife's business, such course of dealing with the public would constitute said Moses Katz a general agent, and any statement or representation made by him in reference to his wife's business would be binding upon her with the same effect as if made by the said Ernestine Katz."

And upon the following instructions given at the request of the plaintiff:

"The court instructs the jury that this is a suit in which the plaintiff brings action against the defendant, Cartwright, for rent of land and mules and supplies furnished to the defendant for 1894, and that Goldman & Company took a mortgage on defendant Cartwright's crop for the supplies furnished during the year 1894, and has interpleaded for said crop."

"The court further instructs the jury that a landlord's lien is superior to a mortgage lien, and the burden is on the plaintiff to show that Ernestine Katz was the owner of the land on which she claimed the rent, and, unless Moses and Leon Katz, the parties who represented her, made a waiver of said rent, or acted in a man-

ner to cause an estoppel—and before you can find that there was an estoppel you must find from the evidence that Goldman & Company were told by Moses and Leon Katz at the time they were acting that they were acting for Ernestine Katz, and not for themselves—*you will find for the plaintiff.*"

The jury returned a verdict in favor of Goldman & Company, and fixed the value of the property in controversy at $277.94; and the court rendered judgment against Moses Katz and others for that amount, and Goldman & Company thereupon remitted the sum of $31.43, the amount of the judgment in excess of what was owing to them; and the plaintiff appealed.

Appellant insists that the instructions given at the request of Goldman & Company are erroneous, and should not have been given. But we find, when read together, and in the light of the evidence, as they should have been, that they contain no error prejudicial to the appellant. The instructions given at the instance of appellee were more favorable to him than they should have been, as it was not necessary to prove "that Goldman & Company were told by Moses or Leon Katz at the time they were acting that they were acting for Ernestine Katz, and not for themselves."

Judgment affirmed.

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STATE EX REL. ARKANSAS WESTERN RAILWAY COMPANY *v.* ROWE.

Opinion delivered November 16, 1901.

CHANGE OF VENUE—CIVIL ACTION.—A proceeding by a railroad company to condemn land for its right of way is "a civil action," within Sand. & H. Dig., § 7379, providing that any party to a civil action "may obtain an order for a change of venue therein."

Petition for Prohibition.

STATEMENT BY THE COURT.

Arkansas Western Railroad Company, incorporated under the laws of Arkansas for the purpose of constructing, maintaining and operating a line of standard-gauge railroad from Howe or Havener, in the Indian territory, to Waldron, county seat of Scott

county, Arkansas, on May 11, 1901, for the purpose of securing by condemnation a right of way over the lands of John T. Wood, filed its petition, under the statute, in the office of the clerk of the circuit court for Scott county. Proceedings against some eighteen or twenty other parties also were commenced in said court at different dates. Thereafter, on August 7, 1900, Wood filed his petition, supported by affidavits, for a change of the venue of said proceedings to condemn, which petition was allowed, and, by order of the court, the venue was changed to Sebastian county, Fort Smith district. The other cases referred to likewise were transferred, upon petitions presented for that purpose, to the same court.

The cases all were set for hearing at Fort Smith, on October 21, 1901, but on October 5, the railroad company moved in the said Sebastian court for leave to file its plea to the jurisdiction of the court to hear and determine said proceedings, upon the ground that the Scott county circuit court was without jurisdiction to enter the order for removal, and that the same was consequently void. Such motion being sustained, on the same day the railroad company filed its plea, upon which a hearing was had on October 9, and on October 10, 1901, said plea was overruled. On October 11, the railroad company filed in the supreme court its suggestion, praying for a rule on said Sebastian county circuit court to show cause why the writ of prohibition should not be issued, prohibiting said court, and the several land owners, parties to said condemnation proceedings, from proceeding further in the hearing of said proceedings in Sebastian county. Upon such suggestion a rule was allowed as prayed, and proceedings were stayed pending the decision of the question by the supreme court.

The facts in the case are, we believe, undisputed, the sole question to be determined being one of law arising on the face of the record.

F. C. Downey, of Kansas City, Mo.; *Leming & Hon* and *Read & McDonough,* for petitioner.

If this is not a civil action as defined in Sand. & H. Dig., § 5602, then it must come within the provisions of § 5603. The term "civil" is generic, and is so employed in Sand. & H. Dig., § 2775. The power of eminent domain may be limited by constitutional provision, but it is an essential attribute of sovereignty. 1 Lewis, Em. Dom. p. 24; 10 Watts, 63; Const. 1874, art. 2, § 23.

The power is an attribute of the political arm of the government. 1 Lewis, Em. Dom. p. 562, § 237; 98 U. S. 403-406; 32 N. J. Eq. 755. The use must be public. Cooley, Const. Lim. (6th Ed.) 660. The right of the property owner to receive compensation is presumed. Const. 1874, art. 2, § 28. The right of trial by jury is beyond the reach of legislation. 130 Mo. 500; 113 Mo. 466. This applies to all claims of compensation, and when under the exercise of eminent domain the statute must be strictly construed. 3 Cook, Corp. § 905; 7 Enc. Pl. & Pr. 468; 51 Mo. 200; 89 Mo. 61; 73 Mo. 30; 2 Bland, Ch. 129; 73 Mo. 651; 66 Me. 39; 108 N. Y. 490; 14 Ia. 296; 15 Ark. 43; 22 Atl. Rep. 1052; 1 N. J. L. 128. The courts cannot interfere with the discretion of those in whom the state vests the right to exercise this extraordinary power. Lewis, Em. Dom. 597; 9 H. L. Cas. 246. The parties were entitled to a trial by jury. Const. 1874, art. 2, § 7; 32 Ark. 17; Const. 1874, art. 12, § 9; Const. 1868, art. 5, § 48. Condemnation proceedings may be had by any tribunal constituted by statute. 114 Mo. 309; 5 Nev. 358; 2 Dev. & Bat. Law, 457; 5 Ohio St. 140; 60 Miss. 621; 30 Ind. 209; 21 Minn. 241. In condemnation proceedings pleadings are improper. 45 Ark. 278; 51 Ark. 350; 51 Ark. 413; 51 Ark. 511. Jurisdiction must appear on the face of record. 31 Mich. 144; 89 Mo. 61; 51 Mo. 200; 48 Mo. App. 254; 3 Johns. Cas. (N. Y.) 107; 7 Enc. Pl. & Pr. 468; 15 Ark. 43. Is a special proceeding. 43 Ark. 120; 52 Ark. 335; 32 Ark. 17; 3 Mich. 504; 8 Ohio, 546; 1 Baldwin, C. C. 205; 85 Ia. 460; 38 N. W. Rep. 926; 36 N. Y. 182; 61 Hun, 365; 80 Hun, 246; 45 Ark. 279. Condemnation proceedings are not suits at law, and statute as to change of venue does not apply. 20 Mich. 57; 20 Pick. 29; 39 N. Y. 109; 63 Me. 27; 65 Cal. 394; 58 Mich. 311. The court of Scott county was without power to change the venue, and Sebastian county court was wholly without jurisdiction. 115 Mo. 474; 1 Lea (Tenn.), 55; 3 Smed. & M. (Miss.) 529; 60 Ala. 93; 17 Fla. 806; 16 Enc. Pl. & Pr. 1094; 7 Wend. (N. Y.) 486; 30 W. Va. 532; 3 Bl. Com. 112; 14 S. Car. 417; 20 N. Y. 531; 4 Ark. 537; 26 Ark. 51; 25 Ark. 567; 33 Ark. 193. This is a special proceeding under § 5603, Sand. & H. Dig., and the provisions of § 7379 do not apply.

