REPORTS

OF

CASES AT LAW AND IN EQUITY

ARGUED AND DETERMINED

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IN THE SUPREME COURT OF ARKANSAS,

EMBRACING REMAINDER OF CASES DETERMINED AT THE JANUARY TERM, AND ALL THE CASES OF THE JULY TERM, 1848: ALSO, THE CASES OF THE JANUARY TERM, AND PART OF THE JULY TERM, 1849.

BY E. H. ENGLISH, COUNSELLOR AT LAW.

VOLUME IV.

LITTLE ROCK:

PRINTED BY FREDERICK S. GARRITT.

1849.

Rec. July 1, 1850

OFFICERS OF THE SUPREME COURT

DURING THE TIME OF THESE DECISIONS.

Hon. THOMAS JOHNSON, Chief Justice.
Hon. CHRISTOPHER C. SCOTT, } Associate Justices.
Hon. DAVID WALKER. }

JOHN J. CLENDENIN, AttorneyGeneral.
LUKE E. BARBER, Esq., Clerk.

CIRCUIT JUDGES.

1st	Circuit,	Hon. JOHN T. JONES,
2d	"	Hon. JOSIAH GOULD,
3d	"	HON. WILLIAM C. SCOTT,
4th	"	Hon. WILLIAM W. FLOYD,
5th	"	Hon. WILLIAM H. FEILD,
6th	"	Hon. JOHN QUILLIN.

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UPON THE ROLL OF THE SUPREME COURT OF ARKANSAS, AND THEIR PLACES OF RESIDENCE.

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NOTE.—By the list of Attorneys furnished me by L. E. BARBER, Esq., Clerk of the Supreme Court, it appears that, since the organization of the court, in the year 1836, ONE HUNDRED have been enrolled. Of this number, *seventeen* are marked deceased, to wit: *Samuel Hall, Chester Ashley, Hamlin Freeman, William Cummins, Horace F. Blanchard. William Cross, William B. R. Hornor, John Linton, Nathaniel Haggard, William Gilchrist, E. L. Johnson, James Pope, J. A. Simpson, M. W. Reinhardt, Cyrus W. Weller*, and *Andrew R. Porter: Thirteen* are marked removed, to wit: *John Taylor, Elijah A. Moore, John Widgery, William Trimble, William M. McPherson, David Lambert, Isaac N. Barnett, George W. Paschal, Lemuel D. Evans, J. W. Oharo, W. S. Oldham, Stephen S. Tucker*, and *Howard W. Smith:* In office, *five*, to wit: *William C. Scott, John S. Roane, Thomas Johnson, Luke E. Barber*, and *David Walker.*

The above list of Attorneys does not include all who have been *licensed* to practise in the court, but only such as have been *enrolled.* See *Digest, chap.* 19, *secs.* 5, 6, 7.

REPORTER.

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REMAINDER OF CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ARKANSAS,

DURING THE JANUARY TERM,

EIGHTEEN HUNDRED AND FORTY-EIGHT.

LAWSON & THORN VS. STATE, USE OF BETTISON.

Every plea must answer the whole count, and every replication the whole plea; but to do this, it is not necessary that every material allegation in the opponants pleading should be traversed.

A party may traverse any material allegation; for if such allegation be necessary to support the action, or defence, the plea or replication denying it, is an answer to the whole count or plea.

Writ of Error to the Circuit Court of Pulaski County.

DEBT, on a sheriff's bond, brought by the State for the use of Bettison, against Lawson, sheriff of Pulaski county, and Thorn, one of his securities in the bond, and determined in the Pulaski circuit court in April 1847, before Hon. WM. H. SUTTON, judge.

In the second count of the declaration, it is assigned as a breach of the bond, that on the 9th Sept., 1841, Bettison recovered a judgment in the Pulaski circuit court against Whitmore for $225, debt, and $16 10 damages, together with costs; and on the 17th Nov., 1842, sued out a *fi. fa.* thereon, which on the same day came to the hands of Lawson, as such sheriff, for exe-

cution. That, on the 18th Nov. 1842, Lawson seized, by virtue of the writ, divers goods and chattels, and moneys of the said Whitmore, *to wit*, a box containing $148 50 in specie, and $265 in Arkansas Bank paper, which paper the said Lawson sold for $117 in specie, making an aggregate sum of $265 50, made by Lawson on the execution, which should have been applied by him to the satisfaction of the writ, but that he failed to have the money in court on the return day of the writ, and falsely returned thereon that said box of specie and Arkansas Bank paper had been given up to the attorney of Whitmore, by order of the court from which the *fi. fa.* issued, &c.

To this second count in the declaration, defendants filed five pleas, the fifth of which follows:

"And for a further plea in this behalf the defendants say, *actio non*, &c., because they say that at the November Term of the said court here, on a day of said term, *to wit:* on the —— day of December, A. D. 1842, in a certain proceeding then there pending between Euclid L. Johnson and Chester Ashley, plaintiffs, and said Lawson, defendant, upon a motion for delivery to said Johnson and Ashley of the goods, chattels, and moneys in said second count mentioned, it was by the said court here ordered and considered that said Lawson should deliver over to said Johnson and Ashley the said goods, chattels and moneys; whereupon, said Lawson did deliver over to said Johnson and Ashley the said goods, chattels and moneys, and said writ of *fi. fa.* was by Absolom Fowler, Esq., attorney of said Bettison ordered to be returned, and was by said Lawson returned accordingly, with the facts above stated endorsed thereon; and this defendants are ready to verify," &c.

To this plea, plaintiff filed three replications, as follows:

"And as to the said fifth plea of the said defendants to the said second count of said declaration, the said plaintiff, for the use aforesaid, says *pre cludi non*, &c., because she says that there is not any record of the said supposed order and judgment in the said fifth plea last aforesaid mentioned, remaining in the said

circuit court, in manner and form as the said defendants have in the said fifth plea to said second count alleged, and this said plaintiff is ready to verify," &c.

"And for a further replication to said last named fifth plea, the said plaintiff, for the use aforesaid, says *pre cludi non*, &c., because the said plaintiff says that protesting that any such order and judgment as is in that said fifth plea alleged, was then and there made and rendered, yet the said plaintiff says, that from said order, and judgment, so made and rendered as in said last named plea alleged, *to wit:* on the 8th day of December, A. D. 1842, the said Lawson then and there filed an affidavit for that purpose, and prayed an appeal to the supreme court of said State, which appeal was then and there immediately allowed and granted by the said circuit court, and further proceedings in that case were then and there, by the said circuit court stayed and suspended until the decision of such supreme court should be rendered therein; all of which will more fully appear by the record and proceedings thereof now remaining in the said circuit court. And said plaintiff further avers, that such appeal was duly carried up to and prosecuted in said supreme court, and such proceedings were therein had, that afterwards, *to wit:* in the January term thereof A. D. 1843, by the consideration and judgment of said supreme court, the said order and judgment of the said circuit court, so stayed and suspended, was reversed, annulled, and altogether held for naught; all of which will more fully appear by reference to the record and proceedings thereof, now remaining in said supreme court: wherefore the said plaintiff says that if the said Lawson did deliver over to the said Johnson and Ashley the said goods, chattels and moneys, as in said fifth plea alleged, he did so unlawfully, and in his own wrong; and this the said plaintiff, for the use aforesaid, prays may be inquired of by the country, &c."

"And for a third replication in this behalf to the said fifth plea, to the said second count, the said plaintiff says *pre cludi non*, &c., because the said plaintiff says that the said writ of

fieri facias in said fifth plea mentioned, was not by the said Absolom Fowler, attorney for said Bettison, ordered to be returned, as in said fifth plea, by said defendant alleged; and this said plaintiff prays may be inquired of by the country," &c.

Defendants took issue to the third replication, and demurred to the first and second, on the following grounds: 1st, That each of said replications leaves a material part of said plea unanswered, and confessed; and so neither denies nor confesses and avoids such material allegations: 2d, that neither of said replications fully answers said plea."

The court overruled the demurrer; the cause was tried on other issues made up in the case, judgment for plaintiff, and defendants brought error.

PIKE & BALDWIN, AND RINGO & TRAPNALL, for Plaintiffs. Every plea must answer the whole count. Every replication must answer the whole plea. It is not allowed to respond by different replications to different parts of the plea; although all the replications taken together make a complete answer. Each must be a full answer in itself. 1 *Ch. Pl.* 553. 1 *Saund. R.* 28 *n.* 3. *Co. Litt.* 303 *a.* *Ascue vs. Sanderson*, *Cro. Eliz.* 434. *Henies vs. Jamison*, 5 *T. R.* 553. *Newhall vs. Bernard*, *Yelv.* 225. *Osborne vs. Rogers*, 1 *Buls.* 116. *S. C.* 1 *Saund.* 267. 6 *Hill* 421. *Herkemer M. & H. Co. vs. Small*, 21 *Wend.* 277. *Cooper vs. Greeley et al.* 1 *Denio* 366. This objection is unanswerable. 6 *Hill* 421. 1 *Denio* 367.

Where a replication professes to answer the whole plea (as each does in this case) and answers only part it is a discontinuance. 1 *Ch. Pl.* 681. *Com. Dig. Pleader*, *F.* 4. *W.* 2. *Marstellar et al. vs. McLean*, 7 *Cranch.* 156. This case was therefore out of court as soon as the replications were filed.

If a plea professes at the beginning to answer the whole declaration, or a replication to answer the whole plea, and only answers part, it is bad on demurrer. *Weeks vs. Peach*, 1 *Salk.* 179. *Truscott vs. Carpenter*, 1 *Ld. Raym.* 231. *Woodward vs. Robin-*

son, 1 *Str.* 303. *Macdonnell vs. Macdonnell*, 3 *Bos. & Pul.* 174. *Nevins vs. Keller*, 6 *J. R.*, 63. *Barnard vs. Duthy*, 5 *Taunt.* 34. *Spencer vs. Southwick*, 11 *J. R.* 583. *Hallett vs. Holmes*, 18 *id.* 28. *Van Ness vs. Hamilton*, 19 *id.* 374. *Riggs vs. Denniston*, 3 *J. Cas.* 205. *Gould's Pl.* 358, 359. 1 *Ch. Pl.* 680.

And in our courts the plea is equally bad on demurrer, though it only professes to answer part. *Sterling vs. Sherwood*, 20 *J. R.* 204. *Hickok vs. Cortes*, 2 *Wend.* 421. *Slocum vs. Despard*, 8 *id.* 617: and so it was held in *Bullythorpe vs. Turner*, *Willes* 475, 480. *Hughes vs. Phillips*, *Yelv.* 38. *Thornell vs. Lassells*, *Cro. Jac.* 27. *Etheridge vs. Osborn*, 12 *Wend.* 402.

So, if it begins as an answer to part and concludes as to the whole. *Loder vs. Phelps*, 13 *Wend.* 48.

FOWLER, contra. In behalf of Bettison it is contended that the pleadings and judgment are strictly regular in every respect, according to the common law and our statutes.

The plaintiff has a legal right "to reply several matters to the plea of a defendant." *Rev. Stat. p.* 630, *sec.* 76. If it be true, as the plaintiffs in error insist, that at common law a replication must answer the whole plea, the reason was that but one replication could be pled; and the reason ceasing under our statute, the rule must cease also. And if the replications objected to be technically deficient in any particular, the plea to which they apply is double, also, and is in every respect more defective than the replications. Therefore, in any view whatever the demurrer was properly overruled.

And it is insisted that none of the authorities referred to by the plaintiffs in error, under our modified practice, can possibly sustain the positions which they assume.

The plea, to which the replications apply, is double. It sets up two distinct matters of defence, either of which, if true, would bar the action. 1 *Ch. Pl.* 511. 1 *Eng. R.* 472, *Kellogg et al. vs. Miller et al.*

At common law a defendant might plead to one part of the

declaration one ground of defence, and another defence to another part. 1 *Ch. Pl.* 512. *Co. Litt.* 304 *a.* 4 *Bac. Abr.* "Pleas" &c., *K.* 1, *page* 118. And would not several replications given by statute be governed by the same rule and the same reason?

The objections raised by the demurrer, if such at all, are entirely too technical to be reached by a general demurrer, under our liberal statutes.

OLDHAM, J. The objections taken to the replications are frivolous, and can be sustained only by a total misconception and a misapplication of the plain rules of pleading. It is true, as is contended for by the plaintiffs in error, that every plea must answer the whole count, and every replication must answer the whole plea; but, to do this, it is not necessary that every material allegation in the opponent's pleading should be traversed. A party may traverse any material allegation. 1 *Ch. Pl.* 644. For if such averment be necessary to support the plaintiff's action, or the defendant's defence, the plea or replication denying it, is an answer to the whole count or plea. In this case each allegation denied by the replication is material and unless sustained by proof, if denied, the defendants below would not have been entitled to a verdict. The circuit court did not err in overruling the demurrer. Affirmed.

FAULKNER ET AL. VS. STATE, USE ELLER'S AD'X.

To an action on a constable's bond, assigning as a breach that he failed to return an execution issued to him on a justice's judgment, a plea that there is no record of such judgment and execution, is bad, because a justice's court is not a court of record.

Where an execution is delivered to a constable before he executes his bond, it is his duty to levy and return it according to law, after his bond is executed, and on failure to do so, his securities are liable.

If he receive money on such execution after the making of his bond, and fail to pay it over, his securities are liable.

Where the securities confess in their pleadings, that the money was received by the constable on the execution, but aver that he received it before the date of the bond, the *onus* is on them to prove that fact.

Writ of Error to Pulaski Circuit Court.

DEBT, on a constable's bond, brought by the State, for the use of Eller, against Faulkner, the principal in the bond, and Woodruff and Williams, his securities therein, and determined in the Pulaski circuit court, at the October term, 1846, before the Hon. WM. H. FELD, judge. The suit was instituted 15th February, 1843.

The bond sued on is alleged in the declaration to have been executed on the 19th April, A. D. 1841, in the penal sum of five thousand dollars, conditioned "that if the above named Faulkner, who was duly elected constable of the township of Big Rock, in the county of Pulaski, at the October general election in 1840, should execute all process to him directed and delivered, pay over all moneys received by him by virtue of his office, and in every respect discharge all the duties of constable according to law, then said obligation to be void," &c. And the declaration assigns as breaches of the condition of the bond, in substance, as follows:

That on the 21st September, 1840, Eller, for whose use the suit was brought, obtained five judgments against Richard C. Byrd, before Jesse Brown, a justice of the peace of said township; the *first* for $39 07 debt, 40 cents damages, and for costs: the *second*, for $100 debt, $4 80 damages, and for costs: the *third*, for $100 debt, $2 80 damages, and for costs: the *fourth*, for $100 debt, $2 costs of protest, $1 50 damages and for costs: the *fifth*, for $100 debt, $2 costs of protest, 30 cents damages, and for costs; and the costs of each suit is alleged, under a *videlicet*, to amount to ten dollars. That the last four judgments were stayed by the recognizance of Wm. Brown, Senior.

That on the 12th day of April, 1841, said justice issued executions on all five of said judgments; on the first against Byrd, and on the other four against Byrd and Brown; directed to the constable of Big Rock township, and returnable within thirty days; which executions, on the 19th day of April, 1841, were delivered to, and came to the hands of said Faulkner, as constable of said township, which said Faulkner was then and there acting as constable of, in and for said township; and although the said Faulkner, as such constable, under and by virtue of said writs of execution, did levy, make, collect and receive of and from said Byrd the several amounts of money therein respectively specified, the said plaintiff in fact says that said Faulkner, as such constable did not, nor would, make due and legal return of each and every, or any of said writs of execution, so as aforesaid to him directed and delivered.

Second breach, that Faulkner did not, nor would, but wholly neglected and refused to pay over to Eller the money so collected by him as such constable, on said executions.

Faulkner made default. Woodruff and Williams filed eight joint pleas, in substance as follows:

1st. That Faulkner received the money on said executions before the making of the bond sued on, and that his refusal to pay it over was before the execution thereof, and that therefore his securities in the bond were not liable.

2d. That Faulkner did make due and legal return of said executions.

3d. That the failure of Faulkner to return said executions was before the making of said bond.

4th. That the causes of action did not accrue within four years next before the institution of the suit.

5th. That said executions never came to the hands of Faulkner, as such constable, for execution as alleged.

6th. That Faulkner, as such constable, did not collect the money of Byrd upon said executions, as alleged.

7th. That said executions were void, and Faulkner, as such constable, was not bound to execute or return them.

8th. That there was no record of said supposed recoveries, and of said executions.

The plaintiff took issue to all of said pleas, but the eighth, to which she demurred, and the court sustained the demurrer.

The death of Eller was suggested, and his administratrix, Catharine Eller, made a party.

The cause submitted to a jury, verdict for plaintiff for $311 57. Motion for new trial overruled, and bill of exceptions by defendants setting out the evidence and instructions of the court to the jury; from which it appears:

Plaintiff read in evidence to the jury the bond sued on, dated 19th April, 1841, and conditioned as stated in the declaration. Also a certified transcript from justice Brown's docket of the five judgments against Byrd in favor of Eller, corresponding in amounts, dates, &c., with the allegations in the declaration. Plaintiff proved by the deposition of justice Brown that he issued executions on said judgments on the 12th April, 1841, in conformity with law, directed to the constable of Big Rock township; that he delivered them to Faulkner who was then acting as constable of said township, on the day they were issued; and that Faulkner never returned them, though requested by him to do so. Plaintiff also proved by the deposition of Baldwin, clerk of Eller's attorneys, that said executions were issued on the 12th April, 1841, and on the same day delivered to Faulkner as such constable. That Faulkner frequently admitted to witness, between that time and the following September, that he had collected the money on the executions of Byrd, and promised to pay it over, but failed to do so; and that Faulkner never returned the executions.

Plaintiff admitted that the first judgment was entitled to a credit of $28 57, the second of $100, and the third of $100, as of 13th October, 1840.

Defendants introduced no testimoney.

Defendants asked the court to charge the jury as follows:

"That if the jury believe from the evidence that the writs of execution, mentioned in the declaration, came to the hands of Faulkner prior to the making of the bond specified in the pleadings, the said Woodruff and Williams, as sureties, are not liable either for a failure to return the executions, or to collect or to pay over the money on said executions, and the jury are bound to find for them."

Which instruction the court refused, and defendants excepted; but the court gave the instruction in a modified form as follows:

"If the jury believe from the evidence that the said writs of execution came to the hands of Faulkner prior to the making of the bond specified in the pleadings, and that Faulkner was at the time legally constable of Big Rock township, the said Woodruff and Williams, as sureties, are not liable either for a failure to return the executions, or for collecting and failing to pay over the money on said executions, and the jury are bound to find for them." Defendants excepted to the giving of the instruction so modified.

The court further instructed the jury, on motion of defendants, that plaintiff was not entitled to recover unless she had proven the truth of one or both of the breaches assigned in the declaration.

The court further charged the jury, of its own motion, "that if the money specified in said executions was received by Faulkner, as constable of Big Rock township, before the bond mentioned in the pleadings was executed, his securities were not liable for the money so received; but if received after the 19th of April, 1841, the date of the bond, they were liable, although in point of fact the executions might have come to his hands on the 12th of April, 1841."

And further, "that although in point of fact the said executions might have been received by Faulkner on the 12th of April, 1841, yet that if he was not then legally a constable of Big Rock township, and did not become such until the 19th of

April, 1841, when the said bond was executed, the said writs of execution would be considered in point of law as having been received by him on the 19th of April, 1841, as alleged in the declaration, and that the said Woodruff and Williams would be liable as his securities in the action, either for a failure to return the said writs of execution, when the same became returnable, or for any money collected by Faulkner upon them after said 19th of April, 1841, and not paid over according to law."

And further, "that if the money mentioned in said writs of execution was paid to Faulkner before the execution of said bond, the burden of proving that fact rested upon the defendants according to their pleading."

Defendants excepted to the instructions so given by the court to the jury of its own motion.

Defendants brought error.

S. H. HEMPSTEAD, for plaintiff.

WATKINS & CURRAN, contra.

OLDHAM, J. The first question to be determined is whether the court correctly sustained the demurrer to the eighth plea filed by the defendants below. The first breach is for failing to return the executions, and consequently there could be no record of the executions. The breach does not aver that there is any such record; the plea denies what is not averred. A justice's court is not a court of record. *Rev. St. Ch.* 43 *sec.* 13. The demurrer was properly sustained.

The remaining question is whether the instructions given by the court to the jury were correct. In the *State vs. Roberts*, 7 *Halst.* 114, it was held that "if an execution remain in the hands of a sheriff when his term of office expires, yet it is his duty on his reappointment to execute it, and his neglect is a breach of his new bond." The executions in the present case

came to the hands of the constable seven days before he executed his official bond. After the execution of his bond it was his duty to levy the executions and make return according to law, and for his failure to do so his securities became liable. They were bound for the faithful performance of his duties, from and after the date of the bond. For acts previously done they were not liable. If he received the money upon the executions after the date of the bond the securities were liable for his failure to pay it over.

According to the principles thus stated the court correctly refused the instruction asked by the defendants below, and erred in their favor in giving it under the modified form in which it was given. All the other instructions upon this point were correctly given.

By the pleadings the defendants confessed that the money was received by Faulkner as constable, but averred that it was before the date of the bond; they averred an affirmative fact, which it devolved upon them to prove and consequently the last instruction was correct.

We are of opinion that the evidence authorized the verdict and that a new trial was properly refused. Affirmed.

VAUGHN VS. BROWN.

A writ of summons addressed to the Sheriff of ——— county, is void, and no officer is authorized to execute it.

A return by a sheriff that he served a writ by leaving a copy with defendant's wife, a white member of his family, over the age of fifteen years, is not sufficient—the return must also show that the copy was left at defendant's usual place of abode.

Writ of Error to the Circuit Court of Pope County.

DEBT, on a promissory note, brought by Wilson Brown against

Sterling Vaughn to the March Term, 1847, of the Pope circuit court.

The summons issued by the clerk for the defendant, commences as follows:

"STATE OF ARKANSAS, }
County of Pope, } ss.

The State of Arkansas, to the Sheriff of ——— *County*—Greeting:

You are hereby commanded to summon Sterling Vaughn, if to be found in your bailiwick," &c.; following the usual form of a summons in debt.

The return endorsed on the writ is as follows:

"Came to hand February 17th, 1847; and executed on the 18th instant, by leaving a certified copy of the within writ for Sterling Vaughn, the within named defendant, with his wife, a white member of his family, and over the age of fifteen years, in the county of Pope, Gum Log Township."

"JOHN W. JONES, Sheriff."

At the return term, judgment was rendered against defendant by default, before the Hon. SEBRON G. SNEED, judge.

Defendant brought error.

LINTON & BATSON, for plaintiff.

E. CUMMINS, contra.

JOHNSON, C. J. This is a judgment by default rendered against the plaintiff in error. He has assigned two errors in the judgment and proceedings of the circuit court. First, that the original writ itself is illegal and void; and secondly, that the service is insufficient. The writ is not addressed to any officer authorized by law to execute process or to any person whomsoever. The writ is clearly a mere nullity, as the sheriff of the county of Pope himself would have had no authority to execute it. All writs and other process must be directed to some person authorized by law to execute the same, and without such direc-

tion they are wholly void. The return is that it was executed by leaving a certified copy for the defendant below, with his wife a white member of his family and over the age of fifteen years. It is not stated to have been left at his usual place of abode. This is expressly required by the statute, when the service is not upon the person of the defendant. This requisition of the statute cannot be dispensed with, and as a necessary consequence the service is utterly insufficient. For these reasons the judgment must be reversed. The case is remanded to the circuit court and the plaintiff in error considered in court.

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GREGORY VS. BEWLY ET AL.

To constitute usury there must be an intention knowingly to contract for, or to take usurious interest.

Where one loans another depreciated bank paper, and takes his bond therefor payable in dollars, with a provision that it may be discharged at maturity in such bank paper, the transaction is not usurious, unless that form is given to it as a device to cover usury.

The fact that the lender was in the habit at the time of paying and receiving such paper at par in business transactions, disproves a usurious intention on his part.

Writ of Error to Pope Circuit Court.

DEBT, in the Pope circuit court, by Gregory against Bewly, Langford and Bruton, on a writing obligatory. The case has been to this court before. *See Gregory vs. Bewly et al.*; 5 *Ark. R.* 318.

After the cause was remanded, the death of Langford was suggested, the cause revived against his executors, and judgment by default taken against them and Bruton. Bewly filed a separate plea of usury, to which plaintiff took issue, the cause

was tried by the court, sitting as a jury, and judgment for Bewly. Plaintiff moved for a new trial, which was refused, he excepted, and took a bill of exceptions setting out the evidence. Bruton and the executors of Langford brought error, and the judgment against them by default was reversed by this court, on the ground that the judgment in favor of Bewly on his plea enured to their benefit. *See Bruton et al. vs. Gregory*, 3 *Eng. R.* 177.

Gregory brought error to the judgment in favor of Bewly.

The bond sued on follows:

"One day after date we or either of us promise to pay to Hawkins Gregory, executor of the estate of R. T. Banks, deceased, the sum of two hundred and twenty-seven dollars, and twenty-five cents, with interest at the rate of ten per cent. per annum, until paid, which may be discharged in Arkansas money, for value received, as witness our hands and seals: this January 26th, A. D. 1842." Signed by Bewly, Langford and Bruton.

The substance of the evidence, as set out in the bill of exceptions, is stated in the opinion of this court.

WATKINS & CURRAN, for the plaintiff.

That the judgment in favor of Bewly ought be reversed, we think is clear. The evidence expressly disproves usury, and the plea is not only unsupported by evidence, but does not in law disclose any usury, so that the plea itself is insufficient on its face. Mason owed Gregory $227 25 in good money. Bewly owed Mason the same amount in Arkansas money, then at a discount. By agreement with Mason, Gregory cancelled his debt against Mason, and accepted in satisfaction Bewly's note to him for the like amount, which if paid by a certain time might be discharged in Arkansas money, which the witness testified he and others in that part of the country received at par, in all ordinary transactions of business, and by which the debt of Bewly to Mason was cancelled. Nothing is clearer that

upon the failure of Bewly to pay at the time stipulated, he lost his right to pay in Arkansas money, and Gregory could recover the full amount of the note as this court decided in *Gregory vs. Bewly*, 5 *Ark.* 319, and *Day vs. Lafferty*, 4 *Ark.* 450, and there can be no usury on the part of Gregory, because in taking the note of Bewly, he could in no event recover more upon it than the amount of his orginal debt against Mason.

BERTRAND, contra.

OLDHAM, J. The defence relied upon in this case is usury. The *Rev. St.*, *Ch.* 80, *sec.* 7, enacts that "all bonds, bills, notes, assurances, conveyances and all other contracts or securities whatsoever, whereupon or whereby there shall be taken or reserved any greater sum or greater value for the loan or forbearance of any money, goods, or things in action, than is prescribed in this act, shall be void." The question presented is, whether the transaction developed by the testimony is usury within the meaning of the statute.

In the case of *the Bank of the United States vs. Waggoner et al.*, 9 *Pet. R.* 378, Judge STORY, in delivering the opinion of the court said, "that in construing the usury laws the uniform construction in England has been (and it is equally applicable here) that to constitute usury within the prohibition of the law there must be an intention knowingly to contract for, or to take usurious interest; for if neither party intend it, but act bona fide and innocently, the law will not infer a corrupt agreement. Where indeed the contract on its face imports usury, as by an express reservation of more than legal interest, there is no room for presumption: for the intent is apparent—*res ipsa loquitur*. But where the contract on its face is for legal interest only, then it must be proved that there was some corrupt agreement or device or shift to cover usury; and that it was in full contemplation of the parties."

The question presented by the facts in this case is the same

as in that; whether there was any corrupt agreement or shift or device to take or reserve usury. The testimony shows that at the date of the writing obligatory sued upon, one Mason was indebted to the plaintiff in the sum of $227 25, in payment of which Mason assigned to the plaintiff a writing obligatory executed by defendant Bewly for the sum of $225 in good current bank notes of the State of Arkansas, due the 25th December, 1840. That on the 26th January, 1842, a new bond was given by the defendant to plaintiff with Langford and Brewton as his securities, for the amount and interest then due upon the bond to Mason, payable one day after date, with interest at the rate of ten per cent. per annum until paid, and which might be discharged in Arkansas money. At the time bank notes of the State of Arkansas were at a discount of twenty-five per cent., but the plaintiff was about that time in the habit of receiving and paying them at par.

When this case was previously in this court, it was held that the makers by performing the alternative stipulation contained in the bond, might have discharged themselves from their obligation to pay money. 5 *Ark. R.* 318. Had the defendants paid the debt when it became due, they could have done it with Arkansas bank notes, for that privilege was reserved in the bond. In *Caton vs. Shaw*, 2 *Har. & Gill*, 13, it was held that a loan of bank notes at a discount unexplained by circumstances would be usurious, but when the borrower was at liberty to return them to the lender at their par value, and so exempt himself from loss, such a transaction will not be deemed usurious unless it was a cover for usury. The principle thus decided is applicable to this case. The renewal of the bond was equivalent to a loan of Arkansas bank notes with the privilege of paying the debt in the kind of funds received, and by which the borrowers might exempt themselves from loss, and consequently the transaction was not usurious, unless that form was given to it as a shift or device to cover usury. The fact that the plaintiff was in the habit of paying and receiving such bank paper

at par value, and that he received Bewly's note at par, disproves the intention of usury on his part. A penalty inserted in a contract from which a party may deliver himself does not make such contract usurious. *Pollard vs. Bailey*, 6 *Mun.* 433. We think that the testimony does not show that there was a corrupt agreement or intention to take or reserve usury, and that the court should have granted the plaintiff a new trial.

ADAMSON VS. ADAMSON.

The fact that a court has a clerk and a seal, raises the presumption, and is *prima facie* evidence, that it is a court of record.

In an action for the hire of slaves for one year, it is erroneous to instruct the jury that what defendant paid for the same slaves the year previous, is the correct criterion of their value—as the value of slave hire fluctuates.

What such slaves hired for during the year in controversy, would be the correct criterion.

Writ of Error to the Pulaski Circuit Court.

Assumpsit, for the hire of slaves, brought by Jane Adamson against John Adamson, determined in the Pulaski circuit court, at the April Term, 1847, before the Hon. W. H. SUTTON, judge.

In a bill of particulars filed by plaintiff, she claimed of the defendant $250 for the hire of two negro boys, Bill and Henson, for one year, commencing January 15th, 1844, with interest from the 15th January, 1845.

The cause was tried on the general issue, and verdict in favor of the plaintiff for $286 25, damages.

Defendant moved for a new trial on the grounds: 1st. that the court admitted depositions, offered by plaintiff, which were not properly authenticated: 2d. the verdict was contrary to

law: 3d. contrary to evidence: and 4th. the court instructed the jury contrary to law. The court refused a new trial, defendant excepted, and took a bill of exceptions setting out the evidence and points reserved, from which it appears:

Plaintiff offered in evidence the depositions of Walter H. Adamson and John H. Higgins, taken in her behalf, before George R. Braddock, a justice of the peace of Montgomery county, Maryland, on the 20th April, 1847, to which is appended the following certificate of the official character of the magistrate before whom they were taken:

"STATE OF MARYLAND, }
Montgomery County, } SCT.

I hereby certify that George R. Braddock, *Gentleman*, before whom the foregoing depositions appear to have been made, and whose name is thereto subscribed, was at the time thereof one of the State of Maryland's Justices of the Peace, in and for said county, duly commissioned and sworn.

{L.S.} In testimony whereof, I hereunto subscribe my name, and affix the seal of said county court, this 22d day of April, 1847.

SAM'L T. STONESTREET, Cl'k
Montg'y Co'ty Co't."

To the reading of which depositions defendant objected upon the ground that the above certificate did not appear to have been made by the clerk of a court of record, but the court overruled the objection, and defendant excepted.

Deponant, Adamson, states that his mother, the plaintiff, hired to defendant two negro boys in the year 1836 or 1837, which he took to Arkansas. For the first three years he was to pay $100 each, the hireing to commence 15th January, 1836 or 1837; and deponant had heard his mother say that after the first three years, defendant was to pay $125 a year for each of said slaves. That defendant kept said slaves until the year 1845. That for the first three years defendant paid his mother $100 each for

the said negroes, and from that time to the 15th January, 1844, settled with her, through an agent, at $125 each.

Deponant, Higgins, states that for the year 1839, defendant paid plaintiff $200 for the hire of the two slaves, and from that time to the 15th January, 1844, paid her, through an agent, partly in money, and partly in merchandize, $250 a year for said slaves.

Defendant proved that in the fall of 1843, he had informed plaintiff that he would not hire the slaves for another year at $125 each, but if he kept them longer it must be at the rate of $100 each per year.

The above is the substance of the evidence—other facts and circumstances were proven, but as the court have not decided upon the effect of the evidence, it is not deemed necessary to state it more fully.

The court charged the jury as stated in the opinion of this court, and further instructed them that it was descretionary with them to give or withhold interest on the hire of the slaves from the time it became due, to which instructions defendant excepted.

RINGO & TRAPNALL, for the plaintiff. 1st. The court improperly permitted the depositions to be read to the jury; because they were not proven and authenticated by the certificate and seal of the clerk of a court of record as required by *section* 16, *p.* 326 *Rev. Stat.*, and hence were *not* legal testimony and could not be read except by consent.

2d. The record shows that there was no contract to hire the slaves for said year; but on the contrary shows that the proposition of Mr. Adamson to hire them was never acceded to by Mrs. Adamson; and it is well settled that where one does not accede to a proposition or promise as made, the other is not bound by it. *Tuttle vs. Love*, 7 *John. R.* 470.

There being no contract to hire and no request on the part of the plaintiff in error for the slaves to remain and work for him,

no action will lie against him for hire. *Bartholomew vs. Jackson*, 20 *J. R.* 28.

Where work is done for another, even with his approbation and knowledge, and it appears that there was an understanding that no compensation should be given, the law will not imply a promise to pay for such labor. *Livingston vs. Acketson*, 5 *Cow. Rep.* 531. See also *Davis vs. Davis*, 38 *Com. Law Rep.* 46, for a similar principle.

As there was no contract to pay a sum certain (or even any thing) the plaintiff below could recover only upon a *quantum meruit* for work and labor, and the defendant below could show in defence that he received no benefit. *Scheneman vs. Withers*, *Anth. N. P.* 166, *n. b.*

The record in this case shows that the labor of the slaves was nothing like as valuable to the plaintiff in error, as it was the previous year, or as it would have been that year if he had expected them to remain with him during the whole year.

FOWLER, contra. The depositions were properly admitted in evidence. Our statute requires that where depositions are taken out of the State, the official character of the officer taking the depositions must be authenticated by the seal of a court of record, &c. *Rev. Stat. p.* 326, *sec.* 16. But it is not necessary that the certificate of the clerk of a court should state that the court is a court of record. The seal itself raises the presumption that it is a court of record, which must prevail, unless the contrary be shown. 7 *Missouri Rep.* 216, 217, *Steamboat Thames vs. Erskine and Gore.*

The verdict was clearly sustained by the evidence, and the instructions of the court were clearly right, as will fully appear when tested by the following principles of law, to wit:

1. Creditors are allowed to receive six per cent. interest on money due on settlement of accounts, &c., and "on money due and withheld by an unreasonable and vexatious delay of pay-

ment or settlement of accounts." *Rev. Stat. p.* 469, *sec.* 1, title *Interest.*

2. When a statute authorizes interest on money "withheld by an unreasonable and vexatious delay of payment," it is for the jury to determine whether there has been such delay, &c. 4 *Missouri Rep. p.* 258, *McLean admr. vs. Thorpe.*

3. Simple interest recoverable in assumpsit, whenever there is either an express or implied contract therefor. *Story on Contracts, part* 3, *ch.* 3, *sec.* 716, *p.* 429.

4. In such cases interest is in the nature of damages, and its allowance wholly in the discretion of the jury. *ib.*

5. When by the terms of a contract, the principal is to be paid at a specified time, an agreement is always implied to pay interest after the default to pay at that time. *Story on Contracts, p.* 430, *sec.* 717. 1 *Baldw. Rep.* 538. 2 *Brown's Ch. Rep.* 3, *Boddam vs. Riley.*

6. An account stated always bears interest, and the claim here is in substance an account stated. 1 *Baldw. Rep.* 538 *et seq. Bainbridge & Co. vs. Wilcocks.* 2 *Burr. Rep.* 1083 *et seq. Robinson vs. Bland.*

7. If the evidence is doubtful the jury will decide whether there was a promise either expressed or implied to pay interest; and though the jury may not be satisfied that there was any such contract for the payment of interest, yet it may find interest as damages for the non-payment of the principal. 1 *Baldw. Rep.* 542, *Bainbridge & Co. vs. Wilcocks.*

8. In the absence of any evidence either enhancing or lessening the value of the slaves for the year in controversy, or changing the terms of their previous hire, a proper criterion would certainly be the price paid for the year next preceding. This is common sense, and it should be presumed that both courts and juries yet pay some regard to common sense.

9. In case of lands, where a tenant holds over from year to year, without a new stipulation as to rent, the legal implication is, that by the tacit consent of both parties he holds over at the

former rent. 4 *Cowen's Rep.* 350, *Bradley vs. Covel.* 13 *Serg. & Rawle Rep.* 63 *Diller vs. Roberts.* 5 *Tenn. Rep.* 472, *Doe ex dem. Riggle vs. Bell.* 15 *John. Rep.* 507 *Abeel vs. Radcliff.* The same reason applies in the case of the hiring of slaves.

OLDHAM, J. The first objection taken by the assignment of errors is, that the certificate of the clerk authenticating the depositions, does not show that it was made by the clerk of a court of record as required by the statute. This certificate was made by the clerk of the county court, and has his seal of office affixed. The fact that the court has a clerk and a seal, raises the presumption, and is *prima facie* evidence, that it is a court of record.

It is next assigned for error that the court instructed the jury "that if they believed from the testimony that the negroes in question remained in the possession of the defendant during the year commencing January 15, 1844, and ending January 15, 1845, and were employed by him on his plantation or about his business, they would find for the plaintiff what their services were reasonably worth; and that in the absence of testimony to show what amount was to be paid for the hire or use of said negroes for the year commencing January 15, 1844, and ending January 15, 1845, a proper criterion for them to be governed by would be the price paid by the defendant for the same negroes the year previous or next preceding." This instruction was clearly wrong. The price of negro hire is quite fluctuating, being continually subject to the control of circumstances. The value of the hire for one year is no correct criterion for the ensuing. Besides, the defendant had expressly informed the plaintiff that he would not retain the negroes at the same rate he had paid for them the year previous. The court should have instructed the jury that they should take into consideration all the circumstances attending the transaction, and that the measure of damages would be a reasonable compensation for the hire of the negroes during the time they were in the service of

the defendant. What such negroes were hiring for during that time would be the correct criterion of damages.

Reversed.

SAWYER VS. CRAWFORD.

In the absence of an act authorizing it, a judgment of a justice of the peace cannot be removed to the circuit court by *certiorari* for re-adjudication. *Levy vs. Lychinski*, 3 *Eng. R.*, cited.

Writ of Error to the Washington Circuit Court.

Sawyer sued Crawford before a justice of the peace of Washington county upon account, in September, 1845, and obtained judgment. Crawford removed the case into the circuit court by *certiorari*, and the judgment of the justice was quashed for irregularities.

BERTRAND & W. WALKER, for plaintiff. The only question by this court to be determined is, can the circuit court issue a writ of *certiorari* to a justice of the peace to bring up a case for re-investigation and re-adjudication? Upon the decision of this question this case must turn and be decided. We understand this court to have decided this question in the negative; and shall do no more, therefore, than to refer to the decision upon this point. *Levy vs. Lychinski*, 3 *Eng. R.*

The plaintiff in the court below should have appealed from the judgment of the justice of the peace. *Rev. Stat. page* 515, *sec.* 170.

E. H. ENGLISH, contra.

OLDHAM, J. This was a suit brought originally before a justice of the peace, and after judgment was carried into the circuit court of Washington county by certiorari. In *Levy vs. Lychinski*, decided at the last term of this court, it was held that "there is no act of the legislature by which the circuit courts are authorized to issue writs of certiorari for the purpose of obtaining jurisdiction of causes from inferior courts, and until such power shall be conferred by legislative authority, the circuit courts cannot assume or exercise it." The circuit court acquired no jurisdiction of this cause by the writ of certiorari. The judgment is therefore reversed.

ADAMS ET AL. VS. STATE, USE STATE BANK.

Declaration in Pulaski circuit court, and writ to Johnson county. Plea in abatement, that the writ improperly issued to Johnson, and judgment on the plea for defendants. HELD that such judgment was merely in abatement of the writ, and no bar to the issuance of a new writ properly directed.

Writ of Error to Pulaski Circuit Court.

The State brought an action of debt, for the use of the Bank of the State of Arkansas, to the April Term, 1843, of the Pulaski circuit court, upon the official bond of the sheriff of Johnson county, against Wm. Adams, James P. Patterson, Samuel Adams, John W. Patrick, and Joseph James, securities in the bond.

A writ of summons was issued to the sheriff of Johnson county, and served upon the defendants. At the return term the defendants filed a plea in abatement of the writ, "because said writ was executed upon them without the jurisdiction of the court, *to wit:* in the county of Johnson," praying judgment

of the writ and that it be quashed. The plaintiff demurred to the plea, upon the ground that the Bank, for whose use the suit was brought, had the privilege of running process into any county in the State. The court overruled the demurrer, and the plaintiff declining to answer over, rendered judgment that defendants go hence without day, and recover of the Bank all their costs in that behalf expended. The plaintiff brought error, and this court affirmed the judgment. See *State, use &c. vs. Adams et al.* 5 *Ark. R.* 677.

On the 25th October, 1844, and after the judgment of the circuit court on said demurrer, plaintiff sued out a summons to the sheriff of Pulaski county against Samuel Adams, which was returned duly served; and at the same time took a summons to Johnson county against the other defendants, which was served upon all of them but Patterson.

At the October term, 1846, on motion of plaintiff, the cause was re-placed upon the docket.

Defendant, Samuel Adams, pleaded the above judgment in abatement of the suit. Plaintiff replied that the said judgment only extended to the writ, that the declaration remained on file, and that a writ of summons was issued thereon to the sheriff of Pulaski county, and returned duly served upon said defendant, &c. Defendant rejoined that said judgment was final, and the court sustained a demurrer to the rejoinder.

Defendants, Patrick and James, filed a similar plea, plaintiff replied the issuance of the summons to Puliski county against Samuel Adams, and the writ to Johnson county against them, to which they demurred, and the court overruled the demurrer. William Adams made default, and the other defendants declining to plead over, final judgment was rendered, on writ of inquiry.

WATKINS & CURRAN, for the plaintiffs. The only question in this case, is whether the first judgment rendered was final. We do not, nor is it necessary that we should, contend that it was a

final bar to the cause of action, but simply that it was a final disposition of, and bar to, this particular suit. It would be no bar to another action for the same cause, but is a bar to this suit. If the plaintiff wished to proceed further, a new suit should have been commenced, by filing another declaration. True, the original plea filed in this case was only in abatement of the writ, and the plaintiff might have submitted to the plea and taken alias process, in which event no final judgment would have been entered; the judgment would have been merely in abatement of the writ: but instead of that, the plaintiff, for the purpose of testing her right to issue process to another county, elected to stand on the demurrer to the plea and permitted final judgement, and then sued error to this court. The language of the judgment is, "that the defendants go hence hereof without day and recover against said Bank for whose use the suit was brought, all their costs in this behalf expended."

But independent of every other consideration, the fact that the judgement was affirmed on writ of error sued from this court, is conclusive of the question, and writ of error will not lie from this court to any other than a final judgment; and even if it could be shown that the judgement was not final, that decision is conclusive—the law of the case, and cannot now be questioned or inquired into on this writ of error. If the first judgment had been against the defendants and the judgment been reversed, the cause would have been remanded. Even in that event it is very doubtful whether the defendants would have been compelled to appear; because the effect of it would have been to enable the Bank to do the very thing which the court decided she was not entitled to do, and to defeat the defence, which, by the decision of the court, had been adjudged sufficient. But as this judgment was affirmed, of course it was not remanded to the circuit court, and no further proceedings could be taken therein without filing another declaration and commencing a new suit.

We insist that this judgment must be reversed and the cause

remanded to the circuit court with instruction to dismiss and strike the same from the docket.

LINCOLN, contra.

OLDHAM, J. The plea in abatement filed by the plaintiffs in error, who were defendants below, was to the writ originally issued against them to the sheriff of Johnson county. The judgment of the court upon the refusal of the plaintiff below to reply to the plea was substantially that the writ abate, and that the defendants go hence without day. The plaintiff upon the first writ having abated by the judgment of the court undoubtedly had a right to sue out a valid writ properly directed, as much so as if the writ had been abated or quashed for any other cause than that set forth in the plea. We perceive no error in the judgment. Affirmed.

SCOTT VS. STATE BANK.

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A plea that a bond was delivered to the *obligee* on conditions not performed, is not a good plea that it was delivered as an escrow. This principle is also applicable to notes.

If delivered to a third person it is not binding until the conditions are performed, but otherwise if delivered to the payee.

A delivery to an agent is a delivery to the principal.

Therefore, a plea that defendant signed the note sued on and delivered it to an agent of the plaintiff (a bank) on the express agreement that it was not to be discounted until it was signed by a third person, as co-security, whose name was in the body of the note, and that the bank discounted the note without obtaining the signature of such third person, is bad on demurrer.

Writ of Error to the Crawford Circuit Court.

DEBT, by the Bank of the State of Arkansas against Scott, on a promissory note, determined in the Crawford circuit court, August Term, 1847, before the Hon. W. W. FLOYD, judge.

The defendant filed a special plea as follows:

"And now at this term comes the defendant, and craves oyer of the writing sued on in this case, and it is read to him in words and figures following, *to wit:*

'$735. FAYETTEVILLE, 3d March, 1842.

Six months after date we, John Dillard as principal, and J. A. Scott and W. Duval, as securities, jointly and severally promise to pay to the Bank of the State of Arkansas, or order, the sum of seven hundred and thirty-five dollars, payable and negotiable at the Branch of said Bank at Fayetteville, for value received; Witness our hands. JNO. DILLARD,

J. A. SCOTT.'

"And therefore, the said defendant says *actio. non,* because he says that upon the face of said promissory note it is positively shown that the said John Dillard, as principal, and the said defendant and Washington Duval, as securities, of the said John Dillard, promissed to pay to the said plaintiff, the said sum of money in plaintiff's declaration mentioned; and that said note was then and there so filled up, presented to the said defendant by an agent of the Bank aforesaid, who then and there told said defendant that the said Duval was to sign said note as security, and the said defendant then and there signed the same with the express understanding and agreement with the said Bank, by its agent, that the said Duval should also sign said note as a security; and that the same then, and not until then, should be used by the said Bank and discounted as a payment or renewal of another certain note then due and owing by the said Dillard to said Bank; and said defendant avers that said agent of said Bank fraudulently afterwards delivered said note, so given on

oyer, to said Bank without first obtaining the signature of said Duval, and the agents and directors of said Bank well knowing the premises, contrary to their prescribed rules and customs, fraudulently used said note in payment or renewal of said Dillard's note for the like amount; and this defendant is ready to verify," &c. PASCHAL & OGDEN.

The court sustained a demurrer to the plea, and defendant brought error.

PASCHAL & OGDEN, for plaintiff, to show that Scott was not liable on the note, cited *Chipman on Contracts*, 23 (1 *Ed.*). *Pauling et al. vs. U. S.*, 4 *Crauch's R.* 219. Same case, 2 *Pet. Cond. R.* 93.

LINCOLN, contra.

OLDHAM, J. The facts set up by the plea do not amount to a good defence. The note was signed and delivered to the agent of the Bank with the understanding that Duval should also sign it. A delivery to the agent of the bank as such was a delivery to the bank. Had the note been under seal, the facts pleaded would not amount to a good plea that it was delivered as an escrow. A plea that a bond was delivered to the obligee, on conditions not performed, is not a good plea that it was delivered as an escrow. *Reed vs. Latham*, 1 *Ark. R.* 66. The principle is also applicable to a promissory note. *Badcock vs. Steadman*, 1 *Root* 87. If delivered to a third person it is not binding, until the condition upon which it was delivered be performed, but if directly to the promisee, it is binding from delivery, whether the condition be performed or not. The court correctly sustained the demurrer to the plea, and the judgment is therefore affirmed.

MURRAY VS. CLAY.

Where a party covenants to do an act, for which he receives a consideration, and fails to perform the act, the other party may bring covenant for the breach, or assumpsit to reclaim the consideration.

In assumpsit for the consideration, plaintiff must prove the contract under which he paid the money, and the failure, refusal or inability of defendant to perform it on his part.

Appeal from the Jackson Circuit Court.

ASSUMPSIT, by Murray against Clay, determined in the Jackson circuit court, November, 1847, before the Hon. W. C. SCOTT, judge.

Plaintiff declared in indebitatus assumpsit, for work and labor, goods, wares and merchandise, money advanced, paid, laid out and expended, and money had and received, &c. &c.

The cause was tried on the general issue, and verdict and judgment for defendant. Pending the trial, plaintiff took a bill of exceptions, in substance as follows:

"On the trial, plaintiff introduced A. H. Graham, as a witness, for the purpose of proving a certain contract (as inducement to plaintiff's cause of action) between defendant and plaintiff, upon which plaintiff had paid defendant $200, and that the consideration for which said money was paid, had wholly failed, (and for which cause plaintiff seeks to recover under the count for money had and received.) And said witness testified that there was an agreement made between plaintiff and defendant, and that they requested him to reduce the same to writing, some time in the month of May, 1847. Whereupon, defendant objected to witness testifying anything about said contract as it was reduced to writing; the court sustained the objection, and plaintiff excepted. Plaintiff then offered to read said written contract to the jury to show an inducement to

the cause of action—to enable him to prove the failure of the consideration for which he paid defendant the said $200, which he sought to recover back—but the defendant objected to the introduction of said written contract, and the court decided that said contract could not be read as evidence to the jury, and that plaintiff could not introduce any other evidence whatever as to said contract, to show that he had paid defendant the said sum of $200 in said contract named, and that the consideration therefor had wholly failed; and plaintiff did not, by reason of such decision, introduce any further or other testimony, and the court directed the jury to find for the defendant, which they did, &c., to all of which plaintiff excepted. The written contract referred to by said witness, and offered in evidence by plaintiff, is in the words and figures following, *to wit:* "Know all men by these presents, I, Mastin Clay, do this day both sell and bargain all my right, title and claim of an occupant claim, that I now live on, to Mr. James Murray for the consideration of two hundred dollars, to be delivered to said Murray on, or by the first day of January next; and said Clay is to prove up the pre-emption in full without dispute to secure to said Murray all right and title and claim in peace. This made and concluded by me, as hereunto I have set my hand and seal, this the fifth day of May, 1847. MASTIN CLAY, [SEAL.]"

"Attest: A. H. GRAHAM."

The plaintiff appealed, and assigned for errors the points reserved in his bill of exceptions.

BYERS & PATTERSON, for appellant.

FOWLER, contra. Wherever a man may have an action on a sealed instrument, he must resort to it. 2 *Cond. Rep.* 98, *Young vs. Preston.* 1 *Esp. N. P.* 96, 130. 2 *Esp. N. P.* 781. 1 *Saund. Pl. & Ev.* 110. 1 *Maule & Selw. Rep.* 575, *Scack et al. vs. Anthony.* 1 *Chit. Pl.* 94. 2 *M. & Selw. Rep.* 315 *et seq. Moorsom vs. Kymer.*

A plaintiff should not be allowed to go into evidence of any

special agreement on a general count in *indebitatus assumpsit.* 1 *Esp. N. P.* 130. 4 *Ark. Rep.* 579, *Hawk vs. Walworth.* 1 *Saund. Pl. & Ev.* 110.

Where in an action of *indebitatus assumpsit* it appears in evidence, on the trial, that the contract had been reduced to writing under seal, the plaintiff cannot recover; because the proof shows that he misconceived his action, and should have resorted to the higher security. 4 *Ark. Rep.* 579, *Hawk vs. Walworth.* 2 *Cond. Rep.* 98, *Young vs. Preston.* 2 *Esp. N. P.* 781.

The party could only proceed in assumpsit, where the deed is inoperative, or void, which is not the case here. 1 *Saund. on Pl. & Ev.* 110. 1 *Chit. Plead.* 95.

OLDHAM, J. It is a principle well settled that where a party has covenanted to do an act, for which he has received a consideration and fails to perform the act, the other party may either bring covenant for the breach or assumpsit to reclaim the consideration. *Sugden on Vendors, vol.* 1, 368–9. *Vol.* 2, 420 (*Hammond's Ed.*) *Weaver vs. Bentley,* 1 *Caines* 47. It is a common practice for purchasers of real estate, upon the refusal or inability of the vendor to convey, to bring an action of assumpsit for the purchase money, instead of covenant to recover damages for a breach of the contract. The last remedy is in affirmance of the contract; the first is not upon the contract, but in disaffirmance of it.

To entitle the plaintiff to recover in this case in the circuit court, it was necessary for him to prove the contract under which he paid the money, and also the failure, refusal or inability of the defendant to perform it on his part. This the court should have permitted him to do. The court erred in excluding the testimony offered, for which the judgment must be reversed.

YOES VS. THE STATE.

A crime or misdemeanor consists in a violation of public law, in the commission of which there must be a union or joint operation of act and intention or criminal negligence. *Digest, p.* 319.

The mere fact of a person going to a place with the intention to assault another, will not subject him to the penalty of such an offence, unless he carry his intention into effect.

If the assault be made, the preconceived intention may be proven in aggravation.

Where a witness has made a different statement from the one made by him on trial, he is not thereby discredited, unless the discrepancy is wilful.

Appeal from the Washington Circuit Court.

Enos Yoes was indicted in the Washington circuit court for an assault and battery upon James C. Hughs. He was tried on the plea of not guilty, at the May Term, 1847, before the Hon. WM. W. FLOYD, judge, convicted and fined ten dollars. Pending the trial, he took a bill of exceptions, from which it appears:

The said Hughs, sworn as a witness for the State, testified that on the 28th July, 1848, he was at a place, in Washington county, where there was a meeting—was some eighty yards from the meeting house, when defendant came up, and said he wished to speak to him, and called him aside—he followed; defendant and he conversed for some time, when defendant gave witness the lie, or witness gave him the lie; defendant kicked witness, he struck defendant, and then they fought.

Being interrogated thereto, by defendant's counsel, witness denied that he had, on the same evening, after the fight, at night meeting, told one Tulk that when defendant gave him the lie, he threw off his hat and attempted to collar defendant—witness was positive that he had told Tulk no such thing.

Another witness for the State testified that he was present, heard defendant call Hughs out—thought defendant was in an

ill humor—presently, he heard a noise like a kick, looked and saw Hughs and defendant fighting, but did not know which commenced the fight.

Another witness heard defendant say to Hughs, "come this way, I wish to speak to you," and soon afterwards saw them fighting, but did not know who began it.