Hill & Brizzolara, for respondent.

All parties having an interest in the subject-matter should be brought into court. Sand. & H. Dig., §§ 2734-2736. The matter shall proceed and be determined as in other causes. Sand. & H.

Dig., §§ 2770-2775. Compensation for property taken for private use is a guaranty in the federal and state constitutions. Sand. & H. Dig., §§ 2729, 2730. This is not like a condemnation proceeding. 98 U. S. 403; 124 U. S. 197; 75 Fed. 34; 94 Fed. 227; Randolph, Em. Dom. § 314; Mills, Em. Dom. § 92; 29 Fed. 193; 25 Fed. 516. The exercise of eminent domain is a sovereign right, and not the enforcement of a private right. 25 Fed. 516; 53 Iowa, 651. A change of venue was proper. 19 Minn. 464; 20 Minn. 28 44 Ark. 256; 68 Ark. 600; Bliss, Code Pl. § 1.

HUGHES, J., (after stating the facts). The facts in this case seem to be undisputed, and the only question presented by the record is one of law, and that is, in a proceeding to condemn land for public use, as for the right of way of a railroad, can a change of venue be ordered according to law? Petitioner contends that a change of venue can be ordered legally only in a civil action, and that a proceeding to condemn land for public use, under our constitution and laws, is not a civil action, but comes within the definition of a special proceeding, under our code, which provides:

Sand. & H. Dig., § 5601. "Remedies in civil cases are divided into two classes:

"*First.* Actions.

"*Second.* Special proceedings.

"Sec. 5602. A civil action is an ordinary proceeding in a court of justice by one party against another for the enforcement of a private right, or the redress or prevention of a private wrong. * * *

"Sec. 5603. Every other remedy in a civil case is a special proceeding."

He then quotes section 7379 of Sand. & H. Dig., which provides that "any party to a civil action, trial by a jury, may obtain an order for a change of venue therein by motion upon a petition," etc. He contends there are no parties plaintiff and defendant, as in an ordinary civil action; that the power to condemn is an attribute of the state sovereignty, and belongs to the political arm or power of the government, and that the only questions for the judiciary are: (1) Is the use in fact public? (2) To see that the right of the property owner to receive due compensation for his property taken (or damaged) is preserved. He contends that such a proceeding has none of the characteristics of a suit at law. From his standpoint he makes an able and plausible argument.

But, laying aside technicalities and technical definitions, is the position tenable?

This was undoubtedly a civil controversy between the railroad and the land owner. In *Anderson* v. *Snyder,* 21 W. Va. 641, it was held that the words "action" or "suit" are to be taken and held as synonymous with "controversy," and not merely as designating the particular mode in which a controversy may be presented to the court.

"An action is a lawful demand of one's right." 2 Co. Inst. 285a. "And such demand may be made judicially in an *ex parte* proceeding or application." *Bruce* v. *Fox,* 1 Dana (Ky.), 450.

A Wisconsin statute provides for a change of venue when an impartial trial cannot be had in the court where the action is brought. It was held that this provision applied to the trial of issues of fact raised on appeal from the decision of the county court in respect to admitting a will to probate. The court said: "It is true, the word 'action' is generally used in the chapter, but we do not suppose any restricted or technical meaning is to be given to that term as here used. It is broad enough in its signification to include the proceeding for the probate of a will." *Jackman Will Case,* 27 Wis. 412.

A statute of Connecticut provides that "on the trial of every civil action each party shall have the right to challenge two jurors peremptorily." It was held, in a proceeding for the assessment for damages for land taken for a public highway, that a party has the right to a peremptory challenge. *Pettis* v. *Town of Pomfret,* 28 Conn. 566. In this case the court said: "A civil action is defined to be 'the legal demand of one's right.' * * * Now, every demand of a right regularly pending before a court, by which a party seeks to recover his right against another who is depriving him of it, and which is of a civil as distinguished from a criminal character, comes directly within this definition, and, as such, comes, of course, within the terms of the statute giving the right of peremptory challenge."

In Massachusetts a statute gives either party dissatisfied with the estimate of the county commissioners of damages for land taken for railroad purposes the right to apply for a jury. It has been held that a judgment entered on the verdict of a jury in such a case is a judgment on a civil action, within the statute providing for review by the supreme judicial court of judgments rendered

in civil actions. *Nantasket Beach Railroad* v. *Ransom,* 147 Mass. 240.

The fact that this proceeding to condemn is in the name of the state can make no difference, as the state is only a formal or nominal party. The railroad is the real party in interest on the one side, and the land owner on the other side of the controversy. *State* v. *Alleghany Oil Co.* 85 Fed. Rep. 872; *State* v. *Lake Erie, etc., Ry. Co.* 85 Fed. Rep. 3.

It seems that there is good authority for holding that a proceeding of this character is a civil action, within the meaning of our statutes.

Section 9 of article 12 of our state constitution provides: "No property nor right of way shall be appropriated to the use of any corporation until full compensation therefor shall be first made to the owner in money, or first secured to him by a deposit of money, which compensation, irrespective of any benefit from any improvement proposed by such corporation, shall be ascertained by a jury of twelve men, in a court of competent jurisdiction, as shall be prescribed by law." This section is repeated in section 2732 of Sandels & Hill's Digest.

Section 7379, under the title "Change of Venue" (Sandels & Hill's Digest), provides that "any party to a civil action, trial by a jury, may obtain an order for a change of venue therein by motion upon a petition stating that he verily believes that he cannot obtain a fair and impartial trial in said action in the county in which the same is pending on account of undue influence of his adversary, or of undue prejudice against the petitioner or his cause of action or defense, in such county." It is evident that the object of the statute allowing a change of venue is that a fair and impartial trial may be had where the trial is by a jury. This is as important in a proceeding to assess the value of land taken for right of way of railroad as in any other case. We think it was the intention that in such a case either party should have the right to a change of venue upon complying with the statute, and that the right exists in this case.

Sec. 7, art. 2, of the constitution, provides that "the right of trial by jury shall remain inviolate, and shall extend to all cases at law, without regard to the amounts in controversy."

Sec. 2770, Sandels & Hill's Digest, provides: "Any railroad, telegraph, or telephone company organized under the laws of this state, after having surveyed and located its lines of railroad, tele-

graph or telephone, shall, in all cases where such companies shall fail to obtain by agreement with the owner of the property through which said lines of railroad, telegraph or telephone may be located the right of way over the same, apply to the circuit court of the county in which said property is situated, by petition, to have the damages for such right of way assessed, giving the owner at least ten days' notice in writing of the time and place where such petition will be heard."

Sec. 2775. "It shall be the duty of the court to impanel a jury of twelve men, as in other civil cases, to ascertain the amount of compensation which such company shall pay, and the matter shall proceed and be determined as other civil causes."

This section, taken in connection with section 7379, which provides that any party to a civil action, trial by jury, may obtain an order for a change of venue, and the section of the constitution which provides that the right of trial by jury shall remain inviolate, is conclusive in our judgment that in this proceeding the right to a change of venue exists. The circuit court of Sebastian county, Fort Smith district, has jurisdiction to try this case, and the writ of prohibition is denied.

The act giving the right to a change of venue is not found in the civil code, and was passed long after the adoption of the code, and it is not to be construed therefore by the provisions of the code. The act providing for a change of venue was approved January 23, 1875. The civil code was adopted on the 22d day of July, 1868, to take effect the 1st of January, 1869.

The writ of prohibition applied for is denied.

ELDER v. STATE.

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Opinion delivered November 16, 1901.

1. EVIDENCE—RES GESTAE—IMPEACHMENT OF WITNESS.—A statement made by one of the eye witnesses to a homicide, to the effect that he did not know anything to tell, made an hour after the killing, is not admissible as part of the *res gestae*; nor is it admissible for the purpose of impeaching the testimony of such witness where his attention was not called to it, and no opportunity was given to him to explain it.

2. IMPROPER EVIDENCE—PREJUDICE.—Evidence improperly admitted must be treated as prejudicial unless there be something to show that it was not.

3. INSTRUCTION—SELF DEFENSE.—It was not error to instruct the jury "that, in passing on the question as to whether the defendant was acting in his necessary self defense, you are to consider his condition and surroundings at the time, and determine whether the circumstances and surroundings were such as to induce in his mind an honest belief that he was in great danger of losing his own life or of receiving great bodily injury at the hands of deceased; and if you believe from the evidence that such was the case, and that defendant fired the fatal shot while acting under such belief, and that he acted *with due caution and circumspection and without negligence*, then it will be your duty to acquit the defendant."

4. TRIAL—ARGUMENT OF COUNSEL.—Defendant lived in a houseboat, in which he kept a small stock of goods, and testified that he came from behind his counter to stop a quarrel between deceased and another, whereupon the rencounter ensued in which deceased was killed. The court charged that if defendant acted with due caution and without negligence, it would be the jury's duty to acquit. State's counsel, over defendant's objection, argued that defendant was guilty of gross negligence in coming from behind his counter, and that but for this it would not have been necessary to kill deceased. *Held*, that the argument was improper and misleading.

5. INSTRUCTION—SELF DEFENSE.—Defendant asked the court to instruct the jury that if the deceased brought on the difficulty, and the assault made by him was so fierce and violent as to make the defendant believe he was in danger of losing his life or suffering great bodily harm then defendant was not bound to retreat, but had the right to act in his defense until the danger was over. The court modified this instruction by substituting for the words "so fierce and violent" in the instruction the words "with such murderous intent." *Held*, error.

6. SELF DEFENSE—DUTY TO RETREAT.—One who is assaulted in his own home is not bound to retreat, and if the circumstances were such as reasonably to cause the defendant to believe that he was in imminent danger of losing his own life or of receiving great bodily harm, and he did so believe, then he was justified in using the force necessary to protect himself, and, if necessary to this end, he could kill his assailant.

Appeal from Faulkner Circuit Court.

GEORGE M. CHAPLINE, Judge.

E. A. Bolton and *John T. Young*, for appellant.

It was error to admit the statement of Bradley after shooting was over as part of the *res gestae.* 9 Cush. 36; 41 Conn. 55; 119 U. S. 99; 8 Wall. 397; McKelvey, Evidence, 278; 43 Ark. 99; 43 Ark. 289. The statement was hearsay evidence. 10 Ark. 638; 62 Ark. 494; 45 Ark. 343. Declarations of an accomplice after the crime is committed, made in the absence of the prisoner, are not admissible. 37 Ark. 67; 45 Ark. 165; 45 Ark. 132. Instructions 3, 4, 5 and 6 are erroneous. 64 Ark. 144; 62 286; 59 Ark. 132; 52 Ark. 45.

G. W. Murphy, Attorney General, for appellee.

Declarations of Bradley were competent. Underhill, Cr. Ev. 125; Greenleaf, Ev. §§ 102, 108, 110; 8 Wall. 397; 192 U. S. 401; Best, Ev. 663; 10 Am. Rep. 22; 61 Ark. 590.

RIDDICK, J. The defendant, W. L. Elder, was indicted for murder of one John Gullett, alleged to have been committed on the 6th day of April, 1899, in Faulkner county. He was tried and convicted of murder in the second degree and sentenced to be imprisoned for the term of five years, from which judgment he appealed.