Tulk, witness for defendant, testified, that on the evening after the fight, at night meeting, and just about sun-down, said Hughs told him that defendant gave him (Hughs) the lie, and that he (Hughs) threw off his hat and attempted to collar defendant, when defendant kicked him. Witness was present when defendant called Hughs out, but did not know which commenced the fight.

This being all the testimony, the State's Attorney asked the court to charge the jury "that if they believed, from the evidence, that defendant went to the meeting-house yard, and called Hughs out for the purpose of having a difficulty with him, they must find defendant guilty." Also, "if the jury believed from the evidence, that Hughs made a different statement about the difficulty to Tulk, to that which he now makes, they will not disregard Hughs' testimony, unless they believed the different statements were made wilfully and knowingly."

To the giving of which instructions, the defendant objected, but the court gave them, and he excepted.

FOWLER, for appellant.

WATKINS, Attorney General.

JOHNSON, C. J. The circuit court manifestly erred in giving the first instruction asked by the State. The instruction is, that if the jury believe from the evidence that the defendant went to the meeting-house yard and called Hughs out for the purpose of having a difficulty with him, they should find him guilty. A crime or misdemeaner consists in a violation of public law,

in the commission of which there must be a union or joint operation of act and intention or criminal negligence. See 1*st sec. of chap.* 44 *of the Revised Statutes.* The mere fact of going to a place with the intention of doing an unlawful act, will not of itself subject the party to the punishment denounced against such act, unless he also carries his intention into effect. If the defendant below actually made an assault upon Hughs in pursuance of his preconceived and settled intention, then it was that the motives, which induced him to go to the place where Hughs was, might have been legitimately inquired into in aggravation of the fine, but could not under any state of case have furnished conclusive evidence of his guilt. No valid objection is perceived to the last instruction. But for the error in giving the first, the judgment must be reversed.

S. & G. TURNER VS. GREENWOOD.

Protest of an inland bill for non-acceptance or non-payment, is not necessary. Where acceptance is refused, the bill need not be presented for payment.

Appeal from the Circuit Court of Benton County.

ASSUMPSIT, by S. & G. Turner against Greenwood, upon an inland bill of exchange, determined in the Benton circuit court, at the May Term, 1847, before the Hon. W. W. FLOYD, judge.

The declaration alleged that on the sixth day of September, 1844, Greenwood drew a bill on Pelham in favor of plaintiffs at sixty days. That on the 28th November, 1844, the bill was presented for acceptance, and not accepted, of which Greenwood was duly notified.

Defendant demurred to the declaration on the grounds, 1st.

that there was no averment that the bill was protested for non-acceptance or non-payment: 2d. the presentment of the bill for payment, and non-payment were not averred.

The court sustained the demurrer, and plaintiffs appealed.

BERTRAND & W. WALKER, for the appellants. The only question raised by the record is, whether the court below erred in sustaining the demurrer to the declaration.

The ground of demurrer assumed is, that the appellants in their declaration do not allege that the bill of exchange sued on was protested for non-acceptance or non-payment. The bill sued on, is an *inland bill*, and protest was not therefore necessary to hold the drawer liable to the appellants. *Story on Bills, pages* 556 *and* 558, *sections* 465 *and* 468.

ENGLISH, contra. The law merchant may not require protest of *inland bills;* but our statute seems to contemplate protest of all bills. *Rev. Stat. Tit.* "Bills of Exchange."

OLDHAM, J. The bill upon which this action is founded is an inland bill. Such bills need not, for non-acceptance or non-payment, be protested by the holder to charge the drawer. *Story on Bills*, 556–558. The *Revised Statutes* of this State does not change the law merchant upon this point.

The drawee refused to accept the bill upon its presentment for acceptance, and therefore no presentment or demand of payment was necessary. *Story on Bills*, 428. The court erred in sustaining the demurrer to the declaration, for which the judgment must be reversed.

GAINES AS ADR. VS. BRIGGS ET AL.

A father, by deed of gift, gave to each of his sons and daughters, and to their heirs forever, a slave, with a proviso that if either of them died without heirs, his or her slave should be equally divided among the survivors. One of the daughters married, and her husband died possessed of her slave and increase. Held that the deed of gift vested the slave absolutely in the daughter; on her marriage the property vested in the husband; and on his death, the title passed to his administrator, subject to the dower of the widow. *Moody vs. Walker,* 3 *Ark. R.* 147, *cited.*

In trover by the administrator for such slaves, the defendant cannot justsfy a taking and conversion, by showing that intestate had mortgaged the property to a third person.

Nor will it avail him, that he discharged the mortgage, and took an assignment to himself subsequent to his trespass.

In trover, it is no defence that defendant acted under the employment of another, who was himself a trespasser.

Trover is a concurrent remedy with trespass.

Writ of Error to the Yell Circuit Court.

This was an action of trover brought by James F. Gaines, as administrator of Gazway Haynes, deceased, against Malissa Haynes, James Briggs, and James Gault, and determined in the Yell circuit court, at the September Term, 1847, before the Hon. WM. W. FLOYD, judge.

The declaration alleged that on the 20th February, 1846, Gazway Haynes was possessed of three slaves, Rose, and her two children, Franklin and Sinda, as of his own property, in Scott county, and that on that day he died so possessed of said slaves. That after his death, the said slaves came to the possession of defendants by finding; and afterwards plaintiff was duly appointed administrator of deceased by the probate court of Scott county, and as such became entitled to the slaves, but though he had demanded them of defendants they had refused to surrender them, &c.

The action was discontinued as to Malissa Haynes, at the return term, for want of service of process.

The other defendants pleaded not guilty, the cause was submitted to a jury, and they returned a verdict for defendants. Pending the trial, the plaintiff took a bill of exceptions, from which it appears:

To maintain the action, plaintiff read to the jury his letters of administration upon the estate of Gazway Haynes, granted by the probate court of Scott county, 4th March, 1846, in due form of law. Also, an order of the probate court of Scott county, reciting that Gaines had made it appear to the court that the personal property of his intestate was insufficient to pay his debts; that he died possessed of certain slaves (the slaves mentioned in the declaration) which had been run out of the county, and probably out of the State, and authorizing Gaines to take the necessary steps to get possession of said slaves, and hold them subject to the further order of the court. This order was made 14th April, 1846, (before the institution of this suit.)

Plaintiff proved by Thos. L. George, that prior to the year 1834, Gazway Haynes intermarried with Malissa George, in the State of South Carolina, who was in possession of the slave, Rose, mentioned in the declaration. That about the year 1834, they moved to Arkansas, bringing Rose with them. That the children of Rose, Franklin and Sinda, were born after they moved to this State, and Gazway Haynes continued in possession of Rose and her said children until he died, in January, 1846, in Scott county. That a short time after the death of Gazway Haynes, John Briggs, a minor son of the defendant, James Briggs, brought the wagon and team of his father to Scott county, and moved the said Malissa Haynes, widow of deceased, together with said negroes to Yell county, taking some other personal property and household effects belonging to the estate with them.

Said John Briggs testified that, at the request of Mrs. Haynes, his father sent him with the wagon and team to move her from Scott to Yell county, and that he moved her, with the negroes,

&c., as stated by the last witness. They stayed at his father's house one night on the route, and next morning proceeded to Danville, Yell county, where witness left them. Witness recollected no direction given him by his father, but to move Mrs. Haynes as above stated. Witness thought the negroes belonged to her.

William Porter, testified that a short time after Mrs. Haynes arrived at Danville, he saw said slaves at the residence of defendant, James Gault, where they remained for a month or two, and that afterwards Gault told him he had taken the negroes out of the State and sold them.

Defendants admitted to the jury, that Gault had so taken the slaves off, and sold them.

Arnold testified that, after the negroes were removed to Yell county, plaintiff, Gaines, asked Gault to surrender them, and he promised to keep them until Gaines should come or send for them.

Duncan testified that, when young Briggs moved Mrs. Haynes and negroes to Danville, he left them at Gault's house.

Parks testified that, some time before the death of Haynes, he advanced him about $122, to discharge a mortgage which one McConnell held upon said negroes, and took a deed of trust from Haynes upon the negroes to secure the re-payment of the loan. After the death of Haynes, witness went to defendant Gault, to endeavor to secure his money, Gault referred him to Mrs. Haynes, but she said she had not the money. Gault then told him not to be in haste to pursue the negroes in the hands of those to whom they had been sold out of the State, and probably the matter would be arranged. Afterwards Gault sent him the money, through an agent. In conversations with Gault and Mrs. Haynes, witness undersood them both to say that the proceeds of the sale of the negroes were in the hands of Gault. On payment of the money, witness assigned his deed of trust to Gualt.

William Briggs testified that, Mrs. Haynes went to defendant

James Briggs, and requested him to move her from Scott to Yell county, and he accordingly sent his son John with the wagon and team and removed her. The family knew at the time that Haynes was dead, and defendant, James Briggs, knew that said negroes were in the possession of Haynes during his lifetime. Some one mentioned to James Briggs that he had gotten into a difficulty about removing the negroes from Scott county, and he replied that he had done what he did ignorantly, and without intention to injure any one.

Defendants then introduced the following testimony:

After proving the execution thereof by Joseph Gault, a subscribing witness, defendants read in evidence to the jury the following instrument:

"SOUTH CAROLINA, Union District.

Know all men by these presents, that I, Thomas George, for divers good causes me hereunto moving, do give to Thomas Jefferson George, Malissa George, Susan George and Andrew Jackson George, the following property, *to wit:* to Thomas Jefferson, one negro boy named Dick—to *Malissa*, two negro girls, named *Rose* and Harritt—to Susan George, one negro girl named Milly—to Andrew Jackson, one negro boy named Allen—to the said Thomas Jefferson George, Andrew Jackson George, Susan George, and Malissa George, (children of my wife Ibby) and their heirs forever; and in case that either of them should die without heirs, then I give their negro or negroes to be equally divided between the survivors: to have and to hold the said negroes, Dick, Rose, Harritt, Milly, and Allen, and their respective increase to the aforesaid Thomas Jefferson George, Malissa George, Susan George and Andrew Jackson George, as above specified, from myself and every other person whatsoever. In witness whereof, I hereunto set my hand and seal, this 10th January, 1827. THOMAS GEORGE, [SEAL.]"

Signed and acknowledged in the presence of

W. W. E. MORELAND,

JOSEPH GAULT."

Defendants proved, by the said subscribing witness, Gault, that the negro woman *Rose*, named in the declaration, was the same referred to in the above deed of gift. That Malissa George, mentioned in said deed, is the same Malissa Haynes, mentioned frequently above. That she intermarried with said Gazway Haynes, in South Carolina, and they lived together many years in Arkansas, with said negroes in possession. Plaintiff objected to the reading of the above deed in evidence, but the court overruled the objection.

Defendants then read in evidence (plaintiff objecting) the trust deed, and assignment thereof to defendant Gault, referred to by the witness Parks.

The deed bears date 31st March, 1845; recites that Haynes was indebted to Parks in the sum of $122 62, by note then due, and conveys the negroes in question to Parks in trust; that upon repayment of the money within twelve months, the deed was to be void, and he was to re-convey the slaves to Haynes; but, on failure to pay the money, a trustee, named in the deed, was to sell the slaves, or so many of them as might be necessary, for cash, to the highest bidder, after giving a prescribed notice of the sale, and, out of the proceeds, pay the debt, interest, and expenses, and pay the balance, if any, to Haynes.

The assignment of the deed of trust by Parks to defendant, Gault, bears date 1st June, 1846.

Haynes testified, that he saw the negroes in Danville, and heard defendant, Briggs, forewarn Mrs. Haynes not to remove them—his language was, "I forewarn you, Mrs. Haynes, not to remove said negroes." Witness heard Briggs give no reason for so doing.

Defendants admitted that the negroes started from Yell county on their way out of the State, as stated by the witnesses, on the 1st April, 1846.

The above is the substance of all the evidence set out in the bill of exceptions deemed material to a proper understanding of the points decided by this court.

The plaintiff moved the court to instruct the jury as follows:

"1st. It is the duty of the court to construe the deed of gift from George to Malissa George, and to determine whether any, and what estate, was vested thereby in said Malissa."

"2d. If the jury believe from the evidence, that, after said deed was executed, said slave, *Rose*, was given up to said Malissa before marriage, and was in her possession at marriage, in pursuance of said deed; and after marriage with Gazway Haynes, the negro and her descendants came into the possession of said Haynes, and remained in his possession many years in this State; then and in that case, upon the said marriage, and upon the said Gazway reducing said negroes into his possession, all right in said negroes before marriage vested in said Malissa, was invested in said Gazway, so far as creditors of said Gazway were concerned, except only the widow's claim to dower, and that upon Gazway's death, said Malissa surviving him and still living, the said negroes or the right and estate acquired therein by marriage, *to wit:* the entire right acquired by Malissa under the deed aforesaid, except her claim to dower, was and is subject to administration as belonging to said Gazway's estate as other similar property, and is subject to the payment of said Gazway's debts."

"3d. Upon Gazway's death, in possession of said negroes as supposed in last instruction, Gaines, as administrator to his estate, had the right to take the proper steps to reduce said negroes to possession, and to administer upon the same as other similar property, if necessary to pay the debts of the estate, and that the probate court of Scott county is the proper judge of that necessity, being the court from which the letters were issued to said Gaines."

"4th. That under the deed of gift last mentioned, after said Malissa intermarried with said Gazway, and the latter reduced the said negroes to possession, the creditors of said Gazway had a right to treat said negroes, as against said Malissa, as the property of said Gazway, to the same extent as any other

negroes belonging to said Gazway, even although he had bought and paid for them with his own money, saving in each case the widow's right of dower."

"5th. That under the deed of gift aforesaid, if the jury find from the evidence, that the negroes sued for were in possession of said Malissa before marriage, and upon her marriage were reduced to possession by her husband, Gazway, after the death of her husband in insolvent circumstances, the said Malissa had no right but to dower in or to the said negroes."

"6th. That a woman, upon marriage, and her husband reducing her personal property to his possession, has no right in or to his property, as against creditors, except such rights as the law may give her to dower in her husband's estate."

"7th. That the deed of gift by Thomas George to Malissa, his daughter, now Malissa Haynes, if valid, vested in her full and absolute and unqualified property in and to the said negro *Rose*, without limitation or restriction, before marriage, and upon the marriage of said Malissa to Gazway Haynes and reducing the negroes to possession, the like absolute property vested in Gazway so far as creditors are concerned, subject only to the widow's claim to dower."

"8th. That the deed executed by Gazway Haynes to Parks, read in evidence to the jury, is a mere mortgage, and if the jury believe from the evidence, that Gazway Haynes retained possession of the property mortgaged until the time of and at his death, and the same never was in possession of said Parks, said Gazway's administrator had a right to the possession and administration upon said property upon the same terms and in the same manner as other property of the same kind."

"9th. That the assignment of said deed of trust to defendant Gault, read in evidence to the jury, if made after the death of said Gazway, did not authorize said Gault to seize the said property, remove it from the State, and sell it."

"10th. That if the jury believe from the evidence, that said Gault took off and sold said negroes, and had the proceeds

thereof in his hands before said assignment of said deed of trust was made, the said assignment would not free him from responsibility for said negroes in this action."

"11th. That if the jury believe from the evidence, that the said Gault paid off the said mortgage out of the proceeds of said negroes, without authority from the legal representatives of Gazway Haynes, deceased, he is responsible to such legal representatives for the entire value of said negroes."

"12th. That after the death of a person in a county where he resides, and where his slaves or personal property are at the time, if such property is removed from such county before any administration granted upon the estate, all persons, knowing of the death and to whom the property belongs, engaged in such removal, are responsible to the legal representatives of such estate."

"13th. That if the jury believe from the evidence, that James Briggs sent his son, with wagon and team, to remove Mrs. Haynes and property from Scott to Yell county, knowing, at the time, of the death of Gazway Haynes, and that the property to be removed, and actually removed by his son, was in possession of said Gazway long before and at the time of his death, said James Briggs is responsible to the legal representative of said estate for the value of the property removed, if not returned or surrendered"—[*Qualification*]—"but that if they believe from the evidence, that James Briggs, in removing the property sued for, acted as a mere carrier, at the instance and request of Mrs. Haynes, and with no intention of converting the property to his own use, or with the intent to exercise any right of ownership over said property, but in good faith, and that at the time of the removal of said property, the said Malissa Haynes was in peaceable and quiet possession, and that said Briggs in no wise consented, aided or counseled the removal of said property, said Briggs is not responsible."

The court gave the 1st, 9th, 10th, 11th, 12th and 13th instruction, with the addition to the 13th, following the word *qualifica-*

tion in brackets, to which qualification plaintiff objected, and excepted. The court refused the 2d, 3d, 4th, 5th, 6th, 7th and 8th, and plaintiff excepted. Plaintiff brought error.

E. CUMMINS, for plaintiff.

BERTRAND, contra.

OLDHAM, J. The deed of gift from Thomas George to his daughter, Mrs. Haynes, conveyed the absolute property in the slave mentioned. There is not an expression contained in the deed which will warrant the conclusion that the grantor intended to convey a life estate with remainder over to the heirs.

The words, "her heirs forever," used in the deed, so far from limiting the title of the grantee to a life estate, are, at common law, essential to the creation of a fee simple estate in lands; a deed without these words would convey but a life estate. All the questions that can arise upon the construction of the deed of gift under consideration, were fully settled by this court in *Moody vs. Walker*, 3 *Ark. R.* 147.

Mrs. Haynes, while sole, had the absolute title to the slave, and upon her marriage the property, upon being reduced to his possession, vested in the husband, and upon his death the title vested in the administrator by law, subject to the marital rights of the widow. The *second, third, fourth, fifth, sixth and seventh* instructions are correct in point of law, and should have been given to the jury by the court. The deed of trust executed by Haynes in his life time to Parks, to secure the payment of the money specified therein, tended neither directly nor indirectly to prove the defendants not guilty of the trover and conversion charged in the declaration. The deed, it is true, created a lien upon the slaves, but it specified the manner in which the lien was to be enforced. Because one man may have a mortgage or deed of trust upon my property, it does not justify another in depriving me of the possession of the property and

in selling it for his own use. A subsequent discharge of the lien by the trespasser will not protect him from the consequences of the trespass. It might be a good defence against the mortgagee in an action brought by him for the deprivation of his lien by the illegal removal of the mortgaged property. The deed of trust was therefore improperly admitted as evidence, and having been admitted the eighth instruction was erroneously refused.

The qualification under which the thirteenth instruction was given is not according to law. In *Stephens vs. Elwall*, 4 *M. & S.* 259; Lord ELLENBOROUGH said, "By law a person is guilty of conversion who intermeddles with my property and disposes of it, and it is no answer that he acted under the authority of another, who himself had no authority to dispose of it." See, also, *Perkins vs. Smith*, 1 *Willes*, 328. Trover is a concurrent remedy with trespass. 1 *Arch. Pr.* 451.

It is no defence to a trespasser that he acted under the direction of one who is himself a trespasser. Reversed.

CARNEAL VS. THOMPSON & HANLY.

The exception in the 13th section of the limitation act of the Revised Statutes, in favor of non-residents, being repealed by act of 14th January, 1843, the statute commenced running from that date against the causes of action of non-residents then existing; but by act of 14th December, 1844, (*Digest*, 698) non-residents were allowed two years from that time to sue upon causes of action barred by that or previous acts.

On a promissory note due a non-resident 15th May, 1838, the statute commenced running 14th January, 1843, and three years being the bar, it was not barred on the 14th December, 1844, when the time was extended two years, and plaintiff having brought his suit on the 18th September, 1846, the cause of action was not barred. *Watson vs. Higgins*, 2 *Eng. R.*, 475, *cited.*

Error to the Circuit Court of Phillips County.

DEBT, by petition, determined in the Phillips circuit court, at the May Term, 1847, before the Hon. WM. C. SCOTT, judge. The facts are stated in the opinion of this court.

S. H. HEMPSTEAD, for the plaintiff. As statutes of limitation affect the remedy, it has become a fundamental principle that it is competent to enlarge or shorten the period of limitation, although the legislature cannot revive a right of action once barred. On the 14th of January, 1843, the saving in the 13th section of the limitation law (*Rev. Stat.* 588,) as to non-residents was repealed. *Acts of* 1842, *p.* 57. The cause of action on the note in question is to be considered as then commencing, and the plaintiff was allowed *three years from that day to sue.* On the 14th of December, 1844, the legislature passed another law allowing non-residents the period of two years to institute suit upon any causes of action they might have. *Acts of* 1844, *p.* 25. They were not barred by this act until the 14th of December, 1846. At the time of the passage of the act of 1844, the plaintiff had a cause of action and was a non-resident as shown in the replication. The action was commenced 18th September, 1846, and within the time prescribed, and therefore the replications of the plaintiff to the second, third and fourth pleas of Hanly were a complete answer to them, and the court erred in sustaining the demurrers to those replications. On the authority of the case of *Watson vs. Higgins*, decided by this court, 2 *English Rep.* 475, I confidently contend that the replications demurred to were good, and that the remedy was not barred. The principles decided in that case are decisive on this question.

CUMMINS, contra. The replications to the pleas of statute of limitations are bad. The act of December 14, 1844, was pros-

pective in its operation, and did not revive causes of action then barred. *Couch vs. McKee*, 1 *Eng. R.* 484. *Hawkins vs. Campbell*, 1 *Eng. R.* 513.

The replications do not attempt to bring the plaintiff within any of the exceptions contained in the act of limitations in the Revised Statutes; and of course admit that the statute commenced running when the note fell due; and having once commenced it would run out—no subsequent disability would stop it. *Ruff vs. Ball*, 7 *Har. & J.* 14. *Haslet vs. Glenn, ib. Hepburn vs. Sewell*, 4 *Har. & J.* 393, 430.

The bar of three years is good even after the acts extending the period of limitation, when the contract sued on shows upon its face, that it is governed by the first act.

The case of *Watson vs. Higgins*, 2 *Eng. R.* 475, differs from the present in this, that the replication there showed that the party was *non-resident* when the cause of action accrued, and thence continued; and sustains the above positions.

CONWAY B, Judge. This was an action brought by Carneal against Thompson and Hanly, by petition in debt, instituted the 18th of September, 1846, on a promissory note due the 15th of May, 1838. Process appears not to have been legally executed on either of the defendants, but Hanly appeared and pled seven pleas. Among them were three setting up the statute of limitations. To these the plaintiff replied his non-residence of the State. Hanly demurred to the replications and the court sustained the demurrer. The plaintiff excepted and rested on his exception. Final judgment was rendered against him and he has brought error.

Previous to the act of the 14th January, 1843, there was no limitation on causes of action belonging to non-residents. That act being simply a repeal of this exception in favor of non-residents, they had the same time after the passage, for the institution of suit as residents had prior to its enactment. *Watson vs. Higgins*, 2 *Eng. R.* 475. Three years was then the limitation to

residents for actions on promissory notes. Consequently the right of non-residents to sue on such causes of action then existing expired the 14th of January, 1846. But the act of December the 14th, 1844, again restricted non-residents to their rights of action then existing. By it they were allowed but two years after its passage for suit in such causes. In this case the action appears to have been instituted before the expiration of two years from the 14th of December, 1844, and as the plaintiff by his replications brought himself within the saving of the statute, the court erred in sustaining the demurrers to the replications. The judgment is therefore reversed.

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BIZZELL & OWENS VS. BREWER AS ADR.

A bond for "one hundred and fifty dollars, to be *paid in any current notes of the Bank of the State of Arkansas,*" is payable in the notes of said Bank at their nominal value, regardless of their depreciation.

This construction accords with common sense, and the popular meaning of the terms used in the obligation.

In covenant on such obligation, the plaintiff must prove the value of such bank paper, otherwise he is not entitled to judgment for any sum.

If the judgment is for the full amount of the obligation, and the evidence is not put upon the record, this court will presume that the bank notes were at par.

But if the evidence is put upon the record, and it appears that the plaintiff offered no proof as to the value of the notes, and yet took judgment for the full amount of the obligation, the judgment will be reversed.

Writ of Error to the Circuit Court of Sevier County.

This was an action of covenant brought by Wm. A. Brewer, as administrator of John Brewer, deceased, against Bizzell and Owens, and determined in the Sevier circuit court, at the July

Term, 1847, before the Hon. C. C. SCOTT, then one of the circuit judges.

The obligation declared on, is in these words: "On or before the first day of January next, we promise to pay John Brewer, or order, the sum of one hundred and fifty dollars, to be paid in any current notes of the Bank of the State of Arkansas, for value received: this the 16th day of May, 1842." Signed and sealed by defendants.

Defendants pleaded payment in current notes of the Bank of the State of Arkansas, to which issue was taken. The cause was submitted to the court, sitting as a jury by consent, and the court found for plaintiff, and rendered judgment for $191, damages. Defendants took a bill of exceptions, as follows:

On the trial, defendants asked a witness, Coulter, the following question: "Were the notes of the Branches of the State Bank of Arkansas in circulation in the State of Arkansas on the 1st day of January, 1843?" Witness answered in the affirmative. Defendants then asked witness: "What was the value of the notes of the Branches of the Bank of the State of Arkansas on the 1st January, 1843, and whether said notes were not the currency of the country at that time?" To which question plaintiff objected, and the court sustained the objection, and ruled that defendants had not the right to ask what was the value of the notes of the Branches of the Bank of the State of Arkansas, until they had first proved that said notes were passing as money in the ordinary transactions of the country, at their nominal value. Defendants also proved that the notes of the Bank of the State of Arkansas were from 50 to 60 per cent. discount on the 1st January, 1843, and that the notes of the principal bank were a shade better than the notes of its branches, but that none of the banks of Arkansas were paying specie at that time. And there being no further testimony, the court gave judgment for the full amount of the obligation sued on, to all of which decisions and judgment of the court, defendants excepted, &c. Defendants brought error.

RINGO & TRAPNALL, for the plaintiff. The court will *ex-officio*, take cognizance of the circulating medium. *Lampton vs. Haggard*, 3 *Monroe* 149. *Dillard vs. Evans*, 4 *Ark.* 175.

At the date, as well as the maturity of the note, the State Bank paper was at a very great depreciation: the note was drawn payable in that paper: the word *current* does not change the meaning of the contract. The court looks to the terms of the contract to ascertain the intention of the parties. *Graham vs. Adams*, 5 *Ark.* 261; and the terms do not import money. *Hawkins vs. Watkins*, *id.* 481.

The obligation was for unliquidated damages, and judgment could not be given for the full amount without proof of the value of the notes. *Day vs. Lafferty*, 4 *Ark.* 181. *Ellet & Burton vs. Chelton*, 5 *Ark.* 183.

WATKINS & CURRAN, contra.

JOHNSON, C. J. The result of this case will necessarily depend upon the construction that shall be put upon the terms of the contract to enforce which the suit was instituted.

Bizzell and Owens promised to pay Brewer or order the sum of one hundred and fifty dollars, to be paid in any current notes of the Bank of the State of Arkansas. The writing was executed on the 16th day of May, A. D. 1842, and made payable on the first day of January, then next following. This court in the case of *Pearson vs. Wallace*, 2 *Eng. Rep.* 293; when defining the meaning of the terms "current bank notes" said that "current bank notes are such as are convertable into specie at the counter where they were issued, and pass at par in the ordinary transactions of the country." If the parties to this contract had adopted the terms, "current bank notes," without any restriction as to the bank from which they should issue, it would have fallen within the definition and rule laid down in the case referred to, but when it is remarked that it is confined to the current notes of the State Bank of Arkansas, it is obvious that we

must depart from the strict legal signification, and have recourse to that sense in which they were generally understood and received by the people. To give to the terms used their plain and popular sense, they obviously amount to a promise to pay the sum specified in the notes of the State Bank, at their nominal value. This we conceive to be the plain and common sense interpretation of the contract.

We will now proceed to determine whether the circuit court properly excluded the evidence offered by the defendant below. He first asked the witness to state whether the notes of the branches of the State Bank of Arkansas were in circulation in said State on the first day of January, A. D. 1843, and upon his answering in the affirmative, he then asked him what was the value of the notes of the Branches of said bank on the first day of January, 1843, and whether said notes were not the currency at that time. The court sustained the objection to the question relative to the value of the notes of the Branches of the State Bank, and ruled that he could not enquire into the matter until it was first proved that said notes were passing as money in the ordinary transactions of the country. The court erred in this respect, as it was not necessary to show that the notes of the State Bank were passing at par or considered as cash under the constructions already given to the terms of the contract.

The court also erred in another particular. The contract sued upon was a pure covenant. It did not simply give the makers the privilege of discharging it in the current notes of the State Bank; but it was expressly agreed that it was to be paid in that kind of currency. Such being the case it most unquestionably devolved upon the plaintiff below to show what such notes were actually worth in money, and until he had made out his case by competent proof, he was not entitled to a judgment for any sum whatever. The bill of exceptions purports to embrace all the evidence adduced upon the trial, and it does not appear that the plaintiff showed himself entitled

to any thing. The defendant below was not required to show what the notes of the State Bank were worth and could not have been expected to offer testimony upon that point, unless it was necessary to rebut such as might have been offered by his adversary. Had not the evidence been reserved, the legal presumption would have been that the notes of the State Bank were equal to specie, and that the plaintiff below was entitled to the full amount expressed upon the face of the covenant, but as the bill of exceptions purports to contain all the testimony and it is wholly silent upon that point, the presumption will not hold in favor of the correctness of the judgment of the circuit court. For this reason also the judgment must be reversed.

HAMMOND VS. FREEMAN.

The certificate of an officer before whom a deposition is taken, must show that it was reduced to writing in his presence, otherwise it cannot be read. *Digest, p.* 433, *sec.* 13.

Where notice of the time and place of taking a deposition is served by a person other than an authorized officer, the affidavit to such return required by statute [*Digest, p.* 799, *s.* 23,] cannot be made before a justice of the peace who is the attorney of the party taking the deposition.

A. made a note payable to the order of B., who endorsed it to C., and C. endorsed it to a Bank. The Bank obtained judgment against A. and C. on the note, and C. paid it. In a suit by C. against A. for the money so paid by him, proof of the payment is sufficient, without producing a transcript of the judgment.

But as the liability of A. to C. depends upon the endorsement of B. to him, the note and endorsement must be produced in evidence, and a copy will not suffice, unless the loss of the original be shown.

Where there are issues to two pleas on record, and verdict upon one only, against defendant, final judgment cannot be given until the other issue is determined.

Appeal from the Madison Circuit Court.

This was an action of assumpsit, brought by Henry Freeman against Job Hammond, determined in the circuit court of Madison county, at the May Term, 1847, before the Hon. W. W. FLOYD, judge.

Plaintiff declared for money paid, laid out and expended by him to, and for the use of defendant, at his request.

The declaration was filed by W. D. Reagan and J. B. Costa, attorneys for plaintiff.

Defendant pleaded non assumpsit, and set-off, to the first of which pleas plaintiff took issue, and to the second replied, and defendant took issue.

The cause was submitted to a jury, and they returned a verdict as follows: "We, the jury, do find that the defendant did undertake and promise in manner and form as charged in the first count of the within declaration, and assess the plaintiff's damages to the sum of $873 32." And judgment was rendered in favor of plaintiff for that sum.

Pending the trial, defendant took a bill of exceptions, from which it appears, that to sustain the issue on his part, plaintiff offered to read to the jury the deposition of W. L. Mitchell, taken before a justice of the peace in the State of Georgia. To the reading of this deposition defendant made several objections, which will be stated below, but the court overruled them, and permitted the deposition to go to the jury.

Deponant states, that on the 20th day of August, 1840, at Millidgeville, Job Hammond made his promissory note, by which he promised to pay to the order of one William P. Hammond, three hundred and sixty days after that date, the sum of six hundred dollars, at the Central Bank of Georgia, and delivered said note to the said William P. Hammond, who on the day and year first aforesaid, for a valuable consideration, endorsed said note to Henry Freeman, who for a like consideration endorsed said

note, on the day and year first aforesaid, to the Central Bank of Georgia. Here deponant exhibits a copy of said note and endorsements, taken, as he states, from the original, which had been placed in his hands for collection by said bank, as her attorney.

Deponant further states, that said note was not paid at maturity. That afterwards he, as attorney for said bank, brought suit on said note in the superior court of Franklin county Georgia, and at the April term of said court, 1843, obtained judgment on said note in favor of said bank against the said Job Hammond and Henry Freeman, for the sum of $600 debt, $79 75 interest, and $12 37½ costs of suit. That said Job Hammond left the State of Georgia without paying said bank any part of said judgment, and that the said Henry Freeman, on the 18th April, 1843, paid him as the attorney of said bank, the sum of $400 on said judgment; and on the 25th September, 1843, said Henry Freeman paid him as such attorney, the further sum of $289 50, and had since paid to the clerk of said court $10 37½ costs of suit; and to the sheriff his costs of $1 87½, making all the costs $12 37½.

The justice of the peace makes the usual certificate, that said deposition was sworn to and subscribed before him, stating the time and place, but omits to state that it was reduced to writing in his presence.

The notice of the time and place of taking said deposition was served on defendant by a private person, and he made oath to his return of service before John B. Costa, one of plaintiff's attorneys, as a justice of the peace.

Defendant objected to the reading of said deposition to the jury, upon the following grounds:

1st. There was no sufficient notice of the time and place of taking said deposition served on defendant.

2d. A copy of said note, and not the original, is exhibited in said deposition.

3d. The original note is not exhibited in the deposition.

4th. Said deposition is not subscribed by the justice at the bottom of each half sheet.

5th. It does not appear that the depositions was reduced to writing in the presence of the justice: and

6th. Because the certificate of the justice is defective and insufficient in other respects, &c.

But the court overruled the objections, and defendant excepted, and appealed.

FOWLER, for appellant. In behalf of Hammond it is contended that the deposition, as well as each and every part thereof, was utterly inadmissible as evidence:

And 1st. The statute requires that the deposition "shall be reduced to writing in the presence of the person or officer before whom the same shall be taken." *Rev. Stat. p.* 326, *sec.* 13. 3 *Bibb* 232, *Logan vs. Steele.*

2d. John B. Costa, being the attorney of Freeman in the cause, it was not competent or legal for him to administer the affidavit of service of the notice. 3 *Ark. Rep.* 813, *Case No.* 301, *in the matter of Hogan, a lunatick.*

The contents of the deposition ought to have been excluded by the court below:

1st. Because it wholly fails to show that the consideration for the contract proceeded from the defendant's request, either express or implied; and consequently discloses no title in the plaintiff below. 1 *Saund. Pl. & Ev.* 148.

2d. And no person can be permitted in law to make another his debtor without his assent. 1 *Saund. Pl. & Ev.* 148.. 8 *Term. Rep.* 310, *Exall vs. Partridge.* 1 *Term. Rep.* 21, *Stoker et al. vs. Lewis et al.* 1 *Saund. Rep.* 264, *note* 1. 5 *Ark. Rep.* 657, *Bertrand vs. Byrd.* 1 *Selw. N. P.* 66, 67.

3d. Even if Freeman was in law and in fact the surety of Hammond, and as such compelled to pay the money for him, yet in this suit he was bound to prove the execution of the note,

and that he became surety at Hammond's request. 2 *Stark. Ev.* 58, 59.

4th. And as judgment had been rendered, he was also bound to produce the record of it. 2 *Stark. Ev.* 59.

5th. The best evidence to be had must always be given. 1 *Esp. N. P.* 144. *ib.* 780. *Gilbert's Ev.* 16. *Buller's N. P.* 293. 1 *Stark. Ev.* 69. 4 *Ark. Rep.* 579, *Hawk vs. Walworth.*

6th. The reason of the rule is, that no such evidence shall be admitted, that from its very nature, supposes better evidence behind in the possession of the party; and the failure to produce it creates the presumption that there is something in it which would operate against the party, if produced, and therefore the secondary evidence is wholly inadmissible. 1 *Stark. Ev.* 69. 2 *Esp. N. P.* 780. *Gilbert's Ev.* 16. *Buller's N. P.* 293, 294.

7th. No parol evidence of any fact or agreement shall be admitted as evidence where there is written evidence thereof, in the party's possession, or under his control. 1 *Stark. Ev.* 318. 2 *Esp. N. P.* 780.

8th. And where a witness mentions any matter which has been reduced to writing, the writing itself must be produced, if not proved to be lost, or the evidence of such matter of fact must be rejected. 2 *Esp. N. P.* 780, 782. 4 *Ark. Rep.* 579, *Hawk vs. Walworth.*

9th. And a reference in a deposition to a paper by giving a copy of it is insufficient; the original itself should be produced. 1 *Tenn. Rep.* 394, *Carissa vs. Edwards.*

And in this case the witness having stated that a judgment had been rendered, and that the original note was in his possession, the evidence was utterly incompetent without their production to the court and jury.

E. H. ENGLISH, contra.

OLDHAM, J. The certificate of the justice of the peace before

whom the deposition read in evidence upon the trial of this cause, was taken is defective in not showing that the examination of the witness was reduced to writing in the presence of the justice, as required by the *Rev. St. Ch.* 48, *sec.* 13.

The affidavit of service by the person serving the notice, was made before John B. Costa, a justice of the peace, and who was one of the attorneys for the plaintiff. It should not have been read in evidence. *Taylor vs. Hath*, 1 *J. R.* 340.

It was not necessary that the plaintiff below should have produced the judgment refered to in the deposition. The money was paid by him as the endorser of a note drawn by Hammond, and the latter was liable, whether the former paid it with or without suit. Hammond's liability to Freeman, depended upon the endorsement of the payee to the latter and for that purpose the note and not a copy, without establishing the loss of the original, should have been introduced in evidence. Freeman having endorsed the note to the bank and afterwards paid it, was restored to his rights as endorsee and holder.

There were two issues formed by the pleadings; one upon the general issue, and the other upon the plea of set-off. The jury found the first issue for the plaintiff, but did not determine the other; the court was not warranted in rendering final judgment until all the issues raised upon the record were determined. *Hicks vs. Vann*, 4 *Ark. R.* 526. *Reed vs. the State Bank*, 5 *Ark. R.* 193.

SAWYERS VS. LATHRAP.

By moving for a new trial, a party abandons previous exceptions, unless he incorporates them in the motion, and reserves them by bill of exceptions to the decision of the court overruling the motion.

The decision of the court below overruling a motion for a new trial, will not be reviewed by this court unless the evidence is put upon record: the presumption is in favor of the correctness of the decision.

A memorandum signed by the judge, stating that certain facts were proven, is not part of the record.

Appeal from the Chicot Circuit Court.

The facts are stated in the opinion of this court.

YELL, for appellant.

PIKE & BALDWIN, contra.

OLDHAM, J. This was an action of forcible entry and detainer under the statute, brought by the appellant against the appellee in the Chicot circuit court. The cause was tried upon the plea of not guilty, upon which a verdict and judgment were rendered for the defendant. During the progress of the trial, the plaintiff excepted to certain instructions of the court, and tendered his bill of exceptions, which was signed and sealed by the judge, and ordered to be made part of the record; but it does not appear that the bill of exceptions was filed, but was brought upon the files as an exhibit to the motion for a new trial. The plaintiff filed a motion for a new trial which was overruled, to which the record states he excepted. No bill of exceptions was presented to the court upon overruling the motion. A memorandum signed by the judge, certifying that certain facts were proven upon the trial, is copied into the transcript as an exhibit to the motion for a new trial; but it has none of the forms nor essentials of a bill of exceptions, and does not purport to be such. Besides, it is shown to have been drawn up and signed by the judge, before the motion for a new trial was made and overruled and not after. There is no entry of record that it was filed, nor is it marked filed.

The plaintiff by moving for a new trial, waived and aban-

doned his exceptions taken to the instructions of the court during the progress of the trial. *Danly vs. Robbins' heirs*, 3 *Ark. R.* 144. He did not, by exceptions to the decision refusing a new trial, set out the evidence or reserve his previous exceptions as he might have done. *Ashley vs. Hyde & Goodrich*, 1 *Eng. R.* 92.

The memorandum signed by the judge stating that certain facts were proven, is not a part of the record. *Lenox vs. Pike*, 2 *Ark. R.* 14. The case is the same as that of *Danly vs. Robbins' heirs*. It presents nothing for the consideration of this court but a motion for a new trial overruled by the circuit court. The presumption is in favor of the correctness of the decision.

Affirmed.

HENSLEY ET AL. VS. MOORE.

Suit on a bond before a justice; defendant interposed the statute of limitation as a defence; judgment for plaintiff, and defendant appealed: tried in the circuit court without formal pleadings, and judgment for plaintiff; defendant, without moving for a new trial, or putting the evidence on record, brought error. *Held*, that though the bond appeared on its face to be barred by the statute of limitation, yet this court would presume in favor of the judgment below that plaintiff introduced proof to take the case out of the statute.

Writ of Error to Lawrence Circuit Court.

On the 28th July, 1845, Wm. Moore sued Larkin Hensley before a justice of the peace of Lawrence county, on a writing obligatory for $23 32, dated October 11th, 1838, and due first of January, 1839. The defendant, says the justice's transcript, "pleaded limitation on the case, which plea was overruled," and judgment rendered for plaintiff for the amount of the obli-

gation. Hensley appealed to the circuit court, giving E. W. Hensley as security in the appeal. The transcript of the record of the proceedings in the circuit court in the case follows in substance:

"Lawrence Circuit Court, October Term, 1846.—October 15th day.

Moore *vs.* Hensley, } Appeal from J. P.

Now, on this day came the defendant by attorney and filed his plea in bar herein, to which the plaintiff, by attorney, joins issue, and the court not being advised, takes time to consider thereof."

"*October Term, 1846,* October 15th day.

Moore *vs.* Hensley, } Appeal from J. P.

Now, on this day came the parties, by their respective attorneys, and say they are ready for trial, and neither party requiring a jury, the case is submited to the court, the plea in bar heretofore filed by the defendant being overruled, and the evidence being heard and the premises seen and *fully* understood, this court doth find for the plaintiff the sum of $23 32 debt, and $15 54 damages, with costs: it is therefore by the court considered and adjudged, that plaintiff have and recover of and from Larkin Hensley, the said defendant, and E. W. Hensley as his security in the appeal, the aforesaid sum of $23 32 for his debt, and $15 54 damages, together with all the costs in this suit, &c."

There is no plea, motion for new trial, or bill of exceptions contained in the transcript.

Hensley and his security in the appeal brought error.

FOWLER, for the plaintiff. The writing sued on was barred

by the statute of limitations, more than five years having elapsed from the time it fell due, and from the taking effect of the statute, before suit was instituted. *Rev. Stat. p.* 528, *sec.* 11. 5 *Ark. Rep.* 512, *Baldwin vs. Cross.* 1 *Eng. R.* 266, *Dickinson vs. Morrison.* 2 *Eng. Rep.* 452, *Davis Ex. vs. Sullivan. ib.* 488, *Watson vs. Higgins.*

The formality of pleadings in writing is dispensed with, in proceedings before justices of the peace, and in cases in the circuit court on appeals from their judgments. *Rev. Stat. chap.* 87. 2 *Eng. Rep.* 148, *Howell vs. Vinsant.*

And even if it be true, that Hensley could have interposed no defence in the circuit court, which he had not relied on before the justice of the peace, which is not admitted, yet the record fully shows that the substantive grounds of his defence was the statute of limitations.

And if no formal pleadings be required, and the record should fail to show the grounds of defence, the inference of law must necessarily be that every legal defence was made of which the case was susceptible; which in this case does include the statute of limitations. The note itself, and the date of the commencement of the suit fully disclosing the propriety of such defence.

Where there is no occasion for written pleadings in cases of appeal from justices of the peace, not only the statute of limitations, but even the character in which the party sues may appear or be contested in evidence. 7 *Smedes & Marsh. Rep.* 254, *Hairston vs. Francher.*

WATKINS & CURRAN, contra. The first objection, and in fact the only point in this case is, that the court overruled or found against Hensley's plea. The record shows that, before the justice of the peace, he pleaded the statute of limitations: when the case reached the circuit court, the record states that Hensley "filed his plea in bar," but no plea of any kind appears in the transcript: and in the entry of the judgment it is stated that both parties "saying they are ready for trial and neither

party requiring a jury, the case is submitted to the court, and the plea in bar heretofore pled being overruled," &c. The record not only fails to show what kind of a plea it was, but utterly fails to set out one particle of the evidence, nothing of the kind being attempted. How can this court decide upon the sufficiency of the plea, when it is not in the transcript, or upon the sufficiency of the evidence, when no bill of exceptions was taken setting out the evidence? True, *prima facie*, the note sued on is barred; but even if the court could presume that was the plea referred to in the record, how could this court know, but what the plaintiff was within some exception in the statute, or proved some matter, such as payment or acknowlegment, in avoidance of the statute.

JOHNSON, C. J. The presumption of the law is clearly in favor of the correctness of the judgment of the circuit court. True it is that the instrument sued upon appears upon its face to be barred by the statute of limitations, but it is not shown that the defendants below, desired to avail themselves of that defence, and in case they had actually insisted upon it, and had failed to reserve all the evidence adduced upon the trial, the legal presumption would still have been that the plaintiff introduced testimony which took it out of the operation of the statute. The presumption, of course, is much stronger where there is no showing of record that the statute was relied upon as a defence. The judgment of the circuit court is therefore presumed to be correct and is consequently in all things affirmed.

BUCKNER ET AL. EX PARTE.

Where a county court exceeds its jurisdiction, its acts are void, and this court has power, on the proper showing, to remove its proceedings by *certiorari*, and quash them.

Under the 42d chap. of the Digest, the county court has power to make an order for the building of a court-house whenever there is sufficient funds in the county treasury, not otherwise appropriated, for that purpose, or may levy a tax therefor, but such tax cannot be laid without an order of the court made after a notification of all the justices of the county to attend for that purpose.

It is possible, however, that a county may have an ample fund for the erection of a court-house, without a dollar in the treasury: an instance supposed by way of illustration.

In such case, the county court may order a court-house erected without a notification to all the justices to attend.

The statute requiring the commissioner of public buildings to take bond of the person who undertakes the erection of the court-house, is directory, and his failure to do so does not affect the jurisdiction of the county court over the subject matter.

Petition for Certiorari.

At the present term of this court (January, 1848,) A. H. Buckner, Milton Keesee, Henry Harper, John Howell, James Norris, Eleanor Pratt, John Russell, and one hundred other persons representing themselves as tax-paying citizens of Union county, Arkansas, presented to this court, through their attorneys, Pike & Baldwin, a petition for certiorari, in substance as follows:

Petitioners represent that at the October term of the county court of said county of Union, 1846, present, Langford the presiding judge, and Pickering and Gill associate justices, it was ordered by said court that there be erected upon the public square in the town of El Dorado, as speedily as possible, a court-house of such size and style as might be thereafter approved and adopted: and John M. Brown was appointed commissioner of public buildings for said county, with power and authority to perform all the duties incumbent on him as such.

Whereupon, the said commissioner reported to said court a certain plan for the court-house so to be erected, which plan was spread upon the record of said court, as will appear by a transcript of said record presented as part of this petition: and, thereupon, it was ordered that he advertise in a certain newspaper published in said town of El Dorado, and at the door of the court-house, for six successive weeks, that sealed proposals would be received for building and erecting a court-house in said town, and that he should exhibit said plan, and receive sealed proposals, until the second Monday of December, 1846, when he should open them in the presence of three disinterested householders, and award the contract to the lowest bidder, provided he should in five days give bond with good security in the sum of $20,000, to perform his contract: on failure whereof, it should be awarded to the next lowest bidder, who should so give bond: and said commissioner was instructed not to receive any bid exceeding the sum of $12,000; and was authorized to contract for the price in three equal annual payments, from the first day of January, 1847.

And at a term of said county court begun and held on the 11th January, 1847, present the said presiding judge, and Boydkin and Hadley associate justices, the bond of Wm. Davis as contractor for building said court-house, according to the plan recorded as aforesaid, for the sum of $8,000, was presented and approved, except as to a provision contained therein in regard to the payment of any surplus which might be in the treasury at the end of the year.

And at the same time it was ordered by said court, with the consent of said contractor, that the plan aforesaid should be changed so as to reduce the size of the court-house from fifty to forty feet square, and to dispense with the cupola and two jury rooms: and that the contractor should build four chimneys with fire places in the upper rooms: and that the price should be reduced from $8,000 to $6,200: that the original plan, with these exceptions, should be observed; and the amount of windows reduced in proportion to the size of the building: all which will

fully appear by a copy of the entries of record abovementioned, which is annexed hereto, and prayed to be taken as part of this petition.

Petitioners further represent, that upon settlement made by the treasurer of said county with said county court, at the April Term, 1846, it appeared that so far from said treasurer having any county funds in his hands, the treasury was empty and the county indebted to him in the sum of $14 12: for which a warrant was ordered to issue as will by the transcript aforesaid appear. And they further represent, that said transcript is a full and complete transcript of all the orders of said court, and of all its proceedings in regard to the matters aforesaid or in any way relating thereto.

And they represent, that under said proceedings the said Wm. Davis is proceeding to erect said court-house at the expense, in part, of your petitioners, who must necessarily be taxed to pay therefor, and as inhabitants and tax-payers of said county are parties to said proceedings.

And the said petitioners say that in the proceedings aforesaid, there is manifest error in this, *to wit:* That said original order, and all the subsequent orders in relation to the building of such court-house, were made by said county court before there were sufficient funds, or indeed any funds in the county treasury wherewith to erect the same, and before any order had been made by said court for the levying a tax wherewith to erect the same.

There is also manifest error in this, *to wit:* That although by the record aforesaid, it appears that there were no funds in the county treasury wherewith to erect said building, nor did said county court make any appropriation therefor out of any moneys in the treasury, yet a majority of the justices of the county did not concur in making such order for the erection of said building, and which order, if valid, authorizes the levying of a tax to pay the price of said court-house.

There is also error in this, *to wit:* that no notice whatever was ordered by said county court to be put up, as required by

law, in each or any township of said county, at any time previous to the making of such order, notifying all the justices of said county to attend at the term at which such order was made, and said court therefore had no power, authority or jurisdiction to make such order, which, if valid, created a debt upon the county after which taxation was a necessary consequence.

There is also error in this, *to wit:* That the final contract for erecting such court-house was made without any plan therefor, having been prepared and submitted by the commissioner of public buildings, or any estimate of the probable cost thereof having been made by him.

There is also error in this, *to wit:* That the final contract for the erection of such court-house was made without any advertisement for proposals therefor having been made, or any bids therefor received: nor was the same let to the lowest bidder: but by private contract made by said county court without any intervention of the commissioner whatever.

There is also error in this, *to wit:* That said county court concluded said contract with said William Davis without his giving any bond whatever therefor: and without requiring of him any bond whatever for the performance of the work according to the plan finally determined on.

There is also error in this, that the bond originally given by said Davis, was by such new contract entirely annulled as to his securities and they absolutely released and discharged therefrom.

Wherefore your petitioners, being greatly aggrieved by said proceedings of said county court, and liable to be taxed and amerced in consequence thereof, do pray the Hon. Supreme Court for a writ of certiorari, to operate as a supersedeas, directed to the presiding judge and associate justices of said county court, requiring them to send up to this Hon. court and hereto to certify a full, true and complete exemplification of the papers, orders, record and proceedings had in said court in regard to said court-house to the end that what may be needful may be here adjudged in the premises: and that by virtue of

said writ they desist from any further proceedings in said premises: and that all said proceedings and orders be reversed, annulled and wholly held for naught.

The transcript exhibited with the petition shows, *first*, a settlement made by the treasurer of Union county with the county court, at the April Term, 1846, in which he is charged with $2,139 07½ and credited with $2,153 19, leaving a balance in his favor of $14 12½, and the clerk was ordered to issue a warrant to him for that sum.

2d. That at the October Term of said county court, 1846, present the presiding judge and two associate justices named in the petition, it was ordered that a court-house be erected, and John M. Brown was appointed commissioner of public buildings as stated in the petition. Whereupon said Brown reported to the court a plan for the court-house as follows, *to wit:* Said court-house to be built of good and well burned brick, fifty feet square from out-side to out-side, two stories high, foundation to commence three feet below the surface, lower story to be sixteen feet high, and the wall two feet thick to the top of the first story, the second story to be fifteen feet high and sixteen inches thick, to be covered with good heart-pine shingles, the roof to have four declivities or to be what is called a hipped roof; a cupola to be erected on the top of said roof in the centre—the building to be erected in the centre of the public square in the town of El Dorado—to be finished off with floors, doors, windows, &c., as will more fully appear from the draft and plan of said house on file in the office of the clerk of this court, which is this day adopted by the court and ordered to be filed.

It was thereupon ordered by the court, that said commissioner be required to advertise in the El Dorado Union, a newspaper published in the town of El Dorado, and also on the door of the court-house for six successive weeks, that sealed proposals would be received for building a court-house in El Dorado; and further ordered that said commissioner exhibit the plan adopted by the court as aforesaid whenever called on, and that the clerk

furnish him a transcript thereof. And the said commissioner was further authorised and required to receive sealed proposals as aforesaid, up to and until the second Monday of December, 1846; and on that day proceed to open, in presence of three disinterested house-holders, the said proposals for erecting said court-house; and to award to the lowest bidder the contract, provided the bidder came forward in five days and gave bond with good and sufficient security in the sum of $20,000, conditioned for the performance of the contract, and in the event of non-compliance, to award the building to the next lowest bidder with the same requirements, and so on until there should be a contractor. And said commissioner was ordered and instructed not to receive any bid for the erection of said building exceeding the sum of $12,000; and empowered to contract for the said building to the lowest bidder as aforesaid, payable in three equal annual installments from the first January, 1847.

3d. That at the January Term of said court, 1847, present the presiding judge and two associate justices named in the said petition, the clerk presented the bond of Wm. Davis, the contractor for the building of the new court-house, which was approved by the court, with the exception of so much thereof as required "a payment of a surplus which may be in the treasury before the first payment will fall due," which bond was ordered to be spread upon the record.

The bond is contained in the transcript—bears date 25th December, 1846. The condition recites the appointment of Brown as commissioner of public buildings, the order of the court requiring him to let to the lowest bidder the erection of the court-house, "of the dimensions and description specified in the plan annexed to the bond," the advertisement made by Brown in pursuance of the order of the court, the receiving of sealed proposals by him; that on the 13th December, 1846, he opened the bids as directed by the court, and found said Davis to be the lowest bidder, he proposing to build a court-house in the town of El Dorado, in accordance with the plan adopted by the said county court and annexed to the bond for the sum of $8,000, to

be paid by said county in three equal annual installments from the first day of January, 1847, and "should there be a balance in the county treasury at the end of the year, it is to be paid to said Davis and credited upon the first payment," and conditioned that if said Davis should build said court house in accordance with the plan thereto annexed by the first day of May, 1847, the bond was to be void. Signed and sealed by Davis and four securities. That at the said term of the court (January, 1847,) and after the approval of said bond, the court made an order by and with the consent of Davis, "that the present plan of a court-house to be built in the town of El Dorado, be and the same is hereby changed, so as to reduce the size thereof from fifty to forty feet square, and dispense with the cupola; and the two jury rooms in the court room are to be dispensed with; and that the contractor shall build four chimneys with fire places in the upper room to said court-house, and that the price of said building is reduced from $8,000 to $6,200, the original plan to be observed with the above exceptions, and the reduction of the amount of windows in proportion to the size of said building."