The facts, briefly stated, are as follows: Elder was the owner of a house boat, on which he and his wife lived, and where he kept a small stock of merchandise. This boat was moored to the bank of the Arkansas river in Faulkner county. People from the opposite side of the river sometimes crossed over to trade at the boat, and it was the custom of Elder to carry such persons across in his skiff free of charge, in order to induce them to trade with him. John Gullett, the person killed, lived with his wife in a tent on the bank of the river not far from the place where Elder's boat was moored. He was the owner of a skiff ferry on the river, and made his living by conveying people across the river. Elder's custom of transferring people across the river to and from his boat free of charge interfered to some extent with Gullett's ferry business. He objected to it, and became angry with Elder on that account, and some of the witnesses say that he made threats against him. But the two men were related by marriage, Elder, though an older man than Gullett, having married his daughter; and from their general conduct towards each other it seems doubtful whether these threats, if made, were intended to be taken seriously. However, Gullett was at times addicted to strong drink, and on the day of the tragedy he spent most of

the afternoon in Elder's house boat, being more or less in an intoxicated condition. As he did not go home for supper, his wife came after him. She found him drinking coffee and eating cakes, which Elder had given him. To her request that he go home with her, he replied that he would go when he got ready; that he was going to settle that matter before he went home. Elder at this time was standing behind the counter where he had been for some time, staying there, as he said, to avoid a difficulty with Gullett, who seemed angry with him. Gullett, after he had finished his coffee, walked up to the counter behind which Elder was standing, threw his arms around Elder's neck, pulled his head down to the counter, and called him "a damned old gray-headed son of a bitch." Thereupon Bradley, a young man, the son of Elder's first wife by a former husband, and a member of Elder's family, caught hold of Gullett, and told him he must have peace. Elder got away, and Gullett then caught hold of Bradley. They struggled with each other a while, and Gullett's wife came up, and asked him to go home with her, and have no fuss. Bradley also said to Gullett that he was his friend, and was for peace. During this struggle between Gullett and Bradley, the stepson of Elder, Elder came from behind the counter with a pistol in his hand, pushed Gullett and Bradley apart, and said: "This thing must be stopped." Gullett then let Bradley go, and turned towards Elder, and advanced upon him. Elder, while Gullett was advancing upon him, and only a few feet away, fired two shots with his pistol. The first shot struck the ceiling of the room, the second struck Gullett; the last shot being fired when Gullett was only a few feet away. Gullett turned and staggered from the boat, and, in attempting to reach the bank, fell into the river. He called for his wife, and she went to him and helped him from the river. Elder and Bradley also went to him, Elder saying as he reached him, "My God! This is like shooting a brother. I never hated to do anything so bad in my life." They assisted Gullett back into the boat where he died in a few minutes.

There is no material difference in the testimony of the several witnesses as to the facts above stated, but there was a difference in their testimony as to whether Gullett at the time he was shot was attempting to cut Elder with a knife, or whether the first shot was fired at Gullett or not. Mrs. Gullett stated that the first shot which struck the roof of the boat appeared to have been fired at Gullett's head, and she and other witnesses for the state testified

that they saw no knife in Gullett's hand; while the defendant and Bradley testified that the first shot was fired above Gullett into the roof of the boat, the defendant saying that he did so purposely to let Gullett know that he had a pistol, and to make him stop, and thus avoid the necessity of shooting him. Both of these witnesses stated that Gullett had a knife in his hand, and was close to Elder, and was cutting at him at the time the last shot was fired, and that his last stroke cut Elder's coat.

After Mrs. Gullett had given her account of the circumstances of the tragedy, she was asked by the attorney for the state to repeat to the jury a statement that Bradley had made after the killing took place. The defendant objected to the proof of this statement as evidence against Elder, but the court overruled the objection, and the witness answered: "After the shooting was over, and after Elder had left, and some time after Gullett had died, Bud Bradley said: 'Well, it is all over now, and there is no one to tell the tale but me, and I will be God damned if I know anything to tell.'" It was shown that this statement was made about one hour after the killing, and the defendant contends that its admission was prejudicial error. The presiding judge allowed it to be proved as a part of the *res gestae,* but we feel convinced that this position cannot be sustained. It is, no doubt, difficult to lay down a rule by which it may be clearly determined in all cases what declarations may be properly received as a part of the *res gestae.* Declarations which emanate directly from the act under investigation, and which explain and illustrate it, are admissible. But mere narrations of a past event, or the declarations of a witness concerning such past event, giving his relations to it and his knowledge or opinion of it, made after the event is complete, and having no immediate connection with it, are not admissible as evidence to prove such event. *Res gestae,* says Mr. Wharton, "are the act talking for itself, not what people say when talking about the act. In other words, they must stand in immediate causal relation to the act,—a relation not broken by the interposition of voluntary individual wariness seeking to manufacture evidence for itself." 1 Whart. Ev. § 259. And, we may add, it would be the same whether the intention of the witness in making the declaration was to benefit himself or another. In either case, if the declaration was the result of an afterthought on the part of the declarant, made concerning a past event, it would be only hearsay, and not competent evidence to prove the facts of such event.

The declaration of Bradley, proved in this case, was, no doubt, made because of his friendship for Elder and his solicitude for his welfare. Yet it emanated not from the killing and the excitement thereof, but from ideas and thoughts that had passed through the speaker's mind after the tragedy was complete. He was, no doubt, at the time of this declaration disquieted by thoughts of the effect of this act upon Elder and others; but the killing itself was completely past, and the fact that the declaration manifested anxiety on the part of Bradley in behalf of Elder did not make it a part of the *res gestae* or competent evidence against Elder, who was not present when it was made, and in no way responsible for it. It is very true that under some circumstances this declaration might have been proved to show the state of feeling existing between the witness Bradley and Elder and to impeach the witness Bradley. In order to introduce this statement as impeaching testimony, the attention of the witness should have been called to it, and opportunity allowed him to explain it. But this statement of Bradley's was proved before he testified, and he was never asked about it while on the stand. It was not introduced as impeaching testimony, but as evidence of the guilt of the defendant, and for this purpose it was clearly incompetent.

There may be more reason for doubt as to whether this evidence was prejudicial or not. But the rule is that evidence improperly admitted must be treated as prejudicial unless there be something to show that it was not. The fact that the attorneys for the state insisted that this declaration should be admitted over the objections of defendant goes to show that both parties considered that it would tend in some degree to sustain the charge against the defendant. That it might have had this effect appears also from a consideration of the other evidence, for there is very little in the facts proved, except the shooting itself, to show malice on the part of the defendant. But this declaration of Bradley may have tended to impress the idea upon the jury that there was some plot or conspiracy between Bradley and the defendant, aimed at Gullett, and which resulted in his death, and may have to some extent injured Elder in the estimation of the jury. For this reason we think it should have been excluded, and are of the opinion that its admission as evidence against Elder was prejudicial error.