The written consent of Davis to said change in the plan of the building and reduction of the price was put upon the record.

The above is the substance of the entries contained in the transcript annexed to the petition.

PIKE & BALDWIN, for the petition. An order *coram non judice* and void is not the subject of an appeal. An excess of jurisdiction is correctable by *certiorari* only. *People vs. Judges of Suffolk*, 24 *Wend.* 252: and even if the order would be considered a nullity and impeachable collaterally, still the court would perform what is the main office of a certiorari—the keeping of inferior magistrates within the compass of their power. *id.* 253.

The supreme court of New York held that, under their general powers, their general superintending power to award a certiorari, not only to inferior courts, but to persons invested by the legislature with power to decide on the property or rights of

the citizen, even in cases where they are authorized by statute finally to hear and determine, has been frequently exercised, is considered as well established by the common law, and can only be taken away by express words. *Le Roy vs. Mayor, &c., of New York*, 20 *J. R.* 435. *Lawton vs. Comrs. of Cambridge*, 2 *Caines* 131. Even if the statute says the decision of the court below shall be without appeal. 23 *Wend.* 287. *Rex vs. Plowright*, 2 *Shower* 458. *Rex vs. Morley*, 2 *Burr.* 1040. *Rex vs. Reeve*, 1 *W. Bla.* 231.

Wherever new jurisdictions are erected, by private or public act, they are subject to the inspection of the King's Bench by writ of error, certiorari or mandamus. 2 *Caines* 181. *Cardiffe vs. Budge*, 1 *Salk.* 146. 1 *Ld. Raym.* 580.

There can be no doubt of the power of this court, at common law, to review the proceedings of inferior jurisdiction by this writ. This power is not taken away by implication, by a similar power being given to another tribunal. *Stair vs. Trustees of Rochester*, 6 *Wend.* 566.

The same general principle was asserted in *People vs. Supervisors of Alleghany*, 15 *Wend.* 203; which was certiorari on application of an individual to bring up the whole assessment and apportionment of taxes for county purposes.

The court held, first, that the writ did not issue *ex debito justitiae*, but only on application to the court, and for reasons shown, and might in its discretion be refused for reasons of public convenience. They relied for this on *Arthur vs. Comrs. of Lewers*, 8 *Mod.* 331. *Bac. Abr. Certiorari, A. Ludlow vs. Lord Com.*, 1 *Southard*, 387. *Lees vs. Childs*, 17 *Mass.* 351, and other cases.

They said they could not avoid the tax as to the relator without avoiding the whole county tax, a great part of which had been paid: and cause hundreds of suits against twenty-six different supervisors. And on these reasons and cases cited they denied the writ. The cases relied on certainly show that it was proper to deny the writ in order to quash a whole assessment. They go no further. *Rex vs. Inhab., &c.*, 2 *Str.* 932. *King vs. King et al.* 2 *T. R.* 234. 2 *Caines* 182. And this is the

very reason why we apply now. If we wait until the assessment list is made up, we shall have to pay an illegal tax without any remedy. To the same point is *People vs. Supervisors of Queen*, 1 *Hill*, 195.

It is the proper office of a certiorari to interfere where there has been an excess of jurisdiction, apparent on the face of the record. If it has to be made out by collateral facts the writ does not lie. *Ex parte Mayor &c. of Albany*, 23 *Wend.* 277. *Rex vs. Somersetshire Justices*, 6 *Dowl. & Ryl.* 469. 5 *B. & Cres.* 816, *Queen vs. Inhab. of Westham*, 10 *Mod.* 159.

The court will in no case go beyond the question of power, that is of jurisdiction: and will, for that, look solely to the record. 23 *Wend.* 287. *Rex vs. Morley*, 2 *Burr.* 1040. *Barnard vs. Fitch*, 7 *Metc.* 607.

In what cases will a certiorari lie? By persons aggrieved, against land commissioners, for illegally laying out a road. *Freetown vs. Co. Comrs. of Bristol*, 9 *Pick.* 46. 2 *Caines*, 181. Against corporate authorities, to set aside an illegal assessment for building a sewer. *Le Roy vs. Mayor &c. of N. York*, 20 *J. R.* 429, 437; or for paving streets. *Bonton vs. President &c. of Brooklyn*, 2 *Wend.* 395. *Stair vs. Trustees of Rochester*, 6 *Wend.* 565. *Ex parte Mayor &c. of Albany*, 23 *Wend.* 277. To remove an appointment by two justices of an overseer of the Poor. *Rex vs. Standard Hill*, 4 *M. & S.* 378. To remove orders for laying out, or discontinuing roads or ways. *Hancock vs. Boston*, 1 *Metc.* 122. *Stone vs. Boston*, 2 *Metc.* 220. To county commissioners on an illegal refusal to abate one's taxes. *Gibbs vs. Comrs. of Hampton*, 19 *Pick.* 298.

Prohibition or mandamus will not lie here. 1 *Hill*, 200. Nor has chancery jurisdiction to grant an injunction. *Movers vs. Smedley*, 6 *J. C. R.* 30.

It makes no difference, as to the power of this court, that we pass by an intermediate court, and appeal directly to this. *Cardiffe vs. Pridge*, 1 *Salk.* 145. The jurisdiction of this court on certiorari to the county court has been deliberately settled. *Lawson vs. Pulaski Co. Court*, 3 *Ark.* 1. *Stevens et al. vs. The*

State, 2 *id*, 291. *Gibson vs. Pulaski*, 309. *Pike vs. The State*, 5 *id*. 204. *Rex vs. Standard Hill*, 4 *M. & S.* 378. *Rex vs. Great Marloe*. 2 *East*. 244.

A certiorari is the only method of getting the judgment of a new jurisdiction reversed, in cases where the court or judge proceeds on a summary method, or other method different from the common law. *Holdipp vs. Otway*, 2 *Saund*. 101. *Com. vs. Ellis*, 11 *Mass*. 462. *Edgar vs. Dodge*, 4 *Mass*. 670. *Com. vs. Blue Hill Turnpike*, 5 *Mass*. 420. *Melvin vs. Bridge*, 3 *Mass*. 305. *Cook, Ex parte*, 15 *Pick*. 234.

S. H. HEMPSTEAD & E. H. ENGLISH, contra.

JOHNSON, C. J. It will be conceded, as contended by the counsel for the petitioners, that if the county court of Union have exceeded their jurisdiction, that their acts are void, and that this court, through its general superintending control over the inferior courts of the State, would be authorized upon a proper case made, to have the proceedings removed by a writ of certiorari, and to quash and set them aside. The petitioners have expressed apprehensions that they may be subjected to the payment of a tax for the purpose of erecting a court-house, and allege that the burthen is about to be thrown upon them without the authority of law. The 36th chap. of the Revised Code declares that "There shall be erected in each county, at the established seat of justice thereof, a good and sufficient court-house and jail;" that "As soon as the court-house and jail shall be erected and the circumstances of the county will permit, there shall also be erected a fire proof building at some convenient place near the court house, in which shall be kept the offices of the recorder and of the clerks of the several courts held in the county;" and that "whenever the county court of any county shall think it expedient to erect any of the buildings aforesaid (the building of which shall not be otherwise provided for) and there shall be sufficient funds in the county treasury which may be appropriated to the erection of county buildings,

or which are not otherwise appropriated, or if the circumstances of the county will permit the county court to levy a tax for the erection of said buildings, such court may make an order for the building thereof, stating in such order the amount to be appropriated for that purpose." The fourth section of the act also provides that, "Whenever the county court shall deem it expedient to levy a tax for the erection of any public building or the repair of the same, it shall require a majority of the justices of the county therein commissioned to concur in making any such order to levy such tax for erecting public buildings." Thus much of the statute is necessary to a correct understanding of the case now presented. The county court, under the third section of the act, have express authority to make an order for the building of a court-house whenever there shall be sufficient funds in the county treasury, which may be appropriated to the erection of county buildings, or which are not otherwise appropriated, or if the circumstances of the county will permit a tax to be levied for that purpose. True it is, that when it shall become necessary to levy a tax for the purpose of raising the funds, such levy cannot be made without an order to that effect, and that too with the concurrence of a majority of all the justices of the county, in case they shall attend after being notified in the manner prescribed by the statute. The obvious reason why a majority of the justices is required to concur in the order to levy the tax is, that the will of the people throughout the county may be expressed through the representatives of the several townships. But it is possible that the county should have an ample fund to erect a court-house, and at the same time not have one dollar in the treasury. It is often the case that donations are made consisting of town lots or other real estate for the avowed purpose of putting up the public buildings, and in such a case, if any individual, in whom the county court should see fit to confide, should agree to erect the buildings and to take such real estate, or the proceeds in case of their sale, we can perceive no good reason why they would not be fully authorized to enter into such an arrangement, and that,

too, without the intervention or concurrence of a majority of the justices of the county. It is not pretended by the petitioners, nor does it appear from the transcript of the record of the county court, that any steps have been taken towards the collection of a tax with which to erect the court house, nor is it shown that a resort to taxation will ever be necessary to effect the object. From the showing in this case the inference is strong that the county has some fund out of which to build the court house, without resorting to taxation, and that therefore the county court, as organized under the constitution, had the unquestionable right and power to order the house to be erected, and also to make the necessary appropriation for that purpose. Under this view of the case, there is no defect of jurisdiction, and consequently no good cause for a quashal of the proceedings. It is also insisted that, inasmuch as the original plan of the building was essentially changed, and as the commissioner did not again advertise for proposals, therefore the present contract with the undertaker is void: and for that cause the whole proceeding should be set aside. The answer to this question is, that whether the bond of the undertaker be binding or not in law cannot properly affect the question of jurisdiction. The statute in requiring the commissioner to take a bond from the undertaker, though it should be strictly obeyed, is merely directory, and the jurisdiction of the court over the subject-matter does not in the slightest degree depend upon the fact whether it is observed or not. It does not necessarily follow from the fact that the county court have made an order to erect a court house, that they will resort to taxation to carry that order into effect. We consider, therefore, that the application is premature, and that it would be time enough for all useful purposes to apply to have the order set aside after it has been made. The application is therefore refused.

FERRIER VS. WOOD.

Where the record entry states that a party prayed an appeal, filed his affidavit therefor and the appeal was granted, on the 15th day of the month, but the clerk certifies at the bottom of the affidavit that it was sworn to and subscribed on the 16th of the month, the record entry must prevail over such certificate, and the affidavit will be regarded as having been filed before the granting of the appeal.

Case and assumpsit are concurrent remedies against a bailee for negligence.

A count in trover may be joined with case.

Where plaintiff bargained for a horse, but was to perform a condition precedent to the vesting of his title and right of possession, and failed to perform such condition, he cannot maintain case or trover for the value of the horse against a bailee who was to deliver him on the performance of such precedent condition.

Appeal from the Marion Circuit Court.

Trespass on the case, brought by Wood against Ferrier in the Marion circuit court, and determined at the April Term, 1847, before the Hon. W. W. FLOYD, one of the circuit judges.

There were two counts in the declaration: the first in case, alleging in substance, that on the 24th October, 1846, plaintiff delivered to defendant a brown bay mare, the property of plaintiff, to be taken care of and safely kept by defendant for the plaintiff, and redelivered on request. That defendant, though requested, failed to redeliver the mare, and by his negligence she was wholly lost to plaintiff. The second count was in trover, in the usual form.

The cause was tried on the plea of not guilty, and verdict in favor of plaintiff for $30 damages. Defendant moved for a new trial, which was refused, he excepted, put the evidence on record, and appealed. The substance of the evidence is stated in the opinion of this court.

CONWAY B, J., *on motion.* This case is here by appeal, and appellee moves its dismission for want of an affidavit in the court below to authorize the appeal.

There are two things necessary for a litigant to do to entitle him to an appeal from the circuit to the supreme court. *First*, he must pray it during the term at which the judgment or decision complained of was given: and *secondly*, during the same term he must file in the court an affidavit stating that such appeal is not made for vexation or delay, but because the affiant verily believes that the appellant is aggreived by the decision or judgment of the court.

No objection is made to the time of praying the appeal, or the form or terms of the affidavit. The motion is based alone on the ground that the appeal appears to have been prayed and granted on the 15th of the month, and the clerk certifies at the bottom of the affidavit filed, that it was sworn to and subscribed on the 16th of the month. The record shows that the case was tried at the April term, 1847, on the 14th of the month, that on the 15th (the next day) appellant moved the court for a new trial, which, on the same day, was overruled, and that he then prayed an appeal and filed his affidavit. The entry is, "And the said defendant prayed an appeal in this case to the supreme court of the State of Arkansas, and filed his affidavit as the law requires, and thereupon it is ordered by the court that the said appeal be and it is hereby granted." The record entry of the court must govern the certificate of the clerk. The clerk was mistaken as to the day the affidavit was made; for it could not have been filed before it was made. Besides, for some purpose, the whole term of a court is to be considered as but one day, and we apprehend such should be the rule in cases of appeal under our statute. The motion is overruled.

E. H. ENGLISH, for appellant. The first count in the declaration, though in case in form, exhibits, if any, a cause of action in assumpsit, according to Chitty's *pig* case. *Chitty Plead.* 156, 185. If so, assumpsit and trover cannot be joined. But if this objection cannot be made on error, the verdict is unsustained by law or evidence.

The horse in question was won by plaintiff below on a horse

race, but never delivered to him, and the law, discountenancing gaming, will not aid him to recover it or the value. On the contrary, if the horse had been delivered, the loser could have recovered it back under our statute. *Digest, Tit. Gaming.*

To maintain trover or trespass, plaintiff must have a special or general property in the thing, and possession, or immediate right to possession. *Chitty Plead. Tit. Trover.* The proof here shows neither. Nor is a conversion proven.

There was no contract between plaintiff and defendant—no consideration moving from the former to the latter—the horse was never delivered to plaintiff and re-delivered, and there is no foundation for the verdict. If the plaintiff has a cause of action at all, it is against witness with whom he made the bet, and he cannot recover the horse of him, because he won him gaming.

If there remain to be done upon a contract some act to ascertain the quantity or *price*, the vendee cannot maintain trover until that be done. 1 *Chit. Plead. p.* 172.

If plaintiff had bought the horse of defendant, instead of having won him of *witness*, he could not maintain trover, because the evidence shows that the parties were to meet the next day and settle the *price* of the horse, prior to his delivery, and plaintiff did not attend.

If defendant had absolutely agreed to deliver the horse to plaintiff on the next day, and plaintiff had attended and defendant failed, plaintiff could not maintain this action, because the proof shows no consideration from plaintiff to defendant.

The verdict is therefore "*shocking on the first blush*" to our sense of justice, and a new trial should be awarded.

FOWLER, contra. Take the case in the most favorable view for Ferrier, it is still but a mere conflict of testimony—evidence on both sides—which it was the exclusive province of the jury to weigh: and in such case no court will overrule their decision. 5 *Ark. Rep.* 243, *McLain's adr. vs. Churchill et al.* 1 *English's Rep.* 430, *Lewis vs. Read.* 6 *Mo. Rep.* 63, *Dooley vs. Jennings.*

6 *Hill's Rep.* 447, *Conrad vs. Williams.* 2 *Pet. Rep.* 323, *Roach vs. Hullings.* 6 *Pet. Rep.* 621, *Crane vs. Morriss et al.*

Wood's attorney has not had leisure to examine the pig case, referred to in the written argument for Ferrier: but suggests respectfully, that the learned counsel is mistaken in his position, that there is a misjoinder of action in this case. The counts are both in case and are by the safest and highest authorities well joined in the same declaration, and aptly drawn when tested by approved precedents. 2 *Chit. Pl.* 275, 276, 323 *et seq.* 1 *Ch. Pl.* 196, 197, 198. 1 *Term Rep.* 276, *Brown vs. Dixon.* 2 *Wils. Rep.* 321, *Dickson vs. Clifton.*

Any number of causes of action in case proper may be joined with trover. 1 *Chit. Plead.* 198. 1 *Term Rep.* 277, *Brown vs. Dixon.*

And even if a cause of action which ought to be laid in assumpsit be improperly laid in case and joined with a count in trover, no objection can be taken with effect on the ground of misjoinder, but by demurrer to the defective count. 1 *Ch. Pl.* 197.

And again, as a full set-off to the pig case of appellant's counsel, it is laid down and so expressly adjudicated that a count for not returning a dog delivered to the defendant, to be returned in a reasonable time to the plaintiff, may be joined in one action with a count in trover. 1 *Ch. Pl.* 198. 1 *Term Rep.* 276, *Brown vs. Dixon.*

JOHNSON, C. J. It is insisted that, though the first count in the declaration is framed in case, it lay in assumpsit, and that therefore it is a misjoinder. The plaintiff below had the undoubted right to elect between the two, and having chosen to frame it in case, he was clearly at liberty to add a count in trover. Case is the appropriate remedy for injuries to personal property, not committed with force or not immediate, or where the plaintiff's right thereto is in reversion. It lies against attorneys or other agents for neglect in the conduct of a cause or other business, or for not accounting for money, &c., though it has been more

usual to declare in such cases in assumpsit. It also lies for negligence against bailees, as against carriers, wharfingers, and others having the use or care of personal property. See, 1 *Chit. Pl.* 140. It is laid down by the same writer, that case will lie for not returning a spaniel delivered to the defendant to be tried and returned in a reasonable time, and also, that a count in trover may be joined with it. See, 1 *Chit. Pl.* 202. The two counts therefore were well joined in the declaration.

The only question remaining to be decided, relates to the sufficiency of the testimony to warrant the verdict. The first witness called by the plaintiff below testified that he was sitting on the road side, when the defendant passed along leading a certain brown brute, that the defendant was asked if that was the nag which was won on the race or put upon a race the day before, that he replied she was the mare the plaintiff won from Sinclair, and said he had borrowed her from the plaintiff for his little son to ride home, and that he was carrying her back to him, and enquired if the plaintiff was in town, and that this took place about two weeks after the last term of the Marion circuit court. The plaintiff proved, likewise, by another witness, that some time in the latter part of October last past, he was called upon by the plaintiff to witness the fact that he demanded his mare of the defendant, that the defendant replied that the mare was in town, and if he wanted her he could go and get her, and that he would not deliver her to him, that the plaintiff was to meet him in town to get the mare, and that the plaintiff denied that he was to meet him in town, but said the defendant was to come by his house, and that perhaps he would go with him to town, and that the defendant again said he was to meet him in town to get the mare. The defendant then introduced a witness, who stated that he and the plaintiff had made a race for one hundred dollars in property, which was to come off some time in the latter part of October last past, that he (the witness) wanted a nag to put up as a stake, that he stated to the plaintiff that he wanted to see Clements in order to get a nag from him, that defendant said he would let Cle-

ments have one, and told him (the witness) to take the nag and put it up to make the stake. He further stated that the plaintiff, the defendant and himself all agreed that if he (the witness) should lose the mare, that they and Clements, who was then present, would meet the next day in the town of Yellville, and have her valued, and that if he (the witness) was satisfied with the valuation, Clements would become accountable to the defendant for the value, and that in that event the witness would receive the mare from Clements and deliver her to the plaintiff; but that if the witness was not satisfied with the valuation, he would let Clements keep the nag and furnish the plaintiff with as good a one in its stead. He also stated that he lost the mare, that the plaintiff and defendant came to him after the race was over, and that the defendant said in the presence of the plaintiff that he wanted to ride her home, and that he would bring her back the next morning to be valued according to the agreement, to which he himself consented, that the defendant in pursuance of his promise brought the mare back the next day and delivered her to Clements, when Clements and himself agreed upon the price, that the plaintiff failed to meet them at Yellville to receive the mare according to their agreement, after having been sent for the second time, that he (the witness) remained there during that day and until near noon on the next, when he rode the mare to his residence, near twenty miles distant, and that he never did deliver her to the plaintiff, and that the plaintiff never had possession of her. This is the substance of all the testimony adduced upon the trial of this cause. We consider it clear that the facts as disclosed before the jury, were not such as to warrant the verdict. The declarations of the defendant, if taken alone, might have left some room to doubt the real state of case; but when the testimony offered by the defendant is considered in connexion with them, all doubts and difficulties are entirely removed. The latter fully explains the former, and leaves the whole case clear and easily understood. The defendant admitted that he had borrowed the mare from the plaintiff, and that he engaged to return her to Yellville, and that the plaintiff was to

meet him there to receive her. He also stated that he had taken her to Yellville pursuant to his promise, and that the plaintiff had failed to meet him. From the testimony of the defendant's witness, the mare had not been delivered to the plaintiff, nor had the title passed to, or vested in him. She was to become his property in case the parties should all meet at the time and place appointed, and the witness should be satisfied with the value that might be set upon her. Here there was a condition precedent, which had necessarily to be performed before the title vested in the plaintiff, and the testimoney is that it never was performed. The testimony of the defendant's witness does not contradict the declarations of the defendant as detailed by the witnesses of the plaintiff, but support and explain them. Every word the defendant said about having borrowed the mare of the plaintiff may be strictly true, and yet he never may have had the title, nor the actual possession. It is quite natural that the plaintiff should have taken the liberty to loan the mare under all the circumstances as related by the defendant's witnesses. This he might have done when no objection was interposed by the party to whom she belonged, and that too without having any strict legal right. That such was the true state of case, we think is abundantly proven, and that, therefore, the verdict was improperly found for the plaintiff. The judgment of the circuit court in overruling the motion for a new trial is, consequently, erroneous and ought to be reversed. The judment is reversed and the case remanded.

HUMPHRIES VS. MCCRAW.

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90 151

Where a father sells a slave to a son, who is a member of his family, and so continues, and the slave remains in the family, in contemplation of law, he is in the possession of the son, and if the father sometimes controls the slave, it raises no presumption of fraud.

The acts and declarations of the vendor after the sale, in the absence of the vendee, are not competent evidence to impeach the title of the latter, but if done or made in his presence, and not disaffirmed by him, they become legal evidence, not as the mere acts or declarations of the vendor, but as indirect admissions of the vendee inconsistent with his title.

A notice that depositions will be taken on the 4th, 5th and 6th days of May, 1846, or any one or more of said days, is indefinite and insufficient.

Writ of Error to the Pulaski Circuit Court.

REPLEVIN, by Carroll B. Humphries and John B. Humphries, against Pleasant McCraw, determined in the Pulaski circuit court, at the October Term, 1846, before the Hon. WM. H. FEILD, judge. The action was commenced in White, and venue changed to Pulaski county.

Declaration alleges that on the 14th April, 1845, at White county, defendant took, and unlawfully detained, from plaintiffs, a slave, named Bannister, the property of plaintiffs, &c.

Defendant pleaded, 1st, property in himself: 2d, property in John Humphries: and 3d, *non cepit*. Plaintiffs took issue to the third plea, and replied to the first and second pleas, property in themselves; to which defendant took issue. The cause was submitted to the jury, and verdict and judgment for defendant.

Pending the trial, plaintiffs excepted to several decisions of the court, and took a bill of exceptions, setting out the points reserved, from which it appears, plaintiffs (reserving all exceptions to the relevancy or competency thereof) read to the jury the deposition of Milton Sanders; to which was appended a bill of sale by John Humphries, bearing date, the 25th day of March, 1843, by which he conveyed to the plaintiffs in this suit, the said slave, Bannister, and three others for the sum of one thousand dollars; which was duly acknowledged, and filed for record with the register of White county on the day after its date.

Deponant Sanders, a subscribing witness to said bill of sale, states that he was present, at the house of John Humphries in White county, and saw him execute said bill of sale to plaintiffs. Plaintiffs paid John Humphries $330 in cash, and execu-

ted their note to him for the balance of the purchase money named in the bill of sale. The slaves were in the yard at the time of the sale, and were delivered by John Humphries to plaintiffs—that is, he pointed the negroes out to them, and told them they were at their disposal. The slaves were afterwards claimed by plaintiffs, and considered their property. Deponent afterwards saw plaintiffs taking the boy Bannister to Independence county to pledge him for corn to Morgan Magness.

Cross Examined.—Did you not hear John Humphries say that he was going over to Independenee county to purchase corn, or to mortgage the boy Bannister for corn?

Ans.—Mr. Humphries passed my house by himself, and said he was going to Independence to buy corn, but do not recollect that he said anything about mortgaging Bannister for corn.

Did you, or not, see John Humphries hauling corn from Independence, and did you not understand that it was corn he bought of Magness?

Ans.—I saw John Humphries' team hauling corn, which I understood was bought in Independence of Magness, but do not know who bought it.

Was said corn hauled to the residence of John Humphries, and did or did not he use it for the support of his family?

Ans.—The corn was hauled to the dwelling of John Humphries, and cribbed there, but I do not know how it was used, or what become of it.

Did not John Humpheries take to New Orleans, or somewhere below, and sell all the negroes named in said bill of sale, except Bannister, who was mortgaged for corn?

Ans.—John Humphries and Carroll B. Humphries took some negroes below for sale, and when they returned, John Humphries said they had sold the negroes pretty well.—The negroes spoken of were at the dwelling of John Humphries: I do not know to whom they belonged.

Did, or did not, John Humphries control said negroes and exercise acts of ownership over them?

Ans—I do not know whether he did or not.

Was there not an execution sent to you from the clerk of the Pulaski circuit court, issued on a judgment in favor of McCraw against John Humphries and returnable to the March Term of said court, 1843?

Ans—There was such an execution sent to me, I believe.

Did you not go to John Humphries to levy on his negroes, and if so what arrangement did you make with him about the matter?

Ans.—I went to the residence of John Humphries to levy said execution on the negroes there as his negroes, and he claimed the privilege of showing me other property in lands, which I levied upon: also upon a stallion.

Did not John Humphries say to you that he had a right to show you other property besides his negroes, on which you should levy?

Ans.—I went to John Humphries to levy on the negroes there as his property, but he told me he had a right to show me other property to levy on, and did, as I have above stated.

Did, or did not, you hear John Humphries say he never would pay the judgment on which said execution issued?

Ans.—I have heard John Humphries say that said judgment was unjust, but do not recollect whether I ever heard him say that he never intended to pay it.

On re-examination, deponant stated that during the times of which he had been speaking, plaintiffs lived with their father, John Humphries, as part of his family. Said execution came to his hands after the execution of said bill of sale. He also stated that defendant, McCraw, instructed him to levy said execution on said negroes as the property of John Humphries.

After said deposition was read, plaintiffs moved the court to exclude from the jury all the testimony of deponant in relation to the acts, declarations and conduct of John Humphries, subsequent to the said sale by him to plaintiffs, but the court overruled the motion, and plaintiffs excepted.

Thomas J. Lindsay, witness for plaintiffs, testified, that as sheriff of White county, by direction of the defendant, McCraw, he

levied upon the boy Bannister, and sold him on the 14th April, 1845, under two *venditioni exponases* against John Humphries, one of which was in favor of McCraw, and the other in favor of Pace, for the use of Stone; and that McCraw purchased him at said sale.

On Cross examination, witness testified that plaintiffs were the sons of John Humphries, and had lived with him ever since he knew them. He supposed the older of the two, was twenty-five years of age. When witness levied on the negro, he was on the farm where plaintiffs, and their father lived, though neither of them was at home—they were in Searcy, a mile and a half from the farm. When witness first received said executions, he called on old man Humphries in relation to them, and after talking to him about them, Carroll B. Humphries, who was present, observed to his father that they had better pay up the executions—"that it had better be settled—that it had already been more trouble and expense than it was worth—that he had rather be shut of the trouble and expense of the matter." Witness was not much about old man Humphrie's, but supposed said negro worked on the farm. Plaintiffs had a store in Searcy, but lived on the farm with their father. When witness levied on the negro, plaintiffs claimed a trial of the right of property. Plaintiffs and the old man Humphries were present, and the old man seemed to take a deep interest in the trial—He took the most active part in it—seemed to suggest questions to plaintiffs' attorney, and to take a leading part in the trial. At the time Sanders had executions against old man Humphries, witness heard one of the plaintiffs say, that if the negroes had remained one day longer the sheriff would have levied on them to satisfy said executions. It was a general talk that negroes were taken off to avoid executions. One of plaintiffs, told witness that the negroes were taken off by Carroll B. Humpheries and the old man Humphries, and they had a bad night of it; but witness did not know that the negroes taken off by them, were the same mentioned in said bill of sale—Bannister was not taken. The negroes were taken off in March, 1844. Witness did not know

whether there were, or were not, other negroes at Humphries than those named in said bill of sale. Carroll B. and the old man took some negroes to the lower country, and sold them, and Carroll B. brought back another negro with him; also a stock of goods, marked in the name of plaintiffs. Witness had heard the old man say he had no interest in the store. Plaintiffs were never engaged in merchandizing in Searcy until after Carroll B. took said negroes off and sold them as above stated.

On re-examination, by plaintiffs, witness stated that plaintiffs were both present at the said trial of the right of property, as was McCraw—that both parties had attorneys present, who managed the trial—that plaintiffs claimed the property—that old man Humphries said on the day of said trial, that the boy Bannister did not belong to him, but belonged to plaintiffs. Old man Humphries and plaintiffs all sat by plaintiffs' attorney at the trial, and seemed to be advising as to what questions to propound—the old man sat next to the attorney and seemed to do most of the whispering. When witness offered Bannister for sale under said executions, John B. Humphries, one of the plaintiffs, forbid the sale, and claimed the negro as the property of plaintiffs.

The above is the substance of so much of Lindsay's testimony as is deemed material to a proper understanding of this case.

The bill of exception states that while said witness was testifying, plaintiffs objected to his testifying about what John Humphries did and said in relation to said negroes after his sale to the plaintiffs, and moved the court to exclude all such testimony, but the court overruled said motion, and permitted said witness to testify in relation to the acts and statements of John Humphries after the date of plaintiffs' bill of sale, and up to, and at the sale, to the defendant by the sheriff, to which decision of the court, plaintiffs excepted. Also that plaintiffs, upon re-examining said witness, asked him to state every thing he knew of John Humphries saying or doing, subsequent to the sale to plaintiffs, and up to the time of the sheriff's sale, disaffirming title in himself, and confirmatory of plaintiffs' title; but the court only per-

mitted said witness to testify in regard to such acts and statements as occured before the levy of the execution upon the negro; and only permitted plaintiffs to examine witness in relation to such declarations and acts subsequent to the levy, as he had spoken of on his cross examination; or other witnesses had spoken of in their testimony in this cause: to which decision of the court, plaintiffs excepted. Here plaintiffs closed.

Defendant, to sustain the issues, on his part, proved by the record, that on the 16th May, 1842, he recovered a judgment in Pulaski circuit court against John Humphries for $311,14 with costs. That on the 23d June, 1842, an execution issued thereon to the sheriff of said county, returnable to the September term, 1842, which was levied on land, and returned without sale.—That on the 9th September, 1843, a *ven. ex.* was issued to the sheriff of Pulaski county, returnable to the November term, 1843, and said land sold, and the proceeds applied to older executions. That on the 28th November, 1843, a *fi. fa.* was issued on said judgment to the sheriff of White county, returnable to the May term, 1844, which came to the hands of the sheriff of said county on the 2d December, 1843, and was levied on lands and a stallion, and returned without sale. That on the 18th December, 1843, Pace, for the use of Stone, recovered judgment in the Pulaski circuit court against said John Humphries, for $217, with costs. That an execution issued upon said last named judgment to the sheriff of White county, returnable to the May term, 1844, which was levied on certain lands and a stallion, and returned without sale. That on the 14th June, 1841, Pitcher and Walters recovered a judgment in the Pulaski circuit court against said John Humphries for $1150, with costs; and that on the 14th May, 1842, Reardon and son recovered a judgment in said court against said Humphries for $188,41, with costs.

Defendant then offered to read to the jury the two executions spoken of by the witness Lindsay, together with the returns thereon, to which plaintiffs objected generally, but the court permitted them to go to the jury.

The first is a *ven. ex.* with a *fi. fa.* clause, issued upon said

judgment in favor of McCraw against John Humphries to the sheriff of White county, on the 2nd day of January, 1845, returnable to the May term 1845. The other is a similar writ, on the said judgment in favor of Pace, issued on the same day, and returnable to the same term. The returns of the sheriff upon these writs show that he levied them upon the said boy Bannister, plaintiffs claimed a trial of the right of property, a jury summoned for that purpose by the sheriff found a verdict in their favor, but the sheriff notwithstanding sold the negro on the 14th April, 1845, and McCraw became the purchaser, at the sum of $300.

Defendant also read the sheriff's bill of sale to him for the negro, dated 16th April, 1845, the plaintiffs objecting.

George C. Watkins testified that John Humphries became embarassed about the year 1842, since which time he had considered him "*broke*." He received a claim against him in 1840, from Georgia for $1800, and had other claims in his hands for collection, part of which had been paid. In 1843 or 1844, executions against him were returned *nulla bona*.

Pleasant Jordan testified that he attended said trial of the right of property; that old man Humphries sat by the plaintiffs' attorney and prompted—managed the trial entirely—plaintiffs were present. After the trial, all hands got mad and quarreled—McCraw threatened to whip one of the negroes, but old man Humphries swore he should not do it.

Defendant offered to read the deposition of Morgan Magness, plaintiffs objected, but the court overruled the objection. The notice given by defendant to plaintiffs, of the time of taking said deposition, was in these words: "I will, on the 4th, 5th and 6th days of May next (1846) or on any one or more of said days, at, &c., take the deposition" &c. Deponant states that in November or December, 1843, old man Humphries came to his house, contracted with him for a boat load of corn, and stated that it was for his son. In February, 1844, the old man and plaintiffs came and received the corn, and plaintiffs gave deponant a mortgage on the boy Bannister to secure the payment of the

debt. In July following, the old man and one of the sons paid the debt, and took the negro. The old man made the trade, and paid over the money, but stated that he was doing business for his sons, the plaintiffs.

Defendant read the deposition of David Royster, plaintiffs objecting to its competency, and the court overruling the objection.

Royster states that in the spring of 1843, or 1844, he went with old man Humphries on White river, about 40 miles below where he lives—the old man said he was taking some negroes down below to sell—Witness did not see the negroes—he said he had started them on ahead to overtake and get on board a flat boat—he said he was taking them off to avoid an unjust debt—witness thought he told him that one of his sons was with him. Witness understood the old man to say, that he meant McCraw's debt.

Defendant read other depositions, but it is not deemed material to state their contents, there being no motion for a new trial.

Plaintiffs proved by a witness, Brown, that they had been doing business for themselves for seven or eight years, and had some means—other witnesses stated that plaintiffs were men of property.

After the testimony was closed plaintiffs moved the court to exclude all the evidence as to the conduct and declarations of old man Humphries, subsequent to the sale of the negroes by him to the plaintiffs; also, the evidence in relation to his insolvency, which the court refused to do.

Plaintiffs moved the court to instruct the jury as follows:

"1st, That if the jury believe, from the evidence, that plaintiffs and John Humphries lived together after the execution of the bill of sale, and that the negro in question was employed in the family, subject to the occasional orders of each member, the presumption of law is, that he was in possession of the person having title; and that if plaintiffs had title, the law presumes that the negro was in their possession; and, that if they all lived together, no fraudulent presumption arises from the fact that John Humphries sometimes controlled the negro: and,

"2d, That if the plaintiffs and John Humphries lived together, and the negro was employed in the same family; and if the plaintiffs had title, the possession of him would be presumed to be in the plaintiffs and not in John Humphries; and consequently that the acts and declarations of said John Humphries, during that time, in relation to the negro are not competent evidence against the plaintiffs."

The court refused to give the said instructions as asked by plaintiffs, and proceeded to instruct the jury generally, and said:

"The plaintiffs claim, under a bill of sale, dated 25th March, 1843; you are to look to that bill of sale, and if it was executed for a valuable consideration, and the property sued for, a portion of the property included therein, so far the plaintiffs have made out their case, and unless the bill of sale is avoided by other evidence appearing in the case, the plaintiffs have established a right of property; but the defendant, to avoid the effect of this bill of sale, contends, and has introduced evidence conducing to show that the bill of sale to the plaintiffs was made to hinder, delay and defraud the creditors of the vendor, John Humphries. —Is there fraud, or was it the intention of these three persons, the plaintiffs and John Humphries, to defraud the creditors of John Humphries? The law does not allow a person to convey his property, even for a valuable consideration, to another who knows that he intends to defraud his creditors. If John Humphries, by making this conveyance, intended to defraud McCraw, or any other of his creditors thereby, and the plaintiffs knew that he made the same with that intent, the sale is void, even though they paid a valuable consideration. If it was a *bona fide* sale, the plaintiffs have established a right to the property. In considering the question, whether the sale was *bona fide* or fraudulent, the jury should take into consideration the acts, conduct and declarations of John Humphries, subsequent to the sale to the plaintiffs; his insolvency at the time of, prior to and since the sale—that an execution was then out against him—his acts, declarations and conduct in relation to the property subsequent to the sale—these are all circumstances for the consideration of

the jury. And if the sale is fraudulent, you are bound by law to find in this case for the defendant. All the testimony which the court has permitted to go to the jury is competent and legitimate evidence for their consideration, and from which they may either infer that the sale was fraudulent or not fraudulent."

The plaintiffs excepted to the decision of the court, refusing the instructions so asked by them, and charging the jury generally as above. Plaintiffs brought error.

WATKINS & CURRAN, for the plaintiffs. 1st, The circuit court erred in permitting evidence to be given of the conduct and declarations of John Humphries subsequent to the sale to the plaintiffs. Even if John Humphries could be said to have remained in possession, that was only prima facie evidence of fraud, subject to be explained. *Field vs. Simco*, 2 *Eng. R.* 269. But in no event could his declaration be given in evidence to destroy the title he had conveyed. He should have been called as a witness himself. *Field vs. Simco, ub. sup. Hurd vs. West*, 7 *Cowen Rep.* 752.

The declarations of a father, that a conveyance by him to his child was fraudulent, made subsequent to the conveyance, are inadmissible against the child. *Arnold vs. Bell*, 1 *Haywood Rep.* 396. *Gray vs. Harrison*, 2 *Hay. Rep.* 292. *Eubanks' Exr. vs. Bent*, 2 *Hay. Rep.* 330.

All the cases agree that declarations made by a person under whom the party claims, after the declarant has parted with his title, are utterly inadmissible to effect any one claiming under him. *Weidman vs. Kohn*, 4 *Serg. & R.* 174. *Patten vs. Goldsborough*, 9 *Serg. & Rawle* 47. *Jackson ex dem. Watson vs. Cris*, 11 *J. R.* 437. *Brillard vs. Billings*, 2 *Vern. Rep.* 309.

2d, The presumption of fraud arising from the fact that the negro remained in the same family, is explained by the evidence that plaintiffs and John Humphries lived together; and, although the father may have controled the negro as usual, the possession in law is deemed to have been in the person having title, consequently the court erred in refusing to give the instruc-

tion asked by the plaintiff. *Orr et al. vs. Pickett et al.*, 3 *J. J. Marsh.* 269. *Kenningham vs. McLaughlin*, 3 *Monroe Rep.* 30. Nor can the admission of the vendor's subsequent acts or declarations be placed upon the ground that he remained in possession because these authorities show that he was not in possession. If the possession was not changed in this instance, it would be impossible, where two persons lived together, for one to make a valid sale of property to the other.

3d, The deposition of Magness should have been excluded. The notice was to take depositions on three different days. *Reardon vs. Farrington*, 2 *Eng. Rep.* The court cannot avoid the objection by coming to the conclusion that the testimony of Magness was immaterial and could not have affected or changed the result of the verdict. If there was a motion for a new trial, the court might, if upon the whole case the verdict was correct, sustain the judgment notwithstanding this error; but in this case there was no motion for a new trial.

4th, The court instructed the jury that they should take into consideration the fact, that there was an execution in the hands of the sheriff at the time he executed the bill of sale, when there is no evidence whatever showing any such fact.

5th, The declarations and acts of John Humphries after the sale to the plaintiffs and before McCraw's purchase, are competent evidence to support plaintiff's title, and to defeat the defendant's. *Coale vs. Harrington*, 7 *Har. & John. Rep.* 147. *Guy vs. Hall*, 3 *Murphy*, 150.

FOWLER, contra. The verdict not having been assailed, the evidence upon which it rests, whether legally or illegally admitted, sustaining McCraw's pleas and deciding that the sale from old man Humphries to his sons was fraudulent, must be taken as sufficient to warrant the finding.

Plaintiffs' first exception is to their own evidence—a deposition, which they offered with a reservation—and after they had read it to the jury, moved to exclude certain parts of it which the court refused to do. If this deposition (that of Sanders)

contained any thing improper, it was the act of the plaintiffs, and neither that court or this should permit them to take an advantage or benefit of their own wrong. It reminds of a perjury in fact with a mental reservation. 5 *Pet. Rep.* 137, *Greenleaf vs. Borth.*

Independent of the fact of Sanders' deposition being the plaintiffs' own evidence, the refusal of the court to exclude all the testimony of the witness "in relation to the acts, declarations and conduct of John Humphries subsequent" to his sale to the plaintiffs was strictly legal. And,

1st, As to his acts and conduct, whether at, before or after the pretended sale to his sons, especially as they showed that he and Carroll, one of the plaintiffs, in conjunction ran some of the slaves off to the low country, they tended to prove the fraudulent sale, and were strictly legitimate. 2 *St. Ev.* 26.

2d, Even if such declarations were incompetent evidence, the plaintiffs, in order to have them excluded, should have asked their exclusion alone, and not coupled it with his acts and conduct, which were clearly good evidence: as the whole was asked to be excluded in mass, the court properly refused.

3d, Such deposition does not show that any such declarations were made after his sale to his sons: and if made before, they were good evidence, and should not have been excluded, unless the plaintiffs showed clearly that they were afterwards.

4th, Such declarations and the substance of them were wholly immaterial to the issue; and could not possibly have had any influence on the minds of the jury: and therefore the refusal was right.

To the documentary evidence of McCraw, the plaintiffs also objected in mass. An objection made to a mass of evidence should not be sustained in law: the objection should be made to each particular part deemed objectionable. See 5 *Missouri Rep.* 393, *Walds vs. Russell.* 13 *Pet. Rep.* 319, *Moore vs. The Bank of the Metropolis.* 2 *Eng. Rep.* 473, *Johnston vs. Ashley. ib.* 524, *Camp et al. vs. Gullett & wife.*

The insolvency and embarrassments of old man Humphries,

and the conduct of himself and his sons, the plaintiffs, clearly establish the conveyance from him to them to have been fraudulent, and fully sufficient to sustain the verdict of the jury, had a new trial been moved for.

The admission of Morgan Magness' deposition, though the defect of the notice may bring it within the rule laid down in the case of *Reardon vs. Farrington*, will not entitle the plaintiffs to a reversal of the judgment in this case: because the substance of the deposition is wholly immaterial, could not have influenced the jury, and therefore could not possibly prejudice the plaintiffs.

Royster's evidence, as to what Humphries, the elder, said and did, while engaged in running off the negroes, in conjunction with one of the plaintiffs, (which conjunction had been previously proved by Lindsay) was competent evidence to establish fraud in the sale of the slaves to his sons.

The instructions given by the court were legitimate and proper as based upon the facts in evidence.

John Humphries' admissions were competent evidence on the ground of his interest and authority being identical with that of his sons. 2 *St. Ev.* 23, 24. The admissions of one of the plaintiffs below, their interest being joint, must be taken as against both, and so taken, tend clearly to prove that the sale was merely colorable and fraudulent. *Greenleaf on Ev., part* 2, *sec.* 172 *et seq. p.* 203 *et seq.* 1 *Espn. N. P. C., Gray et al. vs. Palmer et al.* And fraud being a mixed question of law and fact, it is the province of the jury to draw a conclusion from equivocal facts and suspicious circumstances. 7 *Cowen's Rep.* 304, 305, *Jackson vs. Mather.* 4 *Smed. & Marsh. Rep.* 310, *Bogard vs. Gardley.* And the jury had a perfect right to find the sale fraudulent, if from the circumstances they believed it was made for the purpose of defeating, hindering or delaying creditors, although a full and fair price might have been given for the slaves. 4 *Kent. Com.* (5 *Ed.*) 464 *in note.* 1 *Burr. Rep.* 474, *Worseley et al. vs. DeMattos et al.* And where a conveyance is made to a son by an embarrassed father, it is a material and

important circumstance to be submitted to the jury to establish the fraud. 2 *Saund. Pl. Ev.* 530.

OLDHAM, J. This was an action of replevin brought by the plaintiffs in error against the defendant in error in the circuit court of White county for the recovery of a negro boy named Bannister. Upon the application of the defendant for a change of venue the cause was removed to the circuit court of Pulaski county, in which the same was tried.

Upon the trial the plaintiffs claimed title to the boy in controversy under a bill of sale executed to them by John Humphries, on the 25th day of March, 1843, for the boy and three other negroes, the same purporting to have been for the consideration of one thousand dollars. They proved that they paid $330 of the consideration money down and gave their note for the balance. The defendant claimed title by virtue of his purchase at a sale made by the sheriff of White county on the 15th day of April, 1845, under an execution issued from the office of the clerk of the circuit court of Pulaski county, upon a judgment recovered by the defendant against John Humphries on the 16th day of May, 1842. Upon the trial a verdict was found for the defendant. During the progress of the trial, the plaintiffs excepted to sundry rulings of the court, in admitting evidence offered by the defendant, and in rejecting evidence offered by them, and also the charge of the court to the jury. The points saved by the exceptions are assigned for error in this court.

The first exception taken by the plaintiffs, was to the decision of the court overruling their motion to exclude from the jury all the testimony contained in the deposition of Milton Sanders, in relation to the acts, declarations and conduct of John Humphries, subsequent to the sale by him to the plaintiffs. The witness in his cross examination, stated that John Humphries passed his house by himself, and said that he was going to Independence county to buy corn. Witness also stated, that John Humphries and Carroll Humphries took some negroes below for sale, and when they returned, John Humphries said they

sold the negroes pretty well. That when witness, who was sheriff and to whom an execution had been sent against John Humphries in favor of the defendant, went to levy on the negroes, Humphries claimed the right to show other property.

These are the only points in the deposition to which the exceptions apply. The testimony as it stood in the deposition was certainly irrelevant, as it neither tended to establish the title of the defendant or affect that of the plaintiffs for fraud. There does not appear to be any act or conduct on the part of John Humphries inconsistent with the title of the plaintiffs, nor is there any declaration made by him having such a tendency.

The second exception was taken to the witness Lindsay's testimony, about what John Humphries did and said in relation to the negroes after the sale to the plaintiffs. This witness stated that John Humphries and Carroll Humphries carried off certain negroes and sold them; that upon the trial of the right of property, John Humphries set by with the plaintiffs, suggested questions to their counsel, and on the day of the trial, said the boy in controversy did not belong to him. There is nothing in this testimony going to show an avowal on the part of Humphries senior, inconsistent with the title set up by his sons, but rather in affirmance of it. His conduct in connexion with that of the plaintiffs in reference to the property after the sale was legitimate testimony. If by their consent, he performed acts of ownership inconsistent with the title claimed by them under him, and by their consent and concurrence, such a circumstance would be valid as tending to show the character of the transaction between them and that it was merely colorable. But nothing of that kind can reasonably be deduced from the statements of the witnesses to which exceptions were taken. The declaration made by John Humphries, that he had no title to the boy, was in favor of the plaintiffs' title. The fact that he and Carroll Humphries carried off negroes together was a circumstance, very slight in its character, to prove that the negroes so carried off and sold, belonged to either the one or the other.

We cannot perceive upon what ground the plaintiffs objected to the execution, sheriff's return and bill of sale to McCraw under which he claimed title, as those papers all appear to be regular, and no question as to their regularity has been made in the argument in this court.

The deposition of Magness should have been excluded for want of sufficient notice, according to *Reardon vs. Farrington*, 2 *Eng. R.*

The evidence of Royster should have been excluded. In the case of *Gullett et ux. vs. Lamberton*, 1 *Eng. R.* 109, this court held that "the title of the purchaser cannot be impaired or in anywise affected by the mere statements or admissions of the vendor in his absence." This rule is based upon a series of authorities.

The next question is, whether the court properly rejected the instructions asked by the plaintiffs. The correctness of the first instruction was decided at the last term of this court in *Dodd vs. McCraw.* According to the principle decided in that case, the court erred in refusing the instruction.

The second instruction asked and refused was similar to the first, with this addition that the acts and declarations of John Humphries, during the time the negro was employed in the family, in relation to the negroes, are not competent evidence against the plaintiffs. This instruction was properly rejected. The acts and declarations of the vendor after the sale, in the absence of the vendee, are not competent evidence to affect the vendee's title, but if done or made in his presence, and not disaffirmed by him, they become legal evidence, not as the mere acts or declarations of the vendor, but as indirect admissions by the vendee inconsistent with his title.

The principles already decided, determine that the circuit court erred in instructing the jury that "in considering the question whether the sale was bona fide or fraudulent, the jury should take into consideration the acts, conduct and declarations of John Humphries subsequent to the sale to the plaintiffs—his acts, declarations and conduct in relation to the other

property subsequent to the sale—these are circumstances for the consideration of the jury; all the testimony which the court has permitted to go to the jury is competent and legitimate evidence for their consideration." The judgment must be reversed and the cause be remanded.

MAGRUDER VS. SNAPP.

The overruling of a motion for continuance, cannot be made a ground for granting a new trial.

Writ of Error to Pulaski Circuit Court.

Trespass *vi et armis*, brought by Catharine M. Magruder against Lewis Snapp, determined in the Pulaski circuit court, at the October Term, 1847, before the Hon. WM. H. FEILD, judge.

The declaration alleged that on the first of March, 1844, defendant took, carried away and converted to his own use, certain house-hold furniture, the property of plaintiff.

At the return term (April, 1845) defendant pleaded not guilty, to which plaintiff took issue, and the cause was continued on motion and affidavit of defendant that Jacob Grubb, a material witness for the defence, was absent, &c.

At the October Term, 1845, the cause was submitted to a jury, verdict for defendant, and a new trial granted. At the same term plaintiff took a rule for depositions.

At the April Term, 1846, the cause was continued on motion of the plaintiff, on account of the absence of Charles H. Adamson, a witness summoned on her behalf.

At the October Term, 1846, the cause was continued on motion of plaintiff.

At the April Term, 1847, plaintiff filed an affidavit and motion

for continuance, on the ground that she had taken the deposition of Charles H. Adamson, a material witness, and that the decision of the supreme court in the case of *Reardon vs. Farrington*, made after the taking of said deposition, would exclude it, and it was necessary for her to retake it, and on this showing the cause was continued.

At the October Term, 1847, plaintiff again filed an affidavit and motion for continuance, on the ground that she had been unable to procure the deposition of said Adamson, owing to the fact that he was at Comargo, in Mexico, which was under military government of the United States (war existing between the two countries) and she knew of no legitimate mode of taking such deposition. The court overruled the motion, and plaintiff excepted. The cause was then submitted to the court, sitting as a jury by consent, and finding and judgment for defendant. Plaintiff moved for a new trial, on the grounds that the court overruled her motion for a continuance, and that the court excluded the deposition of Adamson, the court refused a new trial, and plaintiff excepted, and took a bill of exceptions, setting out her motion and affidavit for continuance, and the deposition of Adamson which was excluded, &c. Plaintiff brought error.

WATKINS & CURRAN, for the plaintiff. We concede that the court below rightly rejected the deposition offered in this case, because the notice was defective under the rule established by this court in *Reardon vs. Farrington*, 2 *Eng.* 364. As a decision, that rule operated retrospectively, and had the effect to throw out all the depositions previously taken in accordance with the practice of the bar, when its office under the power given by statute to this court to frame rules of practice, would have been more appropriately fulfilled by rule of court to operate in future. Upon the showing made of the materiality of the witness, and that after the deposition in question in all other respects regular had been taken, the witness had gone to a foreign country, in a state of war, under military government, and without any civil officers *de jure* or *de facto*, and that the movements of the wit-

ness were so uncertain that there was no opportunity for retaking his deposition, we submit, that the court below, in the exercise of its sound legal discretion, as distinguished in *Obaugh vs. Finn*, 4 *Ark.* 122, from an arbitrary discretion, was bound to have granted the plaintiff a new trial to prevent a failure of justice.

BERTRAND, contra. The deposition of Adamson was properly excluded. The notice was the same as in *Reardon vs. Farrington*, 2 *Eng. R.* 364.

The court properly overruled the motion for continuance. The cause had been several times continued for the same deposition. No suit shall be twice continued for the same cause. *Rev. Stat.* 631.

OLDHAM, J. The refusal of the circuit court to continue a cause cannot be made a ground for granting a new trial. We are not prepared to go beyond the rule laid down in the case of *Ashley vs. Hyde & Goodrich*, 1 *Eng. R.* 92. In that case the court said, "but should the party in his exceptions to the opinion of the court in overruling his motion for a new trial, set out the points of law and evidence that the court passed upon, and should the points clearly appear to have been taken at and during the trial, the bill of exceptions unquestionably makes them a part of the record. It matters not when the motion for a new trial was decided so that the exceptions to the opinion of the court overruling it, clearly show that the questions of law and fact were ruled erroneously against him at the trial." The decision of the court overruling the motion for a continuance, was made before and not at and during the trial. A party cannot be permitted to bring every possible decision that may be made during the progress of the cause, into his bill of exceptions overruling a motion for a new trial, and by that means bring them into review before this court. That the court struck out a plea is as much a ground for a new trial as that it refused to continue the cause.

The granting or refusing a continuance is a matter in the discretion of the court below, and will not be reviewed on error, unless that discretion should be abused to the prejudice of the party. So far from such being the case at present, the discretion of the court was governed strictly by the statute upon the subject of continuances. It is not controverted that the evidence given sustains the verdict. Affirmed.

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CASES

DETERMINED AT THE JULY TERM, 1848.

MAIN ET AL. VS. ALEXANDER.

A mortgage is good between the parties, though not acknowledged and recorded, but under our registry act it constitutes no lien upon the mortgaged property as against strangers, unless it is acknowledged and recorded as required by the act, even though they may have actual notice of its existence.

The registry of a mortgage without acknowledgement does not constitute such constructive notice to the world as contemplated by the act.

A mortgage was executed upon a slave, and recorded without acknowledgement; afterwards the slave was attached by creditors of the mortgagor. On a bill to foreclose against the mortgagor and attaching creditors, HELD that the lien of the attachments was paramount to the mortgage.

Appeal from the Chancery side of Crawford Circuit Court.

Bill to foreclose a mortgage, filed by Edward B. Alexander against John Griffith, John H. T. Main, and William M. Bennett, Joseph Bennett and Frederick Montgomery, partners under the style of William M. Bennett & Co., determined in the Crawford circuit court, chancery side, at the August Term, 1847, before the Hon. WM. W. FLOYD, judge.

The bill alleges, in substance, that on the 30th day of April, 1846, complainant loaned to defendant, Griffith, the sum of $150, to be re-paid on the first day of October, 1846, with nine per cent. interest. That at the time of the loan, Griffith was the owner of a negro girl named Minerva, which he had purchased of Henry A. Quesenbury; and being desirous to secure to complainant the re-payment of said money, he delivered to and deposited with complainant the bill of sale which Quesenbury had executed to him for said slave; which bill of sale is copied in the bill. That at the same time, Griffith, for the purpose of securing the complainant the re-payment of said money, with interest thereon as aforesaid, executed and delivered to complainant a mortgage upon said slave, written upon the back of said bill of sale; which mortgage is also copied in the bill. That said bill of sale and mortgage were afterwards, on the 2d day of June, 1846, duly recorded in the office of the Register of Crawford county (where the bill alleges the parties resided.)

Complainant insisted that Griffith, by depositing said bill of sale with him, and executing and delivering said mortgage to him, for the purpose aforesaid, invested him with a lien on said slave, for the money advanced by him and interest, until the same should be paid; and alleges that this was the understanding of Griffith and himself when the bill of sale was so deposited, and the mortgage executed. He further insists that although said mortgage was not executed in strict conformity with the statute, that the delivery of said bill of sale, and execution of said mortgage to him, for the purpose aforesaid constituted a good and valid mortgage in equity, and invested him with a binding lien on said slave, which could be released only by the payment of the mortgage debt. That the debt had not been payed; and Griffith was insolvent.

Complainant further alleges that defendant, Main, had commenced an action of assumpsit, in the Crawford circuit court against Griffith for $300, and caused to be issued therein a writ of attachment, which had been levied on said slave, as the property of Griffith, and the suit was then pending. That defen-

dants, William M. Bennett & Co., had also brought an action of assumpsit against Griffith in said court, for a like sum, caused a writ of attachment to be issued therein, and levid on said slave as Griffith's property, which action was pending. Complainant charges expressly that at the time of the commencement of said suits by attachment, as aforesaid, and long prior thereto, the said defendants, Main and William M. Bennett & Co., had full notice of complainant's mortgage and lien on said slave as aforesaid.

The bill prayed the foreclosure of the mortgage, and the sale of the negro to satisfy the mortgage debt, &c.

Griffith made default, and a decree *pro confesso* was taken against him. The other defendants filed a joint and several answer, in substance as follows:

Defendants admit that complainant loaned Griffith the money, and that Griffith to secure the repayment deposited the said bill of sale with him, and executed upon the back thereof the mortgage, as alleged in the bill—that the bill of sale and mortgage were recorded; and that defendants had attached said slave as alleged; but they allege that although such mortgage as described in the bill may have been executed prior to the seizure of said slave under and by virtue of said writs of attachment, yet they insist that said mortgage was no lien upon said slave at the time of the seizure, because it was never acknowledged by said Griffith in manner and form as required by law.

The cause was heard on bill, answer and exhibits, and the court decreed a foreclosure of the mortgage, and a sale of the slave to satisfy the mortgage debt, according to the prayer of the bill; from which decree the defendants (except Griffith) appealed to this court.

W. WALKER & BERTRAND for appellants. The lien of Alexander is subsequent to the attachment liens of Main, Bennett and others. The mortgage of Alexander is not acknowleged by Griffith, the mortgager, and its record is a matter of no moment, because the acknowledgment is indispensable before it can be

put on record. The mere record of the instrument fixed no lien upon the property.

Our statute, under the head of MORTGAGES, page 578, provides that, "all mortgages, whether for real or personal estate shall be acknowledged before some person authorized by law to take the acknowledgment of deeds, and shall be recorded," &c. The 2d section provides that when a mortgage (so acknowledged, &c.) shall be recorded, it shall be a lien upon the mortgaged property from the date of its filing, &c.

To obtain a lien upon property the party seeking to do so must pursue the requirements of the law. The mode is clearly and plainly pointed out, and if a party elects not to pursue that mode, he does so at the peril of his rights, and has no cause to complain that others have been more vigilant than himself.

The following authorities have some bearing upon the point in this case. *Wood vs. Owings*, 1 *Cranch*, 248. *Bend vs. Kippee et al.*, 3 *Day's Rep.* 500. *Munning vs. Johnston*, 3 *Marshall*, 221.

TURNER, contra. The delivery of the bill of sale and endorsement thereon by Griffith to Alexander, to secure the payment of the loan mentioned in the endorsement, constituted an equitable mortgage, equally binding in a court of chancery, as if the same had been executed in strict accordance with our statute law. *Vide*, 4 *Kent* 149. 2 *John. Ch. Rep.* 603.

And it is wholly immaterial whether the mortgage was recorded or not, if the defendants, Main and Bennett & Co. had notice of its existence at the time of the institution of their suits respectively. *Vide* 2 *Sugden on Vendors* 254, 255, 256, 257, 258, 259. 4 *Kent* 169. 1 *Pick.* 164. 4 *Mass.* 641. 6 *ib.* 487. 10 *ib.* 60. 11 *ib.* 158.

But the mortgage of Griffith to Alexander was recorded previous to the institution of suit and the attachment of the mortgaged slave by the defendants, Main and Bennett & Co. respectively, which operated as a notice to all the world of its existence. And though not acknowledged previous to the registration thereof, when once recorded, like all other recorded mort-

gages, it operated as constructive notice to the defendants, and all the world of its contents.

Notice of the existence of Alexander's lien is expressly charged in his Bill and not denied by the defendants.

Whatever is sufficient to put a person upon inquiry is considered in equity as conveying notice. *Vide* 1 *Paige* 461. 4 *Cowen* 717. 1 *McCord's Ch. Rep.* 395. 3 *Bibb* 204. 4 *John. Ch. Rep.* 47.

JOHNSON, C. J. This is a contest between a mortgagee of a personal chattel and the attaching creditors of the mortgager. To determine the question presented properly, it will be necessary to examine the several acts relating to mortgages and attachments, and endeavor, if possible, to place such a construction upon each as will reconcile their provisions with each other, and acomplish the design of the legislature. The 1st and 2d sections of the 101st chap. of the Revised Statutes, declare that "All mortgages, whether for real or personal estate, shall be acknowledged before some person authorized by law to take the acknowledgements of deeds, and shall be recorded, if for lands, in the county or counties in which the lands lie; and if for personal property, in the county in which the mortgager resides:" and that "Every mortgage, whether for real or personal property, shall be a lien on the mortgaged property from the time the same is filed in the recorder's office for record, and not before, which filing shall be notice to all persons of the existence of such mortgage." It is contended that, inasmuch as the mortgage, relied upon by the complainant, was not formally acknowledged before it was admitted to record, therefore it could not operate as a lien upon the property specified in it. The language of the act, it must be conceded, is exceedingly broad and comprehensive, and if taken in a strictly literal sense, would doubtless warrant the construction contended for by the appellants. We cannot conceive that the legislature ever entertained the idea of changing, or in any manner affecting the nature of a mortgage as between the parties to the contract. The rights

of the parties to a mortgage, whether acknowledged and recorded or not, are precisely the same that they were before the passage of the act referred to, and the only real difference consists in the fact that although actual notice may be shown, it will constitute no answer to the demands of strangers, and that nothing short of an actual filing for record will be recognized as such a notice as to effect his rights. Under this view of the law we consider it clear, that although the mortgage was not acknowledged by the party that made it, yet this is a matter of which he could never take advantage, and that, as between the parties themselves, the lien becomes fixed and complete by the mere execution and delivery of the instrument. It will not be pretended that the mere act of placing the mortgage upon the record without the pre-requisite of an acknowledgment could place the mortgagee in a better situation than if it had never been recorded at all, as it most clearly was not in a condition to be put upon the records of the country in the absence of such acknowledgment, and consequently its being so placed there could not constitute such a constructive notice to the world as is contemplated by the act.

Having thus determined the legal effect and operation of the mortgage in question as between the immediate parties to it, the only remaining point to be settled is as to its effect upon the rights of others. The appellants insist that, as their attachments were levied upon the mortgaged property before the mortgage was acknowledged and recorded, as required by the act, their rights thus acquired, take precedence of and override those of the mortgagee. This brings us to the main point in the case, and upon its decision the whole of it must turn. The question is, whether the levy of the attachment merely changes the custody of the property from the hands of the mortgager and places it into the keeping of the law, for the purpose of confining it within the jurisdiction of the court and to abide the event of the attachment suit, though subject to the paramount rights of the mortgagee, or whether the act of levying the attachment before foreclosure and sale did not, *ipso facto*, utterly oust the mort-

gagee of all the rights that he had acquired under the mortgage. We think it clear that the latter proposition is true. The attachments found the rights of the mortgagee in an inchoate and imperfect state, subject to be divested either by a subsequent purchaser or a judgment creditor, and transferred it into the custody of the law, with all its imperfections upon it, to await the final judgment of the law. The instant it passed into the custody of the law it went out of the reach of all persons having mere inchoate rights, and those rights, if not utterly destroyed, must at least remain in abeyance until the property shall be legally released from the grasp of the attachment. The law regards a mortgage, which has not been ackdowledged and filed for record, as a fraud upon the rights of strangers, and consequently it will not countenance and uphold it in opposition to such rights. If this view of the law be correct, and that it is, we think can scarcely admit of a doubt, it necessarily follows that the circuit court erred in rendering the decree which it did in this case. It is therefore ordered, adjudged and decreed, that the decree herein rendered by the circuit court of Crawford county be and the same is hereby reversed, annulled and set aside with costs, and it is further ordered that the cause be remanded to said circuit court to be proceeded in according to law and not inconsistent with this opinion.

CAMPBELL & CURETON VS. SNEED.

C. & C. brought assumpsit, for the use of O. against S. upon an open account; S. pleaded that after the service of the summons upon him in said action, he was garnisheed by creditors of plaintiffs, and answering that he was indebted, they took judgment against him for the amount of his indebtedness—HELD, on demurrer, that the plea was bad; that the service of the writ upon him in the suit of C. & C. for the use of O. was notice to him of the transfer of the claim to O., and he should have pleaded that in bar of the garnishment

HELD further, that courts of law will regard the assignment of choses in action, and

protect the interest of the assignee against persons having actual or constructive notice of the transfer.

Appeal from the Washington Circuit Court.

This was an action of assumpsit brought by Campbell and Cureton, late merchants and partners, for the use of Williamson S. Oldham, against Sebron G. Sneed, and determined in the Washington Circuit Court, at the May term, 1847, before the Hon. W. W. FLOYD, judge.

The action was commenced August the 7th, 1841, and the plaintiffs demanded of defendant (for the use of Oldham) one hundred and fifty dollars for goods, wares and merchandise before then sold by them to defendant.

Defendant pleaded *non-assumpsit*, and a special plea, as follows: "And for a further plea in this behalf, the said defendant says *actio. non*, because he says that William Smith, Dolzel Smith and John Smith after the commencement of the said action of said plaintiffs, and since the service of the original writ in said action, to wit, on the 5th day of May, 1842, issued out of the office of the clerk of the circuit court of Washington county in the State of Arkansas, a writ of garnishment against the defendant, which was regularly served by the sheriff of said county, and returned, by which said writ, so issued as aforesaid, he, the said defendant was commanded to be and appear before said court on the 16th day of May, 1842, and answer what goods, chattels, moneys, credits or effects he had in his hands of or belonging to the said plaintiffs, Campbell & Cureton; and the said defendant avers that he answered that he was indebted to said plaintiffs in the sum of $73,67 cents, and that a judgment was rendered by the said circuit court, on the 20th day of May, 1842, and regularly entered up for the aforesaid sum of $73,67 cents in favor of the aforesaid William Smith, Dolzel Smith and John Smith; which said judgment rendered as aforesaid was for the said identical sum of money mentioned in the said declaration of the said Campbell & Cureton, which said judgment

still remains in full force and effect, not in the least reversed, satisfied or made void: and the said defendant further says, "that the said Campbell & Cureton are the same persons named in the aforesaid writ of garnishment of the said Smiths; and this the said defendant is ready to verify by the said record, wherefore he prays judgment," &c.

W. D. REAGAN, Attorney for defendant.

To the said second plea, the plaintiffs demurred and assigned for cause of demurrer, "that the interest in this suit is for the benefit of the said W. S. Oldham, and that judgment upon a garnishment issued since the commencement of this suit, as shown in said plea, is no bar to said plaintiffs recovery."

The court overruled the demurrer, and the plaintiffs declining to reply to the plea, gave judgment for defendant, and plaintiffs appealed to this court.

E. H. ENGLISH, for appellants. Possibly, if the suit had been brought by Campbell & Cureton for their own use—if they had not passed the equitable interest in the cause of action to Oldham—according to the *dictum* in *Trowbridge & Jennings vs. Means*, 5 *Ark. Rep.*, the second plea of Sneed would have been good. But here, though the account sued on was not assignable at law so as to pass the legal title, and enable Oldham to sue in his own name, yet the equitable title was in him—he was liable for costs, and Campbell & Cureton were mere nominal plaintiffs. The equitable interest in the account having passed to Oldham, as shown by the bringing of the suit in his name, before Sneed was garnisheed, and he having notice of that fact by the bringing of the suit, this would have been a good bar to the garnishment, and it was his own fault that he did not plead it.

It is well settled that courts of law, as well as courts of equity, will take notice of, and protect, equitable assignments. *Buckner vs. Greenwood*, 1 *Eng. Rep.* 200.

The equitable interest in the cause of action being in Oldham, and he having sued in the name of Campbell & Cureton to enforce his equity before the service of the garnishment, it is clear

I think, that the garnishment cannot cut him out of his claim.

REAGAN, contra.

JOHNSON, C. J. The question here is, whether the defendant, Sneed, was legally bound to plead the pendency of the present suit in bar of the garnishment. It is a settled principle, that a court of law will regard the assignment of a chose in action, and protect the interest of an assignee, against any person having notice, or who is bound to take notice of it. The power of the orignal owner is so far at an end, immediately after an assignment and notice, that no subsequent payments made to him will avail; and consequently no release or discharge from him can operate to the disadvantage of the assignee, for whom he is considered a mere trustee or nominal person, to recover the debt only; and any personal interference on his part is deemed void on the ground of fraud. 5 *Johns. Rep.* 193. If the assignment was valid in law, the defendant cannot, after notice, defeat it: for courts of law will take notice of and protect the rights of the assignee, against all persons having notice, either express or implied. 19 *Johns. Rep.* 96. It is a well settled principle, that courts of law will notice the assignment of a chose in action, and protect the interest of a *cestuique trust* against every person who has notice of the trust. And it seems also, to be pretty well settled that actual notice is not necessary. If a party acts in the face of facts and circumstances which were sufficient to put him upon inquiry, he acts contrary to good faith, and at his peril. 12 *Johns. Rep.* 344. If these principles are correct, there can be no doubt that the court erred in overruling the demurrer to the second plea. True it is that Sneed was not expressly notified of the transfer of the claim to Oldham, but he most assuredly had implied notice, or in the language of the authorities, he acted in the face of facts and circumstances which were sufficient to have put him upon inquiry. He admits in his special plea that the present suit had been commenced and the writ executed upon him before the issuance and service of the garn-

ishment. The writ, which, he admits, had been served upon him, describes Campbell and Cureton as mere nominal parties, and Oldham as the individual really and beneficially interested in the subject matter of the suit. This was certainly sufficient to put him upon inquiry, if not equivalent to an actual notice, and if he omitted to inquire into the real state of case and to avail himself of his legal defence against the garnishment, he did so at his peril. The second plea, therefore, admitting every thing contained in it to be strictly true, is no answer to the declaration. The court, consequently erred in overruling the demurrer; for which the judgment must be reversed.

Inglish & Johnson vs. Breneman. (a)

Where a note is delivered in blank as to the date, no authority for the payee to fill up the blank is implied by law, but express authority is necessary; but this authority may be directly proven, or inferred from circumstances.

A subsequent ratification of the filling of the blank by the makers, is equivalent to an original authority, but a ratification by the principal is only good as to him, and not as to the security.

Where the payee fills the blank without authority with a date prior to the delivery, it avoids the note.

Where the maker proves that the note was delivered in blank as to the date, the payee must prove authority to fill up the blank: none is implied by law.

Where the blank exists when the note is delivered, the presumption is that it was filled by the person having the legal custody of the note.

The payee cannot insert a date different from the true one without authority from the makers.

As to evidence of authority to fill up the blank, or of subsequent ratification.

Writ of Error to Pulaski Circuit Court.

This was an action of assumpsit, originally brought by Brene-

(a) The law of this case was principally settled in *Inglish et al. vs. Breneman*, 5 *Ark. R.* 378.

man, assignee of Brungard, against English & Johnson, Wm. Cummins and L. Gibson, on a promissory note for $3614, dated March 4th, 1839, and payable twenty-four months after date. Gibson was not served with process, and the suit was discontinued as to him. The other defendants pleaded *non assumpsit*, sworn to, upon which issue was taken, the cause tried, verdict and judgment for plaintiff, writ of error by defendants, the judgment reversed and case remanded. See *English et al. vs. Breneman*, 5 *Ark. R.* 378, for a full statement of the case to that time.

After the mandate of this court was filed in the court below, the death of Cummins was suggested, and the cause abated as to him.

The case was again submitted to a jury in June, 1846, before the Hon. J. J. CLENDENIN, judge, and verdict for plaintiff. The defendants moved for a new trial, upon the grounds, that the jury found contrary to instructions of the court: that they found contrary to law and evidence: that the court erred in instructing the jury as moved by the plaintiff: and that the witness (Hutchings) made a material mistake of fact in giving his evidence to the prejudice of defendants, as would appear by the affidavit of said witness appended to the motion. The court overruled the motion for a new trial, defendants excepted, and took a bill of exceptions setting out the evidence and instructions given by the court to the jury. So much of the evidence as was deemed material is stated in the opinion of this court.

On motion of the plaintiff below, the court instructed the jury: "1st, That if they believed from the evidence that the note sued upon was delivered to Brungard with a blank date, that no authority to fill up the date was implied by law, but that it required express authority to fill up the date, which may be proved by direct testimony or inferred by the jury from the circumstances attending the transaction;" and 2d, as set out in the opinion of this court, to which second instruction defendants excepted.

At the request of the defendants, the court instructed the jury as follows:

"1st, That if the jury find that the note sued on was in blank as to the day of the month when it was delivered to Brungard, then unless the plaintiff has proven that the blank was filled by authority from Inglish & Johnson, it is void and the plaintiff cannot recover.

"2d. That the plaintiff in such case must prove express authority to fill the blank; and this he may prove by direct testimony, or by proving circumstances which are sufficient to authorize the jury to infer that such authority was in fact given.

"3d, That as soon as the defendants proved that the blank existed when the note was delivered, then the proof of authority to fill it became necessary, and devolved on the plaintiff: no such authority was implied by law.

"4th, That if the jury find the blank existed at the time when the note was delivered, then the presumption is that it was filled up by the person who had the legal custody of it: and

"5th, That after the delivery of the note, Brungard could not insert a date different from the true one, without authority from all the persons who signed the note."

CUMMINS, for plaintiffs. Any material alteration of a written contract by interlineation or erasure, by the payee or holder, after delivery, avoids the contract, unless made by mistake, accident or consent of all the parties bound thereby. *English et al. vs. Breneman*, 5 *Ark. Rep.* 380. *Martindale vs. Bank of Am.*, 19 *John. Rep.* 391. *Horner vs. Wallis*, 17 *Mass. Rep.* 309. *Chester vs. Frost*, 1 *N. Hamp. Rep.* 145. *Bowers vs. Jewell*, 2 *N. Hamp. Rep.* 543. 10 *Cow. Rep.* 192, 195. *Derlner's case*, 6 *Cow.* 59. 4 *Cranch.* 50. 10 *Serg. & Rawle* 170. 4 *Serg. & R.* 405. 8 *Cow.* 71. *Taylor vs. Mosely*, 6 *Car. & P.* 273. *Stout vs. McCloud*, 5 *Litt. Rep.* 205.

The fact of alteration being established the presumption of fraud attaches, and it devolves upon the holder to show that the alteration was innocent. *Same authorities.*

A note negotiated without a date is a perfect and obligatory instrument; and the day of delivery will be considered as the

day of the date. *Ch. on Bills*, 77, 78. *Armit vs. Breame*, 2 *Ld. Raym.* 1076, 1082. 2 *Shaw*, 422. *Godard's case*, 2 *Co.* 5 (*a*) *Sel. N. P.* 283. *Bac. Abr.* "*Leases*" 1. 1 *Com. Dig. tit.* "*Fait*" *B.* 3.

A material mistake of a witness in delivering his testimony, either from failure of memory, negligence or accident, is a good cause for new trial. *Truchody vs. Brain*, 9 *Price Rep.* 77. *Richardson vs. Fisher*, 7 *Moore Rep.* 549. 1 *Bing.* 145. *Ld. Dudley vs. Robins*, 3 *Car. & P.* 26.

WATKINS & CURRAN, contra.

JOHNSON, C. J. The principal question presented by the record in this case, relates to the dating of the instrument, upon which the suit is founded. This is a question of pure fact; and consequently, must be settled by the testimony detailed before the jury. Hutchings, a witness introduced by the defendant in error, fully established the genuineness of all the signatures, and left no doubt as to the execution of the note. He stated that the note, together with two others, was executed for a stock of goods purchased of George Brungard by Inglish & Johnson, that the date was not inserted at the time Johnson delivered the note to Brungard, that they disputed about the date at the time; but that they finally agreed to refer the matter to Inglish, and abide by whatever he should say in respect to it. He also testified that before and about the time Brungard left Little Rock, he became very urgent to have the blank, which had been left for the day of the month, filled up; but that he and Johnson still differed about the time to be inserted, and that they then agreed again to refer the matter to Inglish. He further stated that Brungard and Johnson disagreed as to the time that the interest should commence running, and that this was the cause of the dispute, and further, that Inglish and Johnson were still partners on the tenth day of January A. D. 1840. The defendant in error then introduced a letter, dated at Little Rock, January 10th, 1840, and which purported to have been

written by English and Johnson and addressed to G. C. Breneman. This letter was in answer to one already received by English and Johnson from Breneman in regard to notes, which they had given to G. Brungard. They remarked, when speaking of the notes, that they were entitled to a credit on the first due of $164 38 for error in the invoice, and also to a credit on the two last of the interest, which had been included, that they were entitled to such credits, and that they should insist upon them, and further, that they held Brungard's obligation for the deduction of the interest in case that English should not say it was the agreement that it should be paid. This is the substance of all the testimony bearing directly upon this point.

The inquiry now is, whether the jury, from this state of facts, were warranted in finding either that the date was inserted before, or at the delivery of the instrument, or that it was subsequently inserted by the party in whose favor it was made, and the act ratified by the makers. Upon the assumption that either state of case is true, the effect is the same in law. The testimony of Hutchings, relative to the execution of the note, coupled with the recognition of English and Johnson in their letter to Breneman, certainly can leave no doubt of its identity. The evidence is clear and conclusive that the day of the month was not inserted at, or any time before the delivery of the note. If there is any evidence of a subsequent ratification, it must be founded upon the slightest and weakest of circumstances. There is nothing in the letter of the plaintiffs to the defendant which can, by possibility, be construed into a ratification of such an act. But the witness testified that the matter of the date was to be referred to English, that he had seen Brungard and that after his interview with him, he had expressed some dissatisfaction in respect to the note. This is certainly very slight evidence that English either fixed upon the date, or ratified that which had been previously inserted. The testimony is wholly silent in respect to the matter, and we conceive therefore that the jury had no sufficient data upon which to base their verdict. The plaintiffs in error urged as one reason why

they should have a new trial that the defendant's witness had committed a mistake in respect to what Inglish had said about having had an interview with Brungard. We do not consider it material to decide whether such mistake was or was not sufficient to entitle them to a new trial as the facts stated by the witness, admitting them to be strictly true, most assuredly were not sufficient to support the verdict; and consequently it is not to be presumed that they had any influence upon the jury. The plea interposed by the plaintiffs had the effect to throw the whole burden of the proof upon the defendant, and having failed in the matter of the date he most unquestionably was not entitled to a verdict. He neither proved that the day of the month was inserted at or before the delivery of the note, or that it was afterwards inserted and ratified by the makers, or that the blank was filled with the date that had been agreed upon by the parties. Under this view of the whole case we are forced to the conclusion that the finding of the jury was not warranted by the evidence.

The only remaining point to be determined, results from the second instruction asked by the defendant. The instruction is as follows: "That a subsequent ratification by the makers is equivalent to an original authority for the filling up the blank in the day of the month, and the jury are bound by law to find for the plaintiff, if they believe from the evidence that such subsequent ratification was made by Inglish and Johnson." It is objected that although the act may have been ratified by Inglish and Johnson, yet they are not bound by it, because it was not shown to have been ratified by the other makers. The instruction was sufficiently broad and technically correct inasmuch as Inglish and Johnson were alone sought to be made liable for the debt. If the suit had been still pending against all or either of the securities, it would not have been sufficiently comprehensive, as the moment the note passed into the hands of Brungard and thereby became perfect as an obligation, the implied authority of the plaintiffs to fill up the blank ceased, and an authority in fact was absolutely necessary to enable

Inglish and Johnson to bind their securities; because any alteration then made without the consent of the securities would either have changed their contract, or have created an obligation where none existed before. 5 *Ark. Rep.* 382.

The other instructions are all believed to be in strict accordance with the principles of law.

We are of opinion that the verdict of the jury is unsupported by the testimony, and that therefore the motion for a new trial should have been sustained. The judgment of the circuit court must therefore be reversed, and the case remanded with instructions to be proceeded in according to law and not inconsistent with this opinion.

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BERRY VS. SINGER.

Though a party appealing from a judgment of the circuit court to this court, may comply with all the pre-requisites required by statute to entitle him to an appeal, yet if no order of court granting the appeal appear of record, this court will dismiss for want of jurisdiction.

Appeal from Bradley Circuit Court.

Replevin by Berry against Singer, determined in the Bradley circuit court at the April term, 1848, before the Hon. WM. H. FEILD, judge. Verdict for defendant, and motion for new trial overruled; plaintiff excepted, prayed an appeal, filed the necessary affidavit, and entered into recognizance, but no order of court granting the appeal appears in the transcript.

RINGO & TRAPNALL, for appellee, moved to dismiss.

YELL, for appellant.

JOHNSON, C. J. This is a motion filed by the appellee to dismiss the appeal. The reason urged in support of the motion is that there is no showing of record that the appeal ever was allowed by the circuit court. The statute declares that the circuit court shall make an order allowing an appeal upon the performance of certain conditions therein specified. It is the order granting the appeal and not the prayer for it that operates to transfer the jurisdiction from the circuit to the supreme court. This being a question of jurisdiction no presumptions can be indulged, so that although the record should affirmatively show that every pre-requisite had been complied with, yet no jurisdiction could attach to this court without an order expressly allowing the appeal. It is conceded that in this case the party who prayed the appeal did every thing required by the statute, yet as the circuit court did no act by which to transfer the jurisdiction of the cause, it cannot be entertained by this court. Motion sustained and the case dismissed.

CHANEY VS. THE STATE.

Where the defendant is convicted in a criminal case, appeals to this court, and the court below orders the appeal to operate as a stay of execution, and he fails to prosecute his appeal as prescribed by law, on application of the State to this court to affirm the judgment, the appellant cannot resist the application on the ground that it is made the duty of the clerk to send up the transcript: he is required to see that the transcript is here in due time.

But the State must make the application for an affirmance of the judgment at the first term of this court, held more than thirty days after the granting of the appeal, and the judgment will not be affirmed on application to a subsequent term.

In such case, it is the order of the court that the appeal shall operate as a stay of execution, and not the recognizance of the appellant, that stays proceedings upon the judgment.

Application to affirm a Judgment.

On the first December, 1848, Johnathan H. Chaney was convicted of arson in the Washington circuit court, and sentenced to the penitentiary for two years. He appealed from the judgment of the court, and the court ordered that the appeal operate as a stay of execution. Defendant also entered into recognizance, as authorized by statute in such cases.

At the July term, 1848 the ATTORNEY GENERAL presented to this court a transcript of the judgment, and moved for a rule upon the appellant to show cause why the judgment of the court below should not be affirmed on account of his failure to prosecute his appeal.

E. H. ENGLISH, attorney for appellant, responded orally.

JOHNSON, C. J. This is a motion filed by the attorney general for a rule against the appellant, to show cause why the judgment of the circuit court shall not be affirmed. The reason urged in support of the motion is that the appellant has totally failed to file a transcript of the judgment and proceedings of the court below within the time prescribed by law. The appellant on his part insists that the duty of making out and filing the transcript devolved upon the clerk of the circuit court, and that consequently he was under no legal obligation to concern himself in respect to the matter. The decision of the point thus presented, will necessarily depend upon the construction that shall be given to the several sections of the statute. The 221st and 222d sections of chap. 45, of the Revised Statutes, declare that "where any appeal shall be taken or writ of error filed, which shall operate as a stay of proceedings, it shall be the duty of the clerk of the circuit court to make out a full transcript of the record in the cause, including the bill of exceptions, judgment and sentence, and certify and return the same to the office of the clerk of the supreme court without delay,"

and that "when the appeal or writ of error does not operate as a stay of proceedings, such transcript shall be made out, certified and returned on the application of the appellant or plaintiff in error as in civil cases." This statute, it is contended, has created two distinct classes of cases, that in the former it is made the duty of the clerk of the circuit court, and in the latter, that of the appellant or plaintiff in error to file the transcript in this court. If the mere act of taking the appeal operated as a stay of the proceedings, then it was the undoubted duty of the clerk of the circuit court to make out the transcript and return it to the office of the clerk of this court, without delay, and without any application from the appellant. The circuit court had authority, expressly given by the statute, in case there was believed to be probable cause for the appeal, or so much doubt as to render it expedient to take the judgment of this court thereon, to make an order directing that the appeal should operate as a stay of proceedings on the judgment. The record shows that the circuit court, upon granting the appeal, expressly ordered that it should operate as a stay of proceedings on the judgment. It is clear therefore that the appeal itself and not the recognizance subsequently entered into by the appellant operated as a stay of proceedings. The right of the accused to be let to bail by entering into recognizance, has no necessary connection with the execution of the sentence, but is a step subsequently taken, and is designed as another and further privilege of being actually relieved from confinement until the cause shall have undergone a full investigation and been decided by this court. The law contemplates that, as soon as the court ordered that the appeal should operate as a stay of proceedings, that the appellant was remanded to the jail of the county, in which the trial was had, and therefore it was that it was made the duty of the clerk forthwith to make out the transcript and forward it to the clerk of this court. It is not only the interest, but the bounden duty of the accused in case his sentence is stayed, to prosecute his case or lose the benefit of his appeal. The fact that the clerk is required to make out and

forward the transcript to the clerk of this court, was not intended to dispense with the necessity of the attention of the appellant, or to give any extension to his rights in case of a failure of the clerk to return it within the time prescribed by law. The obvious reason of the difference in the cases, is, that in case the sentence of the law is suspended, the presumption is that the appellant considers himself aggrieved by the decision and that he will, in good faith, prosecute his appeal and use every possible exertion to reverse the judgment, but in the event that he shall be unable to procure a suspension of the judgment, but is actually suffering the punishment annexed to his crime, the presumptions of law all being against him, it does not necessarily follow that he will avail himself of his appeal, and therefore it is, that it is not made the imperative duty of the clerk to certify and return the transcript, but it is left to the option of the appellant, whether he will apply for it or not. The duty of the appellant is the same in both cases, with the single exception that in case the execution of the sentence is stayed, it is made the duty of the clerk to certify and return the transcript without any formal application. The appeal was granted more than thirty days before the next term of this court, and as such was returnable to that term. If the accused really appealed in good faith and desired to take the opinion of this court upon the points involved in his case, it was his duty to have been here either in person or by attorney at the return term, and if he failed to do so, he must abide the consequences of his own negligence. It is urged on the part of the State, that it would be hard and unreasonable to require her to present her certificate of proceedings and pray for an affirmance at the return term, because the attorney general, whose duty it is to represent her interests in this court, is not presumed to be personally present in the court where the conviction is had. To this we answer that the law has established a close and intimate connection between the attorney general and the prosecuting attorneys throughout the several circuits in the State. The State is left without the slightest excuse, in case she shall

forfeit any of her legal rights, as she is always prepared with her attorney in every court that can take jurisdiction of her cases. It is most unquestionably the duty of the State's attorney for the circuit in which any one of her cases shall be tried, to apprize the attorney general of such steps as shall be taken by either party to bring it into this court, and in time too to enable him to see that her rights are fairly and fully represented. The State certainly has but little cause to complain in case she is permitted to come in at the return term and upon the showing required by law to have the judgment affirmed and carried into execution. If this construction of the statute be correct, and that it is, we think, will scarcely admit of a doubt, it is then clear that the motion comes too late and must consequently be overruled. Motion overruled.

HIXON VS. WEAVER AS ADR. USE, &C.

Where a judge refuses to sign a bill of exceptions, and it is signed by by-standers, and there is an endorsement upon it by the judge that he refused to permit it to be filed, but the record entry states that the court ordered it to be filed and made part of the record, the record entry must prevail over such endorsement upon the bill of exceptions, and no affidavits of the truth of such bill of exceptions are necessary.

This court will presume that by-standers signing a bill of exceptions are reputable persons, unless the opposite party objected to them, and made a showing to the contrary.

By section 52, *chap.* 116 *Rev. Stat.* the defendant has until the calling of a cause in its regular order on the docket to file pleas to the merits, and the court cannot abridge the time allowed him, by a rule of practice.

Rules of practice made by the court must accord with statutary provisions.

Writ of Error to Crawford Circuit Court.

Assumpsit, by Weaver as administrator of Rose, use of Knox,

against Hixon, determined in the Crawford circuit court, at the August term, 1847, before the Hon. W. W. FLOYD, judge.

The suit was brought to the February term, 1847. At the return term, a demurrer was sustained to the declaration, and the case continued with leave to amend. On the second day of the following term (August 2d) the plaintiff filed an amended declaration. On the same day, it seems, the court made and entered of record a rule of practice that all pleas to actions should be filed on or before the fourth day of the term of the court, or in default thereof, judgment should be rendered for plaintiff upon the peremptory call of a cause. On the 6th day of the term, the defendant filed three pleas, two of the statute of limitations, and the third, *non assumpsit*. Afterwards, on the same day, and on the peremptory call of the cause, on motion of the plaintiff, the court ordered the pleas to be stricken from the record, and rendered final judgment for plaintiff, to which defendant excepted; and on the next day presented to the court a bill of exceptions, but the court refused to sign it, and endorsed thereon as a reason for his refusal, that it was not stated in the bill of exceptions that the court had made a rule requiring pleas to be filed on or before the fourth day of the term, &c.; and that defendant had not filed his pleas until after the fourth day of the term, and after the third calling of the cause. The defendant then procured three by-standers to sign the bill of exceptions. On the 9th day of the term, and two days after the bill of exceptions was signed, by the by-standers, the judge endorsed upon the bill of exceptions that he refused to permit it to be filed for the same reason that he refused to sign it. On the 11th day of the term, the following record entry was made: "The said defendant tendered his bill of exceptions in the above entitled case to the Hon. W. W. Floyd, judge, which his Honor refused to allow, sign and seal for the reason that a rule of this court, requiring pleas to be filed on or before the fourth day of the term of the court was not inserted therein, as is set forth by his Honor in his refusal endorsed on said bill of exceptions; and thereupon at the instance of said defendant three inhabitants of this

State, by-standers at the time the proceedings were had in the above entitled case, to wit: John P. Costa, Jesse Turner and Henry Wilcox, certified to and signed and sealed said bill of exceptions in accordance with the statute in such case made and provided; and thereupon said defendant presented said bill endorsed by his Honor as aforesaid, together with the certificate of the above named individuals, and requested that the same might be filed, and made a part of the record, which request is by the court here granted and the bill of exceptions, and the refusal, and reasons therefor, to sign the same by his Honor, together with said certificate, are accordingly filed and made a part of the record in this cause." Defendant brought error.

E. H. ENGLISH, for plaintiff. *Rev. Stat. Practice at Law, sec.* 107, provides that if a judge refuse to sign a bill of exceptions, it may be signed by three by-standers, and when so signed and *filed in court*, shall be a part of the record. The 108*th section* provides that if the judge refuse to permit a bill of exceptions signed by by-standers *to be filed*, the parties may take affidavits as to the truth thereof, &c.; and the 109*th section* provides that this court shall decide upon such affidavits as to the truth of the bill of exceptions, and whether it shall be a part of the record, &c.

Here the court did permit the bill of exceptions to be *filed and made part of the record*, so the record expressly states. True there is an endorsement by the judge, *dated 9th August*, that he refused to allow it filed, but a record entry *dated* 11*th August* says *he allowed it to be filed*, &c. No affidavits were therefore necessary, and this court will regard the bill of exceptions so signed by the by-standers, and filed by the order of the judge, as part of the record. Regarding it so, it shows that the court arbitrarily, and without cause, struck out the pleas of defendant filed before the *peremptory* calling of the cause, of which one was a plea of the general issue. This was erroneous. *Rev. Stat., chap.* 116, *sec.* 52.

BERTRAND, contra, argued that this court should disregard the bill of exceptions, because there were no affidavits taken to verify it. Also that there should have been some showing that the by-standers who signed it were reputable persons.

JOHNSON, C. J. The investigation of this case is narrowed down to one single point, and that is as to the propriety of the decision of the circuit court in striking out the pleas of the plaintiff in error. It appears from an entry in the record, that after the court refused to sign the bill of exceptions, it was signed by three by-standers, and that it was then permitted by the court to be filed and to form a part of the record. The bill of exceptions itself, shows a refusal of the judge to permit it to be filed, and as a reason for his refusal he certifies that the bill is untrue. Here then is a direct and palpable variance between the record entry and the bill of exceptions. The rule is well settled that, where the entries in the record are inconsistent with the statements contained in the bill of exceptions, the former shall prevail over the latter. Such being the rule, the certificate of the judge that he refused to permit the bill to be filed, must be disregarded, and the bill, as signed by the by-standers, must be received and considered as a part of the record in the cause. The bill as transcribed into the record, will therefore fall within the 107th sec. of chap. 116, which provides that, "If any judge shall refuse to sign a bill of exceptions, such bill may be signed by three by-standers, who are reputable inhabitants of the State, and the court shall permit such bill to be filed; and every bill of exceptions signed by the judge or by-standers, and filed in the court, shall form a part of the record in the cause in which the same may be filed." The statute requires that the by-standers, who sign the bill, shall be reputable inhabitants of the State. The defendant insists that the bill must show affirmatively that they are persons of good standing in society, and that in the absence of such showing the presumption of law is against them. We think that the converse of the proposition is true, and that if they are not reputable inhabitants of the

State it would devolve upon the opposite party to object at the time, and to show that they do not come within the description of persons contemplated by the statute.

It appears from the bill of exceptions signed by the by-standers, that at the peremptory calling of the case, the court, upon the motion of the defendant in error, struck out all the pleas which had been filed by the plaintiff. The 52d sec. of chap. 116 *Rev. Stat.* enacts that "Every plea to the merits shall be filed, where the writ has been served thirty days previous to the return day thereof, at or before the calling of the cause in its regular order on the docket, unless further time be given by the court for pleading, which shall in no case extend beyond the term." The pleas were in at the peremptory calling of the cause, which is all sufficient to answer the demands of the statute, and as a necessary consequence the court erred in striking them out. The reason assigned by the judge why he would not sign the bill, admitting that it is entitled to notice, under the state of the record, would not relieve it from the error complained of by the plaintiff. He refused to sign it upon the ground that it was untrue, in not stating that a rule of practice had been made by the court, by which all pleas were required to be filed on or before the fourth day of the term, and that said pleas were not filed until after the third calling of the cause and after the fourth day of the term. The circuit courts have the power to adopt rules of practice for the purpose of despatching the business that may come before them, but those rules must conform to the provisions of the statute, and not be so framed as to deprive either party of his legal rights. By the statute, the plaintiff had until the calling of the cause in its regular order on the docket to file his pleas to the merits. This right might have been extended to a longer, but could not be restricted to a shorter period. The court may by a rule prescribe the times when the docket shall be called for the purpose of deciding preliminary questions, and is not bound to wait until the cause shall be called for trial, but cannot require pleas to the merits to be filed on or before a particular day of the

term, whether the cause be called or not. So the facts stated by the judge for his refusal to sign the bill, upon the supposition that they are entitled to our consideration, would not have warranted the court in striking out the pleas. We think, from the whole showing, that the plaintiff was within the privilege of the statute, and that therefore his pleas were improperly stricken out. We are therefore of opinion that the judgment of the circuit court ought to be reversed and the cause remanded with instructions to restore the pleas to the record, and to permit the cause to progress. The judgment is therefore reversed and the cause remanded.

NORTH VS. DAVIS.

JOHNSON, C. J. The rule of court, under which the plea offered by the defendant below was excluded, is the same as the one relied upon in Hixon vs. Weaver as adr. of Rose use of Knox, decided at the present term. The defendant offered to plead after the case was called, but before the interlocutory judgment was rendered. He therefore was within the time prescribed by the statute, and the court consequently erred in refusing him permission to file his plea. The judgment is therefore reversed.

DIXON VS. WATKINS ET AL.

It is well settled that where a party is sued for an act done under color of process, if the process be void, the action should be trespass *vi et armis;* if voidable, trespass on the case.

An officer may justify under final process, regular upon its face, issued from a court having jurisdiction of the subject matter, without showing the judgment on which it is founded, but the plaintiff in the process, or a stranger, must show a regular judgment.

As to the distinction between *void* and *voidable* process, and authorities on that subject reviewed.

An execution issued upon a judgment of the circuit court, from which an appeal has been taken to this court, and recognizance entered into to stay execution, is *voidable,* and may be superseded, but is not absolutely *void.*

Appeal from the Pulaski Circuit Court.

This was an action of trespass *vi et armis* brought by Wiley Dixon against George C. Watkins, James M. Curran, Ebenezer Cummins and Gordon N. Peay, and determined in the Pulaski circuit court in June, 1846, before E. H. ENGLISH, as special judge.

The declaration alleged that the defendants, on the 5th of March, 1846, with force and arms, seized, took and led away a negro man slave named *Jack*, the property of plaintiff, and converted and disposed of said slave to their own use, &c.

Defendants Watkins, Curran and Cummins filed three joint pleas, first, not guilty, second and third, special pleas of justification, in substance the same. These pleas allege, that in a certain action of replevin, before then pending in the circuit court of Pulaski county, wherein said Dixon was plaintiff and Thatcher's heirs were defendants, for the recovery of said slave *Jack,* the bond given by Dixon to the sheriff to obtain the execution of the writ of replevin having been adjudged by said court insufficient, and Dixon having failed to comply with a rule requiring him to file a sufficient bond, it was for that reason (on the 15th January, 1845,) adjudged by the court that

said action of replevin be discontinued according to the statute, &c., and that defendants in said action should have a return of said slave theretofore replevied by said plaintiff, and that a writ of *retorno habendo* should issue forthwith for that purpose: that on the 25th February, 1846, the said judgment being in full force and unexecuted, said Watkins, Curran and Cummins, being the attorneys of record of the defendants in said replevin suit, as such attorneys, caused to be issued out of the office of the clerk of said court a writ of *retorno habendo*, to the sheriff of Pulaski county, on said judgment, commanding him to cause said slave, *Jack*, to be returned to the defendants in said action of replevin; that they the said Watkins, Curran and Cummins, as such attorneys, delivered said writ to said sheriff, before the return day thereof, &c., and by virtue thereof said sheriff delivered said slave to said defendants in said replevin suit, which were said supposed trespasses complained off by plaintiff, &c.

Defendant Peay filed three pleas also, the first, not guilty, and the other two, pleas of justification, the same as those filed by the other defendants, except that he alleged that he issued said writ of *retorno habendo* as clerk of said circuit court, by the direction of the other defendants, who were the attorneys in the said replevin suit.

To the two joint pleas of justification filed by Watkins, Curran and Cummins, and to the two separate pleas of justification filed by Peay, Dixon's counsel filed one replication, alleging, in substance, that he ought not to be precluded, &c., because in said judgment of discontinuance and for return of the said slave, it was also adjudged that the defendants in said replevin suit should recover against Dixon their damages sustained, and a writ of inquiry awarded to assess them; that Dixon at the time excepted to such judgment of discontinuance; that the entire judgment was indivisible and was interlocutory only; that afterwards, at the same term, such damages were assessed by a jury at $201, and final judgment rendered, from which judgment Dixon appealed, and having entered into recognizance according to law, with sufficient security, the execution

of that judgment was thereby, in all respects, stayed and suspended; and that the same recognizance was still in full force, and the execution of such judgment still stayed thereby; and therefore the said Peay as clerk, and the other defendants, as attorneys, issued, and caused to be issued, &c., said writ of *retorno habendo* in their own wrong, &c.

To this replication defendants demurred, and assigned for causes of demurrer:

1st, That as there was no replevin bond in said replevin suit, the said appeal and recognizance did not stay the issuance or execution of the said writ *de retorno habendo.*

2d, If they did, the writ was not void, but merely voidable, consequently *case* and not trespass was the proper action.

3d, That the recognizance mentioned in said replication, was not such as, in law, would restrain the issuance of an execution for a return of the slave.

4th, There is no provision of law authorizing the court to take a recognizance for staying execution for a return of property in replevin, nor will an ordinary recognizance do so.

5th, The replication does not set forth any such recognizance as required by law to stay execution.

6th, That in replevin a recognizance and appeal only stays execution for damages and costs.

The court sustained the demurrer, the plaintiff refused to answer over, and final judgment was rendered for defendants, from which plaintiff appealed.

FOWLER, for the appellant. The ground assumed by the defendants that there was no replevin bond in the suit, and therefore the appeal, recognizance, &c., did not stay or suspend the issuing of the writ of *retorno habendo* must surely be erroneous; because—

1st, Because the very gist of the judgment appealed from is that the court below adjudged the replevin bond bad—that is the foundation of the whole error complained of.

2d, The statute authorizing appeals and the stay of execution

thereon, upon entering into recognizance, applies to and covers expressly every civil case, and replevin is surely a civil case. *Rev. Stat. p.* 638, *sec.* 141 *et seq.*

3d, The statute is express, that upon entering into recognizance, as was done in this case, and on the court making an order allowing the appeal, "such allowance thereof shall stay the execution," &c. *Rev. Stat. p.* 638, *sec.* 143.

4th, The writ of retorno habendo is embraced in the term "execution" used in the statute above refered to. *Rev. Stat. p.* 638, 639, *p.* 665, *sec.* 40 *et seq.*

5th, On a judgment in replevin "the execution to be issued shall be for the damages, costs, &c., and also to replevy the goods," &c., where it passes against the defendant, &c. *Rev. Stat. p.* 665, *sec.* 40, 41.

6th, On judgment against the plaintiff, the writ of return is by the statute called an execution. *Rev. Stat. p.* 667, *sec.* 51.

7th, In replevin, the *retorno habendo* is the common law writ of execution. 14 *Petersdorf C. L.* 280, 3 *Bl. Com. ch.* 26, *p.* 413, title *Execution.*

8th, Execution is obtaining actual possession of the thing recovered by the judgment, and is called the life of the law. 2 *Bac. Abr.* 328, title *Execution A.* 9 *Pet. Rep.* 28, *U. States vs. Nourse.*

9th, An *execution* is the end of the law; it gives the party the fruits of his judgment, and a *distress warrant,* under the act of Congress is a most efficient *execution.* 9 *Pet. Rep.* 28, *U. S. vs. Nourse.*

And the assumed ground in the demurrer, that the recognizance was not sufficient in law to prevent the issuing of the writ of retorno, &c., could only be made effectual, if true, by rejoinder, as the replication avers a sufficient recognizance and stay of execution, &c. And it must be taken as sufficient as the court so received it, until its order is set aside. And the position that in replevin, the recognizance, allowance of the appeal, &c., stays only the execution for the damages and costs,

and not the issuing of the writ of retorno habendo, will not bear the test of legal scrutiny: because

1st, As we have shown, the action of replevin is not an exception to the general rule concerning appeals, but is embraced in it; the retorno habendo is an execution; and on recognizance and allowance of the appeal, not only the simple process of execution is stayed, but the execution of the judgment itself, in any and every form whatever, is stayed. *Rev. Stat. p.* 638, *sec.* 141, 142, 143.

2d, The award of the return of the property is a part of the judgment, which is an entire thing; and the judgment being stayed, the return must necessarily be stayed with it.

3d, The statute directs that where the plaintiff does not file the new bond, judgment of discontinuance shall be rendered against him, and such judgment as the nature of the case may require, in order to restore the property and to compensate defendant for damages. *Rev. Stat.* 663, *sec.* 26.

4th, On such discontinuance, the judgment for the defendant shall be that he have return of the goods, &c., and also that he recover the damages, &c., which damages shall be assessed by a writ of enquiry as in other cases. *Rev. Stat. p.* 666, *sec.* 43 *et seq.*

5th, These statutes, as well as every principle of law, settle the fact that the judgment is an entirety and the award of a return a part of it: and that the interlocutory and final judgment are one and the same judgment, and that neither can be effectual without the other. And that the allowance of the appeal necessarily suspends the whole.

6th, In replevin a judgment de retorno habendo and an order for a writ of inquiry to assess damages is not a final judgment. 4 *Arkansas Rep.* 591, *Bailey vs. Ralph.*

Therefore the judgment is not ready for execution until the damages are assessed and judgment made final; and the appeal necessarily stays the whole proceeding.

Again, the defendants insist by their demurrer, that it is shown by the pleas and replication that the action was misconceived;

and instead of trespass should have been case, because, as alleged, the process was not void, but only voidable. The following principles, as tests, it is believed, show conclusively the unstable foundation of this pillar of the defence:

1st, Trespass lies for an injury done with violence, either actual or constructive. *Steph. Pl.* 15. 1 *Chit. Pl.* 122, 123.

2d, The law will imply violence, though none is used, where the injury is direct and immediate. *Steph. Pl.* 399. *Marsh.* 186, *Tyson vs. Ewing.*

3d, An implied trespass, though wrongful in law, may be peaceful. *Steph. Pl.* 15.

4th, All persons who direct or assist are trespassers, though not benefited by the act. 1 *Ch. Pl.* 67. 2 *Saund. Pl. & Ev.* 863.

5th, And where several are concerned, it is not material whether they assent to the trespass, before or after it was committed. *Steph. Pl.* 15. 1 *Salk. Rep.* 409. 2 *Coup. Rep.* 478, *Badkin vs. Powell.*

6th, Where the plaintiff in an execution, or a stranger requests a wrongful levy on goods, &c., even he who so requests is a trespasser. 1 *Salk. Rep.* 409, *Britton vs. Cole.* 2 *Saund. Pl. & Ev.* 516.

7th, A plaintiff or a stranger cannot justify for an alleged wrong done under an execution, without showing a judgment as well as an execution, because the judgment might be reversed, and it would be at their peril, if they take out execution afterwards. 1 *Salk. Rep.* 409, *Britton vs. Cole.* 2 *Saund. Pl. & Ev.* 516, 792. 1 *N. Car. Rep.* 340, *Cryer & Moore ads. Weaver.*

Where the judgment is stayed by appeal, is not the reason the same, and the peril the same? And does it not apply more forcibly where the pleadings admit that they sued out the execution unlawfully, on a suspended judgment?

8th, If the injury be forcible and occasioned immediately by the act of the defendant, trespass is the proper remedy; but if it is not in legal contemplation forcible, or not direct and immediate on the act done, but only a consequence of the act, case is proper. 1 *Ch. Pl.* 122, 125, 133.

9th, The degree of violence is not material in order to sustain trespass: even a log put down on a man's foot, in the most quiet way, is a trespass. 1 *Ch. Pl.* 124.

10th, Chitty lays down the rule also, that where the injury done is under regular process, as in the case of a malicious arrest, or malicious prosecution, though it were immediate and forcible, the remedy should be case. 1 *Ch. Pl.* 129, 136, 169. (In this, however, he is not sustained in the cases to which he refers.)

11th, And that where the process or proceeding were irregular, the remedy is trespass. 1 *Ch. Pl.* 137. 2 *Term Rep.* 225, 231, *Morgan vs. Hughes.* 2 *Wils. Rep.* 385, *Perkins vs. Proctor.* 1 *N. Car. Rep.* 340, *Weaver vs. Cryer.*

12th, In case of an error by a ministerial officer of a court, (as the clerk in this case,) trespass is the proper remedy, if the injury is one of force and immediate. 1 *Ch. Pl.* 183. 2 *Saund. Pl. & Ev.* 691.

13th, And where the court has jurisdiction (as the court in this case had before appeal, but not afterwards,) but the proceeding is irregular or void, trespass is the proper form of action against the plaintiff's attorney as well as the plaintiff. 1 *Ch. Pl.* 184.

14th, Trespass is also the proper remedy, where an inferior court has jurisdiction over the subject matter, but is bound to adopt certain forms in its proceedings, from which it deviates, and whereby the proceedings were rendered coram non judice. (In this case the court lost jurisdiction by granting the appeal and staying execution.) 1 *Ch. Pl.* 184.

15th, An execution issued after the expiration of a year and a day (where none had been previously issued) is irregular, and as to the plaintiff and his attorney is void. 4 *Litt. Rep.* 311, *Hoskins vs. Helm.*

And for a much stronger reason is an execution issued after it is stayed and forbidden by an appeal, irregular and void as to the plaintiff or his attorney.

16th, Another distinction between trespass and case is this,

that where the immediate act of imprisonment or other force, proceeds from the defendant himself, the action must be trespass and trespass only; but where it is done by one person in consequence of information from another, case is proper. 2 *Term Rep.* 231, *Morgan vs. Hughes.* 7 *Blackf. Rep.* 296, *Glover vs. Horton.*

17th, In case of an erroneous judgment, although execution be issued on it, the party is protected because it is the fault of the court; but where the execution is irregular (as it clearly was in this case) it is the fault of the party, and as to him it is void, and is no protection to him for a wrongful act. 1 *Cow. Rep.* 734, 735 *et seq.*, *Woodcock vs. Bennett.* 2 *Tidd's Pr.* 936. 2 *Wils. Rep.* 385, *Roe vs. Milton.* 7 *Blackf. Rep.* 296, *Glover vs. Horton.*

18th, And erroneous proceeding or process on an erroneous judgment stands good until reversed, but irregular process is a nullity. 1 *Cowen's Rep.* 735, *Woodcock vs. Bennett.*

19th, The substantial distinction between erroneous and irregular, or voidable and void process is this, that where a party may avoid it, it is merely erroneous, but where the act of issuing is not warranted by law (as in this case it clearly was not) the process is irregular and void as to the party, &c. 1 *Cowen* 739, *same case.* 7 *Blackf. Rep.* 296.

20th, And such irregularity may be either in the process itself, or in the mode of issuing it. 1 *Cowen* 739, *same case.*

21st, If the state of facts existing at the time the process is issued, be such as to render it unlawful, it is irregular. 1 *Cow. Rep.* 739, *same case.*

22d, A judgment which is appealed from is not a final judgment: it is suspended or nullified by the appeal, (consequently no execution could be lawfully issued on it.) 1 *Haywood's Rep.* 364, *Davidson vs. Mull.* 4 *Dana's Rep.* 598, *Runyon et al. vs. Bennett.* 2 *Bos & Puller* 443, *Dixon vs. Dixon.* 1 *Cond. Rep.* 33, *Penhallon et al. vs. Doane's adr.* 2 *Cond. Rep.* 257, *Yeaton et al. vs. The United States.* 5 *Mass. Rep.* 377 *et seq.* 1 *Tenn. Rep.* 2, *Suggs vs. Suggs exr.* 5 *Mass. Rep.* 378.