The defendant objected to the seventh and eighth instructions given by the court to the jury, but the motion for new trial referred only to the seventh, which is as follows: "You are further instructed that, in passing on the question as to whether the defendant was acting in his necessary self defense, you are to consider his condition and surroundings at the time, and determine whether the circumstances and surroundings were such as to induce in his mind an honest belief that he was in great danger of losing his own life or of receiving great bodily injury at the hands of the deceased; and if you believe from the evidence that such was the case, and that defendant fired the fatal shot while acting under such belief, and that he acted with due caution and circumspection, and without negligence, then it will be your duty to acquit the defendant." The main objection to this instruction urged by the defendant is that it made his acquittal depend upon the question of whether he acted "with due caution and circumspection and without negligence." But the instruction, as an abstract statement of law, can hardly be disputed. It is only in cases of absolute necessity, to prevent death or great bodily harm, or in cases where, though the danger may not be real, there is yet an honest belief on the part of the person defending himself that it is real, and when the circumstances may reasonably cause such belief on his part, that the law justifies or excuses one for taking the life of another. To justify the taking of life in self defense, the slayer must not only act in good faith under the belief that the danger is imminent, but there must be reasonable grounds for such belief on his part. If, through carelessness, or fright, or undue excitement, he takes the life of another, when it was not necessary, and when there were no reasonable grounds to believe that it was necessary, he is not excused. In such cases, if the killing be done under fright or excitement, or through failure to exercise due caution, this may go in mitigation of the offense. It may reduce the grade of the offense from murder to manslaghter, but it furnishes no complete justification or excuse for the taking of life. As we understand the instruction, this was the meaning intended to be conveyed by it; but, as the shooting in this case was not accidental, and as one of the attorneys prosecuting for the state seems to have been misled by the statement in the instruction that the defendant must have acted with due caution and without negligence, it may have been better to have omitted such statement, and to have simply stated to the jury that if Gullett, at the time of the

shooting, was making or attempting to make an assault upon the defendant with a knife under such circumstances as made it reasonable for defendant to believe that he was in immediate danger of losing his life, or receiving great bodily injury at the hands of Gullett, and if defendant did honestly so believe, and if he fired the fatal shot while acting in good faith under such belief, in order to protect himself, then, under the law, he is excused, and the jury should acquit.

This, in substance, is what the instruction means, though there may be some unnecessary repetition in the language used, but the special counsel employed to prosecute for the state seems to have misunderstood it, and based upon it an argument to the jury which seems to us improper and misleading. He, so the bill of exception states, read this instruction to the jury, and asserted that, under the instruction, the defendant was guilty of gross negligence in coming from behind his counter, and that, but for this, it would not have been necessary to kill Gullett, and that by such negligence defendant forfeited his right of self-defense. In other words, because the instruction stated that the defendant, in making his defense to the assault, must have acted with due caution and without negligence, the attorney for the state asserted that the defendant was guilty of such negligence because he came from behind his counter to stop a quarrel in his own house, and therefore forfeited his right of self-defense. But we do not think the instruction justified such an argument. The negligence referred to in the instruction is negligence on the part of the defendant in making his self-defense,—not some prior negligence on the part of the defendant. In cases of this kind it is often said that, in order to justify the taking of life in self-defense, the person assaulted must be himself without fault; but the fault spoken of which it is said the defendant must be without is fault in commencing or carrying on the assault or difficulty, not mere negligence or careless conduct but for which he might have avoided the difficulty. For instance, if a person has notice that a certain man of a violent and dangerous character is angry with him and threatens to kill him, it might be his duty to avoid him as far as possible, so as to avert the necessity of defending himself against a probable assault. But if, in pursuing his lawful vocation, he should through forgetfulness travel a public highway leading near the man's house, when he could have as conveniently gone another way, and thus meets the man he wishes to avoid, and is

assaulted by him, the law does not, on account of such forgetfulness or carelessness, take away or lessen his right of self-defense. The fact that, after hearing of the man's anger and threats, he went near his house might be a circumstance tending more or less to show that the hostile meeting was purposely sought by him, and if that were true he could not justify the killing on the ground of self-defense, unless "he had really and in good faith endeavored to retreat or decline the contest." But, if the meeting was not sought or desired by him, and only brought about by such unintentional carelessness or forgetfulness on his part, he would not be at fault in a criminal sense, and would have the same right of self-defense as one would have who was guilty of no carelessness of any kind.

Now, in this case Elder was in his own house, and he says that he went from behind his counter to stop the struggle between Gullett and Bradley—in other words, that he did it to preserve order in his house. He had a right to preserve order and quiet there, and if he went from behind his counter for that or any other lawful purpose, he was guilty of no negligence that the law would treat as criminal. On the other hand, having invited or permitted Gullett to enter his house, he had no right to kill him in order to keep him quiet, and, if he went behind the counter intending to kill him, or if he fired the fatal shot when Gullett was unarmed and attempting to assault him with his hands only, and when there was no reasonable grounds for Elder to believe that he was in immediate danger of losing his life or receiving great bodily harm, then he was not justified in such act, and is guilty of either murder or manslaughter, according to the circumstances and the amount of provocation and excitement under which the act was done. In neither view of the case do we see any ground for holding Elder criminally responsible for mere carelessness in coming from behind his counter, and we think the argument of counsel to the jury on that point was improper and misleading.

It is a matter of course that appellate courts do not reverse judgments for mere misstatements of law or fact on the part of counsel. Counsel often make their arguments off hand, and are liable to commit errors of that kind which are not subject to review on appeal, for appellate courts sit to review errors of courts, not those of counsel. But the trial court should not permit incorrect and misleading statements of law to be made by counsel to the jury, and where timely objection is made to such statements of

counsel, and the trial judge refuses to interfere, the party excepting to such ruling can have it reviewed on appeal. In this case an objection was made to the argument at the time, the presiding judge refused to interfere, and to this ruling the defendant excepted. The refusal of the judge to check counsel was in effect an indorsement of his statements, and we must therefore hold that the court erred in permitting counsel for the state to assert to the jury that, under the instruction given, if Elder negligently went from behind his counter, he forfeited his right of self-defense; for the assertion of counsel that the instruction carried that meaning was, we think, misleading and prejudicial to the defendant.