23d, And on such judgment there cannot afterwards be any procceeding whatever, Ib. 2 *Cond. Rep.* 257. 5 *Mass. Rep.* 378, *Campbell vs. Howard.*

24th, After a change of venue granted the case is no longer within the jurisdiction of the court awarding it, (and is not the principle on appeals the same?) 4 *Ark. Rep.* 163, *Frazier & Tunstall vs. Fortenbury.*

25th, If the writ of execution, &c., be irregular, the party injured may move the court to set it aside and restore the property, or may sue the sheriff, or others liable to suit. 2 *Tidd's Pr.* 935.

26th, Those acts are void which are contrary to law, at the time of doing them, (as the act of issuing the retorno, &c., in this case.) 1 *Hammond's Ohio Rep.* 458, *Arnold vs. Fuller's heirs.* 5 *Bac. Abr.* title "Void and Voidable," letter A.

27th, In general, all acts done by ministers of justice without authority, are void, (as clerk and attorneys in this case.) 5 Bac. Abr., title "Void and Voidable," B.

Again, as to the recognizance, were it the subject of inspection in this court, it is by law sufficient if it substantially covers the provision in the statute, by securing to the appellee all that the law designed to be secured for him. The language of the statute need not be adopted. 4 *Smedes & Marsh. Rep.* 748, *Coleman vs. Rowe et al.* See also, decision of this court at last term in case of *Fitzgerald vs. Beebe,* on error and motion to quash recognizance overruled.

An execution issued after writ of error, bond filed and citation issued, all in due time, is wholly irregular. 2 *How.* (*Sup. Ct. U. States*) *Rep.* 75, *Stockton et al. vs. Bishop.* This case is conceived to be precisely in point.

CUMMINS and WATKINS & CURRAN, contra. 1st, The appeal and recognizance did not have the effect to stay the writ of *retorno habendo.* Neither the property nor the value thereof was secured by the recognizance. The statute requires the recognizance to be in a penalty sufficient to secure and conditioned to

pay whatever of debt, damages and costs have been recovered. No breach of the condition of this recognizance would authorize a recovery against the securities for the value of the slave. This recognizance might operate as a stay of execution in any ordinary action of replevin for the reason that, in such case, the replevin bond is deemed sufficient security for the property, but in this case the replevin bond had been adjudged insufficient and set aside. It certainly was never the intention of the law to permit a party to prosecute an action of replevin and retain possession of the property after his replevin bond is adjudged insufficient. The remedy by action of replevin is a harsh proceeding and the plaintiff's right should be strictly pursued.

In *Boren vs. Chisholm*, (3 *Ala. Rep.* 573) under a statute providing "that when an appeal or writ of error is taken to the supreme court from the decree of a chancellor, all further proceedings on such shall be thereby suspended: provided, the appellant give bond with sufficient security as in cases of error to courts of law," it was held that the prosecution of a writ of error from the decree of a chancellor, dismissing a bill by which a judgment had been enjoined, does not reinstate the injunction and supersede the issuance of an execution upon the judgment, although a bond be given for the prosecution of the writ in double the amount of the judgment at law. The same principle was ruled in *Hoyt vs. Gelston*, 13 *John. Rep.* 139, and in *Garron vs. Carpenter & Hanriet*, 4 *Stew. & Porter Rep.* 336.

2d, Even if the recognizance operated to stay the issuance of the writ of retorno habendo, we insist, that the plaintiff has misconceived his action. If the defendants are liable in any form of action, it should have been *case* and not *trespass*. Where a party is sued for an act done under color of legal process, if the process is absolutely void, the action must be trespass, but if it is merely erroneous and voidable, the action must be *case:* this is the invariable distinction and criterion in determining the form of action to be adopted. *Omer vs. Starr*, 2 *Litt. Rep.* 230. 2 *Dev. Rep.* 370. 2 *Term Rep.* 231. 2 *Wilson* 341. 2 *W. Black Rep.* 845. 11 *Gill. & John. Rep.* 86. 3 *Term Rep.* 185.

1 *Ch. Pl.* 152. 19 *J. R.* 375. 3 *Hawks Rep.* 535. 3 *Conn. Rep.* 270. 1 *Peterd. Ab.* 194. At common law, no execution can issue after a year and a day, but if issued, it is not absolutely void, but merely erroneous and voidable. 16 *John. Rep.* 537. 1 *Cowen* 736. 5 *How.* (*Miss.*) *Rep.* 548. 2 *Howard* (*Miss.*) *Rep.* 607. 2 *Saund. Rep. p.* 7, *No.* 6. *Patrick vs. Johnson*, 3 *Lev.* 404. *Howard vs. Pitt*, 1 *Salk. Rep.* 261. We conceive an execution at common law, issued after a year and a day to be precisely analogous to the process now under consideration. In this case, if the recognizance operated as a supersedeas, it was merely a legal prohibition that the writ should not issue until the appeal was determined, and so in the case of an execution after a year and a day, the legal inhibition is equally as express that an execution shall not issue without a sci. fa. If the effect of the appeal was to set aside and vacate the judgment, of course the process being without any judgment upon which it could be based, would be absolutely void: but such is not the effect of the appeal; the judgment is still in esse, and its execution is merely suspended.

Shaver vs. White & Dougherty, (6 *Munf. Rep.* 110) was trespass for seizing property under an attachment, upon a debt which the defendants had been perpetually enjoined from collecting, and in which the injunction was still in force: held that *case*, and not trespass, was the proper remedy.

In *George ex dem. Bradley vs. Wisdom*, (2 *Burr. Rep.* 756,) it was held that an execution sued out after supersedeas was not void, but merely voidable.

SCOTT, J. The only legitimate question presented by this record is, whether or not the appellant, who was the plaintiff below, adopted the proper form of action.

It seems well settled by the most respectable authorities, that where a party is sued for an act done under color of legal process, if the process be void, the injury in that case being direct, the form of the action must be *trespass vi et armis*. And on the other hand, if the process be voidable merely, in that case the

injury being consequential, the form of the action must be *trespass on the case*. It is also well settled, although this question is but incidentally involved in the decision of the one before us, that although a ministerial officer, who executes final judicial process in all respects regular on its face, whether issued from a court of limited or of general jurisdiction, having jurisdiction of the subject matter, may justify under such process when regularly executed and returned, without showing the judgment on which it was founded; nevertheless the plaintiff in such proceeding or a stranger, for justification, must in addition to such process, also show a regular judgment. A distinction well founded, as we conceive, not only in consideration of sound policy, but of justice and fair dealing to this class of officers; who being bound to execute all such process, without looking further than to the process itself, it is but even-handed justice that its execution should be at the peril of those who caused it to be issued.

To lay down any general rule applicable to all cases, by which the partition line between writs of execution void, and writs of execution voidable merely, could be distinctly drawn, would be extremely difficult, if not altogether impracticable, and we have not found in the books that this has ever been avowedly attempted, or if attempted successfully achieved. It cannot be true, as a general rule, that in every case where a record itself presents upon its face a legal obstacle to the issuance of an execution, that in such case the writ of execution is void, because that rule will embrace the case, where more than a year and a day has elapsed after judgment and before execution, where, according to the almost uniform current of numerous decisions, both English and American, the writ of execution when issued under such circumstances has been held voidable merely. Nor can it be true, as a general rule, that in every case, where a legal obstacle to such issuance is "dehors" the record, that the writ of execution would be void as that would embrace the cases, adjudged to the contrary, of privileged persons, certified bankrupts and others. *Cameron vs. Lightfoot*, 2 *Black*. 1190.

Tarleton vs. Fisher, *Douglass* 671. Much less can it be true, as a general rule, that in every case where "the state of the facts existing at the time that the process issued, are such as to render the issuance of the process unlawful," the writ of execution would be void, as this rule would embrace both classes of cases just noticed, as well as almost every other case of voidable writs of execution. In view then of the intrinsic difficulty, if not the utter impracticability of fixing upon any known principle of law that may serve for a general rule on this question, we shall not attempt the enunciation of any such, but after briefly noticing some authorities, from which we think some light is shed, proceed at once to present our views upon the case before us and announce our conclusion.

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Early after the organization of this court, it was correctly declared, as we conceive, in the case of *Pope, Governor, to use of Reed vs. Latham et al.*, reported in 1 *Ark.* 66, in laying down a rule of practice to be applicable to all cases coming up here, whether by appeal or by writ of error, "That there was no difference between the two classes of cases, and that they stood on the same footing, and must be governed by the same rules of proceedings," which declaration, it was then said, was founded upon "principles conclusively settled upon reason and authority," and "in unison with the uniform rules of practice in all supreme or appellate courts, and in strict conformity to our statutory provisions." Then appropriate adjudged cases in other appellate tribunals taken there by writs of error will reflect light on the question before us of no less dubious character than those which have been taken up to such courts by appeals, where such appeals have been authorized and regulated by statutory provisions substantially similar to our own.

To sustain the main question taken by the appellant that the appeal so radically affected the judgment below, that after the execution of the recognizance provided in such cases by statute, any process of execution issued upon it would be absolutely void, various authorities are cited, all of which we have ex-

amined and we will proceed to comment upon those that seem most relied upon.

The case of *Davidson vs. Mull*, reported in 1st *Haywood's Rep.* 364, was an appeal from the county court to the superior court of North Carolina, and was taken to that court under statutory regulations very similar to those which authorize and regulate appeals in Arkansas from justices of the peace to the circuit court, therefore although the court of North Carolina, in that case, say "As to the judgment of the county court which has been rendered in this case, that was not a final judgment as it was suspended, or rather nullified by the appeal, so much so that there can never afterwards be any proceedings on such judgment after it is appealed from," the case can have no bearing on the question before us.

The case of *Penhallon et al. vs. Doane ad.* cited from 1 *Cond. R.* 58, was a case in a prize court, and was expressly decided upon the opinion of DOMAT as to the effect of an appeal in the civil law. The case of *Zeaton et al. vs. U. States*, cited from 2 *Cond. R.* 256, was also a case in a prize court. In that case C. J. MARSHALL, in delivering the opinion of the court, says, "The majority of the court is clearly of opinion that in admiralty cases, an appeal suspends the sentence altogether, and it is not *res-adjudicata* until the final sentence of the appellate court be pronounced. The case in the appellate court is to be heard *de novo* as if no sentence had been passed." Neither of these cases, then, can have any direct application to the question before us, inasmuch as, besides being governed by the civil law, they were heard in the appellate court *de novo* on their merits. And this seems to be the uniform practice on appeals, both from the prize court and the instance courts.

The case of *Stockton et al. vs. Bishop*, 2 *Howard* (*U. S.*) *Rep.* 75, at first glance, would seem to have some application, but upon being subjected to scrutiny, falls far short of sustaining the position insisted on. In this case, after the suing out of a writ of error from the supreme court of the United States, the execution of a bond, which operated as a supersedeas, and the

service of a citation in due form and in apt time, the plaintiff sued out of the circuit court for Pennsylvania a writ of execution on the judgment thus superseded; and the motion in the supreme court of the United States, was to "Quash the fi. ia. as having been irregularly issued." The entire opinion of the court is as follows, to wit: "Upon the facts stated in the application, there is no doubt that the writ of error, bond and citation having been given in due season according to law, operated as a stay of execution, and that a supersedeas ought to be issued from this court to supersede and quash the same as prayed for in this motion. Indeed the issuing of the execution was wholly irregular, and it might have been quashed by an application to the court below; but it is equally competent for this court to do the same thing in furtherance of justice. The motion is therefore granted and a supersedeas will be issued accordingly." It will be perceived that the question now before us was not raised, neither was it necessarily involved, and the motion would doubtless have been granted, whether the court had regarded the process void or voidable merely. And the only indication that the process was looked upon as void is from the use of the word "irregular" in the opinion, which word, although in some of the cases it is used synonymously with "void," is by no means uniformly used by the courts in this sense, as will abundantly appear by a scrutiny of the cases; and even this dubious indication may be considered as fully repelled by the face of the process, that was issued in this case, which recites the writ of execution ordered to be superseded as having been "unjustly, improvidently and erroneously issued."

The case of *Runyon et al. vs. Bennett*, reported in 4 *Dana Ky. Rep.* 598, goes to this extent and no further—being the only question involved—that is to say: that in case an *habere facias* upon a judgment in ejectment should be issued, and executed after a certificate of supersedeas from the clerk of the supreme court had been filed with the clerk in whose office the judgment in ejectment remained of record, and the plaintiff had notice of the supersedeas, before the issuance of the *habere facias*, that in

such case the *habere facias* should be quashed for irregularity and abuse of the power and process of the court, and restitution should be awarded; but whether the process so issued was void or voidable, was not raised or decided.

In the case of *Samuel Campbell vs. Amaziah Howard,* reported in 5 *Mass.* 376, it is held that the effect of an appeal under the statutes of that State, is to make the judgment appealed from "wholly inoperative," and that "when an appeal is allowed, the judgment no longer, in legal construction, remains in force, and cannot be the foundation of an action of debt. That this construction is not new. The question has frequently been before the court when a judgment appealed from, and not affirmed has been pleaded in bar to another action for the same cause, and it has been considered as no bar, as a judgment inoperative and not in force after the appeal allowed." The doctrine of this case is unquestionably based upon the statutory provisions on this subject, regulating appeals in that State, which differ from ours in several particulars, as, while ours, upon the allowance of the appeal and the execution of the recognizance "stays the execution," the statute of Massachusetts enacts that "no execution shall be issued by the common pleas on the judgment appealed from."

In the case of *Dixon vs. Dixon,* reported in 2 *Bos. & Pul.* 444, process of execution had been issued after writ of error and after the execution of the recognizance provided for stay of execution in such cases by *St.* 3 *Jac.* 1, *Ch.* 8, which statute provides that "No execution shall be stayed upon any writ of error for the recovery of any judgment given upon any obligation with condition for the payment of money only, unless such person or persons in whose name such writ of error shall be brought with two securities, such as the court shall allow of, shall first before such stay made, be bound unto the party for whom such judgment shall be given by recognizance in double the sum adjudged to be recovered by such judgment, to prosecute such writ of error with effect, and also satisfy and pay the debt, damages and costs adjudged upon the said judgment, and

all costs and damages to be recovered for the same delaying of execution." And the causes, shown by the plaintiff against making a rule *nisi* absolute to set this execution aside because it had been irregularly issued, that is to say, 1st, that the party himself, who had sued out the writ of error, had not, as well as two securities entered into the recognizance, the two securities only having done so; and 2dly, that the amount of the recognizance was double the amount of the judgment appealed from without the addition of the interest accrued, were both adjudged insufficient and the rule was made absolute. But there is nothing in the case or in the opinion of the court to indicate in any degree that the objection that the process was void, was either made or entertained; on the contrary, the inference is strong that it was regarded only as erroneous process.

We conceive then, that none of the authorities relied upon by the plaintiff in error sustains his position.

Among the authorities cited on the other side, the case of *Bradley et al. vs. Wisdom*, decided in 1759 by the court of King's Bench, and reported in 2 Burrow, 756, seems most in point, but by no means directly so. This was an action in ejectment, which was not within the statute, 3 Jac. 1, chap. 8. The defendant, Wisdom (the landlord) had, upon the tenant's refusing to appear, made himself a defendant in the place of the casual ejector against whom judgment was signed for want of appearance, and the plaintiff having obtained judgment against Wisdom (the landlord) had afterwards on leave, no cause having been shown to the contrary, taken out execution against the casual ejector, and under it, had obtained possession of the premises. But Wisdom had, before the motion for leave was filed, sued out a writ of error. The remedy sought in the King's Bench, where Wisdom's writ of error was pending, was to have this writ of *habere facias possessionem* set aside and the possession of the premises restored. But although it was agreed on all hands that the writ of error could not have been sued out in the name of the casual ejector, and could only have been sued out, as it was, in the name of Wisdom, the new defendant, and

although the writ of error, in this wise sued out, had been held in *Edwards vs. Edwards*, and was still regarded by the court as sufficient cause against the plantiff's application for leave to sue out the *habere facias*, still, forasmuch as Wisdom had failed to appear and show his writ of error for cause against the plaintiff's application for leave, the court refused the motion. This decision evidently turned upon the pure technicality, that although the writ of error operated to stay execution against Wisdom (the landlord) who had, after judgment by default against the casual ejector, been substituted in his place, yet it did not operate to stay the execution of the judgment against the casual ejector rendered in the same court, until it was shown as cause against the application for leave to sue out execution on that judgment. Here, like the case above remarked upon, reported in *Dana's Rep.* the court refused to set aside the process of execution, and restore the possession, and for the same reason, that is to say, although the writs in both instances were issued after supersedeas, they were issued before notice—that is, in the case from Dana, before notice filed with the clerk, and in this case before technical notice as to the judgment against the casual ejector, although this judgment was a part of the suit, the other judgment in which was actually staid by the writ of error—an extremely refined technicality.

The case of *Shaver vs. White & Dougherty*, cited from 6 *Mun. Rep.* 110, although not bearing upon the particular question we have been investigating, throws some light on another part of the case before us. This was an action of *trespass vi et armis* brought because the defendant had, by false pretences and iniquitously sued out an attachment against the plaintiff, and had levied it upon three hundred head of cattle. The judgment obtained in this attachment was afterwards perpetually enjoined by the court of errors of Tennessee. The court of appeals of Virginia held that, for redress of this injury, *case* and not *trespass* was the proper remedy, and, in delivering their opinion, say, "The act complained of was unaccompanied with force—the defendant was only seeking redress of an injury by

the regular forms of law. If he has gone out of his proper sphere and has endeavored to make the forms of law subservient to the malignity of his views, if he has instituted the action or proceeded with malice and without probable cause, then indeed is he responsible for his conduct, but not in *trespass*. The action adapted to such a state of things is a special *action on the case*."

Then none of these authorities determine the question before us, although it may be deduced from most of them that the courts are slow to determine as absolutely void any process of execution that is founded on a regular subsisting judgment of a court of competent jurisdiction of the subject matter, though it may have been issued over some legal obstacle existing either upon the face, or which may exist *de hors* the record, but seems rather to prefer, as far as may be practicable and consistent with the well established forms of justice, to hold all such as voidable merely. And if this be the true exposition of the law, as we take it to be, it cannot be doubted that its foundations are laid in principles of sound public policy, in view of the frailty and imperfections of our nature, and of the mischief that must flow into the community from a too stringent rule on this subject, in an age of the world when multifarious and complex pecuniary operations, in such rapid succession transpire. And especially when it is remembered that the ministers of justice, under our constitution and laws, are so amply armed, not only with all the time-worn writs of the common law, but with many other devices, to which the exigencies of modern times have given birth, all ready to do the high behests of the law in sustaining and perpetuating formal and substantial justice.

After looking at the case before us, in the light of the authorities examined, and applying the principles we have recognized, derived from the authorities cited on both sides and others not cited, including the case of *Ex parte Caldwell*, reported in 5 *Ark.* 390, we hold that the legal effect of the appeal and of the execution of the recognizance provided in such case by the statute, is, in the language of the statute, "to stay the execution;" that upon the circuit court and its judgment it is identically the

same, in effect, as would be the suing out of a writ of error accompanied by the recognizance provided in such case; that in neither case is the judgment itself affected by the stay of its execution; but in both cases a legal prohibition rests upon the circuit court from executing the judgment appealed from until such time as that prohibition may be removed either by operation of law or by the judgment of the supreme court. The former would occur when neither the appellant or the appellee appeared in the supreme court at any time during the proper return term of the appeal; and the latter, when the supreme court shall dismiss the appeal or writ of error, or affirm the judgment below. But in each of these cases the judgment itself of the court below would remain regular, valid and unimpaired, and consequently operate as a lien on real estate, as is provided by the statute, up to the day when it might be reversed by the supreme court. And in case of reversal, such reversal would not operate as by continuing and perpetuating this legal prohibition resting on the court below, but by its utter destruction and annihilation of the judgment itself. And if at any time, after appeal and recognizance and before reversal and before the death of the defendant, or any one of them (if there be more than one) process of execution should be sued out, it would be competent either for the supreme court, in furtherance of justice or the circuit court, in which the record of the judgment appealed from remains, to supersede such process of execution. And the party causing it to be sued out, would expose himself to be punished by the circuit court as for a contempt in abusing the power and process of that court, and also subject himself to an action on the case at the suit of the party injured by such process. But the process itself would not be void, because it was issued upon a regular judgment *in esse*, the parties to which had not been changed, and against a part, *in esse*, competent to raise the question of irregularity. On the contrary, should such execution be issued on a judgment against two or more defendants, after one of them should die, it would be void absolutely, because being void as to one material part,

it could not be upheld and supported as valid as to the residue; and besides, it might be levied upon land which might be held by persons strangers to the judgment, and this would invade one of the great principles upon which our security depends, under a government of laws, that no person shall be put out of his freehold or lose his goods and chattels unless he be first duly brought to answer, or be prejudged of the same by due course of law. In support of which principle, the courts have ever held a decided and unequivocal language.

Therefore, as the process of execution, under color of which the supposed trespass was committed, was voidable merely and not void, *case* and not *trespass*, was the proper remedy; wherefore, as there is no error in the judgment below, let it be affirmed.

CHILDRESS VS. FOWLER.

In a suit by attachment, the defendant, by executing bond as required by statute in order to retain possession of the property attached, does not preclude himself from interposing pleas in abatement.

Executing such bond is analogous to giving bail in an ordinary suit, after which the defendant may plead matter in abatement.

Scott, J., reviews the attachment Statutes of this State, and comments upon the genius, scope and design of them.

Appeal from Independence Circuit Court.

This was an action of debt, by attachment, brought by West J. Fowler against Patrick H. Childress, upon a promissory note, and determined in the Independence circuit court, at the May term, 1847, before the Hon. WM. C. SCOTT, judge.

The plaintiff filed his declaration, affidavit and bond, and sued out an attachment against the defendant, which the sheriff

levied upon a slave, and the defendant executed to the sheriff the bond required by statute, and retained possession of the negro.

At the return term, the defendant appeared and filed four pleas in abatement; the first alleging a variance between the declaration and the writ: the second, a variance between the affidavit and writ: the third, that the writ was not properly attested: and the fourth, that the writ was not made returnable according to law.

The plaintiff moved to strike out the pleas, upon the grounds "that the defendant had no right to interpose such pleas at this stage of the proceedings, but must plead to the action," and further, that the objections raised by the pleas could only be interposed by motion. The court sustained the motion, and ordered the pleas stricken from the record, to which defendant excepted; declined to plead further, final judgment was rendered against him, and he appealed.

BEVENS & FAIRCHILD, for appellant. The appellant contends that he had a right to file his pleas in abatement, and cites the court to the cases of *Shields vs. Barden*, 1 *Eng. Rep.* 459. *Delano vs. Kennedy*, 5 *Ark. R.* 457. *Didier vs. Galloway*, 3 *Ark. Rep.* 501.

Didier vs. Galloway, decides that the want of an attachment bond may be pleaded in abatement. *Delano vs. Kennedy*, decides that a defendant who has given bond to retain possession of the property may plead the want of an attachment bond in abatement, and that he may plead generally in abatement. *Shields vs. Barden*, decides that a defendant in giving bond had notice of the pendency of the suit, and that the suit proceeds as if the defendant were served with summons.

The above authorities sustain the proposition that giving bond as Childress did, did not preclude him from pleading in abatement any matter that he might have pleaded if the suit had commenced by summons. We maintain, on the above authorities, that Childress had a right to plead in the same way

as if he had been sued by summons, except as to the single matter of excepting to the affidavit, which is disallowed until the defendant has pleaded to the action.

That attachments are to be construed strictly, see *Didier vs. Galloway, supra. Kellogg & Kenneth vs. Miller & Rogers*, 1 *Eng. R.* 472. *Smith vs. Block & Son*, 3 *Eng.*

The subject matter of the pleas was proper to be pleaded in abatement. *Renner vs. Read*, 3 *Ark. R.* 339. *Brown vs. Peevey*, 1 *Eng. R.* 37. *Wilson & Turner vs. Shannon & wife*, 1 *Eng. R.* 196.

If Childress had a right to plead in abatement and his pleas were formal and contained matter proper to be pleaded in abatement, they could not be struck out. *Sillivant & Thorn vs. Reardon*, 5 *Ark. R.* 154. 1 *Eng. R.* 198.

By the 29th section of the 13th chap. of the Revised Statutes, it is clear that the defendant is not bound to plead in bar, and thereby waive all defences prior to this in the order of pleading. *Heard & Co. vs. Lowry*, 5 *Ark. Rep.* 522.

BYERS & PATTERSON, contra. The only matter presented to this court for consideration is, did the court below correctly strike out Childress' four pleas in abatement.

Upon principle and authority we think the court correctly struck out the pleas. Pleas in abatement are odious, and not, at this day, favored by our courts: and the pleas, here presented, were frivolous and presented no matter in law or fact, which should, if true, have abated the writ.

This court, in the case of *Didier et al. vs. Galloway*, 3 *Ark. Rep.* 502, say, they know of only two instances in which the attachment can be dissolved and the property restored. "1st, where the party gives bond for his appearance and compliance with the judgment of the court. 2d, where an exception is sustained to the affidavit; and even then the defendant must appear and plead to the action before his exception will be sustained by the court. In the event of its being sustained, his common appearance will be accepted, the property attached

released, and the suit then proceed as other suits at law. (*Rev. Stat. Ark. ch.* 13, *sec.* 13, 29.)"

The bond entered into is conditioned, "that he will appear to, and answer the plaintiff's demand," &c. By this, he does not bind himself to appear to the writ, but to answer the demand of the plaintiff. The giving bond by the defendant is an acknowledgment of the correctness and validity of the writ, and service thereof, and by his own deed, binds himself to appear and answer the plaintiff's demand. The defendant, by his bond, is estopped from taking any advantage of the writ, and by its terms is bound to appear to the declaration.

In the case of *Shields vs. Barden*, 1 *Eng. Rep.* 460, this court lay down the correct rule "that when the defendant enters into bond, that he has notice and is bound to appear and defend the action or suffer judgment by default."

By entering into bond, he waived the writ and service thereof, and bound himself to defend the action.

It appears to be the policy of the statute that the attachment shall not be released until the defendant enters his appearance to the action or declaration, and that the suit then shall progress as an ordinary suit.

The case of *Shields vs. Barden* settles this case, and according to the principles there declared this judgment must be affirmed.

SCOTT, J. The only question presented by the record is, whether or not the court below erred in striking out the several pleas in abatement filed by the defendant below, after the execution of his bond under the provisions of the 13th section of the Statute of Attachments, and the consequent release of the property attached. And as the record presents no other apparent reason for the action of the court below, on the plaintiff's motion to strike out these pleas in abatement, than the apparently supposed legal effect of the execution of this bond upon the defendant's right to file dilatory pleas, we will examine somewhat at large so much of the Statute of Attachments as seems connected with the solution of the question before us.

In the case of *Delano et al. vs. Kennedy*, reported in 5 *Ark.* 457, the principle involved was decided by this court, but as there was a dissenting opinion in that case by an eminent jurist, and the correctness of the decision of the majority of the court has been strongly questioned, it will not be inappropriate to review the doctrines of that case, which will necessarily be done in presenting our views on the question now to be decided.

The proceeding authorized by the Statute of Attachments, chap. 13 of the Revised Statutes, is, in its inception, a compound proceeding, combining a proceeding *in rem* with a proceeding *in personam*, each having a distinct identity, but liable to be transformed, at any time before final judgment, into a proceeding solely *in personam.* And as a whole is founded upon the declaration, bond, affidavit and writ in harmonious combination. Should this foundation be defective, as it would be in case the affidavit, the bond, or the writ should not be in conformity with the statute, or either should vary, the one from the other, in so much as to disturb the harmony of the whole as one suit, the entire proceedings, if appropriately assailed, would necessarily fail, because being unknown to the common law and a mere creation of the statute with prescribed pre-requisites and fixed limits, it must necessarily stand or fall upon its conformity or non-conformity with the terms upon which, by the statute, it is permitted to be set on foot and have its being. Harsh and effective in its operation and so easily perverted to purposes of oppression, the legislature have wisely attempted to restrain its potency within its legitimate sphere of action, by requiring as a pre-requisite, a prescribed affidavit under the pains and penalties of perjury, and an ample bond, with security for the indemnification of the defendant, to be delivered over to him for suit, by order of court, whenever it shall be shown that the debt or demand, proceeded for by the plaintiff, was not really due, or it shall appear that the writ was not "issued in accordance with the true intent and meaning of the statute." *Secs.* 3, 5, 50.

The original of this extraordinary remedy (so often held by all, or most of the American courts to demand a strict construc-

tion in furtherance of the views of the legislature in placing these unusual restraints upon its use, and in confining it, thus trammeled, to specified cases only,) is to be found among the immemorial custioms of the city of London, designated as the "Custom of Foreign Attachments," an account of which is given in Bacon's Abridgement and in other old books. And it will be found that, although our statute has, in establishing the substance of this ancient custom, introduced several modifications, it has at the same time preserved all its strong and distinguishing features. One of these modifications is the introduction of a new rule, less onerous upon the defendant, for making resistance to these proceedings; and another, is a restriction as to the time when the attachment may be dissolved. And both of these modifications are effected by the provisions of the 15th and 29th sections of our statute. By the "Custom," a defendant could not, in any case, make defence without first giving bail to the action: by the 29th section, as well as by the 15th, he is allowed to do so without bail. So by the Custom, the defendant could, at any time within a year and a day, appear, put in bail to the action, even although after judgment and execution against the garnishee, (if at that time satisfaction had not been entered of record,) and by this means dissolve the attachment, and thus authorize the defendant or garnishee, as the case might be, to have trover or replevin for the goods attached, if they were not forthwith delivered. But by section 29 he can only dissolve the attachment, as to time, "before judgment entered or jury empanneled," not afterwards; and as to means, he is allowed to effect this dissolution by successful exceptions to the affidavit, provided he will first "appear and plead to the plaintiff's action." Thus by the 29th section the defendant is allowed, not only to appear and make his defence without bail, as he is also allowed to do by the 15th section, but he is authorized to set up abateable matter (by objection to the affidavit) in an extraordinary manner (by exceptions) instead of in the ordinary manner, by plea in abatement. And thus it is plainly intended to confer upon *him* extraordinary

means for putting an end to so much of the proceedings, as is a proceeding *in rem*, leaving the entire proceedings themselves to be overthrown only by the ordinary means allowed and used for the overthrow of "other suits at law," as authorized by the 15th section. And contemplated that this extraordinary means will be used only in that condition of the case in its progress through the court, when, by the rules of law, dilatory pleas could be no longer made available. And designing that when by default of the defendant, the case was in this condition, he might then, upon the terms of pleading to the merits, still have the privilege of abating, by means of successful exceptions to the affidavit, the attachment only, for an objection, which, if taken in time by plea in abatement, would have overthrown the entire suit. This is evident from the consideration that, by the 15th section the defendant, without giving bail, has the right secured to him of pleading to, and defending the compound proceeding "as any other suit at law," and that it could not have been designed by the 29th section to impair this right. Moreover, to apply the principles of strict construction, which are usually applied to remedies derogatory to the common law, to provisions of the statute for resistance to this class of remedies would be *felo de se*, and an utter perversion of this conservative doctrine. And inasmuch as proceedings under the statute of attachments, for all purposes perhaps, and certainly for all purposes connected with resistance to their progress through the courts, cannot be considered in any other light than in that of suits or actions at law, set on foot by the legislature, not in a condition of isolation, but directly in view of, and in harmonious combination with our entire system of jurisprudence as a whole, of which it was itself to form a part; necessarily, like all other remedies, its want of propriety or efficiency must be made to appear in the regular established course of pleading applicable to all other actions at law, unless in points where the statute, which gave it existence, otherwise provides. It is safe then to conclude that the legislature designed by section 29 to confer benefit upon the defendant, and not impair or take

from him privileges and rights, which had been conferred upon him either by the previous sections of the statute, or by its necessary connexion with the general law of the land. It will not then be unimportant to inquire in what predicament or condition the case can be placed, in its progress through the court, to make this statutory mode of setting up abateable matter in the manner authorized by sec. 29, of any value or benefit to the defendant when used upon the terms prescribed—that "of appearance and plea to the plaintiff's action." We have seen, under the general principle of law just referred to in connection with the 15th section, that, without any aid from section 29, the defendant would have the undoubted right to plead any abateable matter within the time and within the rules fixed by law for other actions at law, and that such matter, pleaded in due form and apt time, would go to the entire proceedings, and that section 29 was not designed to impair or take away any of these rights and privileges, but confer upon the defendant a new facility or means of abating, not the entire proceedings, but so much only of the proceedings, as is a proceeding *in rem.*

What then is the practical benefit designed to be conferred on the defendant? and in what predicament or condition of the case, in its progress through the court, will the benefit, conferred on him by section 29, be of avail to him upon the terms annexed to its use? Much light will be shed upon this question by again referring to the "Custom of London," as to the time when the defendant could come in and dissolve the attachment, (which it will be recollected was even after judgment and execution issued) in connexion with the phraseology of section 29, "before judgment entered or jury empanneled;" and also similar sections found in statutes of other States of this Union, where the phraseology is most usually "before final judgment entered or writ of inquiry executed." In which predicament the defendant is allowed to "plead to issue, so that the plaintiff shall not thereby be delayed of his action." All designed, as section 29 evidently was, to allow of the dissolution of the attachment at all times up to the time of final judgment, upon

some terms or other, but not to allow of its dissolution after that period, as the Custom of London did to the great delay of the plaintiff. The declared great object of the Custom of London and of the American Statutes of Attachments being to compel the appearance of the defendant, or, more accurately speaking, as to most of the American Statutes, to obtain jurisdiction of the person of the defendant, the policy of permitting the dissolution of the attachment at any time before actual satisfaction on the record, if within a year and a day, in the one case, was productive of the mischief of great delay to the plaintiff, which it has been the object of the American Statutes to remedy by establishing a policy to allow of its dissolution only before final judgment upon terms more or less onerous to the defendant. This being the object and policy designed to be established, it is manifest that the phrase, "at any time before judgment shall be rendered against him," used in section 13, and the phrase, "at any time before judgment entered or jury empanneled," in section 29, should be taken and construed to mean final judgment as contradistinguished from interlocutory judgment, as such doubtless was the sense in which they were used by the legislature. Both sections having been manifestly designed for the benefit of the defendant, as an amelioration of the effects of a harsh remedy, so liable to abuse, consequently should have the most favorable construction for the defendant in advancement of the remedy and suppression of the mischief. And this construction being admitted, it follows that the predicament or condition of the case, in its progress through the court in which the benefit, conferred upon the defendant by section 29, can be made available to him, in case he will "appear and plead to the plaintiff's action," is when judgment by default has been rendered against him and the case stands upon a writ of inquiry. In that predicament the case is beyond the reach of dilatory pleas, because as these pleas are never favored by the courts, a judgment by default will never, according to the settled rules of practice, be set aside but upon the condition that the defendant will plead, not a dilatory plea, but a plea to

the merits. It results then that in a proceeding by attachment under our statute, the defendant, under the provision of the 15th section, may, without giving bail, appear and defend an action commenced by attachment in the same manner in every respect as an action commenced in the ordinary way by declaration and summons, having the right to plead in apt time and in appropriate order all dilatory pleas and pleas in bar. And that the effect of section 29 is not to impair, to any extent, any of these rights derived either from the statute or the general law of the land, but to superadd to them the right to have an interlocutory judgment, rendered by default, set aside (on condition of pleading *instanter* to the merits) at any time in the progress of the case before jury empanneled to assess the damages, and that, after pleading to the merits in such case, he may file exceptions to the affidavit, which if sustained, will have the effect to dissolve the attachment, restore the property if still in custody of the sheriff, discharge all garnishees, cancel all bonds given on the part of the defendant either by the defendant or garnishees, and discharge all rules entered against the sheriff or other officer touching the proceedings *in rem*.

Now, these being the rights and privileges of a defendant who defends without giving bail, does the execution of the bond with security provided for by the 13th section, to any extent impair these rights? It is insisted that it does, and urged that the condition of the bond, that the defendant "will appear to and answer the plaintiff's demand at such time and place as by law he should, and that he will pay and abide the judgment of the court, or that his security will do the same for him," has the legal effect to estop him from pleading any dilatory plea and to place him under imperative obligations to plead only to the merits. It is supposed that it would be difficult to show that the doctrine of estoppels, which the courts have ever been most unwilling to extend, because of its tending directly to prevent the investigation of the truth, was ever carried thus far or held applicable in the most remote degree to a case of this kind. And if it were necessary, by reasoning and authority to combat

this position of the plaintiff it might, perhaps, be sufficient to present the consideration that the defendant's undertaking by his bond, so far at least as appearance and pleading are concerned, is an executory and not an executed covenant, and refer to the case of *Gibson vs. Gibson*, 15 *Mass. Rep.* 106, and the cases there cited; but it is not deemed necessary to discuss this doctrine, as it will appear in the sequel, that the defendant does not violate the condition of his bond, when he pleads a dilatory plea at the appropriate time.

His undertaking "to appear and answer the plaintiff's demand," is not an absolute and unqualified undertaking, but it is to do so "at such time and place as by law he should"—what law? The Statute of Attachments alone? By no means; but the law of the land of which the statute of attachments is a component part. When, then, by the law of the land—giving to the phrase "plaintiff's demand" its most favorable signification for the plaintiff—is a defendant bound to answer to the merits of a cause? Certainly not until such time after the plaintiff is himself *rectus in curia* (either by his own act or that conjoined with the waiver of the defendant) as his cause "may be called in its regular order on the docket," in case the process has been served at least thirty days previous to the return day thereof, or on or before the third day of the term, if the term so long continue, when the process has been served more than fifteen and less than thirty days before the return day thereof. But the plaintiff must be *rectus in curia*, either by his own act, or that conjoined with the waiver of the defendant, at the time of the calling of his cause in the one case, or at the day specified, or the defendant would not then be bound to plead to the merits: as for instance, if the plaintiff had not then a declaration in, the defendant would not then be bound to plead to the merits. Indeed, upon the authority of King's Bench by Lord MANSFIELD, in *Douglass vs. Green*, 2 *Chitty Rep.* 7, he would not only, in such a state of the case, be not bound to plead, but would actually have no right to plead any plea, and even a plea in abatement filed under such a state of facts would be, in the

language of that eminent judge, "no plea at all, because there was no declaration in."

Then, will the bond in question, executed under the provisions of the 13th section of the statute, be such a waiver of all dilatory objections to the plaintiff's case as to place him *rectus in curia*, or, in other words, will it place his case on such high grounds as to be quit of this class of objections, although taken in apt time and by appropriate pleas? To determine this question in view of all the principles we have touched, it will be necessary to analyse this bond and fix its legal character. The first clause of the condition of this bond will be found substantially identical with the condition of a bail bond to the sheriff, as is shown by the following extract from a bond of this kind taken from *Burns' Law Dictionary*, to wit, "The condition of this obligation is such that if the above bound E. F. do appear before our sovereign Lord the King, at Westminster, on the morrow of the Holy Trinity, to answer J. K. gentleman, of a plea of debt of 100 pounds, then this obligation to be void." And the second clause will not be found materially variant from the condition of the recognizance of bail taken above by the court, as will be shown by the following extract from such a recognizance, taken from the same author, to wit: "Upon condition that if the defendant be condemned in this action, he shall pay the condemnation of the court or render himself a prisoner in the fleet for the same, and if he fail so to do, C. D. and E. F. will undertake to do it for him."

It will therefore appear that the bond in question is essentially an instrument of bail, which accomplishes substantially all the ends that were accomplished in England, by the taking of the bail bond below together with the subsequent filing, entering and perfection of bail to the action above. And that when a party defendant in an attachment has executed the bond authorized by the 13th section, he has, in legal effect, certainly done nothing more than a defendant did in England in an ordinary action, when he first executed a bail bond below to the sheriff, and subsequently appeared, as he had covenanted to do,

and entered into a recognizance of special bail to the action above and perfected appearance there by the justification of his bail. Now, did all this have the effect in England to take from the defendant his right to plead dilatory pleas, if presented in apt time and due form, and oblige him to plead to the merits? The following authorities show that such was not the legal effect. In *Bacon's Abridgement, Abatement* O, it is said, "If the defendant put in bail within four days and give notice of justifying them, he may then plead in abatement, and his plea will stand good should the bail be ultimately perfected." But the defendant cannot plead in abatement before the plaintiff has declared nor before the defendant has put in special bail or has appeared.

In the case of *Wakefield vs. Marden*, 2 *Chitty Rep.* 8, a plea in abatement was filed within the time allowed for their being filed, but without the defendant's having first entered an appearance, and judgment was signed for want of a plea. Upon a rule to set aside the judgment, "LAWES admitted that the plea was regularly pleaded, but urged that the defendant had not appeared." "ESPINASSE, contra, urged that the plea was pleaded in person, and that it was unnecessary that an appearance should be entered." "Sed per curiam: There is no such distinction. The defendant must in all cases appear, and therefore the rule must be discharged."

In the case of *Saunder vs. Owen*, 2 *Dowland & Ryland's Rep.* 252, the plaintiff having declared *de bene esse*, and demanded plea, the defendant pleaded in abatement within four days, but at that time had not put in special bail; he did, however, afterwards put in and perfect special bail; but notwithstanding this, the plaintiff treated his plea as a nullity and signed interlocutory judgment. READER moved to set aside the interlocutory judgment, and contended that the demand of a plea waived the bail, and that the time when the bail was put in and perfected, must have reference to the day when it ought to have been put in by the rules and practice of the court." "WALFORD, *contra*, urged that the defendant could not be considered as in court,

until bail had been put in and perfected, and therefore he could not take advantage of any premature step of the plaintiff until he himself was in court." "THE COURT was of this opinion, and held that the interlocutory judgment was regularly signed."

In the case of *Dimsdale vs. Neilson*, 2 *East* 406, after the putting in and justifying special bail in the country, the defendant on being served with a declaration, filed a plea in abatement: notice of exception was given on the following day, in consequence of which, the bail afterwards justified in court, but notwithstanding the bail having justified, judgment was signed by the plaintiff on the day after the justification as for want of a plea. A rule *nisi* was obtained to set aside the judgment and to stay proceedings. "LORD ELLENBOROUGH, C. J.: the defendant seems to me to be in court after he has put in bail, unless it turn out that the bail, on exception taken, are afterwards set aside. But if the bail are ultimately accepted, the defendant has done every thing which it was in his power to do, and therefore ought not to be deprived of any benefit which the law gives him." LAWRENCE, judge (in the same case,) said that in the case of *Vernon vs. Calvert*, the plea must have been a plea in bar, pleaded after the bail had been excepted to, and it would be impossible, if the plaintiff delivered his declaration conditionally, and delayed excepting for four days, that a defendant could ever plead in abatement, as by the rule of court he must plead in abatement within that time.

In first *Tidd's Practice*, 587, it is laid down as a "general rule that if the defendant plead before the bail are perfected, his plea will be considered as a nullity, although the bail afterwards justify. But in a country cause, if the defendant put in special bail in time, he may plead in abatement, though the bail be not perfected until after the four days, if they be ultimately perfected." And in the case of *Hopkinson vs. Henry*, 13 *East* 170, it is said to be "the same whether in a town or country cause."

The perfecting of bail to the action having no such effect in England, it would not be unsafe to conclude upon these authorities, that the bond in question, which we have seen is essen-

tially an instrument of bail, can have no effect to impair any of the defendant's rights of defence, when presented in apt time. And indeed it would seem impossible that it could be otherwise, for at most the execution of this bond could not be considered as any thing beyond an appearance in proper person, as special bail was considered in England by the fiction of law, that at the time of filing special bail to the action, the defendant made his actual appearance in court. And as bail below never contemplated this fictitious actual appearance in court, it was never regarded as equivalent to technical appearance, and hence upon forfeiture of a bail bond, the defendant, then being in default, was not afterwards allowed even to enter an appearance for himself, but upon the condition of pleading to the merits and not in abatement. 3 *Salk.* 519.

But within the system of laws which govern this State, this bond need not now (whatever it may have heretofore been) be considered even as much as special bail was considered in England—so far as appearance is concerned—in view of our change of policy effected by the act of the legislature, approved the 3d February, 1843, which abolished imprisonment in every civil action, either upon original, mesne or final process, except only "in cases of fraud alleged by the plaintiff and supported by his affidavit, and also by the affidavit of some other disinterested and creditable person to the facts on which the allegation of fraud is founded." Because the law of appearances, as established in England and brought to this State, had its orign in the plaintiff's claims upon the defendant's person, which it was the policy of English jurisprudence to make available to him through the instrumentality of an actual appearance in court, and from which claims upon his body the defendant could only extricate himself for the time by giving bail. But the plaintiff in this State, having no such claims upon the defendant's body, except only in the specified cases supported in the manner pointed out in the statute; our present policy is as well satisfied, so far as the rights of the plaintiff are concerned, by placing the defendant in an attitude to have a judgment *in per-*

sonam rendered against him, as if he had actually appeared in court by himself or his attorney, which, so far as the plaintiff's rights are concerned, would be now an idle ceremony. And whether cases, which authorize the issuance of an attachment, be such cases of fraud as are contemplated by our new statute or not would be unnecessary to examine inasmuch as, if they were found to be such, the ordinary proceedings by attachment do not present them to the courts in a manner (that is, by the additional affidavit of a disinterested person) to come within the purview of the statute. Accordingly, when it is held, as it was by this court held in the case of *Shields vs. Barden*, 1 *Eng.* 459, that the execution of the bond, authorized by the 13th sec. of the statute of attachments, is such express notice of the pendency of the suit as will authorize a judgment against the defendant by default, upon his failure to "appear and answer upon the calling of the cause according to the practice of the court," all that the plaintiff has any right to claim is secured to him, and he must be prepared, as in other actions at law, to show himself in court in a manner to resist any lawful defence either in abatement (if presented in time) or in bar, if thus presented.

But it has been objected that any construction of the 13th section, which would admit of pleading in abatement by the defendant, after the execution of the bond it authorizes, would operate "unjustly and oppressively upon the plaintiff." How this can be shown it is difficult to conceive. If the plaintiff attempt to use this remedy and fail in his action because his case is not within its scope, he can only complain that the scope of the remedy was not sufficiently ample to embrace his case. If his case be within its scope, and he fails because of his own fraud or unskilfulness in presenting himself in court, he can only lament that he had not more integrity or more skill. And in either case, in the exercise of the rights of defence enjoyed in common by all defendants in our courts of law, if the plaintiff is defeated, no rights of his are invaded, for he had none in this remedy that the statute did not provide. Nor are his rights, in

any substantial way, impaired by the substitution of the bond and security in the place of the property attached: for he seeks a judgment *in personam* against the defendant and captures his property to hold it *pendente lite*, with the intent ultimately to subject it to the payment of his demand. The defendant substitutes his bond and security in the place of the property, and at the same time, by that act, places himself in such an attitude that, if the plaintiff's case is within the remedy he has adopted and he has used the remedy in the manner fixed by law for its use, a judgment will be obtained against him, to be satisfied by the bond as amply as it would have been satisfied by subjecting the property. Is not this *quid pro quo?* Where then is the injustice and oppression upon the plaintiff? But give this section the opposite construction, and it will not be difficult to conceive of, in its operation, a degree of injustice and oppression to the defendant, that could never have been designed by the legislature to have the sanction of law.

We therefore hold that the execution of the bond, authorized by the 13th section, does not impair any of the defendant's rights of defence, and that after its execution, he may defend the action either by plea in abatement interposed in apt time and in due form, or by plea in bar, in the same manner, in every respect, as if he had not executed the bond, and had suffered the property attached to remain in the hands of the sheriff. Therefore, inasmuch as the court below clearly erred in striking out the defendant's pleas in abatement, let the judgment be reversed and the cause remanded to be proceeded in.

ANTHONY VS. HUMPHRIES ADR. USE, &C.

By moving for a new trial, a party abandons previous exceptions, unless they are made the grounds of the motion, and reserved in the bill of exceptions to the decision of the court overruling the motion, as held in *Danley vs. Robins' heirs*, 3 *Ark.*, and *Ashley vs. Hyde & Goodrich*, 2 *English R.*

Where the sheriff serves a *sci. fa.* upon the defendant in the writ, and also upon persons not named therein as defendants, this does not impair the writ or return.

The levy of an execution upon sufficient real estate to satisfy the judgment, undisposed of, is a satisfaction, as held in *Anderson vs. Fowler*, 3 *English R.*, which case is approved.

A *scire facias* was issued and attested by the clerk of the *circuit court*, and recited a judgment in the *circuit court*, but commanded the sheriff to summon the defendant to appear before the *probate court* and show cause, &c. Held that the error was clerical, and that the writ was not void but amendable.

Where the original judgment is not void, the defendant cannot take advantage of mere errors and irregularities on *scire facias* to revive it.

Writ of Error to Pulaski Circuit Court.

Scire facias to revive and continue the lien of a judgment recovered by Joel Johnson, for the use of Ashley & Watkins, against James C. Anthony, and afterwards revived in the name of John Humphries as administrator of Johnson; determined in the Pulaski circuit court, in June, 1846, before E. H. ENGLISH, as special judge.

The facts are stated in the opinion of this court.

RINGO & TRAPNALL, for plaintiff. The first plea filed by the defendant below, to which a demurrer was sustained, presents distinctly the question, whether a judgment and execution creditor, who has caused lands of the defendant to be levied upon, admitted to be subject to levy and sufficient to satisfy the judgment, can, while such levy remains, have his judgment revived, its lien continued against other lands, and proceed regardless of such levy to resort to other property, real, personal or mixed, and satisfy his judgment thereout? If he can disregard such

levy—or the fact of such levy existing has no legal operation whatever; and neither binds the plaintiff to look to the property so levied for the satisfaction of his judgment; separates it from the mass or residue of the property of the defendant, subject to levy for the satisfaction of the judgment, and appropriates it to this specific object; nor, during its existence, suspends the right of the creditor to resort to other property of the debtor for a satisfaction of his debt; nor exempts the other property of the debtor from execution and levy for the satisfaction of the same judgment by virtue of another execution to be issued thereon, then the judgment on said demurrer is right—otherwise it is erroneous. In short, the levy of real estate has some legal operation, affecting the rights of the parties, or it has none. The plaintiff insists that it has a definite and specific legal operation, and amounts to an appropriation, by law and the act of the officer and the plaintiff in execution, of the lands levied specially to the satisfaction of the judgment and execution; and separates the same from the residue of the defendant's property not levied; and for the time being releases the latter from all incumbrances or liability to the plaintiff's judgment and execution; and obliges the plaintiff to cause all the property so levied to be legally sold, before he can in any manner proceed against the defendant, or any other of his property—that it confines the plaintiff to look alone to the property so levied for the satisfaction of his debt—suspends or divests all rights of the defendant therein until the plaintiff's demand is satisfied, when, if any portion remains, it reverts to him—and if the judgment is not satisfied thereout, when the same has all been legally sold, the plaintiff is remitted to his right to resort anew to the defendant, and any other property then owned by him, for a satisfaction of the residue of the judgment.

That such is the legal consequences of a levy of personal property will not, we suppose, be controverted. *Clerk vs. Wethers*, 1 *Salk.* 322. *Oviat vs. Viner*, *Ib.* 318. *Green et al. vs. Allen*, 2 *Wash. C. C. R.* 280. *Hoyt vs. Johnson*, 12 *John. R.* 208. *Ladd vs. Blunt*, 4 *Mass. R.* 403. *Reed vs.* —— *& Staats*, 7 *John.*

428. *Woods vs. Torry*, 6 *Wend. R.* 562. *Camp vs. Laird*, 6 *Yerger*, 246. *Carroll, Gov. use, &c. vs. Fields et al., Ib.* 305. *Verton vs. Perkins et al., Martin & Yerger*, 367. 3 *Yerger*, 297. *Conrad vs. The Atlantic Ins. Comp.*, 1 *Peters*, 434. 4 *Cowan*, 417. 7 *Cowan*, 21.

Where lands are levied, no other execution can issue, until the lands are sold, or the levy otherwise lawfully disposed of. *Hopkins vs. Chambers*, 7 *Monroe*, 262. 1 *Ohio R.*, 206. 5 *Cowan*, 417. 8 *Ala. Rep.*, 764.

And such levy concentrates and fixes the lein of the judgment, and limits and confines it, until the levy is disposed of, to the lands levied. *Miller vs. Estell*, 8 *Yerger*, 460. *Conrad vs. Atlantic Ins. Comp.*, 1 *Pet.* 443.

The lien created by the levy continues until the land is sold, in all cases where the delay to sell is not regarded as a fraud upon the rights of other creditors, or of purchasers. *Pennock vs. McKesson*, 13 *Sergt. & Rawle*, 144. *Young vs. Taylor*, 2 *Binney*, 227-8-9. *Gilpin*, 55.

Can lands be sold on execution without a previous levy? If so, the levy is a useless and nugatory act. But if useless, why does the law require lands to be levied on prior to sale? *Rev. Stat. chap.* 60, *sec.* 23, 28, 34, 35, 59, 60, 73. *Ib. chap.* 61, *sec.* 8. Would the legislature require a nugatory act? See also, *Tidd's Pr.*, 1190, 1091, 1102 to 1107—1130 to 1132. 2 *Saund. R.*, *p* 6, *note* 1 *and* 2. *Ib. p.* 71, *note* 4.

To such action, a plea that the debt or damages were levied on a *fi. fa.*, or the defendant's lands extended for them upon an eligit, is a good bar. 2 *Tidd Pr.*, 1130.

Lands are well levied by the officer noting officially on the execution by any sufficient description, what lands in particular he has seized or levied for its satisfaction, or in any other manner distinctly indicating the same; as by showing or describing to appraisers, &c., or publishing a notice that he has levied and will sell them to satisfy the execution, by receiving a description list thereof from the debtor, containing his direction to the officer to levy the same, &c. Such is all the seizure required by law;

and all that thing is susceptible of; and upon either ground constitutes a valid levy. See *Whipple vs. Foot*, 2 *John. R.* 422.

Against these principles and authorities, and the express requirements of our statutes, is to be found an isolated dictum of BRONSON, judge, that no levy of land is necessary in the State of New York under their statute. We think there is no other.

WATKINS & CURRAN, contra.

SCOTT, J. This was a proceeding to revive a judgment and continue its lien on land. The defendant in error sued out process of sci. fa. against the plaintiff in error, returnable into the Pulaski circuit court, at the October term, 1845, which was returned by the sheriff of that county as executed, not only upon the plaintiff in error, but also upon John Brown and David Skelton, his terretenants. During the return term, the plaintiff in error filed his motion "to set aside the sheriff's return on the *sci. fa.*," which motion was pending and undetermined when the defendants in error moved to amend the writ of *sci. fa.*, "by striking out that portion commanding the sheriff to summon the terretenants," and immediately afterwards, on the same day, the plaintiff in error filed his motion or demurrer, seeking "to quash and set aside" the writ of *sci. fa.* for misjoinder of parties: whereupon the court "sustained the motion to amend" and "overruled the demurrer." To which decision of the court in sustaining the motion to amend and in overruling the demurrer the plaintiff in error excepted at the time, and his bill of exceptions sets out a literal copy of the *sci. fa.* and of the sheriff's return thereon prior to the amendment, by which it appears that the *sci. fa.*, prior to its amendment, run not only against the plaintiff in error, but also against his terretenants, and that the amendment allowed removed the objection taken by the demurrer, and that the court then adjudged the *sci. fa.* and the return thereon sufficient in law and overruled the demurrer: whereupon, by the leave of the court, the plaintiff in error filed three pleas in bar: The 1st, setting up a levy on real

estate of the plaintiff in error subject to sale for the satisfaction of the judgment, of value more than sufficient to satisfy the judgment, which levy had never been, in any manner, disposed of or discharged by sale or otherwise howsoever. (*a*) 2d, Payment of the judgment in full. 3d, Nul tiel record of such judgment as is mentioned in the writ.

(*a*) NOTE BY THE REPORTER. It having been decided by this court that a levy upon lands, undisposed of, is a satisfaction, pleas of this kind may become frequent; and as this plea was drawn by DANIEL RINGO, Esq., an able and accurate pleader, and as this court have held it good on demurrer, it may be useful to the bar to print it here.

THE PLEA.—"And the said defendant, by his attorney, comes and defends, &c., and says that the said judgment in said *scire facias* mentioned ought not to be revived, and execution thereof had against him, nor the lien thereof continued as to the real estate owned by him at the time of the rendition of said judgment, or at any time subsequently thereto; because he says that after the recovery of said judgment as in said *scire facias* mentioned, *to wit:* on the 30th day of October, 1843, the said plaintiff, for the obtaining satisfaction of said judgment, sued out, and caused to be issued thereon, from the office of the clerk of said circuit court, a certain *alias* writ of *fieri facias*, signed by H. Haralson, then clerk of said court, by J. A. Hutchings, his deputy in said office, sealed with the seal of said court, and bearing date the day and year last aforesaid, which said writ run in the name of the State of Arkansas, was addressed to the sheriff of the county of Pulaski, and after reciting that 'whereas Joel Johnson, who sued for the use of Chester Ashley and George C. Watkins, on the 10th day of November, in the year of our Lord, 1840, at our circuit court, recovered against James C. Anthony the sum of eight hundred dollars, debt, and the further sum of forty dollars damages, besides costs, which costs amount to the sum of twelve dollars and seventeen and a half cents; and whereas the said Joel Johnson hath had no execution of satisfaction upon his said judgment; and whereas since the rendition of the judgment in this case, the said Joel Johnson hath departed this life, and letters of administration have, in due form of law, been granted by the probate court of Pulaski county to John Humphries on said estate; and whereas, on the 28th September, 1842, at our circuit court aforesaid, it was ordered and considered by said circuit court, that said judgment be and the same was revived in favor of the said John Humphries as such administrator, for the use of the said Chester Ashley and George C. Watkins against the said defendant, James C. Anthony, and that said administrator for use as aforesaid, should have execution thereof against said Anthony for the debt, interest, damages, and twenty-nine dollars and seventy-five cents for his costs in the *scire facias* to revive said original judgment,' commanded the said sheriff, as he had theretofore been commanded, that of the goods and chattles, lands, and tenements of the said James C. Anthony, he should cause to be made the debt, damages and costs aforesaid, so that he should have the debt, damages and costs aforesaid before our said circuit court, on the 28th day of November, A. D. 1843, and should

To the first plea, defendant in error filed his demurrer; to the second plea, he filed his replication denying the payment; and to the third plea, his replication affirming the existence of the record. To the demurrer to the first plea, plaintiff in error joined, and after argument it was submitted, and by the court taken under advisement; to the second and third pleas, issues of fact were joined, both of which were tried by the court and found for the defendants in error; on which finding judgment final was rendered by the court that the original judgment be revived and the lien thereof continued and that execution issue. The plaintiff in error then filed his motion for a new trial, which was overruled. To which opinion of the court overruling the motion for a new trial, plaintiff in error excepted, and by his

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then and there certify how he had executed said writ; which said writ afterwards, and before the return day thereof, *to wit:* on the day and year last aforesaid, in the county of Pulaski aforesaid, was placed in, and came to the hands of James Lawson, Jr., then sheriff of the county of Pulaski aforesaid, to be by him executed according to law; and the said defendant avers that afterwards, and before the return day of said writ, *to wit:* on the first day of November, in the year last aforesaid, in the county of Pulaski aforesaid, the said James Lawson, Jr., as sheriff of the county of Pulaski aforesaid, levied and seized, on and by virtue of said writ, for the satisfaction of the debt, damages and costs aforesaid, certain real estate, lands, situated in the county of Pulaski aforesaid, the property of the said defendant, of great value, *to wit:* of the value of two thousand dollars, sufficient to pay and satisfy to the said plaintiff for the use, &c., as aforesaid, the debt, damages and costs aforesaid, together with all the legal costs and charges of making the sale thereof and paying over to said plaintiff, for the use aforesaid, the debt damages, and costs aforesaid, to wit: the west half, &c., [*here the lands levied upon are described,*] which levy and seizure of the lands aforesaid, for the purpose aforesaid, was by said James Lawson, Jr., as such sheriff as aforesaid, on the day and year last aforesaid, endorsed in writing on the back of the writ of execution aforesaid; which said lands so levied and seized as aforesaid, have not as yet been sold by said James Lawson, Jr., for the satisfaction of the debt, damages and costs aforesaid, nor hath any part or portion thereof ever been sold for that purpose, nor have they been in any manner released or discharged from said seizure and levy for the purpose aforesaid; and this the said defendadt is ready to verify; wherefore he prays judgment, whether the said judgment in said writ of *scire facias* mentioned, or the lien thereof on the real estate of said defendant ought to be revived, and said plaintiff, for the use aforesaid, have any other or further execution thereof against the said defendant or his real estate owned by him at the time of the rendition of said judgment or at any time subsequent thereto, &c."

RINGO & TRAPNALL, Attorneys for defendant.

bill of exceptions all the evidence adduced on the trial of the issue joined on the plea of nul tiel record is set out, which consisted of a judgment entry (read from the record book in which the proceedings and judgment of the circuit court of Pulaski county had and pronounced at the September term, A. D. 1840, are entered and recorded) of the original judgment, which is the foundation of these procedings, entered there as by default, and also the judgment entry (read from the record book in which the proceedings and judgments of the circuit court of Pulaski county had and pronounced at the September term, A. D. 1842, are entered and recorded) of the revival of said original judgment, in the name of Humphries, as administrator, also entered there as by default. To the reading of all which said plaintiff in error, on the trial of the issue formed on the plea of *nul tiel* record, objected, and his objection was overruled.

Numerous supposed errors by the court below are assigned in this court by the plaintiff. The first and second assignments will be considered together, as they both relate to the motion to set aside the return of the sheriff to the *sci. fa.*, to the motion or demurrer to quash that writ, and to the granting of the motion to amend.

In the cases of *James Danley vs. Robins' heirs*, reported in 3 *Ark.*, and of *Ashley vs. Hyde & Goodrich*, reported in 2 *English*, 92, the legal effect of a motion for a new trial is clearly declared: and the doctrine of these cases, when applied to this, cuts out from the record, and takes from the view of this court, the first bill of exceptions taken by the plaintiff in error, which, until that motion was made, presented the facts upon which these two assignments are based. And as the supposed misjoinder of parties does not, otherwise, appear than by this bill of exceptions, thus taken from the view of this court, inasmuch as the *sci. fa.*, as contained in the record now before the court, is against the plaintiff in error alone, the demurrer for the supposed misjoinder of parties must be considered as having been properly overruled. The fact that the sheriff executed a *sci. fa.*, running against the plaintiff alone, upon the plaintiff in error,

and also upon two other persons, against whom the process did not run, cannot impair either the writ or return; at most, it was but supererogation on the part of the sheriff, without legal effect. And as there is nothing in the record now before this court, upon which the leave given by the court below to amend, could have operated, the granting of that motion must be considered as having been inoperative.

The third assignment is predicated upon the action of the court below upon the first plea of the plaintiff in error. To this plea there was a demurrer and joinder, and after argument it was submitted and taken under advisement. And although the record does not otherwise disclose the holding of the court below on this question of law thus presented, the subsequent final judgment of the court in favor of the defendant in error and against the plaintiff in error after the trial of the two issues of fact, necessarily shows that the matter set up in this plea was taken and held by the court below to be insufficient to bar the action. The question, then, presented by this assignment, is the sufficiency of this first plea. And this question was directly determined in the affirmative at the January term, A. D. 1848, of this court in the case of *Anderson vs. Fowler*, the doctrine of which case we are not disposed to disturb. Therefore in holding the matters set up in this first plea of the plaintiff in error to have been insufficient to bar the action of the defendant in error, there was manifest error in the court below.

The other assignments will be considered together, as they all, subsequently, call in question the evidence adduced on the trial of the issue of fact formed on the plea of *nul tiel record*. The judgments read in evidence were clearly not void; and the error on the face of the *sci. fa.*, which preceded the second one, irregularly brought to the knowledge of the court below—manifestly a clerical misprision, which could have in truth neither injured or deceived any one—was clearly amendable in the court below, and in this court would be considered as amended.(*a*)

(*a*) NOTE BY THE REPORTER. The writ of *scire facias* referred to by the court, as copied in the bill of exceptions, is as follows: "State of Arkansas, County of Pulaski: SS.

But, however erroneous might have been these judgments in point of law, nevertheless, while they stood unreversed and not in any manner vacated, they could not in point of fact be questioned in this collateral way on the plea of nul tiel record, but were clearly admissible in evidence to prove the issue formed on this plea.

But, for the error of the court below in holding the first plea of the plaintiff in error insufficient to bar the action of the defendant in error, the judgment must be reversed.

The State of Arkansas, to the Sheriff of Pulaski County—Greeting: Whereas Joel Johnson, who sued for the use of Chester Ashley and Geo. C. Watkins, plaintiff, on the 10th day of November, A. D. 1840, in our Pulaski circuit court, recovered against James C. Anthony, defendant, the sum of eight hundred dollars debt, and also the sum of forty dollars damages which were adjudged to him, as well as all the costs in and about that suit expended; and since the rendition of said judgment the said plaintiff, Joel Johnson, has departed this life, and letters of administration of all and singular the goods and chattels, rights and credits of the said Joel Johnson, deceased, were afterwards, in due form of law, granted to John Humphries, of said county of Pulaski: Now, therefore, you are hereby commanded to summon the said James C. Anthony, defendant, as aforesaid, to appear before our Pulaski *Probate Court*, on the first day of the next term thereof, to be held at the court house in the county of Pulaski on the first Monday of March next, it being the 7th day of March, A. D. 1842, to show cause, if any he can, why the judgment above recited should not be revived and execution issue thereon, in the name of the said John Humphries, as administrator, as aforesaid, against him, the said James C. Anthony; and then and there make due return of this *scire facias:* herein fail not.

{L. S.} In testimony whereof, I have hereto set my hand and affixed the seal of office, as clerk of said circuit court, this tenth day of February, A. D. 1842.

LEMUEL R. LINCOLN, *Clk.*"

KING & HOUSTON VS. STATE BANK.

The circuit court may, at any time, in furtherance of justice, order its record amended in whatever is necessary to make it speak the truth: this the court does in the exercise of its high equity powers, and not by virtue of the Statute of Jeofails.

The practice of correcting errors in the record by writ of error *coram nobis* has measurably fallen into disuse in this country; and the practice of amending on motion, supported by affidavits, has been substituted.

Amendments may be made by interlineation, where the order of court particularly specifies the amendments to be made, but the more regular mode of amending, after the judgment term, is by an order of court reversing the defective entry, followed by a new order *nunc pro tunc*, such as should have been made.

A plea by a surety that when the obligation fell due the principal was solvent, and the creditor neglected and forbore to sue him until he became insolvent, is bad: mere forbearance by the creditor, is no discharge of the security.

But if the creditor give day of payment to the principal, upon a valid consideration without the consent of the surety, the surety is discharged; but part payment of the debt is no such consideration.

Writ of Error to Pulaski Circuit Court.

This was an action of debt, brought by the Bank of the State of Arkansas against King and Houston, and determined in the Pulaski circuit court, in April, 1847, before the Hon. WM. H. SUTTON, judge.

The bank declared on a promissory note made to her by one Stephenson, as principal, and the defendants, and another, as securities.

The defendants pleaded payment, to which plaintiff replied.

The defendant King also filed two separate pleas, the substance of which is stated in the opinion of this court. To these pleas the court below sustained a demurrer, whereupon, the original record entry states, "the said King withdraws his pleas in this case; and thereupon the said defendants declined to plead further herein, and now say nothing in bar or preclusion of said plaintiff's action: it is, therefore, considered by the court," &c. —then follows the judgment.

At a subsequent term of the court (April Term, 1848) King's counsel filed the following motion in the case:

"Comes the said King and moves the court here to amend the record in this case in this: that the said entry, as it now stands, shows a withdrawal of all pleas filed in said cause, when, in fact and in truth, only those pleas on which issues were joined were withdrawn, and the pleas to which demurrer was sustained were not withdrawn, but remained in the cause, and in this the clerk of the court mistook the order of the court and action of the parties."

On this motion the following order was made:

"On this day comes said plaintiff and said defendant King, by their attorneys, and said King, by leave of the court, files his motion for leave to amend the record in this case; and, upon consideration the court sustains said motion, and doth order that the record in this cause be amended accordingly."

In pursuance of this order, it seems that the clerk interlined the words "*of payment*" after the words "*withdraws his pleas*" and before the words "*in this case*" in the original record entry above copied.

This amendment was made after the defendants brought error, and on certiorari issued from this court the amended record was brought up.

CUMMINS, for the plaintiffs. The surety was released according to the repeated decisions of this court. See *Hughes vs. State Bank*, 2 *Eng.* 394. *Hempstead & Conway vs. Watkins*, 1 *Eng.* 317, and authorities there cited.

LINCOLN, contra. The only questions presented by the record in this case are, *first:* Did the circuit court improperly sustain the demurrer of the bank to the second and third pleas of King; and *second:* Did not the circuit court err in permitting the defendants, on motion, to amend the record by interlineation after the term had expired.

As to the first point, the statute provides how a security may

be discharged, and expressly requires the security to give notice in writing to the person having the right of action. In these pleas notice is not alleged to have been given in any manner. *Hughes vs. The State Bank*, 2 *Eng. Rep.*, 396. *Rev. Stat., p.* 722, *secs.* 1, 2. The defence set up in these pleas can only be available in a court of equity. *Hempstead & Conway vs. Watkins ad.*, 1 *Eng. Rep.* 317.

The court below clearly erred in permitting King, one of the defendants, to come in after the term had elapsed and amend his pleadings so as to make the record present an entire different case, not only as to himself, but as to his co-defendant, Houston. He not only withdrew his own plea of payment, but, by the language used in the record, also withdrew the plea of payment filed by Houston. All amendments should be made in apt time. *Anthony vs. Beebe*, 2 *Eng. Rep.* 448. The record of a judgment is only amendable during the term at which it is rendered. Permitting amendments is a power which should be exercised with great caution. Amendments, when allowed, are uniformly to support or sustain a judgment, but never to defeat or impair one. *McDonald and others vs. Watkins ad.*, 4 *Ark. Rep.* 628, and authorities there referred to. *Auditor vs. Woodruff*, 2 *Ark. Rep.* 84.

SCOTT, J. It is insisted on the part of the bank that the court below erred in permitting the plaintiff's in error, on their motion, to amend the record by interlineation, after the judgment term had elapsed. The writ of error *coram nobis*, which, at common law, was granted in cases like this, *ex debito justitiæ*, has almost entirely fallen into disuse in the United States from the fact that, in our practice, the end that was accomplished by it is now achieved by mere motion supported by evidence offered the court in a summary way, most usually by affidavits, upon which the court either grants or refuses the relief sought. And although many amendments may be appropriately made by interlineation, especially where the order of court granting them specifies and describes the particular amendment allowed to be

made in this wise, (as it should always do in such case,) still the more regular mode of making these amendments, after the judgment term, is by an order of court reversing the defective entry, followed by a new order *nunc pro tunc*, such as should have been made. 2 *Washington Rep.* 130. 2 *Randolph*, 174.

As to the power of the court below to allow the amendment in question, there can be no doubt at all. The authority of the court, in such cases, does not arise from the statute of *Amendments and Jeofails*, although these statutes control in cases of amendment after writ of error brought, but from the high equity powers of the court, which enable it to amend in whatever may be necessary to make the record speak the truth, whenever the ends of justice require such amendment. See *Hart vs. Renolds*, referred to in *Chichester v. Cande*, 3 *Cowan*, 44.

In *Mara vs. Quin*, 6 *T. R.* 8, Lord KENYON, C. J., says: "The forms of the courts are always best used when they are made subservient to the justice of the case;" and ASHHURST, J., observed, "It is admitted that amendments have been made at all times in order to forward the justice of the case." In that case the court put the judgment *forti manu* two years back to prevent injustice, because it could not injure third persons. In *The King vs. The Mayor of Granpend*, 7 *T. R.*, Lord KENYON says: "I wish that that could be attained, that Lord Hardwick, in the case before him, lamented could not be done, namely, that these amendments were reduced to certain rules; but, there being no such rules, each particular case must be left to the sound judgment of the court. And the best principle seems to be that on which Lord Hardwick relied in that case, that an amendment shall or shall not be permitted to be made, as it will best tend to the furtherance of justice. Amendments of this kind are not made under the statute of Jeofails, but under the general authority of the court."

In *Sumner vs. Drake*, 1 *Caines Rep.* 9, the court allowed the judgment to be signed *nunc pro tunc*, because, they say, the omission "was a neglect of one of their officers, which ought to prejudice no one." "It is to be observed on this case that, by 1 *R.*

L. 501, *s.* 2, it is enacted that no judgment shall effect land, &c., as to purchasers, &c., but from the actual filing of the roll after the same shall have been signed." Of course, by this statute, subsequent purchasers had acquired a priority of lien, yet the court destroyed that priority by an amendment *nunc pro tunc*, without even calling purchasers before them. In the case of *Chichester vs. Cande*, 3 *Cowen*, 56, WOODWORTH, J., in delivering the opinion of the court, says that the judge who delivered the opinion of the court in *Close vs. Gillespie*, 3 *John. R.* 526, was sustained by all the authorities when he said "I cannot perceive that our right to amend in case of the mistake of one of our officers is to be controlled by the effect which is to be produced in another case." And numerous authorities, both English and American, show that the courts will always interfere by way of amendment, and do that equity which a party would be entitled to on application to a court of equity. It is therefore (although we fully recognize the doctrine of the case of *McDonald et al. vs. Watkins ad.*, 4 *Ark.*, 624, "that the permitting amendments is a power which should be exercised with great caution and delicacy after the case has been disposed of and the court adjourned,") that we hesitate not to hold, as we do, that the court below had ample power to allow the amendment in question, and that there is nothing in the record to show otherwise than that it exercised that power discreetly and properly.

The remaining question to be considered is, whether or not the court below erred in sustaining the demurrer to the two pleas that were not withdrawn.

One of these set up that the defendants below executed the note sued on solely as security of Stephenson, which the plaintiff below knew, and that when the note fell due Stephenson had ample means to pay, of which the plaintiff below had knowledge: but that the plaintiff below would not and did not sue or otherwise attempt to collect the debt until Stephenson became insolvent. The other plea set up that the defendants below executed the note sued on solely as security for Stephenson, and that after it became due the plaintiff below, on good and suffi-

cient consideration moving from Stephenson, gave day and extended the time of payment without the knowledge or consent of the defendants.

It is clear that the matters set up in the first plea presented no defence at all, as it presented matter that amounted to nothing more than simple forbearance by the creditor, that did not interfere with any of the rights of the security, or otherwise have any disabling effect upon him. Not so, however, with the second plea. That set up a state of things, which, if true, constitutes an effectual barrier to the recovery sought. For it is well settled that giving time by the creditor to the principal by an obligatory contract made on a valid consideration, without the consent of the security, operates to discharge him; and that this defence is available at law or in equity: a doctrine that this court has repeatedly recognized. The giving time, however, must not only be without the consent of the security, but must be the result of an obligatory contract made on a valid consideration. That is to say, the agreement must be binding in law upon the parties thereto, and based upon a sufficient consideration. In case the alleged consideration should be shown by evidence to have been merely a part payment of the debt, this would not be sufficient to support a binding contract for the extension of time, as this would but be a part performance of a duty, and, moreover, was for the benefit of the security. The principle on which the security's exoneration rests is, that the creditor has, without his consent, changed the original attitude of the parties by tying his own hands, or has otherwise impaired some of the legal or equitable rights of the security in the premises, or has abstracted or impaired some of his remedies legal or equitable.

The court below, then, having erroneously sustained the demurrer to the second plea, its judgment must be reversed, and the cause remanded to be proceeded in with leave to the bank to withdraw her demurrer and take issue to the second plea.

BROWNLEE EX PARTE.

An alien who has emigrated to the United States since the 18th of June, 1812, and who was not a minor on his arrival, is not entitled to take the oath of naturalization on five years residence, without having made the declaration of his intention to become a citizen required by the Act of 26th May, 1824, two years before his application to take the oath of naturalization. (See *Digest Stat. Ark.* 90.)

Application for Naturalization.

RINGO & TRAPNALL, presented the application, and argued the case orally.

JOHNSON, C. J. This is an application made by Thomas Brownlee to be admitted to all the rights of a citizen of the United States. He represents that he is a native of Scotland, that he emigrated to the United States of America, and landed in New Orleans in the State of Louisiana, on the 15th day of November, A. D. 1842, and from thence immediately came to the State of Arkansas, where he then fixed his residence, and thenceforward has resided and yet resides; that at the time of his arrival in the United States, it was, and ever since has been and still is, *bona fide*, his intention to become a citizen of the United States of America, and to renounce and abjure forever, all allegiance and fidelity to every foreign prince, potentate, State and sovereignty whatever, and particularly all allegiance and fidelity to Victoria, Queen of the United Kingdom of Great Britain and Ireland, of whom he was a subject: that he has resided in the county of Pulaski and State of Arkansas, for a period of more than five years last past, during which period he has never been out of the territory of the United States, except while serving as a volunteer, regularly mustered into the army and service of the United States, when under the command of General Zachary Taylor, he marched with the company of Captain Albert Pike, of which he was a member,

into the territory of the Republic of Mexico, from which he returned immediately to his residence aforesaid in Arkansas, upon obtaining his discharge from service as a volunteer in the army of the United States. He then offered to renounce and abjure forever all allegiance and fidelity to every foreign prince, potentate, state and sovereignty whatever, and particularly all allegiance and fidelity to Victoria, Queen of the United Kingdom of Great Britain and Ireland, of whom he was a subject. The question presented is whether he is entitled to be admitted to become a citizen of the United States, upon the showing contained in his petition.

The Act of the 26th of May, 1824, provides that, "Any alien, being a free white person, may be admitted to become a citizen of the United States or any of them, on the following conditions and not otherwise." The first condition imposed upon the applicant is that he shall have declared, on oath or affirmation, before the supreme, superior, district or circuit court of some of the States, or of the territorial districts of the United States, or a circuit or district court of the United States, or before the clerk of either of such courts, two years at least before his admission, that it was *bona fide* his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state or sovereignty whatever, and particularly by name, the prince, potentate, state or sovereignty whereof such alien may, at the time, be a citizen or subject. The Act of April 14, 1802, required that the applicant should have made his declaration three years at least before making his application for admission. The Act of May 26, 1824, reduced the time from three to two years, and further provided, that the declaration might be made before the clerks of the courts, as well as before the courts themselves. This act also contains a provision in favor of minors, and under certain circumstances they are not required to make the previous declaration. By the Act of May 24, 1828, (chap. 106) those aliens, who arrived in the United States before the 18th of June, 1812, are exonerated from the performance of this

condition, provided that the applicant, when he presents himself for admission, shall (in addition to the other requisites) prove to the satisfaction of the court that he was residing within the limits and under the jurisdiction of the United States, before the 18th day of June, 1812, and has continued so to reside. To take a case out of the operation of the Act of 1824, the applicant must state such fact as to bring himself within one of the exceptions. The present applicant admits that he emigrated to the United States in 1842, and having wholly failed to make such a showing as to bring himself within either of the exceptions, he must necessarily fall within the rule laid down in the act of 1824. This act expressly requires that he should have made his declaration two years in advance of his application. This he does not pretend to have done; but, on the contrary, admits that he has not done so. The application is therefore refused.

HANY VS. STATE.

In an indictment for gaming, it was charged in two of the counts that the defendant and four other persons did *bet together and against each other* at a game of cards, &c.; and in the other count that the said defendant and the said other persons *did bet together* at a game of cards, &c. HELD that proof that the four persons named in the indictment played the game of cards, and defendant stood by and bet with one of them; that three of the players bet with each other, but the fourth player did not bet at all, was not sufficient to sustain a verdict of guilty against defendant. That the charge in the indictment, though made with unnecessary complication, should have been proven as aleged.

Appeal from the Circuit Court of Yell County.

Indictment for gaming against Loony McDaniel, Thomas Morse, Jackson Smith, Abraham McCarly and the appellant, John Hany, determined in the Yell circuit court in September Term, 1847, before the Hon. W. W. FLOYD, judge.

There were three counts in the indictment. The first charged that the said McDaniel, Morse, Smith, McCarly and Hany, on, &c., at, &c., did *bet together and against each other* divers large sums of money, *to wit:* the sum of fifty cents, at and upon a certain unlawful game at cards commonly called seven up, against the peace, &c.

The second count charged that said McDaniel, Morse, Smith, McCarly and Hany, afterwards, *to wit:* on, &c., at, &c., *did bet together* divers other large sums of money, *to wit:* the sum of fifty cents, at and upon a certain other unlawful game at cards commonly called seven up, against the peace, &c.

The third count charged that said defendants, on, &c., at, &c., did *bet together and against each other* divers other large sums of money, *to wit:* the sum of fifty cents, at and upon a certain other unlawful game at cards, commonly called three up, against the peace, &c.

The defendant, Hany, was tried on the plea of not guilty and convicted. He moved for a new trial, on the grounds that the verdict was contrary to law and evidence, and that the court erred in charging the jury. The motion was overruled and he excepted. From his bill of exceptions, it appears that on the trial the State introduced Loony McDaniel as a witness, who testified that about the time alleged in the indictment, he, the witness, and Thomas Morse, Jackson Smith and Abraham McCarly played at a game of cards, in Yell county, called seven up: that he, the witness, and defendant, Hany, bet twenty-five cents on the game: that Hany was a by-stander, and did not bet *with or against any other person*, but that the players all, except McCarly, bet at the game—that McCarly did not bet at all. This was all the evidence given on the trial. Whereupon, the court charged the jury, "that if they were satisfied from the testimony, that the defendant did bet, in manner and form as charged in the indictment, together with one or more of the persons as charged to have engaged in the game, they should find the defendant guilty."

W. WALKER & BERTRAND, for appellant. The jury was mislead by the instructions of the court, as the evidence does not warrant the finding, or sustain the offence as laid in the indictment.

The indictment, in two of the counts, charges that the *appellant and four others* "did bet together and against each other" divers sums of money, &c. The other count charges that the *appellant and four others* "did bet together" large sums, &c. The proof is that the four played at a certain game, and that the appellant and one of the four bet twenty-five cents: that the appellant was a bye-stander and did not bet with or against any other person: that, of the four playing the game, but three of them bet at it.

WATKINS, *Att. Gen'l*, contra.

SCOTT, J. In the first and third counts of this indictment it is charged that the appellant and four other persons, whose names are disclosed, "did bet together and against each other divers large sums of money, to wit: the sum of fifty cents, at and upon a certain unlawful game of cards," &c.; and in the other count it is charged that the same five persons "did bet together divers other large sums of money," &c. The evidence presented by the bill of exceptions to the opinion of the court overruling the motion for a new trial, establishes that the appellant stood by while the other four played cards, and that the appellant and one of the card-players bet twenty-five cents on the game, but that he (the appellant) did not bet with any other person, and that two others of the card-players bet on the game, but that the remaining card player did not bet at all. So that only three other persons besides the appellant bet on the game, and not four others, as charged in all the counts of the indictment.

The indictment is predicated upon the *8th section* of the *3d article* of the *6th Division* of the statute of Criminal Jurisprudence, *Revised Statutes*, 274; and, unfortunately for the State, the offence is charged in a manner so unnecessarily complicated as

to be extremely difficult of proof; but having charged it in this manner, it was devolved upon her to prove it as charged. It is true that the presumption of law is in favor of the verdict, and that unless the record affirmatively overthrows this presumption, it must not be disturbed. But in a case like this it is manifest that wrong and injustice might grow out of the verdict, if not overthrown, since another indictment might be framed and a second conviction had (if attempted within the time limited by law for the prosecution of the offence) upon the identical same testimony: Wherefore, although the testimony abundantly shows that the appellant violated the law, it does not establish the charge as laid in the indictment and support the verdict and judgment thereon. And consequently, as the court below erred in overruling the appellant's motion for a new trial, the judgment of that court must be reversed, and the cause remanded to be proceeded in.

THE STATE VS. WILLIS.

In an indictment against a minister for solemnizing the marriage of minors without the consent of the parent, it is sufficient to allege that he is authorized by law to solemnize the rites of matrimony in this State, without alleging in terms that his license or credentials of clerical character have been previously recorded.

And it is sufficient to allege that the marriage was *solemnized* without the consent of the parent, and that the parent resided in the State, without setting out the name of the parent.

Appeal from the Johnson Circuit Court.

This was an indictment against the Reverend Thomas Willis, for solemnizing marriage without the consent of the parent of the young lady, determined in the circuit court of Johnson county

in August, 1847, before the Hon. WM. W. FLOYD, judge. The indictment follows:

"STATE OF ARKANSAS, } SCT.
COUNTY OF JOHNSON. }

In the Johnson Circuit Court at the March Term thereof, 1847.

The grand jurors for the State of Arkansas, duly selected, impanneled, sworn and charged to inquire in and for the body of the county of Johnson, aforesaid, upon their oath, do present that Thomas Willis, late of said county, on the tenth day of January in the year of Christ eighteen hundred and forty-seven, in the county of Johnson, aforesaid, was then and there a regularly ordained minister of the christian denomination called *Baptist*, and authorized by law to solemnize the rights of matrimony in the State of Arkansas; and that the said Thomas Willis, on the day and year aforesaid, with force and arms, in the county aforesaid, did perform the marriage ceremony and solemnize the rites of matrimony between *Lorenzo Dow Teague* and one *Dicy Ragsdale*, which said Dicy Ragsdale was then and there a female over the age of fourteen years, and under the age of eighteen years, and that the said Thomas Willis then and there performed the marriage ceremony, and solemnized the rites of matrimony between the said Lorenzo D. Teague and the said Dicy Ragsdale without the consent in person or in writing of the parents of the said Dicy, which said parents were then and there living in the State of Arkansas; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Arkansas."

The defendant's counsel moved to quash the indictment on the grounds: "1st. Because the said indictment does not show that said defendant has had his license or credentials recorded in the office of the clerk of any court in this State: 2d. Because the said indictment wholly fails to show who were the parents of the said Dicy Ragsdale."

The court quashed the indictment, and the State appealed.

WATKINS, *Att. Gen'l.* The indictment is technically good under

the statute. This court has uniformly held that, in misdemeanors, the indictment is good, if it substantially conforms to the description of the offence contained in the statute. The defendant, in assuming to solemnize marriages, would be presumed to have performed his duty in having his credentials recorded, else he would be guilty of a double offence, and he certainly cannot make such an objection to this indictment. So, in regard to the second objection, if the parents of the female resided in this State, the defendant was bound, at his peril, to ascertain and know who they were, and that their consent had been obtained before he solemnized the marriage.

No counsel for the *Parson!*

SCOTT, J. The indictment in this case is technically good under the statute upon which it is predicated. It describes the offence with which the defendant was charged with sufficient certainty. It was not necessary to allege in terms that the defendant's license or credentials of clerical character had been previously recorded. It was sufficient to allege that he was authorized by law to solemnize the rites of matrimony in this State, as was done. Neither was it necessary to set out the names of the parents whose consent had not been obtained; it was sufficient on that point to allege, as was done, that the marriage had been solemnized without the consent of the parents, and that the parents resided in the State of Arkansas. If the parents resided in the State of Arkansas the defendant was bound, at his peril, to ascertain and know who they were and that their consent had been obtained before he solemnized the marriage. And being an ordained minister of a christian denomination, his assuming to solemnize marriage as such must raise the presumption that he had had his credentials previously recorded, as, otherwise, he must be presumed to have committed another misdemeanor, which the law would not do.

And as the court below quashed the indictment its judgment must be reversed, and the case remanded to be proceeded in.

GATTON VS. WALKER.

The effect of the act of 5th December, 1846, (*Digest, p.* 795,) authorizing the commencement of suits by filing the evidence of debt in the clerk's office, merely dispenses with the declaration, but has no further or other effect, either upon the form or substance of the writ, or upon the pleadings subsequent to the declaration.

And when a defence is made to an action brought under said act, it must be presented by pleas appropriate to the form of action which the plaintiff may have adopted as indicated by his writ.

The summons in this case, showing that the plaintiff proceeded to recover a money demand, and distinctly indicating that he adopted the action of debt as the form of his remedy, declared good.

The return of the sheriff upon the writ shows a good service within the rule laid down in *Gilbreath vs. Kuykendall*, 1 *Ark. Rep.* 50, as it distinctly describes the time, place and manner of the service, and the name of the party on whom it was made.

The service of the writ having been made more than fifteen days before the return term, plaintiff was entitled to judgment on failure of defendant to appear and plead, as held in *Tagert vs. Harkness*, 1 *Eng. Rep.* 528.

Writ of Error to the Circuit Court of White County.

This was an informal suit brought under the act of 5th December, 1846, (*Digest, p.* 795,) by James Walker against Augustin Gatton, in the White circuit court, and determined before SUTTON, judge.

On the 9th of March, 1847, the plaintiff filed in the office of the clerk of the circuit court of said county, the following note:

"$192 91. SEARCY, *April* 1*st*, 1845.

I promise to pay John W. Bond, or order, one hundred and ninety-two dollars and ninety-one cents, for value received, with interest at 10 per cent. per annum. A. GATTON."

Endorsed: "I assign the within note to James Walker, for value received. Jan'y the 25th, 1847. J. W. BOND."

On the filing of which the clerk issued a summons for the defendant, as follows:

"*In the Circuit Court of White County, in vacation.*

The State of Arkansas, to the Sheriff of White county, in said State—Greeting:

You are hereby commanded to summon Augustin Gatton, if he be found within your county, to appear before the judge of the circuit court of said county, in the town of Searcy, in said county, on the first day of the next term of said court, which will be holden on the first Monday of April next, then and there to answer the complaint of James Walker, assignee of John W. Bond, to a plea that he render unto him the sum of one hundred and ninety-two dollars and ninety-one cents, which to him he owes and from him unjustly detains, to his damage one hundred and fifty dollars; and have you then there this writ.

In testimony whereof," &c.—attested by the clerk in the usual form, and sealed, &c.

Sheriff's return: "I executed the within by reading to the within named Augustin Gatton, at his residence, in White county, on the 17th day of March, 1847.

J. G. ROBBINS, Sh'ff."

At the return term the defendant failed to appear, and the plaintiff took judgment for the amount of the note sued on by default in the usual form of entering judgments in actions of debt.

The defendant brought error, and his counsel assigned for errors:

1st. The judgment of the court below was for defendant in error, whereas it should have been for plaintiff in error.

2d. There was no declaration, petition, or statement, in writing, filed on the commencement of the suit whereto the defendant below could confess or make default.

3d. The writ disclosed no form of action known to the law, and disclosed no sufficient cause of action, and the ground of complaint disclosed is inconsistent with, and variant from, the note filed:

4th. No valid summons issued, and there was no timely ser-

vice thereof upon defendant below to authorize judgment against him; and

5th. The judgment is for an amount of damages not claimed in the writ, and not by law recoverable."

WATKINS & CURRAN, for plaintiff in error.

P. JORDAN, contra.. The suit was legally commenced by filing the note. *Digest, p.* 795. The writ was good in substance and form. *Jeffrey vs. Underwood*, 1 *Ark. Rep.* 119. The service was in time to warrant the judgment by default. *Tagert vs. Harkness*, 1 *Eng. Rep.* 528.

SCOTT, J. The act of our legislature, approved the 5th of December, 1846, entitled "an act to change in part the manner of commencing suits in the circuit courts of this State," authorizes a suit at law to be commenced in any of the circuit courts of this State by filing in the office of the clerk of such court a note, or other writing obligatory, or due bill, or other evidence of debt. Which note, writing obligatory, or due bill, or other evidence of debt, it is enacted, "shall be a sufficient declaration on which a writ of summons or capias ad respondendum against the person, or of attachment against the property of the defendant shall be issued." Its effect is only to dispense with the declaration in case a party may choose to adopt this mode of commencing a suit on any of the instruments of writing specified in this act in lieu of the other more general mode applicable to suits on these instruments, as well as to all other suits at law; which general mode is prescribed in the first section of chapter one hundred and sixteen of the Revised Statutes; but it has no further or other effect, either upon the form or substance of the writ, or upon the pleadings subsequent to the declaration. And when a defence is made to an action brought under the provisions of this act it must be presented by pleas appropriate to the form of action which the plaintiff may have adopted as indicated by his writ.

The summons, issued in the case before us, not only shows that the plaintiff proceeded to recover a money demand; but also distinctly indicates that he adopted the action of debt as the form of his remedy. And the only legitimate question presented by the record before us is as to the sufficiency of the service to warrant the judgmeut by default. We think the return of the sheriff endorsed on the summons comes fully up to the rule laid down in the case of *Gilbreath vs. Kuykendall*, reported in 1 *Ark.*, *p.* 50, as it distinctly discloses the time, place, and manner of the service, and the name of the party on whom it was made; and, as the service was more than fifteen days before the return day of the summons, the plaintiff, on the defendant's failure to appear and plead at the return term, was entitled to a judgment by default, as held in *Tagert vs. Harkness*, reported in 1 *Eng.* 528. And as there is no error in the judgment below it must be affirmed.

SADLER VS. BEAN AND WIFE.

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Marriage suspends the legal existence of the wife during coverture, and vests her personal estate in her husband.

Her future acquisitions of personalty vest in him also, unless settled upon her to her sole and separate use by apt words excluding *the marital rights* of the husband: and this, whether the property be conveyed directly to her, or to a trustee for her use.

If such apt words are used in a conveyance to the wife, the husband becomes her trustee.

Appeal from the Johnson Circuit Court.

Lucian O. Sadler brought an action of assumpsit, by attachment, against Jeremiah Bean, in the Johnson circuit court. The sheriff attached a negro woman named *Rhoda*, as the slave and property of the defendant. Polly Bean, wife of the defendant,

by the said defendant as her trustee, interpleaded, claiming the slave attached as her separate property. Plaintiff took issue to the interplea, and the court, sitting as a jury, (Judge FLOYD presiding, in September Term, 1847,) found in favor of the claimant, and rendered judgment discharging the slave from the attachment. The plaintiff moved for a new trial, which the court refused, and he excepted and put the evidence on record. Mrs. Bean claimed the slave under a clause in the will of her father, Johnathan Logan, which is copied in the opinion of this court. It was proven that she intermarried with Jeremiah Bean, defendant in the attachment, in the lifetime of said Logan, and that the slave named in the will was the same attached. Sadler appealed.

E. H. ENGLISH, for appellant. The evidence shows that the father of the lady devised the slave to her absolutely. She married Bean before the bequest, and on the devise the property in the slave vested in him, and became liable to his debts. The law is well settled on this subject, and is found in all the elementary books. There are no words in the will creating a separate property in the wife.

SCOTT, J. In this case two supposed errors of the court below are assigned: 1st. The overruling of the appellant's motion for a new trial: 2d. The judgment of the court below for the claimant of the slave.

The wife, through her husband as trustee, claimed the slave, levied upon as the property of the husband, as her sole and separate property under the following clause of the last will and testament of her deceased father, which was executed and took effect after the marriage and during the life-time of the husband and wife, to wit: "Item 4th. I will and bequeath to my daughter, Polly Bean, a negro girl named Rhoda, one mare, saddle, bridle, two cows and calves, which are now in her possession." The will contained no further provision by which either this or any other

bequest contained in it, was settled to the sole and separate use either of Polly Bean or any other female.

Marriage suspends the legal existence of the wife during coverture, and invests the husband with the absolute title to all the personal estate of the wife, and such of her choses in action as he may reduce into possession during the coverture. Over all such he has unqualified dominion with untrammelled right of disposition. And such also are his rights in all like acquisitions of the wife during the coverture, unless the doner shall accompany the gift with the limitation to the sole and separate use of the wife; and this can be done only by apt words to negative the marital rights of the husband,—the presumption of law being always in favor of these rights. Without such apt words, by which are to be understood words that, by their import, exclude the husband from the benefit intended to be bestowed, although the legal title might be conveyed to trustees for the benefit of the wife, still the husband would be the beneficiary, taking in such case an equitable interest in virtue of his being, by the effect of the marriage, the legal embodiment and representative of the will, capacity and rights of the wife. While, on the other hand, if the gift be accompanied with such apt words, whether made in terms to trustees or to the husband, or even to the wife, it would be upheld and secured for the sole and separate use of the wife. The husband, in the two latter cases, in virtue of his same legal representative character, wherein all the legal rights and capacities of the wife are absorbed, takes and holds as trustee merely for the wife's separate use. Such being the law, long and well settled, it will be seen at once that the testimony before the court, as presented to us in the bill of exceptions, established beyond any controversy at all, that the negro in question belonged to the husband, and was not settled to the sole and separate use of the wife. The possession proven was the legal possession of the husband, because the wife had no legal capacity to take or hold possession in her own right, and the will and testament relied upon proved the negro to have been given, in legal contemplation, expressly to the husband in his own right,

as it contains no expression which, even in the most remote degree, indicated that the bequest was intended by the testator for the sole and separate use of the wife.

Therefore, as the finding and judgment of the court below in favor of the claimant was not supported by any evidence at all, and was in the face of conclusive evidence to the contrary, the court erred in overruling the motion for a new trial, and therefore the judgment below must be reversed, and the cause remanded to be proceeded in.

PAUP ET AL. VS. DREW, AS GOVERNOR, &C.

The 28th section of the charter of the State Bank, which provided that the notes of the bank should be received in payment of debts due the State, having been repealed by act of 10th January, 1845, since the repeal, notes of the bank are not a legal tender in payment of a bond executed to the governor for a part of the seminary lands, even if the debt be regarded as due to the State in her own right.

The General Assembly had full power to pass the repealing act, as it is not a law impairing the obligation of contracts, as held in *Woodruff vs. Attorney General*, 3 *Eng. Rep.* 236, which case is approved.

Writ of Error to Pulaski Circuit Court.

This was an action of debt brought by Thomas S. Drew, as governor of the State of Arkansas, and successor of Archibald Yell, late governor, against John W. Paup, James Trigg, and Richard Pryor, and determined in the Pulaski circuit court, in December, 1847, before the Hon. WM. H. FEILD, judge.

The action was founded on five writings obligatory for $784 each, executed, by the defendants, on the 13th day of May, 1842, to Archibald Yell, governor of the State of Arkansas, or his successor in office, payable and negotiable at the bank of the State of Arkansas, in specie or its equivalent, in one, two, three, four

and five years from date, and bearing interest at ten per cent. per annum.

The defendants filed a plea of tender in Arkansas bank paper, after suit brought, in substance as follows:

The plea alleges that the bonds sued on were executed to the governor, by the defendants, on the day of their date, for the purchase money of six hundred and forty acres of the lands granted to the Territory, and confirmed to the State, by acts of Congress, for the support of a seminary of learning, sold by the governor of the State, under the act of 28th December, 1840, authorizing the governor to sell said lands, to defendant Paup. That the bonds sued on, and the moneys and interest thereby secured, belonged exclusively to the State, and constituted, in law and in fact, a debt due to her and to no other person, and that the governor was therein and in regard thereto a mere naked trustee and a mere nominal party to the suit.

That before the sale of said land to Paup, and before the execution of said bonds, *to wit:* on the 2d day of November, 1836, by an act of the General Assembly of the State of Arkansas, entitled "An act to incorporate the Bank of the State of Arkansas," approved on that day, the Bank of the State of Arkansas, a public corporation, was created, the said State being the sole stockholder therein, and was authorized to issue and emit such bank bills as are hereinafter mentioned, and to exercise banking powers and privileges, and it was among other things provided and enacted that the funds arising from the sale of said seminary lands should be deposited in the principal branch of said bank, and constitute a part of the capital thereof; and it was further expressly provided, enacted, and stipulated, and by said State expressly agreed and contracted, that all the bills and notes issued by said bank should be received in all payments of debts due to said State of Arkansas, which provision, enactment, stipulation and contract was in full force, in no wise repealed, annulled, or set aside, at the time and times of the issuance by said bank of all its bills and notes, and particularly the bills and notes hereinafter mentioned; and the same were issued on

the faith and credit thereof, and by means thereof obtained currency, and the said contract is in all respects binding, obligatory, and valid upon and against said State and said plaintiff, and cannot be repealed by said State, nor the obligation of said contract impaired under the constitution of the United States of America:

That, after the said bonds fell due, and after the commencement of this suit, *to wit:* on the 20th day of October, 1847, the defendants tendered and offered to pay to said plaintiff, and to said State, or to either of them, the sum of $6,050 in the notes and bills of said bank, payable in current money of the United States, and long before then due, with the further sum of ninety-five cents in specie, to receve which of the defendants the State and the plaintiff wholly refused; and which sum the plea alleged to be the full amount of principal and interest due upon said bonds, and made profert thereof in court.

The record shows that the defendants brought said money into court, and also offered to pay costs of the suit.

The plaintiff demurred to said plea, on the following grounds: 1st. The plea shows no legal tender: 2d. That any law authorizing the paper of said bank to be received in payment of said bonds was repealed long before said tender: 3d. The plea only shows an equitable ground of off-set, if any thing, and no legal ground of defence: 4th. That the proceeds of said bonds are part of a trust fund committed to the State by Congress for special purposes, over which the State has no power, except to collect and disburse the same in pursuance of the objects of the grant; and the State has no power to apply said funds to the payment of her ordinary liabilities, nor is the State bound to accept in payment of such bonds depreciated bank paper, even though she may be ultimately liable to redeem such paper: 5th. The bonds sued on never constituted any part of the capital of said bank, nor were the issues of said bank ever made receivable in payment of debts due the State in a merely fiduciary capacity: 6th. The plea does not show that said bank bills were in the hands of defendants, or tendered, when the same, if ever,

were receivable in payment of said bonds: 7th. That if the charter of said bank created any obligation on the part of the State to receive said bank bills in payment of such debts, the defendants waived all right thereunder by expressly stipulating in said bonds to pay in specie or its equivalent: 8th. That in a law court the defendants have no right to go into or show upon what consideration said bonds were given, &c., &c.

The court overruled the demurrer, and the defendants permitted final judgment to go thereon.

By a bill of exceptions taken by defendants, it appears that the bank paper tendered by them was worth but thirty cents on the dollar.

PIKE & BALDWIN, for plaintiffs in error.

E. CUMMINS, *Land Attorney*, contra.

JOHNSON, C. J. The question involved relates to the sufficiency of the plaintiffs' plea. The argument is that the governor being the mere naked trustee of the State, the moneys, though sued for in his name, are in reality due to the State in her own right. We deem it wholly immaterial for the purposes of this case, whether the governor is the real or nominal plaintiff. Under either state of the case the plea interposed by the plaintiffs could not avail them as a legal defence to the action. We will concede for the sake of the argument that the State is the party really and beneficially interested in the subject matter of this suit, and then see how the defence set up accords with the law. Upon the assumption that the State is the party really interested in this suit, which is the strongest grounds that could be taken for the plaintiffs, we conceive that the whole question is conclusively settled by the decision of this court in the case of *William E. Woodruff, Ex parte*, pronounced at the last July Term. That was an application for a mandamus by Woodruff to compel the Attorney General to receive the notes of the State Bank in payment of a debt due the State. The debt demanded in that case

accrued after the passage of the State Bank charter, and before its repeal by the act of 1845. It was insisted that the liability having accrued after the passage of the charter and before its repeal, it could be discharged in the bills and notes of that institution, and that the act of 1845 is a law impairing the obligation of contracts and consequently void.(*a*) This court, in that case, said: "It is objected that the act of 1845 is a law impairing the obligation of contracts, and that, therefore, it is repugnant to the constitution of the United States and void. This brings us to the only question really involved, and that is whether the act of 1845 so operated as to impair any obligation imposed by the contract in this case. It will be conceded that the entire debt accrued prior to the passage of the repealing act, and that the petitioner had an undoubted right to discharge it at any time before the repeal in bills or notes of the State Bank, we think, cannot, for a moment, admit of a doubt. But did the act of 1836 so incorporate itself into the contract as to become a part of the contract, and to fix and vest a right in the petitioner to discharge it in the kind of funds specified in that act? If such was the legal effect and operation of it, then it is clear that the doctrine contended for is not only sound in principle, but that it is conclusive upon the question, and the necessary result is that the legislature possessed no power to divest that right by a repeal of the act. We think that a single observation, touching the consequences which might very naturally flow from this mode of reasoning, will be fully sufficient to expose its uttter fallacy. The act by which the State Bank was created was nothing more than a grant of power for certain purposes therein specified, which was exclusively under the control of the legislature, and consequently subject to be repealed at any time whenever in the wisdom of that body it should seem expedient for the good of the country. Suppose that, instead of merely modifying the charter and placing the bank in liquida-

(*a*) NOTE. The 28th section of the bank charter provided that the bills and notes of the bank should be received in payment of all debts due the State. The act of 10th January, 1845, repealed that section of the charter.—*Reporter.*

tion, they had conceived a total repeal better calculated to subserve the interests of the community. Upon the passage of the act abolishing the charter, that moment would the entire circulation of that institution have become wholly valueless, and, as a necessary consequence, it would in effect have operated as an extinguishment of the debt. The act relied upon by which the debtors of the State were permitted to make payment of the bills or notes of the State Bank was a mere gratuity, and, of course, liable to be revoked and withdrawn at any time when it should suit the purposes of the power that conferred it. If this position be correct, then it clearly results that the privilege of paying debts due the State in bills and notes of the bank was only conferred upon the implied condition that such debt should be paid before the repeal of the law, but, if delayed till after that event, in the absence of any saving in the repealing act, they could be discharged alone in the constitutional currency of the country." This, we believe, to be the sound and legitimate construction of the statutes, and as such fully approve and adopt it in this case. If the State would not be legally bound to receive the bills of the bank in case she is the party really and legitimately interested in this suit, for a much stronger reason would she not be if she is not entitled to the moneys in her own right. Under this view of the law, we do not conceive it necessary, or even important, to determine the attitude of the governor in relation to the subject matter of the suit, as in no aspect of the case could the defence set up by the plaintiffs be admitted.

We are, therefore, clearly of opinion that there is no error in the judgment of the circuit court in sustaining the demurrer, and that the same ought to be affirmed. The judgment of the circuit court is in all things affirmed.

NOTE. The case of *Trigg et al. vs. Drew, as Governor, &c.*, was similar to this, and was affirmed under the decision in this case. Both cases have been taken to the Supreme Court of the United States by writs of error, and are now pending there.—*Reporter.*

HUGHES VS. STINNETT'S ADRS.

Plaintiff applied to the clerk for a writ of attachment, and made the affidavit required by statute previous to issuing the writ; the clerk, instead of filing the affidavit, wrote out the writ on the reverse side of the half-sheet on which the affidavit was written, and handed it to the sheriff, who kept it until he executed the writ, and made his return. HELD that the validity of the affidavit was not thereby impaired, and that the failure of the clerk to retain it in his office and mark it filed, furnished no grounds for dissolving the attachment.

HELD, further, that on motion of the plaintiff, at the trial, the court properly ordered it filed *nunc pro tunc.*

In such affidavit it is not necessary for the affiant to swear, in terms, that his demand exceeds one hundred dollars: it is sufficient if the sum sworn to exceeds that amount.

Appeal from the Yell Circuit Court.

Debt, by attachment, brought by Baird & Jones, as administrators of Stinnett, against Hughes, and determined in the Yell Circuit Court, in September, 1847, before the Hon. W. W. FLOYD, judge.

The facts are stated in the opinion of the court.

E. CUMMINS, for appellant.

CONWAY B, J. This was a suit by attachment. The writ was duly executed, and the defendant below appeared and *pled* four pleas in abatement. Plaintiff demurred to them all, and the demurrer was sustained. Defendant then *pled* payment, and issue was joined on the plea. He then filed his exceptions to the affidavit, and moved the court to dissolve the attachment, and restore the property attached. The court overruled the exceptions and the motion. Defendant excepted, and declining farther defence rested on his exceptions. Final judgment was rendered against him, and he appealed.

The principal objection urged to the affidavit is, that it was not filed before the writ of attachment issued. It appears, from

the testimony of the clerk on the motion of the plaintiff made at the trial for the affidavit to be filed *nunc pro tunc*, that when the writ of attachment was applied for, the affidavit was made before the clerk, and that the clerk, instead of filing it or marking it filed, wrote out the writ of attachment on the reverse side of the half-sheet on which the affidavit was written, and handed it to the sheriff, who kept it until he executed the writ and made his return.

We do not conceive that the validity of the affidavit was at all impaired by the clerk's omission to retain it in his office and mark it filed, though it was his duty to have done both. Nor was it improper in the court at the trial to order the affidavit to be filed *nunc pro tunc*. It was competent for it to make such order at any time. The plaintiff complied with the requisites of the law when he made the affidavit and left it with the clerk to be filed prior to the issuance of the writ.

It is also objected that the affidavit is not sufficiently formal. It is true it contains no allegation in words that the defendant was indebted to plaintiff in a sum "exceeding one hundred dollars." But we do not think this material. It is not necessary thus literally to allege the fact. It is sufficient if the indebtedness stated in the affidavit exceeds one hundred dollars.

The judgment is affirmed.

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ZACHARY VS. PACE.

In trover, proof of demand and non-compliance is *prima facia* evidence of conversion: But where the plaintiff demanded the goods of defendant, and he answered that he had no claim to them himself, but would not give them up until he ascertained to whom they belonged, and the proof showed that the property was in dispute, and defendant had reasonable grounds to doubt the title of plaintiff—HELD that the re-

fusal to surrender the goods under such circumstances was not sufficient evidence of conversion.

In trover it is not necessary for plaintiff to prove that the defendant was in possession of the goods at the commencement of the suit, for parting with possession is often evidence of conversion.

Abstract instructions to the jury are improper.

Where the court erroneously instructed the jury as to the law, but the instructions could not have influenced the verdict, a new trial will not be granted on that account.

Writ of Error to the Johnson Circuit Court.

TROVER, brought by Bartlett Zachary, Jr., against Alfred E. Pace, determined in the Johnson Circuit Court, in March, 1847, before SNEED, judge.