The eighth instruction asked by the defendant told the jury, in substance, that if the deceased brought on the difficulty, and the assault made by him was so fierce and violent as to make the defendant believe he was in danger of losing his life or suffering great bodily harm, then defendant was not bound to retreat, but had the right to act in his defense until the danger was over. The presiding judge modified this instruction by substituting for the words "so fierce and violent" in the instruction the words "with such murderous intent." The instruction, as asked, is not, abstractly considered, a correct statement of the law, for the fact that an assault is sudden and violent does not of itself excuse the one assaulted from endeavoring to retreat if he can safely do so to avoid the necessity of taking life. An assault of that kind may, of course, tend, more or less, to show that no opportunity for retreat was afforded, especially when made with a deadly weapon. But we need not discuss that question, for, under the admitted facts of this case, the defendant was in his own dwelling house, and therefore not required to retreat from one assaulting him there, without regard to the nature of the assault or the intent of the assailant. While the fact that he was in his own house did no justify him in using more force than was necessary, or in killing Gullett to prevent a mere assault with the hand or fist, yet he had the right to repel force by force, and to use such means as were reasonably necessary to protect himself from harm, even to the extent of taking life, if necessary to do so to preserve his own life or to pervent great bodily harm.

For these reasons, we think the instruction, as modified, was calculated to mislead the jury. The main question in this case, as we see the evidence, was whether the defendant used more force than was necessary in repelling the assault of Gullett. Being in

his dwelling house as we have stated, he was not required to retreat, and had the right to resist force by force, but he had no right to take the life of one attempting to assault him with the hand only. If Gullett at the time he was shot had no knife in his hand, and if defendant had no reasonable grounds to believe he was about to be assaulted with a deadly weapon, he was not justified in shooting Gullett as he did. On the other hand, if Gullett was attempting to assault the defendant with a knife, and the circumstances were such as to reasonably cause the defendant to believe that he was in imminent danger of losing his life or of receiving great bodily harm, and he did so believe, then he was justified in using the force necessary to protect himself, and, if necessary to this end, he could take the life of his assailant.

Most of these questions were properly presented to the jury, but for the errors noted we are of the opinion that the judgment should be reversed, and a new trial granted. It is so ordered.

APPENDIX.

I

OPINIONS NOT REPORTED.

West *v.* State use of Griggs; appeal from Conway circuit court; Jeremiah G. Wallace, judge; reversed and dismissed March 16, 1901; *per* Riddick, J.

White *v.* Beal & Fletcher Grocer Co.; appeal from Conway circuit court; Jesse C. Hart, special judge; affirmed May 4, 1901; *per* Bunn, C. J.

Butler *v.* State; appeal from Benton circuit court; John N. Pittman, judge; affirmed May 4, 1901; *per* Battle, J.

Highsmith *v.* State; appeal from White circuit court; Hance N. Hutton, judge; affirmed June 1, 1901; *per* Bunn, C. J.

Gazzolo & Co. *v.* Barstow; appeal from Monroe circuit court; George M. Chapline, judge; affirmed June 22, 1901; *per* Bunn, C. J.

Hudspeth *v.* Files; appeal from Ashley chancery court; Marcus L. Hawkins, chancellor; affirmed June 22, 1901; *per* Hughes, J.

St. Louis, I. M. & S. Ry. Co *v.* Woodard; appeal from Sebastian circuit court; Styles T. Rowe, judge; reversed and remanded July 6, 1901; *per* Battle, J.

Choctaw & Memphis R. Co. *v.* Bobbitt; appeal from Crittenden circuit court; Felix G. Taylor, judge; reversed and remanded July 13, 1901; *per* Wood, J.

Collins *v.* Gage; appeal from Craighead chancery court; Edward D. Robertson, chancellor; affirmed with modification October 12, 1901; *per* Hughes, J.

Supreme Lodge Knights of Pythias *v.* Faucette; appeal from Pope circuit court; William L. Moose, judge; reversed and new trial ordered October 26, 1901; *per curiam.*

St. Louis, I. M. & S. R. Co. *v.* Cline; appeal from Hot Spring circuit court; Alexander M. Duffie, judge; reversed and new trial ordered November 9, 1901; *per curiam.*

Lanigan *v.* Gordon; appeal from Sebastian circuit court; Edgar E. Bryant, judge; reversed and remanded January 19, 1901; *per Riddick*, J.

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Hight *v.* Cummings; appeal from Madison circuit court; James M. Pittman, judge; affirmed for non-compliance with rule nine February 11, 1901; *per curiam.*

Westmoreland *v.* McLendon; appeal from Garland chancery court; Leland Leatherman, chancellor; dismissed for non-compliance with rule nine February 11, 1901; *per curiam.*

Dozier *v.* Tapp; appeal from St. Francis chancery court; Edward D. Robertson, chancellor; affirmed February 16, 1901; *per* Bunn, C. J.

Bewley *v.* Bewley; appeal from Pope circuit court in chancery; Jeremiah G. Wallace, judge; affirmed February 16, 1901; *per* Bunn, C. J.

Miller *v.* Wilkerson; appeal from St. Francis circuit court; Hance N. Hutton, judge; dismissed for non-compliance with rule nine February 18, 1901; *per curiam.*

Kansas City, P. & G. R. R. Co. *v.* York; appeal from Polk circuit court; Will P. Feazel, judge; affirmed February 23, 1901; *per* Battle, J.

Peace *v.* Walker; appeal from Madison circuit court; James M. Pittman, judge; dismissed for non-compliance with rule nine February 25, 1901; *per curiam.*

Casey *v.* Barnett; appeal from Clay circuit court; S. A. D. Eaton, special judge; dismissed for non-compliance with rule nine February 25, 1901; *per curiam.*

Edrington *v.* Moss; appeal from Clay circuit court; Felix G. Taylor, judge; dismissed for non-compliance with rule nine February 25, 1901; *per curiam.*

Hall *v.* Little; appeal from Polk circuit court; Will P. Feazel, judge; affirmed for non-compliance with rule nine February 25, 1901; *per curiam.*

Kansas City, Ft. Scott & M. Ry. Co. *v.* Elkins; appeal from Craighead circuit court; Felix G. Taylor, judge; dismissed for non-compliance with rule nine February 25, 1901; *per curiam.*

Miller & Jones Furniture Co. *v.* O'Neal & Berry; appeal from Sebastian circuit court; Styles T. Rowe, judge; compromised and appeal dismissed by consent February 25, 1901; *per curiam.*

Crenshaw *v.* Campbell; appeal from Boone circuit court; Elbridge G. Mitchell, judge; affirmed March 2, 1901; *per* Bunn, C. J.

Joyner *v.* McCrary; appeal from Little River circut court; Will P. Feazel, judge; affirmed on motion for non-compliance with rule nine March 2, 1901; *per curiam.*

Bowden *v.* Bowden; appeal from Lee chancery court; Edward D. Robertson, chancellor; affirmed March 9, 1901; *per* Bunn, C. J.

Washington County *v.* Carroll County; appeal from Washington circuit court; Lafayette W. Gregg, special judge; dismissed for non-compliance with rule nine March 11, 1901; *per curiam.*

Arkansas & Oklahoma Ry. Co. *v.* Lovelady; appeal from Benton circuit court; James M. Pittman, judge; dismissed for non-compliance with rule nine March 11, 1901; *per curiam.*

Dudley Bros. *v.* Sun Mutual Ins. Co.; appeal from Hempstead circuit court; John H. Crawford, special judge; affirmed March 16, 1901; *per* Bunn, C. J.

St. Louis & S. F. Ry. Co. *v.* Boles; appeal from Washington circuit court; James M. Pittman, judge; affirmed March 16, 1901; *per* Battle, J.

St. Louis, I. M. & S. R. Co. *v.* McClure; appeal from Independence circuit court; Frederick D. Fulkerson, judge; affirmed March 16, 1901; *per* Hughes, J.

Jones *v.* Comer; appeal from Little River circuit court in chancery; Will P. Feazel, judge; affirmed March 16, 1901; *per* Riddick, J.

Kelley *v.* Scheck; appeal from Sebastian circuit court; Styles T. Rowe, judge; compromised and appeal dismissed March 16, 1901; *per curiam.*

Hale *v.* Cunningham; appeal from Carroll circuit court in chancery; James M. Pittman, judge; compromised and appeal dismissed March 18, 1901; *per curiam.*

Page *v.* Sumpter; appeal from Garland circuit court; Alexander M. Duffie, judge; affirmed under rule seven; *per curiam.*

Eagle *v.* Lonoke County; appeal from Lonoke circuit court; Sam W. Williams, special judge; affirmed March 23, 1901; *per* Bunn, C. J.

Kempson *v.* Goss; appeal from White circuit court; Hance N. Hutton, judge; affirmed March 23, 1901; *per* Battle, J.

St. L., I. M. & S. R. Co. *v.* Bain; appeal from Hot Spring circuit court; Alexander M. Duffie, judge; affirmed March 23, 1901; *per* Wood, J.

Wood *v.* Holland; appeal from White chancery court; Thomas B. Martin, chancellor; appeal dismissed March 23, 1901; *per* Wood, J.

Bryant *v.* Germania Ins. Co.; appeal from Hempstead circuit court; John H. Crawford, special judge; affirmed by consent March 23, 1901; *per curiam.*

Southwestern Tel., etc., Co. *v.* McClain; appeal from Saline circuit court; Alexander M. Duffie, judge; affirmed by consent March 23, 1901; *per curiam.*

North Ark. & Western Ry. Co. *v.* Cooper; appeal from Washington circuit court; James M. Pittman, judge; compromised and appeal dismissed March 23, 1901; *per curiam.*

Ross *v.* Satterfield; appeal from St. Francis circuit court; Hance N. Hutton, judge; affirmed March 30, 1901; *per* Battle, J.

Western Ass. Co. *v.* Barker; appeal from Yell circuit court; Elbridge Geary Mitchell, judge; affirmed March 30, 1901; *per* Hughes, J.

Bauer Grocer Co. *v.* Boshears; appeal from Clay circuit court; Felix G. Taylor, judge; dismissed for non-compliance with rule nine April 1, 1901; *per curiam.*

Underwood *v.* Cooper; appeal from White circuit court; Hance N. Hutton, judge; affirmed April 6, 1901; *per* Wood, J.

Clark *v.* Seidel; appeal from Carroll circuit court in chancery; James M. Pittman, judge; dismissed by consent April 13, 1901; *per curiam.*

Grigsby Construction Co. *v.* Knight; appeal from Little River circuit court; James D. Shaver, special judge; affirmed April 20, 1901; *per* Battle, J.

St. Louis & S. F. Ry. Co. *v.* Bryan; appeal from Washington circuit court; Edward S. McDaniel, judge; affirmed April 20, 1901; *per* Riddick, J.

Less *v.* Frager; appeal from Little River circuit court; Will P. Feazel, judge; appeal dismissed for non-compliance with rule nine; *per curiam.*

Sachs *v.* Fuller; appeal from Poinsett circuit court; Felix G. Taylor, judge; affirmed April 27, 1901; *per* Battle, J.

Ferguson *v.* Washington County Bank; appeal from Washington circuit court; E. C. Meacham, special judge; affirmed April 27, 1901; *per* Hughes, J.

Franklin *v.* Fitzgerald; appeal from Jefferson chancery court; John M. Elliott, chancellor; dismissed for non-compliance with rule nine April 29, 1901; *per curiam.*

Pultz *v.* Thomas; appeal from Polk circuit court; Will P. Feazel, judge; affirmed May 4, 1901; *per* Bunn, C. J.

Kendall *v.* Porter Lumber Co.; appeal from Jefferson circuit court; Antonio B. Grace, judge; affirmed May 11, 1901; *per* Bunn, C. J.

Deering *v.* Independence County; appeal from Independence circuit court; John B. McCaleb, judge; affirmed May 11, 1901; Bunn, C. J.

Taylor *v.* Cheatham; appeal from Miller circuit court; Joel D. Conway, judge; compromised and appeal dismissed May 13, 1901; *per curiam.*

Burk *v.* Kaiser Lumber Co.; appeal from Phillips chancery court; Edward D. Robertson, chancellor; affirmed May 18, 1901; *per* Wood, J.

Bussey *v.* Sawyer; appeal from Chicot chancery court; George W. Norman, special chancellor; affirmed May 18, 1901; *per* Wood, J.

Western Electric Supply Co. *v.* Odell; appeal from Pulaski circuit court; Joseph W. Martin, judge; dismissed for non-compliance with rule nine May 20, 1901; *per curiam.*

Taylor *v.* Cheatham; appeal from Miller circuit court; Joel D. Conway, judge; settled and appeal dismissed May 20, 1901; *per curiam.*

Streett *v.* Lindsay; appeal from Chicot circuit court; Marcus L. Hawkins, judge; affirmed for non-compliance with rule nine May 20, 1901; *per curiam.*

Grimes *v.* Beloat; certiorari to Lawrence circuit court in chancery; Hance N. Hutton, judge; settled and dismissed May 25, 1901; *per curiam.*

Harper *v.* State (two cases); appeals from Sebastian circuit court; Styles T. Rowe, judge; affirmed for non-compliance with rule nine May 27, 1901; *per curiam.*

Ballard *v.* Ballard; appeal from Garland chancery court; Leland Leatherman, chancellor; affirmed for non-compliance with rule nine May 27, 1901; *per curiam.*

Nicola *v.* Moore; appeal from Crittenden circuit court; Felix G. Taylor, judge; affirmed June 1, 1901; *per* Wood, J.