The declaration charged the defendant with the trover and conversion of certain writings obligatory, promisory notes, and receipts, the property of plaintiff. The cause was tried on a plea of not guilty, and verdict for defendant. Plaintiff moved for a new trial on the grounds that the verdict was contrary to evidence, and that the court instructed the jury erroneously; the court overruled the motion, and plaintiff excepted. From the plaintiff's bill of exceptions it appears:

John Rogers, a witness on the trial for the plaintiff, testified that he was the executor of Bartlett Zachary, Sr. That the plaintiff handed the instruments named in the declaration to John Zachary to give to Lemuel Wallace, who, together with E. W. Courtney and F. H. Arbough, had been selected as arbitrators to decide to whom they rightfully belonged, the witness claiming them as such executor, and plaintiff contending that they belonged to him. That said John Zachary handed all of said papers to said Wallace, and before arbitration could be had Wallace died, and that the next time he saw them they were in the hands of defendant Pace. Witness did not know who was the owner of said instruments: the amount due thereon was about $700.

James M. Hamilton testified that on the morning of old man Bartlett's sale, the plaintiff exhibited to him the instruments in question.

E. W. Courtney testified that, at a certain time in the lifetime of Bartlett Zachary, Sr., one Wicks, a constable, executed a receipt to said Zachary for a note, and, on handing him the receipt, he said it was not right: that the note belonged to plaintiff, and Wicks then drew a receipt for the note to plaintiff, which receipt was one of the instruments named in the declaration. On the Sunday before the old man died, witness made a schedule for him of some notes and papers, and he believed part of the instruments named in the declaration were the same, but could not say which, as he scheduled them from the backs, and did not read them.

Oglevie testified that, on the Sunday before Bartlett Zachary, Sr. died, he sent the plaintiff and one White to his (the old man's) house for the papers in controversy: the old man enquired several times if they had come? When they returned plaintiff wished the papers to be registered, or a memorandum made of them, so that if the old man died there should not be any "persecution" against him for keeping them. The notes were accordingly numbered, and a memorandum made by Dozier. Witness believed that the old man did not know what he was doing, he was in so much pain. He believed the notes in question were the same: two of them he knew to be, for they were on him. He saw the plaintiff have the notes afterwards, and he told witness to "keep it dark," and say nothing about it. Old man died on Wednesday after the Sunday spoken of.

William Adams testified that one of the notes in controversy was executed by him to Bartlett Zachary, Sr.

Another witness testified that one of the notes was executed by him to the old man.

W. S. Swigart and Marion B. Street testified that, in January (then) last, they heard plaintiff demand of defendant the instruments named in the declaration, and defendant said that he had no claim to said papers, and would not give them up until he ascertained who they belonged to. This is the substance of all the evidence contained in the bill of exceptions.

SNEED, J., instructed the jury as follows: "This is an action of

trover and conversion brought by the plaintiff against the defendant for the recovery of some evidences of debt. It requires several things on the part of the plaintiff before he can recover: 1st. It is necessary that the plaintiff prove property in himself: 2d. That the property was in the possession of the defendant: 3d. A demand and refusal is necessary, or that a conversion has been made by the defendant. If you find all the foregoing requisites proven, then you will next ascertain the value of the notes. If the notes were placed in the hands of Wallace, who is represented by Pace, the defendant, as Wallace's administrator, by the plaintiff Zachary, and the executor (Rogers) of B. Zachary, deceased—if it was done jointly for the purpose of Wallace retaining the same until the title could be settled, then Wallace, nor his representative, would be bound to re-deliver until they were demanded by the parties who placed them in his hands.

"If plaintiff had the possession of the papers, this is enough against one who has no better title; but if it turns out that the notes are the property of Rogers, and not the property of plaintiff, you will find for the defendant. It is not sufficient to prove a conversion that the defendant wished to know to whom the property or choses in action belonged: a refusal will not be sufficient when it is upon condition. If the plaintiff demands the goods, and the defendant answers that he has no claim to the goods, but wishes to be satisfied whose goods they are before he gives them up, it is not a sufficient conversion."

LINTON & BATSON, for plaintiff in error.

JOHNSON, C. J. The correctness of the decision of the circuit court in overruling the motion for a new trial is the question to be determined. It was proved upon the trial that the plaintiff demanded the property described in the declaration before the institution of his suit. Upon the demand being made the defendant did not expressly and positively refuse to deliver the property to the plaintiff, but remarked that he had no claim to

it, yet he would not give it up until he ascertained to whom it belonged. This is believed to be equivalent to saying that he made no pretence of claim to the property himself, and that he would deliver it to the plaintiff in case he could become satisfied he was entitled to it. If this is the legal import of his answer, then it is clear that he did not make a positive, but a qualified, refusal. The first point to be adjudicated, therefore, is as to the effect of such a refusal in furnishing evidence of a conversion. It is laid down in 1st Chitty's Pleadings, at p. 155, that "a demand and a non-compliance are prima facia evidence of a conversion, and will induce a jury to find it, unless the defendant adduce evidence to negative the presumption, as that he being a carrier, &c., lost the goods by negligence, &c., or that he has reasonable grounds for doubting the plaintiff's right, and offered to deliver them to the right owner." A reference is there made to 3 *Camp.* 215, and 2 *Bulst.* 310. The case referred to in 3 *Campbell* is *Green vs. Dunn.* It was trover for timber, which the defendant found on his premises, and which had been deposited there by the permission of the former occupier. The plaintiff, to whom the timber belonged, having demanded it of the defendant, the latter said: "If you will bring any one to prove it is your property, I will give it you, and not else." Lord ELLENBOROUGH, in delivering the opinion of the court, said: "This is a qualified refusal, and no evidence of conversion." It will be conceded that it is not said, in so many words, that the defendant must have reasonable grounds to doubt the plaintiff's right, yet the rule is most clearly subject to that restriction, and the facts of that case were fully sufficient to raise such doubts. The principle being thus ascertained, it now remains to be seen whether the facts developed here are of such a character as to bring this case within its operation. It appears, from the testimony, that there was a contest going on in respect to the right of property in the instruments described in the declaration, and that three persons had been selected as arbitrators to determine the matter, that the notes and receipts had all been delivered to Wallace, one of the arbitrators, by the plaintiff, for the purpose

of being acted upon; that Wallace died before the arbitration was had, and that they fell into the hands of Pace, the defendant. They were claimed by John Rogers, as the executor of Bartlett Zachary, and by the plaintiff in his own right. It is not shown by the testimony how the defendant became possessed of the property, and all that is said in respect to him is that he did not pretend to set up any claim, but refused to deliver it up until he could ascertain to whom it belonged. We consider the facts of the case fully sufficient to raise a reasonable and well-grounded doubt in the mind of the defendant in regard to the right of the plaintiff, and that therefore his refusal, qualified as it was, can furnish no evidence of a conversion. The conversion, being of the very gist of the action and the only injury of which the plaintiff complains, and there being no sufficient evidence of such conversion, the plaintiff necessarily failed in his proof, and was not entitled to recover.

After the testimony was closed the court gave the jury sundry instructions. The second instruction is, that it was necessary for the plaintiff to prove that the property was in the possession of the defendant. If this instruction pointed to the time of the commencement of the suit, it was clearly wrong, as the suit is not for the thing itself, but for damages commensurate with its value, and in many cases the parting with the possession is the very fact upon which the plaintiff relies to establish a conversion.

The court also instructed the jury that if the notes were placed in the hands of Wallace, and that they fell into the hands of Pace as his administrator, and that they were placed there jointly by the plaintiff, Zachary, and Rogers, the executor of B. Zachary, deceased, in order that Wallace might retain them until the title could be settled, that neither Wallace, nor his representatives, would be bound to re-deliver them until they were demanded by the parties by whom they were so delivered. This the court had no authority to give, as it simply involved an abstract principle of law. There was no evidence tending to prove

that Pace was the administrator of Wallace, or that he received the notes and papers by virtue of any such authority.

The last instruction is, that it is not sufficient to prove a conversion, that the defendant wished to know to whom the property belonged, and that a refusal is not sufficient when it is made upon a condition. That if a plaintiff demands goods, and the defendant answers that he has no claim to them, but wishes to be satisfied to whom they belong before he gives them up, it is not sufficient evidence of a conversion. The principle enunciated by this instruction was incidentally discussed whilst commenting upon the force and effect of the testimony. It is believed that it is not sufficient of itself to re-but the presumption of a conversion that the defendant made a conditional, or qualified refusal, but that the reason of the law requires also that the case should develop such a state of facts as to afford reasonable ground to doubt the plaintiff's title. The instruction is, therefore, erroneous in not going to the extent indicated. If a mere qualified refusal were admitted as conclusive evidence to re-but the presumption of a conversion, and no facts or circumstances were required upon which to predicate the defendant's doubts, it would place it in his power in every case to defeat the action unless the plaintiff should be prepared to prove an actual conversion.

The court also gave other instructions: all of which are believed to be substantially correct. We are, therefore, of opinion that, although the court erred in point of law, in giving some of the instructions, yet, as those instructions could not have had any influence upon the verdict of the jury, they ought to be wholly disregarded, and the judgment affirmed.

The judgment of the court below is affirmed.

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EDISON ET AL. VS. FRAZIER.

A promissory note payable to bearer may be assigned by delivery so as to vest the legal title in the assignee.

The term "assignment" is frequently used in the law books to express the transfer by delivery, though assignments are generally made by endorsement.

Where a party declares upon a note payable to bearer as assignee by indorsement, he must make profert of the indorsement, but where he declares as assignee by delivery, of course no profert can be made.

The words, in a declaration, "assigned over and delivered," held to import an assignment by delivery.

Appeal from the Union Circuit Court.

Assumpsit by Thomas Frazier against Rowland Edison and Hamilton G. Quarles, determined in the Union circuit court, in October, 1847, before Hon. GEORGE CONWAY, then one of the circuit judges.

The facts are stated in the opinion of this court.

B. F. HEMPSTEAD, for plaintiff. In the case of *Alston & Patrick vs. Whiting & Slark*, 1 *Eng*. 402, the demurrer raised the same question which the record in this case presents, and it is submitted that upon the authority in that case the decision of the circuit court in overruling the demurrer must be reversed.

The assignment was not by delivery merely, for the declaration alleges that the obligation "was assigned over and delivered," and, this being so, it is manifest that profert of the assignment was requisite. If the declaration had alleged that the obligation was assigned by delivery, the record might have presented a different question.

S. H. HEMPSTEAD, contra.

SCOTT, J. The defendant in error filed his declaration in assumpsit upon a promisory note payable to Peter Goodwin, or

bearer, and in making out his title to sue alleges that the said Goodwin "assigned over and delivered the said promisory note to the said plaintiff, who then and thereby became, and was, and still is, the lawful bearer thereof and entitled to receive and demand payment of said sum of money therein specified," &c. To this declaration the plaintiffs in error filed their demurrer, which the court below overruled, and, the plaintiffs in error saying nothing further, but resting on their demurrer so overruled, final judgment was rendered against them, which they seek in this court to reverse. And to this end they insist that there should have been *profert* of the assignment declared on; and to sustain this position they cite various decisions of this court on the subject of making profert of the assignment of bonds, bills and promisory notes.

All these decisions were made in cases where the assignment had been made by endorsement, and proceed upon the declared ground "that our statute has elevated (these) assignments to the same dignity, as instruments of evidence, as the originals themselves, and that they can be impeached only in the same manner." See *Merchaxt vs. Slater*, 1 *Eng.* 529. And if the assignment of a promisory note, payable to bearer, could be made in no other way than in writing, these authorities would be conclusive in favor of the objection to the declaration, but such is not the case. The definition of an assignment that it "is the setting over, or transfering, the interest a man hath in any thing to another," (see *Jacob, Law Dictionary, Edition of* 1773,) being sufficiently broad to include the case of the transfer of a note payable to bearer by delivery merely.

The supposition that the term "assignment" has never been used to express the transfer by delivery of a promissory note, payable to bearer, is an entire mistake. The case of *Jackson vs. Heath*, 1 *Bai. Rep.* 355, and that of *Robinson vs. Crenshaw*, 3 *Steward & Porter Rep.*, and the cases there cited and commented upon, show that that term has been frequently used in this sense by Chief Justice MARSHALL, and other jurists. It is true that assignments are very generally made in writing, and for the

most part by indorsement, but they are by no means exclusively so made. For, in the case of promissory notes, payable to bearer, their assignment is most usually made by delivery merely without any written evidence of the assignment: and when so made (by delivery merely) the legal title in the bearer is as complete for all purposes as if there had been superadded to this assignment by delivery an assignment by indorsement. And in a case where a party assignee held under both, it would be competent for him to prosecute his suit under either at his own election. But should he, in such case, declare upon the written assignment, he would necessarily have to make profert as declared by the several decisions of this court on this subject; but, on the contrary, should he declare only upon the assignment by delivery, the obligation to make profert would not be upon him.

In the case before us had the plaintiff below used the phrase "assigned over by delivery," instead of that of "assigned over and delivered," which he did use, doubtless no question would have arisen. But, inasmuch as he has not used the word "indorsement," or any other word, in connection with the word assignment that indicates, in the slightest degree, that the assignment declared on was in writing, and, moreover, does show distinctly that the note declared on was payable to bearer, and also that the effect of the assignment declared on was to make the plaintiff below the "lawful bearer," it becomes manifest that he predicated his title to a recovery upon an assignment by delivery, which imposed no obligation upon him to make profert of such assignment. The court below, therefore, did not err in overruling the demurrer, and its judgment must, in all things, be affirmed.

WHITE EX PARTE.

By the 16th section of the Declaration of Rights all persons are entitled to bail, except in capital offences where the proof is evident or the presumption great.

An indictment in a capital case does not raise such presumption of defendant's guilt as absolutely to preclude the power of this court to go behind the indictment, and investigate the merits of the charge with the view of ascertaining whether the party is entitled to bail, but it raises such presumption against defendant as to deprive him of the privilege of habeas corpus as a matter of right; and to entitle him to the writ, he must state such facts in his petition, under oath, as will rebut the presumption raised against him by the indictment.

In such case a general allegation of his innocence is not sufficient to entitle him to the writ.

Application for Habeas Corpus.

FOWLER and RINGO & TRAPNALL, for the petitioner. At common law all criminal offences were bailable. The first limitation was in the statute of Westminister, 3 Edward, 1 ch. Other statutes were subsequently passed, restricting the right of justices of the peace to let to bail. 4 *Black.* 299, 300. *Petersdorf on Criminal Proceedings*, 10 *Law Library*, 270. These acts did not apply to the court of King's Bench, and this court, in taking bail in cases of treason, murder, &c., was only limited by its discretion. *Com. Dig.*, *Bail*, *F.* *Rex vs. Remnoni*, 2 *Tenn. R.* 169. *Rex vs. Marks*, 3 *East.* 157. *Elderton's case*, 2 *Ld. Raym.* 978. *Hort.* 500. *Skin.* 683. *Cowp.* 333. *Rex vs. Baltimore*, 1 *Black. R.* 648.

If there be a reasonable doubt as to the truth of the accusation, bail will be granted by the King's Bench in all cases. *Petersdorf on Bail*, 270.

After an indictment for murder, &c., the English court, in many cases, refused to carry the examination behind the indictment, for this reason alone, that the evidence, upon which the grand jury found the bill, was by law not to be disclosed, and the court could not know upon what proof they acted. *Rex vs. Moheen*, 1 *Salk.* 104. *Goodwin's case*, 1 *Wheeler's Crim. Cases*,

446. *Lester's case*, 1 *Salk.* 103. *Rex vs. Marks*, 3 *East.* 160, 163. *Taylor's case*, 5 *Cow.* 39.

In New York it is decided that the right to bail, in all cases, is regulated alone by the discretion of the court. 1 *Wheeler's Crim. Cases*, 436. But a person indicted will not be bailed unless something is presented, in opposition to the charge, to raise a presumption of innocence. *Idem*, 437.

If it stands indifferent whether a party charged with felony is guilty or not, he ought to be bailed. *Idem*, 445. *Hawkins*, 6, 2, 40, 50. And even in capital cases, where there is any circumstance to induce the court to suppose he may be innocent, they will bail. *Idem*, 445, 446, 447.

In *The State vs. Hill*, 1 *S. C. Const. Rep.* 244, the court say, expressly, they have a right to go into the case, although an indictment was found, to examine if the defendant was entitled to bail. *Barney's case*, 5 *Mod.* 323. *Farrington's case*, 2 *John.* 222. The same doctrine is affirmed by the supreme court of North Carolina in the *State vs. Ward*, 2 *Hawks*, 447, althuogh he could not be bailed after conviction. *Foley ad. vs. People*, 1 *Breese*, 32.

The reason for the rule in England does not exist here, because the grand jury are required to preserve minutes of the evidence. *Rev. Stat.*, 295.

The 16th section of the 2d article of our constitution declares that all persons shall be bailable, by sufficient securities, unless in capital cases, where the proof is evident or the presumption great. If the framers of the constitution intended to say that the indictment should raise a presumption great against the prisoner, they would have done so, and not used ambiguous terms. We contend that it is the constitutional right of every citizen, even under an indictment for murder, to have the merits of his case examined upon a habeas corpus to enable the court to determine if the proof of guilt be evident, or the presumption great. Under the act of 1838 there are made two degrees of murder, one of which only is capital: and on such an indictment the accused may be found guilty of manslaughter: the minutes of the examining court and grand jury are within the reach of

the court, so that the indictment, in no event, could, of itself, raise a presumption against the prisoner that he was guilty of a capital offence.

At common law the court of King's Bench had the discretionary power to admit prisoners to bail in all cases, including murder and high treason, and as well before indictment found as after. 1 *Chit. Cr. Law*, 98. 1 *Bac. Abr.* 223, *et seq.* 4 *Black. Com.* 298, 299. 3 *Petersdorf's C. L.*, 302, 303.

WATKINS, Att. Gen'l, *contra.*

JOHNSON, C. J. This is an application made by Oscar L. White for a writ of habeas corpus. The applicant shows in his petition that he stands indicted, by a grand jury of the county of Saline, in this State, as an accessory before the fact to the murder of Henry Carr by John B. Hester, and that he is now held in custody in the jail of Pulaski county under said indictment. After making this statement of facts he then prays for the writ of habeas corpus, and that he may be admitted to bail, and then concludes with a general allegation of his innocence, which he verified by his affidavit.

This application involves but one single question for our consideration and decision. The question is, whether we have the power, under our constitution and laws, to go behind an indictment, for a capital offence, to investigate the merits of the case with the view of letting the party indicted to bail. The statute declares that an accessory before the fact shall be deemed in law a principal, and that he shall be punished accordingly. There can be no doubt, therefore, but that the petitioner stands indicted for a capital offence. The 16th section of the Declaration of Rights provides, "that all prisoners shall be bailable by sufficient securities, unless in capital offences, where the proof is evident or the presumption great." It is contended by the prisoner's counsel that the provision, being general in its terms, embraces all cases as well after as before indictment. We are willing to concede the correctness of the construction contended

for, yet we do not think that it follows, by any means, that the writ can be claimed as a matter of right after an indictment for a capital offence. The petitioner's counsel have referred to numerous ancient authorities upon the subject, and argue that because the King's Bench in England have the power to bail for any crime whatever, therefore the same power is incident to this court. These authorities we do not consider as applicable to the case before us, as this matter is not left in doubt, but, on the contrary, is fully settled and forever put to rest by the express language of our bill of rights. It has expressly and emphatically prohibited the granting of bail to persons charged with capital offences where the proof is evident or the presumption great.

It is contended by the prisoner's counsel that the indictment raises no presumption against the party indicted, and that therefore he is entitled to the writ as a matter of right, and that where he has complied with the requisitions of the habeas corpus act this court has no option in the matter. The habeas corpus act was designed to apply exclusively to cases before indictment found, or to such cases after indictment as are expressly made bailable by the constitution and laws of the land. It is true, as a general rule, that an indictment raises no presumption against the indictee as to his guilt of the crime charged against him; but this does not prove that it does not raise presumptions for all the purposes of his capture and custody, and that for such purposes it is perfectly conclusive till rebutted. We are inclined to think that, under our system of laws, such is the legal effect of an indictment for a capital crime. This doctrine is clearly deducible from the case of *The State vs. Hill*, 1 *vol. S. Carolina C. R. p.* 242, and *Ex parte, Taylor*, 5 *Cow. R. p.* 50. Chief Justice SAVAGE, in the case of *Ex parte, Taylor*, said: "The writ was allowed in this case for a defect apparent upon the face of the warrant. No affidavit was therefore necessary on the part of the prisoner stating the circumstances which he might consider as entitling him to relief." Here is a clear recognition of the necessity of stating some facts or circumstances, which, if found upon examination to exist, would entitle the party to bail. But

the prisoner insists that he has made sufficient showing in this case to entitle him to the writ. This we are not willing to admit. He has made a general allegation of his innocence, which is nothing more than a mere conclusion of law, and not such a showing of facts or circumstances as comes within the principle laid down by Chief Justice SAVAGE, and which we are disposed to recognize as entitling him to relief. The law requires the party to make an affidavit of merits to warrant this court in going behind the indictment, and the affidavit must state such particular facts that, if proven to be false, the affiant could be indicted for perjury: otherwise, the requiring of an affidavit would be a merely idle form.

As the affidavit in this case is a general one of innocence, and does not set out such facts as are required by law, the writ must be denied.

SCOTT, J. While I fully concur in the conclusion arrived at in the opinion of the court, just delivered by the Chief Justice, I do not entirely concur in all the views expressed.

PORTER VS. STATE, USE OF BROWN.

In a declaratiou upon an administrator's bond, it is assigned as a breach thereof that plaintiff had obtained judgment in the circuit court against the administrator, that he had assets in his hands, and, though requested, neglected and refused to pay plaintiff's judgment. Breach held insufficient.

To charge the administrator, or his securities, upon his bond in such case, it should have been further alleged that the plaintiff's judgment was filed, allowed and classed in the Probate Court against the estate, that the court had ordered the payment thereof, on settlement with the administrator and ascertaining assets in his hands, and that he had neglected or refused to do so in obedience to the orders of the Probate Court, as held in *Outlaw et al. vs. Yell, Governor*, 5 *Ark. R.* 468.

In an action upon the bond of an administrator by a creditor (under *sec.* 170, *chap.* 4, *Digest*) to subject the administrator, and his securities, to damages for his failure to

account and settle according to the conditions of his bond, a general breach, alleging a non-performance in the language used in the condition of the bond, is sufficient.

In such an action it is proper that the character in which the plaintiff sues should appear in the commencement of the declaration, though it is sufficient if it appear in the conclusion.

As to the evidence necessary to sustain such action.

Appeal from the Phillips Circuit Court.

DEBT, in the name of the State, for the use of John Brown, against Clement Brown, Benjamin A. Porter, and Sidney P. Craig, determined in the Phillips circuit court, in May, 1847. before the Hon. WM. C. SCOTT, judge. The action was founded on an administrator's bond, executed by Clement Brown, as administrator of Jacob Hackler, principal, and Porter and Craig, as his securities, bearing date 9th August, 1842. The declaration, after setting out the bond and condition, assigns three breaches thereof, in substance as follows:

1st. That after the grant of letters of administration to defendant, Brown, upon the estate of Hackler, by the probate court of Phillips county, there came to his hands, as such administrator, $223 37. That John Brown, for whose use this suit was brought, having a claim against said estate for $466, presented the same, duly probated, to said administrator for allowance, and he rejected it; that afterwards, at the October term of the probate court of said county, he presented said claim to said court for allowance and classification against said estate, the court refused to allow it, and he excepted, and appealed to the circuit court of said county, and obtained judgment in the circuit court upon said claim for $360, which judgment remained in full force, &c.; and that although assets to the amount first above named had come to the hands of said administrator; and although payment of the said judgment, or so much thereof as said John Brown was entitled to, taking into consideration other claims classed and allowed against said estate, had been frequently demanded of said administrator, he had wholly neglected to pay the same or any part thereof.

2d. That said Clement Brown has not, since the date of said

writing obligatory, and the grant of his letters of administration on said estate of said Jacob Hackler, deceased, made, or caused to be made, just and true accounts of his administration of said estate in pursuance of law and the orders of said court of probate of Phillips county.

3d. That said Clement Brown has not, since the date of said writing obligatory, and the granting of letters of administration to him on the estate of said Jacob Hackler, made due and proper settlement of said estate from time to time according to the law, or the lawful order, sentence, or decree, of the probate court of said county; by means of which said premises the said John Brown, and the other creditors of the estate of said Jacob Hackler, have sustained damages to a large amount, *to wit:* to the amount of $300; by reason of which said breaches the said writing obligatory became forfeited, and, according to the statute, &c., an action has accrued to said plaintiff, &c., &c.

The action was discontinued as to defendants Brown and Craig for want of service of process upon them. Defendant Porter demurred to the declaration, the court sustained the demurrer as to the first breach, and overruled it as to the second and third. Porter rested upon his demurrer, judgment was taken against him, writ of inquiry awarded, and the jury assessed the plaintiff's damages at $170 19. Porter moved for a new trial, which was refused, and he excepted, and put the evidence on record. It appears, from his bill of exceptions, that, on the inquest of damages, plaintiff proved, by the records of the probate court of said county, that at the term of said probate court next before the October term, 1843, Clement Brown, as administrator of Hackler, filed his settlement account, in which he charged himself with amount of sales, $223 37, and credited himself with items amounting to $53 18; that notice of the filing of said account for settlement was duly published, and that, at the October term of said probate court, 1843, said account was examined by the court, confirmed, and ordered to be spread upon the record. Plaintiff also proved by the clerk of said probate court, that said settlement account was the only one ever filed

by said administrator. This was all the evidence introduced on the inquest.

W. H. & A. H. RINGO, for appellant.

E. CUMMINS, contra.

JOHNSON, C. J. This was an action instituted in the Phillips circuit court by the State, at the instance, and for the use, of John Brown, against Clement Brown, as the administrator of Jacob Hackler, deceased, and Benjamin A. Porter and Sidney P. Craig, as his securities. The first count charges, by way of a breach of the bond, that the plaintiff had recovered against Brown, as such administrator, in the circuit court of Phillips, the sum of three hundred and sixty dollars, and that, though said administrator had received property belonging to said estate of the value of two hundred and thirty-three dollars and thirty-seven and one-fourth cents, and though often requested to pay the sum so received, he had and still refused to do so. John Brown, the real plaintiff, seeks in this count to enforce a demand which he claims in his own individual right and not as the representative of all persons interested in the estate. For the purposes of this count we consider the exposition of the law as given by this court in the case of *Outlaw et al. vs. Yell, Governor*, 5 *A. R.*, 472, 473, as fully sufficient: "The judgment in the circuit court ascertained and established the claim, and the probate court ascertains the amount of the fund and fixes the order of its appropriation in satisfaction of such claim. We are not here required to decide whether, under any circumstances, the circuit court would be permitted to execute its own judgments in such cases, as this question is not raised by the record. We only intend to say that no action can be maintained upon the bond for the non-payment of the judgment of the circuit court without the judicial ascertainment in the probate court of the sufficiency of the assets and their liability in satisfaction of the debt." By sections from 121 to 125, inclusive, page 87, *Rev.*

Stat., the probate court is authorized and required to make settlement with the administrator, ascertaining the amount of debts legally exhibited against the estate, and the amount of assets in his hands for their satisfaction, to make an appropriation of them to the debts, and order the administrator to pay them in ten days. This seems to be necessary to fix his liability to pay the debts. The order of the court for that purpose makes it a duty of the administrator, for a breach of which an action may be maintained on his bond, under section 171. The first act which seems to fix his liability, is the refusal to pay in obedience to the order of the court. As there are facts necessary to make the administrator personally liable, they must be alleged and established before the securities can be reached. This we conceive to be a clear deduction from the several provisions of the statute upon that subject. If this interpretation of the administration law be sound and sensible, and that it is we do not entertain a single doubt, it is then manifest that the first count is palpably defective, and that it does not exhibit even the semblance of a cause of action.

The second and third counts seem to have been predicated upon the one hundred and seventy-first sec. of the fourth chap. of Rev. Stat. This section provides that "the bond of any executor or administrator may be sued on at the instance of any legatee, distributee, creditor, or other person interested, in the name of the State, to the use of such legatee, distributee, creditor, or other person interested, for any mismanagement, waste, or other breach of the condition of such bond, and the party to whose use suit is brought shall have judgment against the executor or administrator, and his securities, for the whole value of the estate mismanaged, or wasted, with costs of suit; and the amount so recovered shall be distributed by the court of probate in the same manner as if the same had been accounted for by the executor or administrator." These two latter counts do not seek to subject the administrator, and his securities, to the payment of any specific sum, which it is alleged has been recovered against him by the plaintiff, but simply charge him with a neg-

lect of duty, and seek to fix their liability for such damages as all persons in the estate may have sustained. The point to be determined here is as to the sufficiency of the breaches assigned by these two counts.

The breaches are in general terms: First, that the administrator had not made, or caused to be made, just and true accounts of his administration; and, secondly, that he had not made due and proper settlements thereof from time to time, according to law, or the lawful order, sentence, or decree, of the probate court of Phillips county, and then concludes to his own damage, and also to the damage of the other creditors of the estate of the said Jacob Hackler. We think that where a party merely seeks to subject the administrator, and his securities, to damages consequent upon his failure to account and settle according to the conditions of his bond, that it is all-sufficient to charge him in the language used by the law creating the obligation. The defendant cannot complain that the particular failure is not specifically set out and the amount of damage sustained is not directly and expressly charged, as he has nothing to do until his liability is fully made out and the damage which has accrued is clearly established by proof. In strictness the statute would require, that the party at whose instance suit is instituted, in case the law is put in motion by either of the beneficiaries specified in the act for the benefit of all, that the particular character in which he presents himself should be expressly set forth in the commencement of the declaration. It does not appear in this case at whose instance the State has instituted her suit, until we have reached the conclusion of the declaration: there it is that he represents himself as a creditor of the estate, and though perhaps substantially sufficient for the purposes of the law, yet it is not strictly and technically correct, and if not absolutely requisite it would certainly be desirable to have the precise character of the interest to appear in the begining of the declaration. We are of opinion, therefore, that the circuit court committed no error in the disposition which it made of the demurrer interposed to the declaration.

This brings us to the only remaining question to be determined, and that is, whether the circuit court erred or not in overruling the motion for a new trial. The bill of exceptions purports to contain all the evidence offered upon the trial, and it is upon the sufficiency of this testimony to sustain the verdict of the jury that the decision must necessarily turn. In order to have entitled the State to a recovery upon either of the last counts, it was necessary that she should have shown either a failure to make just and true accounts of his administration, or due and proper settlements of the estate. The testimony adduced before the jury utterly failed to establish either of the breaches charged in the two last counts. The whole case made by the evidence offered merely went to show that the administrator filed an account current, which, after due notice, was confirmed by the court, and that, after deducting his claims against the estate, left a balance against him. This circumstance most certainly could not fix any liability upon the administrator or his securities. It did not appear that he had been guilty of any breach of legal duty, and consequently it could not be made to appear that any damages whatever had accrued to the plaintiff. It devolved upon the plaintiff, in order to entitle her to a recovery upon either count, to have shown not only a failure to make just and true accounts of his administration and due and proper settlements, but also to have shown what amount he retained in his hands, and for which he failed to account, or charge himself with in his settlements with the court. Upon both of these points the testsmony is wholly silent, and, as a matter of course, there is an utter failure to establish any liability whatever. It is manifest, therefore, that the defendant below was entitled to have the verdict set aside as being without evidence to support it, and consequently the circuit court erred in overruling his motion. The judgment of the circuit court is therefore reversed, and the cause remanded to be proceeded in according to law and not inconsistent with this opinion.

GRACIE VS. SANDFORD.

Plaintiff declared against defendant as drawer of an inland bill of exchange, made in New York, and added the common counts. On the trial it was proven that plaintiff sold defendant goods, and received, in part payment thereof, the bill sued on, which was drawn by defendant in favor of plaintiff upon M. & Co., and accepted by them, but there was no proof that plaintiff demanded payment of the bill, at maturity, of the acceptors, and that payment was refused by them. On this evidence, the plaintiff obtained judgment on the common counts for the price of the goods. HELD, that it is well settled in New York, where the contract was made, that a plaintiff is not allowed to resort to the common counts, and base his recovery upon the original consideration after he has lost, by his own laches, his action against defendant upon the bill or note which has been passed to him either as absolute or conditional payment.

On the contrary, the rule seems to be that a plaintiff can never recover on the original consideration for which the note or bill was given, until he shows such a state of facts as will authorize him to recover on the note or bill itself.

In this case, the plaintiff having failed to fix the liability of defendant as drawer of the bill, by proving demand and refusal of the acceptors, could not resort to the common counts, and recover the original consideration for which the bill was drawn.

Writ of Error to Pulaski Circuit Court.

Assumpsit, brought by Francis P. Sandford, against Pierce B. Gracie, determined in the Pulaski circuit court, in November, 1847, before the Hon. WM. H. FEILD, judge.

The plaintiff declared on a bill of exchange drawn by defendant, at New York, on the 25th October, 1845, upon L. Mudge & Co., of the same place, in favor of plaintiff, for $250, payable ninety days after date, and accepted by said L. Mudge & Co. Presentment to the acceptor at maturity for payment, non-payment, and notice to defendant as drawer, were alleged. The common counts were also added. The case was submitted to the court, sitting as a jury, on the general issue, and finding and judgment in favor of plaintiff for $281 82, damages. Defendant moved for a new trial on the grounds that the finding was contrary to law and evidence, which the court refused, and he excepted, and put the evidence on record. From his bill of excep-

tions it appears that, on the trial of the cause, the plaintiff proved by the deposition of John George, that, in Oct., 1845, the plaintiff sold and delivered to the defendant, goods amounting, in value, to between $290 and $300. Deponant was plaintiff's clerk at the time, and, as such, sold the goods to defendant. The particulars of the sale were, that the defendant went to the store of plaintiff, in the city of New York, and desired to purchase a bill of shoes for cash; he selected them, agreed upon the prices, and they were sold to him, the bill amounting to a sum between the sums aforesaid. That, before the goods were packed, defendant wished to know whether an acceptance, for a part of the amount, at a short date, of a respectable house, would answer instead of the payment of cash for the goods, if interest were added to the amount for the time the acceptance had to run. Deponant asked defendant whose acceptance he proposed to give, and he answered that of L. Mudge & Co. Defendant then left plaintiff's store to go after Mudge, and soon returned with him. Mudge furnished references as to his responsibility, agreed to accept the draft of defendant for $250, and then left the store. Defendant then wanted to know if the acceptance of Mudge of his draft, for $250, would relieve him from any further responsibility, and deponant told him that it would not; that, in the event Mudge did not pay the acceptance, he would still be liable as the drawer of the draft. Defendant then paid, in cash, about $43, the amount of the purchase over and above $250, (the amount of said acceptance,) and then made and delivered to plaintiff the draft, accepted by L. Mudge & Co., (which was annexed to the deposition,) and the goods were afterwards delivered to him. Deponant informed plaintiff of the transaction, and he approved it. At the time defendant made the purchase, he informed deponant that he was going to Van Buren, Arkansas, having been advised by a friend that that place offered inducements to a "new beginner;" but that he might remove from thence if he should not be pleased with the place.

Plaintiff also proved, by the deposition of Ebenezer Platt, a clerk of his, that, on the 27th January, 1846, he deposited in the

post office at New York, a notice of a notary public of protest for non-payment of said draft by L. Mudge & Co., addressed to defendant at Van Buren, Arkansas, which notice was handed to him, to be forwarded, by a clerk of the notary public. This was all the evidence introduced on the trial, whereupon the defendant asked a verdict in his favor on the ground that plaintiff had failed to prove demand of payment of the said bill of exchange at maturity of the acceptors, and refusal by them to pay, but the court found for plaintiff on the common counts contained in the declaration. Defendant brought error.

CARROLL, for plaintiff. The plaintiff relies upon the following points:

1st. The acceptor of the bill, L. Mudge & Co., is the principal debtor and is primarily liable. *Chit. on Bills*, 10*th Amer. Ed.* 304, *note* (*h*). 1 *Sel. N. P.* 286, 308.

2d. As days of grace on mercantile bills constitute a part of the original contract, (see 8 *Conn. Rep.* 505,) it was necessary for the defendant in error to prove a demand of L. Mudge & Co. on the third day of grace, and a refusal by them to pay, in order to render Gracie liable. *Chit. on Bills*, 353, 388. *Kent's Com.* 103. *Mills vs. U. S. Bank*, 11 *Wheat.* 431, *and notes. Bank of Washington vs. Triplett & Neal*, 1 *Pet.* 31. *Munroe vs. Easton*, 2 *John. Cas.* 75.

3d. The averment in the declaration that the bill was presented for payment when it became due, and that L. Mudge & Co. refused to pay, has not been substantiated by proof. *Chit. on Bills*, 575, 652. The only evidence produced at the trial below, in proof of the averment, is the letter sent to Grácie, directed to "Van Buren, Arkansas," and signed "John T. Irving, Notary Public, Merchants Bank." In cases of foreign bills a regular protest, under seal of the notary, is *prima facia* evidence of a demand and refusal, and notice from a notary in that case is good. *Peak's Ev*,, 4 *Edit.*, 80, *and notes.* 6 *Serg. & Rawle*, 484. 7 *Yerg.* 477. But there is no such protest here, and, as this is an

inland bill, protest was not necessary, nor would it be evidence. 6 *Wheat.* 572. (*Union Bank vs. Hyde.*)

4th. Demand and refusal must be proven by some other source, and may have been proven by the clerk of the notary public, or by the person who actually demanded payment, if it was demanded. *Chit. on Bills*, 655. *Peake's Ev.*, 18, 5. Notice must have been given by a party to the bill, and due diligence used to find out residence of drawer. *Chit. on Bills*, 492, 3, 4, *and notes*. *Hall vs. Varrell*, 3 *Greenlf. Rep.* 233.

6. As no demand and refusal were proven, nor notice of dishonor given, the plaintiff is not only discharged from his liability on the bill, but also from the debt in respect of which the bill was given. *Chit. on Bills*, 172, 3, 4, *and notes; Ib.* 180, *note* (1); 433, *and notes*. *Story on Sales*, 171. *Smith vs. Wilson*, *Andr. R.* 187. *Bridges vs. Berry*, 3 *Taunt.* 130. *Jones et al. vs. Savage*, 6 *Wend.* 658. *Austin vs. Rodman*, 1 *Hawks*, 195. *Long vs. More*, 3 *Esp.* 155, *note*. *Cruger vs. Armstrong*, 3 *John. C.* 5. *Clark vs. Young*, 1 *Cond. Rep.* 287. 4 *Esp. Rep.* 46, *and Mr. Day's note*. *Ward vs. Evans*, 2 *Ld. Raym.* 930.

7th. Sandford, having received the bill for a debt contracted at the same time, took the bill as payment. *Everett vs. Collins*, 2 *Camp.* 515. *Denniston vs. Embree*, 3 *Wash. C. C. Rep.* 396. *Ward vs. Evans*, 2 *Ld. Raym.* 930. *Whitbeck vs. Van Ness*, 11 *John.* 409.

8th. The plaintiff below could not resort to the common counts if he has been guilty of laches in regard to the bill. *Chitty on Bills*, 578, and cases cited in notes (6) and (1): or where there has been a special agreement. *Robertson vs. Lynch*, 11 *John. Rep.* 451.

PIKE & BALDWIN, contra. The law of New York governs in this matter. In that State it is well settled that taking the note, bill, or acceptance, of the debtor, or a third person, does not operate as payment, or in any way discharge or end the original simple contract, or suspend the remedy on it, unless it is expressly agreed to be taken as payment, and where the note, or

acceptance, of a third person is taken, it does not affect or impair the original contract, unless it is taken as absolute payment, and the original debtor is wholly discharged from any responsibility on ihe original contract, or on the paper so received. The cases on this point will be found fully discussed in *The R. E. Bank vs. Rawdon, Wright & Hatch*, 5 *Ark.* 558. The principal and leading ones are *Picott vs. Rathbone*, 5 *Wend.* 490. *Reid vs. Van Ostrand*, 1 *Wend.* 424. *Raymond vs. Merchant*, 3 *Cowen*, 147. *Porter vs. Tallcott*, 1 *Cowen*, 359. *Muldon vs. Whitlock*, *id.* 290. *Tobey vs. Barber*, 5 *J. R.* 68. *Putnam vs. Lewis*, 8 *J. R.* 389. *Johnson vs. Weed*, 9, *id.* 310. *Burdich vs. Green*, 15, *id.* 247.

These cases establish the principle that, in New York, unless the original debtor is absolutely and entirely discharged, and the creditor takes the note or bill of the third person, and agrees not to look to the original debtor at all,—unless he absolutely takes the note or bill at his own risk, and looks to the responsibility of the third person alone, the original consideration may be still sued on. The plaintiff, however, must have possession of the note or bill, so that it may appear that he has not passed it away, in which case the defendant might be twice liable. The plaintiff here produced it on the trial, and it is in court attached to the depositions to be cancelled. The simple question is, did Sandford agree to take the acceptance of Mudge & Co., as an absolute payment—to look to Mudge & Co., and in no event to look to Gracie. If not, his right of action for goods sold remained.

The law of New York must prevail here, and it has been so held in other States, as to transactions which took place in New York, though the *lex fori* was different as to the question of payment. *Vancleef vs. Therasson*, 3 *Pick.* 12, where the authorities on this subject are collected in the note.

The court is further referred, on the main question, to *Wathen vs. Bush*, 16 *J. R.* 233. *Wathen vs. Wendell*, 19, *id.* 153. *Holmes vs. De Camp*, 1, *id.* 36.

SCOTT, J. Recognizing the position that the contract, out of

which this cause originated, having been made in the State of New York, with reference to its laws, it is to have the same effect here which it would have there, (*Story's Conflict of Laws*, 274. 3 *Pickering*, 12,) we have examined the numerous decisions of that State that have a bearing upon the question that arises upon this record, (reported in Johnson, Cowen, and Wendall's Reports,) and finding the law clearly laid down in several of these cases, and more especially in the case of *Dayton vs. Trull*, reported in 23 *Wendall*, and the numerous cases therein cited, recognized, and commented upon, we have found but little difficulty in arriving at a satisfactory conclusion.

The finding and judgment of the court below in favor of the defendant in error were upon the common counts. It is admitted that the evidence was not sufficient to authorize a finding and judgment on the special count; and the question presented for our decision is, whether or not this judgment can be sustained consistently with the exposition of the law in the cases cited above.

In our researches we have not found a single case where a plaintiff was allowed to resort to the common counts, and base his recovery upon the original consideration, after he has lost, by his own laches, his action against the defendant upon the bill or note, which has been passed to him either as absolute or as conditional payment. On the contrary, the reasonable doctrine that a plaintiff can never recover on the original consideration for which the note or bill was given until he shows such a state of facts as will authorize him to recover on the note or bill itself, is distinctly and emphatically recognized in several of these cases.

In case a plaintiff has lost by his own laches his legal recourse against the defendant upon the bill or note, it is in vain that he brings it into court and offers to cancel it, with the expectation of being allowed, after cancellation, to proceed to recover on the original consideration. As well might he hope, by such means, to revive a cause of action that had been barred by the statute of limitations. And in case some third party had been prima-

rily liable (as maker or acceptor) on such note or bill, upon which the right to recover of the defendant had been so lost by lachess, no less vain would it be to show that such party so primarily liable upon the note or bill was still so liable. As well might this argument be used to charge any endorser who had been discharged by the *lex mercatoria*. And still not less vain would it be to show that, by actual agreement, much less by any agreement that the laws of New York might have set on foot, that the bill or note was not taken as payment absolutely, but only to apply the proceeds, when collected, to a debt for which no other security was taken. Because, in each of these three cases the legal effect of the party's own laches has been to make the bill or note his own; for, whether received as payment, or on agreement, either express or implied, to apply the money, when collected, to a debt for which no other security had been taken, the duty of presenting the bill or note, and demanding the money, and giving due notice, results from the nature of the security. When a bill, it purports to be a transfer of funds which the drawer has in the hands of the drawee: and there is an implied undertaking on the part of the holder that he will take the proper steps to have these funds applied to the satisfaction of his debt. When a note, the undertaking to make demand, and, in case of payment, to apply the funds, is no less implied. When a draft is given upon a third party, as in the case before us, it is not like the ordinary case of a note given upon the purchase of goods, which may be cancelled on the trial and a recovery had on the original consideration. In such a case there is no doubt of the defendant's liability on his note. So also when there is no doubt of the defendant's liability, as drawer or endorser on a bill, the same rule will apply; but not so in any case where the defendant is discharged from all liability on the written instrument.

But although the note of a third person, or the draft of a defendant on a third person, when received on account of a preexisting debt, as for instance to be applied when collected, may operate as payment, if the creditor disposes of and parts with

the note or bill, or is guilty of laches in not presenting it for payment in due time, and giving the proper notice of non-payment, yet he is not bound to sue, but may return the security when dishonored on due presentation, and then resort to the original consideration, because the effect of receiving such security, when not expressly agreed to be taken as payment and at the risk of the creditor, is only to postpone the time of payment of the old debt until a default be made in the payment of the bill or note on its presentation for payment at the proper time and place, and notice given of dishonor to the maker or drawer. Considering it well settled, by the authorities to which we have referred, that the plaintiff in this case was bound to present the draft in question to L. Mudge & Co. for payment on the very day of its maturity, according to the *lex mercatoria*, and give due notice to the drawer, if was not paid, and that the burthen lay on him of proving that due diligence had been used, and that until he makes out due diligence, or such facts as will excuse the want of presentment and notice, as well as produce the draft in court for cancellation, he cannot recover on the common counts. It follows necessarily that the court below erred in its finding and judgment, and that its judgment must be reversed, and the cause remanded to be proceeded in.

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BREM VS. ARKANSAS COUNTY COURT.

Where an inferior tribunal has a discretion, and proceeds to exercise it, this court has no jurisdiction to control that discretion by mandamus; but if the inferior court refuse to act, or to entertain the question for its discretion, where it is enjoined by law, this court will enforce obedience to the law by mandamus.

The statutes in reference to paupers construed, and the county court of Arkansas county compelled by mandamus to take jurisdiction of, and determine, a claim for medical attendance, &c., in the last illness of a person who died in that county destitute of means.

Application for Mandamus.

E. CUMMINS, for applicant.

SCOTT, J. The petitioner states that he is a doctor of medicine, and that, in his professional character, he gave medical aid, in personal attention, proscriptions and medicine, in the last illness of one Nicholas Jacobs, deceased, then a citizen of Arkansas county, who departed this life in the month of September, A. D. 1846: that Jacobs was a very poor man, whose estate was wholly insolvent, and not of sufficient value to discharge any portion of petitioner's claim for medical aid so rendered: That in and at the April term, A. D. 1847, of the county court of that county, he filed his account for those services, and moved for an allowance, but that court refused to take jurisdiction of the case, and refused to permit him to introduce any proof of the rendition of the services and of the other facts upon which his alleged claim is based. To an alternative mandamus, issued from this court, reciting the foregoing statement of the petitioner's, and commanding said county court to take jurisdiction of the subject matter and adjudicate the same, or show cause for refusal to this court on the 20th day of the last July term, the county court of Arkansas county has made the following return, to wit: That, "upon examination of the law, and it appearing to the court that Nicholas Jacobs, deceased, for whom the claimant requires payment of an account for medical services rendered to said Jacobs in his life time, and who, as it is alleged, died insolvent, was a resident of Arkansas county for several years prior to his death, and never was a pauper, or considered a poor person, so as to come under the exception to the act of the Legislature of the State of Arkansas, approved the 21st December, 1846, entitled "An act to amend the 110th chapter of the Revised Statutes of Arkansas," and this court being of the opinion, from the facts before stated, that the account of said M. B. Brem is not authorized by law so as to make it a legal claim against this county, and come under the jurisdiction of this court

for liquidation and allowance: they, the undersigned, therefore, refuse to entertain said account, or take jurisdiction of the subject matter therein contained, for causes aforesaid. All which is hereby certified in return to the mandate of said writ. October 18, 1847.

THOS. HALLIBURTON, [P. J.]
JOHN SMITH, [J. P.]
JOHN F. HAMILTON, [J. P.]"

And the petitioner, by his counsel, now moves the court for a peremptory mandamus.

Recognizing the rule declared in the case of *Gunn's admr. v. The County of Pulaski*, reported in 3 *Ark.* 427, and in *Ex parte, Trapnall*, reported in 1 *Eng. Rep.* 9, that where the inferior tribunal has a discretion, and proceeds to exercise it, we have no jurisdiction to control that discretion by mandamus: but that, if the subordinate public agents refuse to act, or to entertain the question for their discretion in cases where the law enjoins upon them to do the act required, it is our office to enforce obedience to the law by mandamus, in cases where no legal remedy exists, or where clearly none exists so adequate or appropriate as this, for the relief of a party having a clear legal right, we will proceed to the petitioner's case.

The first section of chapter 110, of the Revised Statutes, page 605, enacts that each county in this State shall "relieve, maintain, and support its own poor," and defines a pauper "to be such as the lame, the blind, the sick, and other persons, who, from age and infirmity, are unable to support themselves, and who have not sufficient estate of their own." But expressly excepts, from this obligation thus imposed on each county, all persons of this description who may have removed from any other county for the purpose of imposing the charge of keeping them on any county other than the one in which they last lived."

The second section, after declaring the duty of sheriffs, coroners, and constables, in relation to "any such poor person or persons as are described in the first section," declares "that such court, so soon as it shall be satisfied" that such person or persons "comes within the purview and meaning of this act, shall,

from time to time, and as often and for as long a time as it may be necessary, provide, at the expense of the county, for the support and maintenance of such poor person or persons, and order from time to time the defraying of such expenses by drawing orders on the treasury of the county."

The third section provides that "when any non-resident, or any other person not coming within the definition of a pauper, shall fall sick or die in any county in this State, not having money or other property to pay his board, nursing, medical aid, or burial expenses, it shall be the duty of the court to make such allowances therefor as shall seem just." And the 48th section of the 78th chapter of the Revised Statutes, page 455, enacts that "the father and mother of poor, impotent, or insane persons shall maintain them at their own charge, if of sufficient ability, and the children and grand-children of poor, impotent, or insane parents or grand-parents, shall maintain them at their own charge, if of sufficient ability."

Thus all residents of any county, who are poor persons as defined by the first section of the statute, are to be supported, under the provisions of the second section, at the expense of the county in which they reside, unless such paupers may have removed from some other county for the purpose of imposing the charges for their support on the county to which they may have been removed, or unless the father or mother, or children or grand children, as the case may be, of any such paupers, may be of sufficient ability to defray such charges, in either of which cases the county in which such paupers may reside will be exempt from their support.

But the third section provided expressly for another class of persons, embracing non-residents as well as residents, who, although of bodily and mental ability sufficient to support themselves when in health, and could not therefore come within the description of paupers as defined by the first section, might suddenly fall sick, when destitute of means, and encounter extreme suffering and want, and possibly not be afforded a decent burial, and, for remedy, it was by this section made the duty of the

county court of the county in which such person might fall sick or die, to make such allowance for board, nursing, medical aid, and burial expenses, as might seem just. This policy, however, although so humane, was found to impose a heavy annual expense upon the counties of this State, and was abandoned by an act of the Legislature, approved the 21st December, 1846, which repealed this section of the statute, and substituted another one which does not embrace any other than non-residents and the case of a person who may be within the definition of a pauper.

But the professional services, for which an allowance is claimed by the petitioner, were rendered before the repeal of this provision of the statute, and as his rights cannot be impaired or destroyed by that repeal, and it clearly appearing, by the return of the county court of Arkansas county to the alternative mandamus, that Jacobs was not a person within the defition of a pauper, we are of the opinion that the petitioner has clearly a lawful claim, for which the county court of Arkansas is bound by law to make such allowance as shall seem just, exercising a legal discretion as to the amount to be allowed. The writ of mandamus must therefore be, and it is hereby, granted to compel the county court of Arkansas county to take cognizance of the demand of the petitioner presented for allowance, and adjudicate the same, and allow him such sum as shall seem just, and direct the same to be paid out of the county treasury.

STATE, USE OF WALLACE VS. RITTER, ADR.

Where a party makes and files the proper appeal affidavit, and the clerk notices the filing of it of record, an omission to endorse it filed will not prejudice appellant.

Where a creditor of an estate brings an action upon the bond of an administrator to recover the amount of his own claim, he must aver, in assigning a breach of the condition of the bond, that his claim has been allowed, classed, and ordered to be paid, by the probate court, and that he has demanded payment of the administrator, and

payment has been refused. *Outlaw et al. vs. Yell, Governor*, 5 *Ark. Rep.* 468, and *Porter vs. State, use Brown, ante*, cited.

The proper form of a declaration by a creditor upon the bond of an administrator, for the benefit of creditors generally, under sec. 170, chap. 4, Digest, declared. *Porter vs. State, use Brown, ib.*, cited.

Appeal from the Washington Circuit Court.

This was an action of debt brought in the name of the State of Arkansas, for the use of Alfred Wallace, against Young Ritter, as the administrator of Daniel Ritter, determined in the Washington circuit court, in June, 1847, before the Hon. WM. W. FLOYD, judge.

The action was founded upon an administration bond executed by Daniel Ritter, in his lifetime, as administrator of William Ritter. The declaration sets out the bond sued on, and its condition, (which is in the form prescribed by statute,) and assigns breaches thereof in substance as follows:

"Plaintiff avers that said Daniel Ritter, so being administrator of said William Ritter, as aforesaid, (as recited in the condition of the bond sued on,) did not make, or cause to be made, a true and perfect inventory of all and singular the goods and chattels, rights and credits, which were of the said William Ritter, deceased, and file the same in the office of the clerk of the probate court of said county of Washington, within sixty days from the date of said writing obligatory: that said William Ritter departed this life possessed of goods and chattels, rights and credits to the value of $550, all of which came to the hands of said Daniel Ritter, as such administrator, and that he, the said Daniel, filed an inventory in the office of the clerk of said probate court within the time last aforesaid, charging himself with but $74 75 worth of property of said William Ritter, deceased, and kept and detained the residue of said property which came to his hands, amounting, in value, to the sum of $476, and so the said plaintiff saith that the said Daniel squandered and wasted the said residue of said estate so by him kept and detained as aforesaid.

"And said plaintiff further saith that, at the time of the death of said William Ritter, he, the said William, was indebted to said Wallace, for whose use this suit is brought, in the sum of $67 23, with interest, &c.; that, on the 15th March, 1841, said claim was presented, duly authenticated, to said Daniel, as such administrator, and by him endorsed, allowed, &c.; and afterwards, to wit: on the 16th April, 1841, said claim was allowed, by the court of probate of said county of Washington, against said Daniel, as such administrator, and classed in the first class, &c.; and the said plaintiff further avers that he, said Daniel, upon obtaining letters of administration on said estate, collected and took into his possession goods, chattels, rights and credits, of said William Ritter, deceased, of the value of $399 87, and did not make, or cause to be made, a true and perfect inventory thereof, and file the same in the office of the clerk of said probate court within sixty days from the date of said writing obligatory and of his letters of administration, but filed an inventory of only $74 75 worth of said property, and kept and converted the residue of said property to his own use, by means whereof said debt of said Wallace was not paid, but wholly lost, &c.