Anderson *v.* State; appeal from Pulaski circuit court; Robert J. Lea, judge; affirmed June 8, 1901; *per* Bunn, C. J.

Phoenix Ins. Co. *v.* Nibler; appeal from Sebastian circuit court; Styles T. Rowe, judge; affirmed June 8, 1901; *per* Bunn, C. J.

Routh *v.* Madison County; appeal from Madison circuit court; Lafayette W. Gregg, special judge; dismissed for non-compliance with rule nine June 10, 1901; *per curiam.*

Southwestern Telegraph, etc., Co. *v.* Chandler; appeal from Saline circuit court; Alexander M. Duffie, judge; affirmed June 15, 1901; *per* Battle, J.

St. Lous Southwestern Ry. Co. *v.* Jenkins; appeal from Jefferson circuit court; Antonio B. Grace, judge; affirmed June 15, 1901; *per* Riddick, J.

Hudgins *v.* Hudgins; appeal from Polk circuit court in chancery; Will P. Feazel, judge; affirmed for non-complance with rule nine June 17, 1901; *per curiam*

Gazzolla *v.* Bartrow; appeal from Monroe circuit court; George M. Chapline, judge; affirmed June 22, 1901; *per* Bunn, C. J.

Malin *v.* Webb; appeal from Clay chancery court; Edward D. Robertson, chancellor; affirmed June 22, 1901; *per* Wood, J.

Kansas City, P. & G. R. Co. *v.* Morris; appeal from Benton circuit court; James M. Pittman, judge; compromised and appeal dismissed July 6, 1901; *per curiam.*

Wyckhoff *v.* State; appeal from Sebastian circuit court; Styles T. Rowe, judge; reversed on confession of error July 13, 1901; *per curiam.*

Thomas *v.* Matthews; appeal from Sebastian circuit court; Styles T. Rowe, judge; appeal dismissed by consent October 7, 1901; *per curiam.*

Sims *v.* Files; appeal from Ashley circuit court; Marcus L. Hawkins, judge; appeal dismissed by consent October 7, 1901; *per curiam.*

Philan *v.* Philan; appeal from Sebastian circuit court in chancery; Styles T. Rowe, judge; appeal dismissed by consent October 7, 1901; *per curiam.*

New *v.* State; appeal from Cleburne circuit court; Elbridge G. Mitchell, judge; affirmed October 12, 1901; *per* Bunn, C. J.

Lynch *v.* State; appeal from Arkansas circuit court; George M. Chapline, judge; affirmed October 12, 1901; *per* Hughes, J.

Nunnally *v.* State; appeal from Columbia circuit court; Charles W. Smith, judge; affirmed October 12, 1901; *per* Riddick, J.

Foley *v.* State; appeal from St. Francis circuit court; Hance N. Hutton, judge; affirmed October 19, 1901; *per* Bunn, C. J.

Walker *v.* Reiff; appeal from Pulaski circut court; Joseph W. Martin, judge; affirmed October 19, 1901; *per* Hughes, J.

Monks, etc., Distillery Co. *v.* Matthews; appeal from Ashley chancery court; Marcus L. Hawkins, chancellor; affirmed October 19, 1901; *per* Hughes, J.

Pryor Lumber Co. *v.* Roach; appeal from Polk circuit court; Will P. Feazel, judge; affirmed October 26, 1901; *per curiam.*

Beecher *v.* Abbott; appeal from Randolph circuit court; John B. McCaleb, judge; affirmed October 26, 1901; *per* Hughes, J.

Mayer *v.* Hemingway; appeal from Jefferson chancery court; James F. Robinson, chancellor; affirmed October 28, 1891; *per* Bunn, C. J.

Kelley *v.* Jaegersfeld; appeal from Little River circuit court in chancery; Will P. Feazel, judge; affirmed October 28, 1901; *per curiam.*

Steen *v.* Helmer (two cases) appeals from Pulaski circuit court; Joseph W. Martin, judge; affirmed November 2, 1901; *per* Hughes, J.

St. L., I. M. & S. Ry. Co. *v.* Fondren; appeal from Sebastian circuit court; Styles T. Rowe, judge; affirmed November 2, 1901; *per* Wood, J.

Rosenberg *v.* Bloxham; appeal from Little River circuit court; Will P. Feazel, judge; affirmed November 2, 1901; *per* Wood, J.

Grubs *v.* Wood Machine Co.; appeal from Hot Spring circuit court; Alexander M. Duffie, judge; affirmed November 2, 1901; *per* Riddick, J.

Jones *v.* Chromister; appeal from Conway circuit court; William L. Moose, judge; dismissed for non-compliance with rule nine November 4, 1901; *per curiam.*

White *v.* North American Trust Co.; appeal from Pulaski circuit court; Joseph W. Martin, judge; affirmed for non-compliance with rule nine November 4, 1901; *per curiam.*

Smith *v.* Knight; appeal from Marion circuit court in chancery; Elbridge G. Mitchell, judge; affirmed November 9, 1901; *per* Bunn, C. J.

Kirtley *v.* Winston; appeal from Conway circuit court in chancery; Jeremiah G. Wallace, judge; affirmed November 9, 1901; *per* Battle, J.

Paxton *v.* State; appeal from Marion circuit court; Elbridge G. Mitchell, judge; affirmed November 9, 1901; *per* Wood, J.

Hoxie, P. & N. R. Co. *v.* Bigger; appeal from Randolph circuit court; John B. McCaleb, judge; compromised and appeal dismissed November 9, 1901; *per curiam.*

St. Louis S. W. Ry. Co. *v.* Paxton; appeal from Miller circuit court; Joel D. Conway, judge; compromised and appeal dismissed November 11, 1901; *per curiam.*

Hicks *v.* Bronaugh; appeal from Prairie chancery court; John M. Elliott, chancellor; appeal dismissed for non-compliance with rule nine November 11, 1901; *per curiam.*

St. Louis S. W. Ry. Co. *v.* Allen; appeal from Miller circuit court; Joel D. Conway, judge; compromised and appeal dismissed November 11, 1901; *per curiam.*

Grady *v.* Farrar; appeal from Lee chancery court; Edward D. Robertson, chancellor; affirmed November 16, 1901; *per* Bunn, C. J.

St. Louis, I. M. & S. Ry. Co. v. Shell; appeal from Drew circuit

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Whitelaw *v.* Hopkins-Weller Drug Co.; appeal from Washington circuit court in chancery; James M. Pittman, judge; affirmed November 16, 1901; *per* Hughes, J.

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