"Plaintiff further avers that, at the time of the death of said William Ritter, he was indebted to said Wallace in the further sum of $9 31, with interest, &c.; that, on the 23d February, 1842, said demand was presented, duly authenticated, to said Daniel, as such administrator, allowed by him, and afterwards, on the 15th April, 1842, said demand was allowed by said probate court, against said administrator, and classed in the fifth class of demands, &c.; and plaintiff further avers that said Daniel, so being administrator as aforesaid, upon obtaining letters, &c., collected and took into his possession goods and chattles, rights and credits, of said William, of the value of $399 87, and did not make, or cause to be made, a true and perfect inventory thereof, and file the same in the office of the clerk of said probate court, within sixty days from the date of said writing obligatory and his said letters of administration, but filed an inventory of only $74 75 worth of said property, and kept

and converted the residue thereof to his own use, by means whereof the debts aforesaid of said Wallace were not, nor are they yet, paid, but have been and are wholly lost to said Wallace.

"Plaintiff further avers that said Daniel, so being administrator as aforesaid, presented to the said probate court, on the 18th day of January, 1841, (at January term,) his account current with said estate, in which he charged himself with the sum of $399 87; but that said Daniel did not, at the first term of said court thereafter, settle with said court as to the amount of which he stood charged as aforesaid, but kept and converted the same to his own use, by means whereof the aforesaid debts of said Wallace were, and are, unpaid and lost.

"Plaintiff further avers that assets, more than sufficient, came to the hands of said Daniel, as such administrator, to pay all the demands allowed and classed against the estate of said Daniel Ritter, deceased; but that said Daniel wasted the same by delivering them to one James Wilson, who converted and disposed of them to his own use, by means whereof the debts of said Wallace remain wholly unpaid.

"Plaintiff further avers that said Daniel, so being administrator as aforesaid, presented to said probate court, on the 18th January, 1341, (in January term,) his account current with said estate, in which he charged himself with the sum of $399 87; but that the said Daniel did not, at the first term of said court thereafter, settle with said court as to the amount with which he stood charged as aforesaid, but kept said amount and converted and disposed of the same to his own use, and to the use of one James Wilson; by means whereof the debts aforesaid of the said Wallace, for whose use this suit is brought, are wholly unpaid, and are wholly lost, and said estate has become and is hopelessly insolvent.

"And plaintiff also saith that said William Ritter departed this life leaving personal estate to the value of $550, and more than sufficient to pay all demands allowed and classed against his estate, all of which came to the hands of said Daniel, as his administrator, and was by him not legally accounted for, but

wasted and disposed of to his own use; by means whereof the debts aforesaid of the said Wallace have not been paid, but have become and are wholly lost."

In the last special breach, it is alleged that said Daniel administered on the estate of said William Ritter, and took into his possession all his goods and chattels, &c., that Wallace demanded of him payment of said claims, but that he refused to pay the same or any portion thereof.

Defendant demurred to the declaration on the grounds that it was not averred that the probate court made an appropriation of the assets in the hands of said Daniel Ritter to the debts against his estate: that it was not averred that said Daniel, as such administrator, was ordered by the probate court to pay said claims within ten days, &c.: and not averred that said Daniel refused to pay said claims in obedience to such order, &c.

The court sustained the demurrer, and plaintiff appealed.

Wallace, for whose use the suit was brought, made the affidavit required by statute on appeal, and the clerk made a record entry of the filing of it, but omitted to endorse it filed.

FOWLER, for appellee, moved to dismiss for want of an affidavit.

E. H. ENGLISH, for appellant.

CONWAY B, J. On motion, at January term, 1848. This case was brought here by appeal, and it is now moved to dismiss it on the allegation that the requisite appeal affidavit was not made and filed in the court below.

We can perceive no substantial objection to the affidavit or its filing. It seems in due form, and is certified by the clerk to have been sworn to and subscribed in open court. And the entry of record that "the said Alfred Wallace came into court and filed his affidavit for said appeal," is sufficient evidence of the affidavit having been filed without the clerk's endorsement. The omission of the clerk to mark the affidavit "filed," was but a clerical misprison, and did not affect the party's right to appeal.

Wallace, being the beneficiary plaintiff, and responsible for costs, was the proper person to make the affidavit. The motion is refused.

JOHNSON, C. J. The circuit court decided correctly in sustaining the demurrer to the declaration of the plaintiff. All the breaches assigned were evidently intended to rest upon sec. 171 of chap. 4 of the Revised Statutes, and yet they seek to subject the administrator to the payment of the individual demand of Wallace alone, and clearly look to his claim against the estate as the measure of damages. The creditor of an estate, where his demand has been allowed, classed, and ordered to be paid, is not of necessity forced to his action upon the bond, as he is entitled, upon such a showing as is required by the 124th section of the act already referred to, to his execution for the amount which has been ordered to be paid to him, yet if he should elect to waive his summary remedy and resort to an ordinary action upon the bond, he will be held to strict allegation and proof of all the requisitions of the law in order to mature his claim in the probate court, and also that such claim has been demanded and not paid in obedience to the order of the court. The distinction between the cases where a creditor, or other person interested in an estate, is suing for his own individual demand, and where he puts the law in motion merely as the agent and general representative of all the beneficiaries of the estate, is broadly laid down and enforced in the case of *Outlaw et al. vs. Yell, Governor*, 5 *Ark.* 468, and in the case of *Porter vs. The State, use of Brown*, decided at the present term of this court. It is obvious that neither count in the declaration contains a good cause of action, when tested by the rule of those cases, if it is conceded that the object of the suit was to recover the specific sums which the plaintiff alleges had been allowed and classed by the probate court, as there is an utter failure to show that those claims had been ordered to be paid, or that the administrator had failed to pay them after demand made for that purpose. The counts are all equally bad, if the suit is regarded as having been brought by

Wallace not exclusively for his own individual benefit, but as the agent or representative of all persons interested in the estate. The 171st section of the 4th chapter of the Revised Code provides that "the bond of any executor or administrator may be sued on at the instance of any legatee, distributee, creditor, or other person interested, in the name of the State, to the use of such legatee, distributee, creditor, or other person interested, for any mismanagement, waste, or other breach of the condition of such bond; and the party to whose use suit is brought, shall have judgment against the executor, or administrator, and his securities, for the whole value of the estate mismanaged or wasted, with costs of suit; and the amount so recovered shall be distributed by the court of probate in the same manner as if the same had been accounted for by the executor or administrator." This section, without a rigid scrutiny, is well calculated to mislead as to its real object. The first clause of the section speaks of the suit being brought in the name of the State for the use of such legatee, &c., and, if considered alone and unconnected with the latter clause, would convey the idea that the judgment, when recovered, would inure solely to the use and benefit of the party at whose instance the suit is instituted. This, most clearly, was not the design of the Legislature: but, on the contrary, the only object that they had in view by this proceeding was to enable any person interested in the estate to compel the administrator to proceed and to settle the estate according to the requirements of the law and the express stipulations of his bond. It matters not what amount he might recover in this action, and although it is brought at his instance, and nominally to his use, it would not necessarily follow that he would actually realize one solitary cent of the amount so recovered. The judgment when rendered is turned over to the probate court, and there to be distributed in the same manner as if the same had been accounted for by the executor or administrator.

It is necessary that the party at whose instance the State institutes her suit should disclose the precise nature of his interest

(that is, whether he is legatee, creditor, &c.) in the commencement of the declaration, as it is only a person interested in the estate that is armed with the power to coerce the administrator. This is a matter material to be stated, and the defendant, if he chooses, may traverse it, and call for the proof. It is not essential to a recovery, upon the 171st section, that the party suing should set forth specifically the precise amount of his claim against the estate, or what steps he may have taken to bring it forward; but it is all-sufficient for him, after setting out the bond and its condition, to charge a breach in the language of that instrument, and then, after inserting the usual breach of his promise to pay, (the penalty of the bond,) conclude to his damage with a sufficient sum to cover the damages actually sustained. If the sum, to which the party suing is entitled, were the measure of damages, there would then be good reason for specifying the amount to which the party himself were entitled; but when it is considered that such is not the case, but, on the contrary, that the amount, whatever it may be, which is found in the hands of the administrator, and unaccounted for, is the extent to which the jury are allowed to go, then it is clear that no such showing is necessary, We are, therefore, clearly of opinion that there is no error in the judgment of the circuit court in sustaining the demurrer to the plaintiff's declaration. The judgment is, therefore, in all things affirmed.

CASES

DETERMINED AT THE JAN'Y TERM, 1849.

BORDEN ET AL. VS. STATE, USE BOWEN & MCNAMEE.

Where a sheriff collects money on an execution, and fails to pay it over, he is liable, under section 70, chapter 67 of the Digest, for the sum collected, with lawful interest thereon, and ten per cent. per month added, from the return day of the writ until he pays the money over. But, in an action on his bond therefor, it is erroneous to render judgment for the amount collected, interest, and penalty, and for ten per cent. per month upon the amount of the judgment. This would be compounding the penalty, which the statute does not authorize.

Writ of Error to Pulaski Circuit Court.

DEBT, on a sheriff's bond, determined in the Pulaski circuit court, October term, 1847, before the Honorable WILLIAM H. FEILD, judge.

The action was brought in the name of the State of Arkansas, for the use of Bowen, McNamee, Weed, and Holmes, partners, under the firm name of Bowen & McNamee, upon the bond of Borden, sheriff of Pulaski county, against said Borden, as principal, and Walters, Newton, Chase, Baldwin, Fenno, Wassel, Borden, and Crutchfield, securities in the bond. In the declaration two specific breaches of the condition of the bond are assigned:

1st. That, on the 28th day of April, 1846, Bowen & McNamee recovered judgment in the Pulaski circuit court against one Aldrich, for the sum of $282 50, damages, and $4 90, costs of suit. That, on the 23d day of July, 1846, an execution was issued upon said judgment to the sheriff of said county, returnable to the October term following, which came to the hands of Borden, as sheriff of said county, on the 30th July, 1846, to be executed; that, while the execution was in his hands, and before the return day thereof, said Aldrich paid to him, as such sheriff, the full amount of said judgment, damages, interest and costs, which he had wholly failed and refused to pay over to said Bowen & McNamee.

2d. That, after the rendition of said judgment, to wit: on the 23d day of July, 1846, a *fi. fa.* was issued thereon to the sheriff of said county, returnable to the October term following, which came to the hands of Borden, as such sheriff, on the 30th July, 1846, to be executed; and that, although said Aldrich had sufficient goods and chattels, lands and tenements, in said county, to pay and satisfy said judgment, yet the said Borden wholly neglected and refused to levy said *fi. fa.* thereon, and did not return said *fi. fa.* to said court on or before its return day, &c.

Defendants pleaded, 1st, that there was no record of said supposed judgment and recovery in said declaration mentioned, &c.: 2d, (to the first breach,) that no such writ of *fi. fa.*, as in said first breach alleged, ever issued and came to the hands of said Borden: 3d, (to the first breach,) that said Borden, as such sheriff, never did collect and receive the said damages, interest

and costs adjudged, as in such breach mentioned, or either, or any part of either, as therein alleged: 4th, (to the second breach,) that no such *fi. fa.*, as in said second breach alleged, ever issued and came to the hands of said Borden: 5th, (to the second breach,) that said Aldrich had not any goods, chattels, lands or tenements, whatever, subject to levy under said writ, and that said Borden did make due return thereof, &c.

Issues were made up to these pleas in short upon the record, and then follows this entry:

"OCTOBER 29, 1847.

"Came the parties, &c., and the issues joined on the pleas of *nul tiel record* are submitted to the court; and, upon inspection of the record, the court doth find that there is such record of the judgment and recovery as alleged, &c.; and also such writ of *fi. fa.* execution, as alleged in said declaration, and therefore doth find upon said issues for plaintiff.

"Whereupon, neither party requiring a jury, by consent of parties, this cause is now submitted to the court, sitting in the place of a jury, upon the issue joined upon the defendants' third plea, and upon such submission, after hearing the evidence adduced, the court finds upon the issue for the plaintiff, that the breach of the bond assigned in said plaintiff's declaration is true, and that said plaintiff, for the use aforesaid, has sustained damage, by reason of such breach, to the sum of four hundred and twenty-three dollars and ninety-three cents:"—then follows the judgment of the court for the amount of the penalty of the bond, "and that said plaintiff, for the use aforesaid, do have execution against said defendants for the said sum of four hundred and twenty-three dollars and ninety-three cents, for her damages, by the court in form aforesaid assessed, together with interest on said damages at the rate of ten per cent. per month from this date until paid, and also for the costs of this suit," &c.

Defendants brought error.

FOWLER, for the plaintiffs. There is nothing in the record or

proceedings, or in the judgment, or award of execution, that legitimately shows that this was a proceeding to recover the additional damages of ten per cent. per month, given by the statute, (Digest, chapter 67, section 70,) and the assessment and, consequently, the judgment therein are erroneous; but if the assessment be regular, the law does not authorize an additional ten per cent. per month upon the damages so assessed.

E. CUMMINS, contra.

JOHNSON, C. J. The question presented is one purely of law, and will depend entirely upon the construction that shall be placed upon the statute. The 70th section of chapter 67, of the Digest, declares that "If any officer sell any property under any execution, whether he shall receive payment therefor or not, or shall make the money in any execution, specified or therein endorsed, and directed to be levied, or any part thereof, and shall not have the amount of such sales, or the money so made, before the court, and pay the same according to law, he shall be liable to pay the whole amount of such sale, or money by him made, to the person entitled thereto, with lawful interest thereon, and damages in addition, at the rate of ten per cent. per month, to be computed from the time when the execution is made returnable, until the whole be paid, to be recovered in an action against such officer and his securities on his official bond." True it is, that it does not appear, from any terms used in the judgment, that ten per cent. per month were included up to the time of its rendition, yet it is manifest that such must have been the case, as the amount of the original recovery against Aldrich, including lawful interest, could not, by possibility, have swelled into so great a sum. There seems to be a slight inaccuracy in the calculation of the circuit court, though it is plain, from the amount of the judgment, that that court included not only the lawful interest, but also the ten per centum per month upon the original recovery up to the time of the rendition of the judgment

in this case. If this be so, it is then clear that the sheriff would not only be subjected to damages at the rate of ten per centum per month upon the sum for which he may have made himself liable, but that he would also be required to pay at the same rate from the rendition of the judgment against him upon the damages that had already accrued, and which had been included in the judgment. This construction of the statute we believe to be unsound and wholly at war with the obvious intention of the Legislature. The sheriff, by a failure to discharge his legal duties, subjects himself to the payment of the amount specified in the execution placed in his hands, with lawful interest, and also to damages in addition, at the rate of ten per centum per annum, to be computed from the time when the execution is made returnable, until the whole is paid. It is manifest that the statute never designed to visit such terrible consequences upon the officer of the law as the present judgment would inevitably produce. It was not intended to compound the damages allowed by the statute, but simply to inflict single damages, by way of a penalty, at the rate of ten per centum per month, to be computed from the return day of the execution, until the whole amount, for which he had rendered himself liable, should be fully paid. If this view of the statute be correct, and that it is we do not entertain a doubt, then it is clear that the judgment is erroneous, and consequently ought to be reversed. The judgment of the circuit court of Pulaski herein rendered is therefore reversed, and the cause remanded.

PRYOR & PAUP EX PARTE.

An execution may issue on a judgment rendered at the suit of the governor, where the State is the beneficiary, after he goes out of office, without a revival in the name of his successor.

Application for Supersedeas.

The facts are stated by the court.

WATKINS & CURRAN, for the petitioners.

WALKER, J. Not present.

JOHNSON, C. J. This is an application to supersede an execution. The grounds relied upon are that the judgment having been obtained against the petitioners in the name and favor of Thomas S. Drew, as, and in the capacity of, Governor of Arkansas, and as the successor of Archibald Yell, late Governor of said State, and that, after the resignation of said Drew, and whilst Richard C. Byrd was the acting Governor, an execution was taken out in the name of said Drew. The position taken by the counsel for the petitioners is, that no execution could lawfully issue after the resignation of Drew, without a revivor in the name of his successor; and that, consequently, the one issued in this case is a mere nullity. To this doctrine we cannot yield our assent. The mere circumstance of the resignation of Drew cannot operate so as to destroy, or even to impair in any degree, the force and effect of the judgment. True, it is, that the obligation is made payable to the governor and his successors in office in terms, yet it is in legal effect executed to the State of Arkansas in her corporate capacity. The 4th section of the act of 1840, declares "that the following terms, in all cases, shall govern the sale of said lands, to wit: on a credit of one, two, three, four, and five years: all of which payments shall be se-

cured by the execution of writings obligatory by the several purchasers thereof with two good and sufficient securities, which said writings obligatory shall be made payable to the governor of the State of Arkansas and his successors in office." If the objection taken be sustainable, it must be upon the ground that Thomas S. Drew, in whose name the judgment was originally rendered, being officially dead, that, therefore, no execution can legally issue in his name. Here the inquiry is directly presented as to the necessity of the use of the name of the acting governor and, in case it shall be disclosed, as to the legal effect of such disclosure. The act does not require the obligations to be made payable to Archibald Yell, or to Thomas S. Drew, or to any other individual, but merely and simply to the governor of the State of Arkansas and his successors in office. This being the case, it cannot be essential that the proper name of the governor should be disclosed either in the obligation or in the judgment based upon it. If the name of the officer should be expressed in the obligation, it would not be regarded as any thing more than a mere personal description, and, in contemplation of the law, it would be considered as payable to the governor by name and description of the name of his office. If this construction be correct, and that it is we consider clear, then it is that although the particular individual who was the acting governor at the time be either officially or naturally dead, yet the corporation of the State, the party really and beneficially interested, is still fully competent to execute the judgment. According to this construction, the name of the governor, either in the obligation or in the judgment, must be regarded as mere surplusage, and, consequently, though essential in the execution as descriptive of the judgment, yet, in law, it can have no other force or effect whatever. Under this view of the law, we think that the execution is well sustained, and that consequently it ought not to be suspended.

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NEEL VS. THE STATE.

The power to punish for contempts, in a summary manner, is inherent in all courts of justice and legislative assemblies.

By the common law, a court may punish for contemptuous conduct toward the tribunal, its process, the presiding judge, or for indignities to the judge while engaged in the performance of judicial duties in vacation, or for insults offered him in consequence of judicial acts; but indignities offered to the person of the judge in vacation, when not engaged in judicial business, and without reference to his official conduct, are not punishable as contempts.

The question as to how far our constitution and statutes have modified the common law doctrine of contempts, is waived by the court in this case.

In a proceeding for contempt, the party is not entitled to trial by jury.

Writ of Error to the Washington Circuit Court.

Proceedings for contempt, determined in the Washington circuit court, at the June term, 1845, before the Hon. S. G. SNEED, judge.

The transcript shows the following proceedings in this case in the court below:

"*State of Arkansas*, Plaintiff,
vs.
James P. Neel, Defendant. } CONTEMPT.

STATE OF ARKANSAS,
COUNTY OF WASHINGTON. }

The State of Arkansas, to the Sheriff of Washington Co.—Greeting:

You are hereby commanded to summon James P. Neel, an attorney at law, to appear, and show cause, forthwith, why he shall not be fined, and his license revoked, for a contempt of the judge of the 4th judicial circuit, now in session: in this, by sticking up at the office-door of the judge thereof the following words: "☞ Sebron G. Sneed is a dam'd base and corrupt man," signed, "James P. Neel"—and further to be dealt with accord-

ing to law. Given under my hand and seal, this 16th day of June, A. D. 1845. S. G. SNEED, [SEAL.]

Judge of the 4th Judicial Circuit, Arkansas."

The sheriff returned upon said writ, served by reading to defendant 16th June, 1845. On the same day the defendant filed the following response:

"And now on this day comes James P. Neel, in answer to summons commanding the same, and for cause, in answer to said summons, says that he did not design any thing he did as an insult or contempt to the court, as it was an out-door matter, &c. JAMES P. NEEL."

"Whereupon" [a bill of exceptions taken by defendant states] "the said Neel appeared in court, and the following charge was immediately exhibited against him by the court: 'Sebron G. Sneed is a dam'd base and corrupt man,—James P. Neel.' The words constituting which charge were written on a piece of paper, and found sticking on the door of the office of Sebron G. Sneed, the judge who here presides, to which charge the said Neel filed the above response," &c.

The court ordered the name of the defendant stricken from the roll of attorneys, &c., for six months, and defendant excepted, and brought error.

FOWLER, for the plaintiff. The charge, if regularly made, does not, on its face, constitute a contempt of court: it is a mere reflection, made out of doors, upon the *person of Sebron G. Sneed*, and is not cast upon him as *judge*.

By our statutes the power of courts to punish for contempts is greatly restricted. (Digest, page 261.) They can punish *summarily* only where the contempt is committed in its "immediate view and presence." *Ib.* 261, *sec.* 1. The trial should have been by a jury. *Ib.* 189, *sec.* 22.

WATKINS, Att. Gen'l, *contra.*

SCOTT, J. The supposed contempt, for which the name of the defendant in the court below was stricken from the rolls of Washington circuit court, and he, by that court, suspended from the practice of his profession, as an attorney at law and solicitor in chancery, in all courts of the fourth circuit of this State for the space of six months, consisted of the following words, written on a piece of paper, and found sticking on the door of the office of Sebron G. Sneed, the then judge of the circuit court, to wit: "Sebron G. Sneed is a dam'd base and corrupt man," signed, James P. Neel. Whether this paper was there found during any term of the Washington circuit court, does not appear with entire certainty; all that the transcript shows, on this point, is to be found in the process issued against the defendant below, by which he was "commanded to appear, and show cause, forthwith, why he should not be fined, and his license revoked, for a contempt of the judge of the 4th judicial circuit, now in session, in this: by sticking up at the office door of the judge thereof the following words," &c. From which it seems that the defendant below was called upon to answer for a contempt of the judge now in session: but whether that supposed contempt had been committed during the term of the court then in progress, or during some previous term, or at some previous period, not in term time, does not fully appear—whether it was committed during the hours of any sitting of the court, or of the judge, when discharging any judicial function, or in the hours of recess, or time of vacation, or whether or not it grew out of, or had any connection whatsoever, either proximate or remote, with the official character, or with the official conduct, of the judge, either as a court or as a judge. The transcript, however, in the answer of the defendant below, which is not contradicted, shows "that he did not design anything he did as an insult or contempt to the court, as it was an out-door affair." It cannot, therefore, be presumed, against the face of the record, that the paper in question, upon which the charge of contempt was based, had any reference to the official conduct, or to the official character, of Judge Sneed, either as a judge or as a court. In-

deed, the silence of the record, upon this essential point, speaks volumes to the contrary, even if the uncontradicted answer of the defendant below be left out of view; for, in case the fact were otherwise, it would be difficult to conceive, when it is remembered that every contempt must necessarily involve official functions, that it would not have appeared on the record, either by the answer of the defendant to interrogatories propounded to him by the court, or otherwise.

The question, then, to be determined, is, whether or not the defendant below, in the matter presented by the transcript, was guilty of a contempt cognizable by the court below. And we shall first examine this question in reference to the common law doctrines on this subject, and if it be found that, within the scope of these doctrines, the defendant below committed no contempt, it will be unnecessary to determine how far these doctrines have been modified by any of the provisions of our constitution, or by the acts of our legislature defining these offences, as both, so far as they affect these doctrines, clearly restrict the field of their operation. Before entering upon the exposition of the legal principles, however, on which these doctrines are based, and by which we have proposed first to test the action of the court below, we may be permitted to remark that we can but feel it a delicate and an odious task to define rules that must necessarily be the measure of our own powers; nor are we ignorant that, in cases of this kind, our views may expose us, on the one hand, to the imputation of timidity and irresolution, or, on the other, to that of usurpation and tyranny. But to shrink from any question legitimately before us, because of any consequences in which we ourselves may be involved, however directly, would be even more unworthy than the absolute verity of such suggestions. Every occasion of resort to the extraordinary powers of the court should, by all the judges, be carefully avoided; but when proper, aggression should be met in the front with deliberation and firmness: and although the issue of the contest might prove them naked and powerless, they should prefer this to a flimsy panoply, that served them as a defence

against the weak only, until the strong were pleased to tear it from their shoulders.

The right to punish for contempts, in a summary manner, has been long admitted as inherent in all courts of justice and in legislative assemblies, founded upon great principles, which are co-eval, and must be co-existent, with the administration of justice in every country—the power of self-protection. And it is only where this right has been claimed to a greater extent than this, and the foundation sought to be laid for extensive classes of contempts, not legitimately and necessarily sustained by these great principles, that it has been contested. It is a branch of the common law brought from the mother country and sanctioned by our constitution. The discretion involved in the power is necessarily, in a great measure, arbitrary and undefinable, and yet the experience of ages has demonstrated that it is compatible with civil liberty and auxiliary to the purest ends of justice, and to the proper exercise of the legislative functions, especially when these functions are exerted by a legislative assembly.

A luminous writer, and deservedly eminent jurist, (the late Judge DADE, of Virginia, in the case of *The Commonwealth vs. Dandridge*, reported in *Virginia Cases*, 409,) has made the following remarks: "In this country we know no privileges but such as exist for the public good; many such privileges we have: from those which appertain to the legislature itself even down to such as belong to the lowest executive officer. Those which surround the administration of justice belong to the same order. Courts, their officers, and process, are shielded from invasion and insult, not from any imaginary sanctity in the institutions themselves, or the persons of those who compose them, (as in the political and ecclesiastical establishments of another hemisphere,) but solely for the purpose of giving them due weight and authority, and to enable those who administer them to discharge their functions with impartiality, fidelity and effect. This is the true test of every privilege not granted by statute, and is the spirit of every one (not merely private) which is so secured. The political character of the judiciary, and the tendency of the

duties which are devolved upon it, rendered it necessary to invest it with a considerable share of these privileges. It is confessedly the weakest branch of all governments, wielding neither wealth, force, nor patronage. Its duties consist in adjusting and settling the contested rights of individuals, in controlling their turbulence, and punishing their crimes. These duties are often of a severe and rigorous character, and as they are generally to be discharged in almost immediate contact with those on whom they act, their exercise will frequently elicit the angry passions, or excite unworthy and sinister attempts to bias or avert their operation, and where there is little real power and no patronage a certain degree of external dignity may have been considered necessary to supersede a too frequent resort to the actual powers of the courts."

In these remarks are to be found the true basis of the whole doctrine of contempts, and of attachments for contempts, as it existed at common law, and has been recognized by some of the ablest American jurists, extending, as it does, not only to acts which directly and openly insult or resist the power of the court or the persons of the judges, but to consequential, indirect and constructive contempts, which obstruct the process, degrade the authority, or contaminate the purity of the court; and every case of authority seen in the books will be found to proceed upon the idea, either remote or proximate, of disrespect to the court, or the judges, in reference to their official character or conduct, or of matter in derogation of the dignity of the courts, or are referable to that power of self-protection which, we have remarked, is necessarily inherent in judicial institutions. Although these doctrines of the common law had their primitive origin in an idea totally unrecognized and without place in this country, and preserved even in England only by a fiction of law, still, in our own free government, it has always been admitted that, to a greater or less degree, they must have place, and here they have been rested on an idea not totally dissimilar to that original one. Anciently, in England, it is known that the king, in person, presided in his courts of justice, and sat himself in

judgment, and the insult, resistance, or contamination, was to majesty itself, that held sway in divine right. In our day we refer it to the majesty of the law.

It has never been contended, in this country, that the common law, although it is our birth-right and in force among us without express recognition by our constitution and laws, was ever actually in force in all its length and breadth, but only to an extent that was not wholly inconsistent with those great principles upon which our free institutions, purely American, have been reared and maintained. So these doctrines, which we are considering, in being recognized by the courts, must be regarded as having received a corresponding abatement of those of its lineaments, which are at open war with the nature and character of our constitution, and the actual state of things among us under its legitimate operation, or it would be an exotic that could not germinate in our soil.

In 4 *Blackstone's Commentaries*, 238, that writer says: "The contempts that are thus punished are either direct, which openly insult or resist the powers of the court or the persons of the judges who preside," &c.; and at page 285, in enumerating the contempts which degrade the judicial authority, he refers to one which consists "in speaking or writing contemptuously of the courts or judges acting in their official capacity." It is obvious that in these two clauses the word "judges" is not used by the writer for the mere purpose of illustrating his meaning in the use of the word "court," for, besides the consideration that this view is not sustained by the context, such an explanation of his meaning is so altogether futile and useless after his luminous exposition of the courts in his third volume, as not to be attributed to a writer so able and perspicuous. On the contrary, it was evidently his purpose, in the first clause, to take the distinction between a disrespect of the constitutional powers of the court, and a personal disrespect of the judges therein sitting; and, in the second, between a contempt of the judges while actually holding a court, and a contempt of the same persons while in discharge of judicial duties appertaining to their official charac-

ter, though not performed in court. The opposite construction would produce a complete identification of the judges with the court so as to make a contempt of the one or of the other perfectly convertible. From which may be deduced the clear privilege of the persons of the judges, in or out of court, when acting in their judicial capacity; not because of any imaginary sanctity of their persons, nor because that an indignity to their persons, when so engaged, obstructs the course of justice, for it might sometimes be of such a character as not to have that effect, (and besides, in that aspect, it is always referable to another head of contempts: that is, for obstructing the powers of the court,) but because, to use the words of Blackstone, "it demonstrates a gross want of that respect which, when once courts of justice are deprived of, their authority (so necessary for the good of the kingdom) is entirely lost among the people." Nor, to produce this effect, is it of any importance whether the contumely be used in open court at the moment when the occasion occurs, or the moment afterwards, when the sheriff has proclaimed the adjournment. The only real question in either case is, whether it is the official conduct for which the judge is challenged and insulted. Nor can a reason be offered for the protection of the person of the judge in court, that will not equally apply to a protection out of court on the same account, in view of the remark we have already made, that whenever the indignity in open court would have the effect to interrupt its business, the attachment would be referable to the head of obstructing the powers of the court.

An ideal, imaginary being, without form, substance, or locality, needs no protection from penal sanctions. A court separate from the persons who compose it, is of this description. A sensible writer has said that "the terms nation, State, community, are words only; they do not denote any thing separate from the individual members whose aggregation and association have received these names;" and the like may be affirmed of a court of justice. When, therefore, attachments were sent out against inferior judges and magistrates for contempts in acting unjustly,

oppressively, or irregularly in their office, or in disobeying the writs issuing from superior courts to them, such as writs of prohibition, certiorari, mandamus, &c., (*Kelle* 484. 6 *Mod.* 90,) or against sheriffs, bailiffs, &c., (2 *Hawk. P. C.* 151. 2 *Burr.* 692, 797,) or against witnesses, jurymen, and parties, (*Barnes* 30, 32. *Stra.* 1094,) or against attorneys and other officers of court, (2 *Hawk. P. C.* 144. *Barnes* 29, 31,) or on account of any of that large class of contempts which is summed up by Blackstone as "demonstrating a gross want of that regard and respect which, when once courts of justice are deprived of, their authority (so necessary for the good order of the kingdom) is entirely lost among the people," (4 *Blk. Com.* 286,) such as using rude and offensive language in the face of the court, (*Cro. Car.* 503,) obstinate perverseness or prevarication, breach of the peace, or willful disturbance in court, (3 *Inst.* 141, 142,) treating with contumely or disrespect the writs, process, rules, and orders of the court, (*Stra.* 185, 557, 567, 1068,) perverting them to the purpose of malice, extortion, or injustice; speaking or writing contemptuously of the court or judges acting in their official capacity, (4 *Black. Com.* 285,) printing false accounts, &c., of causes pending in judgment, (2 *Atkins*, 469,) or for other contempts which seem to consist in the breach of a necessary privilege, noticed by Sir William Blackstone, in the 4th volume of his commentaries, in the following language: "Likewise all those, who are guilty of any injurious treatment to such as are under the immediate protection of a court of justice, are punishable by fine and imprisonment, as if a man assault or threaten his adversary for suing him; a counsellor or attorney, for being employed against him; a juror, for his verdict; or a jailor, or other ministerial officer, for keeping him in custody and properly exercising his duty,"—they (these attachments) were not issued upon the idea that the abstract, ideal, invisible, judicial institution called a *court*, had been injured, nor, in some cases, (as when they were issued for light and contemptuous words used in reference to the writs, process, rules and orders of the court,) because the efficacy of the writ, process, rule, or order was impaired by such con-

tumely: but, for the most part, because the public good, as connected with the preservation, in its purity, of the judicial institution, required them, and that the authority and dignity of the officers in whom this ideal, invisible being called a court, is realized and personified, was sunk and degraded. And that the impurity of such conduct would deprive these institutions of the aid of public opinion in carrying into effect their ordinances, and render a resort to force in all cases necessary, and thus avert a state of things in which it is not probable that any judicial system could long exist.

It will be thus seen, from the partial enumeration of the grounds of contempt which we have made, that the common law not only deemed it necessary to defend the citadel of justice itself from every invasion, that, while it might strike at the purity of the judicial institutions, would assail with no less violence, the frame of society itself; but deemed it also needful to defend even the approaches, out-works, and barriers, of the judicial authority, in order to give the fullest effect to its legitimate acts. And it was, therefore, not only when the course of justice was wilfully and visibly obstructed, that judicial animadversion was called forth, but in numerous other cases, when it was supposed that the general authority and efficacy of the court was, to some extent, impaired and its dignity lessened, and that, too, in some cases by inferences remote and far-fetched, which cannot be defended but by the consideration that the paramount interest of society requires that the course of public justice should be made to flow like a mighty river cleared of every obstruction, permanent or temporary, however slight.

When, therefore, the common law deemed it so necessary, for this great purpose, to protect the juror, the witness, the informer, the party, the jailor, the attorney, and other persons, many of whom might never again be called into a court of justice, it was not to be expected that it would fail to cover, with its complete armor, the presiding minister of the law's majesty, who would be so often exposed to similar trials. Not that any higher personal privileges were arrogated for him, than for the humblest

of these, but because it was obvious that the principle, which suggested the protection of these, would, at least to the same extent protect him, if it did not rise with the grade of the officer, and the majesty of the law be more degraded in the person of a higher than a lower officer, entrusted with its administration. To the same source are to be traced the numerous cases that have settled the doctrine that a judge, acting within the scope of his jurisdiction, shall not be called to answer for his judgment, except by impeachment, however erroneous, malicious, or even corrupt it may have been. But while the Ægis of the law is so thrown over the judge, it finds no pleasure in him when he proves recreant to the high trust reposed in him, for, in the language of one of its oracles, (SERGEANT HAWKINS,) "If a judge will so far forget the honor and dignity of his post as to turn solicitor in a cause which he is to judge, and privately and extrajudicially tamper with witnesses, or labor jurors, he hath no reason to complain if he be dealt with according to the capacity to which he so basely degrades himself;" nor does it animadvert upon his "out-door affairs" more than upon those of other citizens, unless these are forced upon him on account of his judicial functions.

Finding no difficulty, therefore, in arriving at the conclusion that, within the scope of the common law doctrines, the conduct of the defendant below, as shown to us by the transcript, did not amount to a contempt, it is unnecessary for us to determine how far these doctrines have been modified by any of the provisions of our constitution, or how far these doctrines may be affected by the act of our legislature, designed, as it seems, to restrict the field of their operation, in view of the consideration that some of these doctrines are based on principles claimed as inherent in the courts and as essential for their protection and existence, and that by the constitution the judiciary is made co-equal and co-ordinate with the legislature as a branch of the government, as none of these questions legitimately arise in this case, and they are therefore reserved. We will, however, upon the question of the right to a trial by jury, insisted upon in the

argument, give it as our opinion that the provisions of our constitution and laws guaranteeing this right, unless waived, do not take away from the courts the power to punish contempts in a summary mode; and that their provisions are to be construed to relate only to those cases, which, by our former laws and customs, had been tried by jury, as held in the case of *Hollingsworth & Duane*, in *Wallis' Reports*, 77, 106. The judgment of the court below must be reversed.

STATE VS. SCOTT.

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BY JOHNSON, C. J. The constitution of the State, like all other deeds or charters, is to be construed according to the sense of the terms used, and the intention of its authors:

It is to be construed (says Story) as a frame of laws established by the people according to their own free pleasure and sovereign will:

It should receive a fair and liberal interpretation, so that the true objects of the grant may be promoted, and the government left in the full and free exercise and enjoyment of all its rights, privileges and immunities, which are not expressed out of its ordinary and general powers, and declared by the sovereign will to be inviolate and supreme.

Every word (says Story) employed in the constitution, is to be expounded in its plain, obvious and common sense, unless the context furnishes some grounds to control, qualify, or enlarge it.

The amendment to the constitution, ratified by the General Assembly of 1848, declaring that "the qualified voters of each judicial circuit shall elect their circuit judge," must be construed in harmony with other provisions of the constitution, if it will admit of such construction.

When this amendment is construed in connection with the provision of the constitution fixing the official term of the circuit judges, the conclusion is irresistible that the amendment was not intended to have immediate effect, but designed to go into operation as vacancies should occur in the office of circuit judge.

The amendment was not designed to act upon the office, or incumbents, but merely to change the mode of filling vacancies occurring in future.

It is not true, as argued, that because the people, by said amendment, resumed into their own hands a portion of sovereign power previously delegated to the Legislature

—the power to elect the circuit judges—the offices filled by the exercise of that power whilst in the hands of the Legislature, were thereby vacated.

The power to fill the office, whether exercised by the people, or their representatives, is equally sovereign, and the rights accruing to the officer are the same under either mode of election.

A statute goes into effect from its passage, if no other time be fixed, because it is perfect in itself: not so with said amendment to the constitution: it transferred the power of election to the people, but that power could not be exercised until the mode of its exercise was prescribed by legislation.

The conclusion that said amendment did not oust the judges in office at the time of its ratification, is not predicated upon the doctrine of vested right in the office, in its technical sense.

BY WALKER, J. Constitutions are interpreted by the following rules (laid down by Story and sanctioned by this court):

1st. The first fundamental rule in the construction of all instruments is, to construe them according to the sense of the terms, and the intention of the parties:

2d. Where its words are plain, clear, and determinate, they require no interpretation, and it should, therefore, be admitted, if at all, with great caution, and only from necessity, either to escape from absurd consequences, or to guard against some fatal error:

3d. It is to be construed as a frame of fundamental law of government, established by the people according to their own free pleasure and sovereign will.

The terms of the amendment to our State constitution, ratified by the General Assembly of November, 1848, declaring that "the qualified voters of each judicial circuit, in the State of Arkansas, shall elect their circuit judge," are too plain and unambiguous to admit of but one construction:

The framers of our constitution, anticipating change in the wants and necessities of an increasing population, have expressed its powers in general terms, vesting in the legislative department, as occasion might require, power to pass such laws as might be found necessary to give efficacy to the general grants.

Such is the case in regard to said amendment; it depends directly upon legislative enactment for its development—was designed to confer upon the qualified voters of each judicial circuit the power to elect their judge, and has reference to no other subject.

The amendment is clear, explicit, and therefore needs no interpretation; but to determine that its effect was to oust the judges in office at the time of its ratification, would be to produce absurd consequences and fatal evils, which the above rules of interpretation forbid.

In determining the intention of the framers of the amendment, we must keep in view the constitution as it stood at the time the amendment was made.

No interpretation should be allowed which would conflict with any other provision of

the constitution, or which is not absolutely necessary in order to give effect to the amendment.

On the contrary, such construction should be given as will, if possible, leave all the other provisions of the constitution unimpaired and in full force.

The withdrawal of the power from the Legislature to elect judges, did not vacate the offices previously filled by an exercise of that power.

The amendment was only designed to prescribe a new mode of filling vacancies in the judgships occurring after its ratification.

The power to elect the judges was transferred from the Legislature to the people, but before the power could by exercised by them, legislative enactments were necessary, and occasions must occur making the exercise of the power necessary.

The constitution confers upon the voters of each township the right to elect a constable, but this power could not be exercised without legislation prescribing the mode of holding the election—nor could the people elect the judges under said amendment, until the Legislature made provision therefor.

The constitution provides for the creation of the office of circuit judge, but the Legislature creates the office, and when the office is established by legislative enactment, and filled, the officer looks to the constitution for the tenure and powers of his office.

In this country, there is no vested right in office as against the public: the Legislature creates, and may abolish, a circuit judgship when the public good requires it.

The Legislature may also change, at pleasure, the territorial limits of a circuit after it is established.

But though the Legislature may change, or abolish, a circuit, and when the circuit is abolished the office is vacated, yet a mere alteration or change, or re-modeling, of a circuit does not necessarily vacate the office, whilst its identity exists.

BY SCOTT, J., *dissenting*. Where a new constitution is framed, the government built upon it necessarily ceases, and officers holding under the old government instantly go out of office, unless provision is made in the new organic law for their continuation.

So where one of the departments of the government (or even a single office) is re-organized by a change of the constitution, in the mode prescribed.

Therefore the amendment to our State constitution, ratified by the General Assembly of 1848, declaring that the qualified voters of each judicial circuit shall elect their circuit judge, took effect immediately on its ratification, and the tenure of the circuit judges then in office ceased.

BY THE COURT. The defendant was elected, by the General Assembly, judge of the 3d judicial circuit on the 9th day of December, 1846, and commissioned on the 11th of the same month, for the term of four years—the amendment to the State constitution ratified by the General Assembly at the November session of 1848, declaring that the qualified voters of each judicial circuit shall elect their judge, did not vacate his office.

On Writ of Quo Warranto.

The facts are stated by the judges.

WATKINS, Attorney General, contended that if the defendant was ousted of his office, by the amendment of the constitution adopted at the November session, 1848, of the Legislature, he was not continued in office until the election and qualification of his successor under the amendment adopted at the November session, 1846; as the latter amendment was made to remedy a particular evil, and not intended to embrace such a case as the present; nor can the judges, when elected by the people, be, in any sense, the successors of the old judges.

Whether it was the intention of the Legislature to turn the judges out of office, can be inferred only from the language of the amendment itself, without regard to the question of public policy. But if it be permitted to go beyond the amendment to inquire into the intention, the act of 29th December, 1848, is a clear evidence of that intention.

Two propositions will not be questioned: one is, that there is no property in a public office in the United States: the other, that the people have the right, in the constitutional mode, to alter, reform, or abolish, their government. This power exists in the nature of our form of government, independent of the 2d section of the Declaration of Rights; and, therefore, though an officer may not be illegally ousted by a legislative act, the office itself may be abolished or the tenure changed by that sort of peaceful revolution peculiar to American constitutions.

This amendment to the constitution is not to be construed like an amendatory statute, but precisely as if the people had met in convention and altered the fundamental law; to the extent it goes it is, to all intents, a new constitution, and must abrogate every office not filled by the people. It changes the tenure of the office, and sweeps away every vestige of a vested right.

That this is the common understanding is proved by the very dearth of judicial precedent, and the fact that no instance can be shown, in the formation or amendment of a constitution where the officers are continued in office unless by a saving clause to that effect.

The courts in this State are the creatures of the constitution or organic law, deriving all their powers and jurisdiction from that source, and are subject to be abolished or changed, and the incumbents to be ousted by an amendment or by a new constitution. By the act of Congress of the 29th April, 1802, to amend the judicial system of the United States, the district courts were re-organized, and the number reduced; and the effect of the act was to vacate the offices of all the former district judges without any expressed declaration in the act to that effect. Upon the same principle the like effect must follow the adoption of the amendment of the constitution of this State providing for an election of the judges by the people.

The cases cited for the defendant go to this extent merely, that a person in office cannot be ousted by an act of the Legislature while the office itself is continued, not because it would impair the obligation of a contract or any vested right to a public office, but because the officer, during the term for which he was appointed, can be removed only for misfeasance or malfeasance, and in the constitutional mode. But they establish the doctrine that the power which created the office can abolish it, and where that is done the functions of the incumbent cease.

CUMMINS, contra. The constitution is to be construed as any other act of legislation (1 *Story's Com. on Const.*, 382): the whole instrument, as amended, must be taken together, (*ib.* 384,) and the intention of the Legislature ascertained and carried out, (*ib.* 383.)

The amendment of 1848 must be construed to be prospective in its operation and not retroactive, so as to divest vested rights, (*Dash vs. Van Kleeck*, 7 *J. R.* 477. 2 *Gall. C. C. Rep.* 144. It is not within the competency of a State to divest a vested right,

(3 *Story's Const.* 268,) nor will even a forcible revolution do so, (4 *Cond. Rep.* 579.) When a judge is duly elected and commissioned under the constitution and laws, he has a vested right in the office—a species of property, created by contract with the State, which cannot be divested by any act of the State so long as the office continues and he faithfully discharges its duties, (1 *Story's Const.*, 259, 260. 4 *Cond. Rep.* 579. 4 *Dev.* 1. 2 *Ala. Rep.* 33. 1 *Bay's Rep.* 179,) though the office may be destroyed by the power which created it, and thus oust the officer.

The adoption of a new constitution destroys all offices under the old constitution, and, in such case, all the officers would go out: but here the office, powers, and tenure of the office have never been affected.

JOHNSON, C. J. The writ issued in this case commanded the defendant to appear before this court on the 15th of Jan., A. D. 1849, and to show by what warrant he exercises and claims to hold, use, exercise, and enjoy the office and franchise of judge of the third judicial circuit in the State of Arkansas. The writ then avers that, by an amendment to the constitution of the State, the said office is made elective by the people of said circuit, and that thereby the election of the defendant thereto has been vacated, and set aside. The defendant, on the return of the writ, appeared and filed his response, in which he sets forth that, on the 9th day of December, A. D. 1846, he was elected to the office of judge of the third judicial circuit of Arkansas, by the General Assembly of said State, for the term of four years, and that, on the 11th day of the same month, he was commissioned and sworn into office by the governor of said State, and that under that commission he now exercises the said office of judge of the third judicial circuit. To this response the attorney general filed his demurrer, thereby admitting the truth of all the facts stated therein, and denying their sufficiency in law.

The Legislature of this State, at its last session, adopted an amendment to the constitution, which, under the authority of that instrument, immediately became a part and parcel of it.

The amendment is in the following words, to wit: "The qualified voters of each judicial circuit in this State shall elect their circuit judge." It is contended, on the part of the State, that this amendment the instant it was ratified and engrafted upon the constitution, *ipso facto*, ousted all the incumbents of the circuit bench, and worked a vacancy in each to be filled by the people of the several circuits so soon as the Legislature should pass an act fixing the time and prescribing the manner of the election. In order to deduce the legal effect and operation of the amendment, it will become necessary to have recourse to the constitution, and to examine it with the view of seeing how it stood before that amendment was engrafted upon it. The 7th section of the 6th article of that instrument, after declaring that "the General Assembly, by joint vote of both houses, shall elect the judges of the supreme and circuit courts, and that a majority of the whole number in joint vote shall be necessary to a choice," further declares "the judges of the circuit court shall be at least twenty-five years of age, and shall be elected for the term of four years from the date of their commissions." The first clause of the 8th section of the same article also provides that "the judges of the supreme and circuit courts shall, at stated times, receive a compensation for their services to be ascertained by law, which shall not be diminished during the time for which they are elected."

Before I proceed to consider the effect of the amendment in question, I will lay down what I conceive to be the proper rules by which to test the true sense and meaning of the constitution: 1st. The constitution, like all other deeds or charters, is to be construed according to the sense of the terms used, and the intention of its authors. 2d. It is to be construed, says Judge STORY, "as a frame of laws established by the people according to their own free pleasure and sovereign will." 3d. It should receive a fair and liberal interpretation, so that the true objects of the grant may be promoted, and the government left in the full and free exercise and enjoyment of all its rights, priviliges, and immunities, which are not expressed out of its ordinary and

general powers, and declared by the sovereign will to be inviolate and supreme.

If the amendment so operated as to occasion a vacancy immediately upon its adoption, there being no express declaration to that effect, it can result alone from the fact that, in the transfer of the power of filling the office to the people of the several circuits, the entire foundation upon which the incumbent stood was overturned and utterly destroyed. How would such a construction comport with the obvious sense of the terms used and the manifest intention of the framers of the instrument: or, in other words, would it be a fair and liberal interpretation, and such an one as would be calculated to promote the true objects of the grant? If the amendment will bear such a construction as to allow other provisions of the constitution to stand without doing violence to any, it is then clearly permissible to put such a construction upon it. If the intention was to create vacancies, is it not fair and reasonable to suppose that words would have been employed directly and emphatically declarative of that purpose, and that no room would have been left for doubt or construction? I apprehend that such would have been the case. It would have been as easy to have declared that the offices should be vacated upon a particular day as to have framed the amendment. It cannot be presumed that language of a doubtful character would have been adopted had the intention been to remove any of the judges from office, as it must have been foreseen that in that event a contest would arise, and that the courts of the country would be called upon to settle the question. Judge STORY says (1 *Story's Com. on Con. U. S.*) that "every word employed in the constitution is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it. Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, for established shades of meaning, or for the exercise of philosophical acuteness or judicial research. They are instruments of a practical nature, founded on the common business of human life, adapted to common wants, designed for com-

mon use, and fitted for common understandings. The people make them, the people adopt them, the people must be supposed to read them with the help of common sense, and cannot be presumed to admit in them any recondite meaning or any extraordinary gloss." If I should adopt this construction, and admit its applicability to the case before the court, what is the necessary and inevitable result? Is it possible to read the amendment, and at the same time direct the eye to the provisions fixing the constitutional term of the office without being irresistibly drawn to the conclusion that the former was not intended to have immediate effect, but that its action was designed to be postponed until a vacancy, or vacancies, should occur in some one of the modes indicated in the constitution, or by the actual expiration of the constitutional term? The mere amendment itself cannot be said, in any possible view of the case, to *produce* a vacancy in the office; for all that could be claimed under it would be a mere naked power to be called into life and action when it should please the Legislature to pass a law fixing the time and prescribing the manner of putting it in operation. This is the strongest view that could be taken against the defendant, and this most clearly shows that it could not go into immediate operation. The distinction then that lies at the bottom of the whole matter is, that the amendment was not designed to act either upon the office or the incumbent during his constitutional term, but that the only end and object of it was to change the mode of exercising the power of filling the offices. It is argued that, inasmuch as the power to elect the circuit judges has been taken away from the Legislature and transferred to the qualified voters of the several circuits, therefore the people have resumed one of the sovereign powers of the government, and that by the mere act of resumption, or withdrawal, of the power, the office that had previously been filled by its exercise, was immediately vacated. To the correctness of this proposition, I cannot yield my assent. The power to fill the office of circuit judge is equally sovereign whether exercised by the people's representatives, or by the people themselves, and, as a matter of course, the rights that attach

themselves to the officer upon the election, in either mode, must be identically the same.

I regret to say that, after a most patient and laborious examination of the books, I have not been able to find a solitary adjudication that sheds the least glimmering of light upon the question before the court. This great and extraordinary dearth of authority is doubtless attributable to the circumstance that but few constitutions in the Union contain a similar provision to our own in respect to the mode by which it may be amended. The constitution of the State of Missouri contains a provision that is a perfect counterpart of ours, and the only question which has, as yet, arisen out of its exercise, relates to the power of the Legislature, sitting in their constitutional capacity, to make such an amendment as to oust a circuit judge by an express declaration that the office shall be vacant from a particular day expressed in the amendment. To this question the supreme court of that State responded in the affirmative, and declared the office vacant from the day specified. The principle enunciated in that case cannot be said to have any analogy to the one involved here, as in that case there was an express declaration that the office should be vacated upon a particular day, whereas in this there is no similar expression, and in its absence the presumption irresistibly arises that such could not have been the intention of the framers of the constitution. It may be insisted that an amendment to the constitution, like a legislative act, in the absence of any declaration as to the time when it shall go into operation, is presumed to have been intended to have immediate effect. To this my answer is, that such a result does not, by any means, follow, because the act of the Legislature is perfect and complete in itself: whereas, the amendment merely confers the power to do an act, but that power cannot, by possibility, be exerted until it shall have received shape and mould by an exercise of legislative authority. It is contended that this construction is predicated upon the doctrine of vested rights and that under our form of government no man can acquire a vested right to a public office. I presume that no one would be less

disposed to countenance the idea that a public office could become the subject of vested rights in the legal and technical sense of that term than myself; yet I respectfully submit that the conclusions to which I have arrived do not depend, in the remotest degree, upon such rights. If the amendment had, either by express words or by necessary implication, declared the office of the circuit judges vacated from a fixed period, the question would then have been directly presented, and would have been as promptly met and decided.

If this view of the question be correct, it is clear that the respondent has shown sufficient authority to enable him to hold and exercise the office of circuit judge of the third judicial circuit of Arkansas for the term of four years from the date of his commission, and that therefore he ought to be discharged and go hence without day. I am, therefore, of opinion that William C. Scott, the defendant herein, be discharged and go hence, and recover his costs against the State of Arkansas.

WALKER, J. The defendant has been called upon, by the State, to show by what warrant of authority he exercises the office of judge of the third judicial circuit in this State, and has answered that, on the 9th day of December, 1846, he was elected by the General Assembly for the term of four years, and, on the 11th of said month, he was duly commissioned and qualified, and entered upon the duties of his office. To this response the State demurred, and the defendant joined issue. The law arising upon this issue is presented for the consideratien of the court.

The solution of the whole question thus presented depends upon the construction and effect of the following amendment of the constitution: "The qualified voters of each judicial circuit in the State of Arkansas shall elect their circuit judge." The writ of quo warranto was issued by the State upon the suggestion that this amendment to the constitution vacated the office of judge of the circuit courts. For the defendant, it is contended that the effect of the amendment is to divest the Legislature

of, and confer upon the voters of the several judicial circuits, the power to elect their judge.

As the decision of this question depends upon the legal effect of the amendment and its proper construction, it becomes necessary to refer to the rules by which constitutions are interpreted. Judge Story says: "1st. The first fundamental rule in the construction of all instruments is, to construe them according to the sense of the terms and the intention of the parties. 2d. Where its words are plain, clear and determinate, they require no interpretation, and it should therefore be admitted, if at all, with great caution, and only from necessity, either to escape from absurd consequences, or to guard against some fatal error. 3d. It is to be construed as a frame or fundamental law of government established by the people according to their own free pleasure and sovereign will." *Story's Com. on Con.*, 135, 136. These rules of construction are of high authority, have been adopted and approved by this court; (*State vs. Ashley*, 1 *Ark. Rep.*, 279,) and, when applied to the amendment under consideration, seem to my mind to leave but little room for doubt. The terms used in the amendment are surely too plain and unambiguous to admit of but one construction. Like most other constitutions, ours deals in general language, and, in view of the changes constantly taking place, particularly in the south-western territory into which a tide of emigration has been pouring, could not anticipate the wants and necessities of the community for whose government it was formed, and, from necessity, its powers are expressed in general terms, vesting in the legislative department, as occasion may require, power to pass such laws as may be found necessary to give efficacy to the general grant. Such is decidedly the case in regard to this amendment; it depends directly upon the legislative enactment for its development,—was designed to confer upon the qualified voters of each judicial circuit the power to elect their judge, and has reference to no other subject. Can it be true then, as contended for, that this amendment vacates the office of judge? The amendment is clear and explicit, and therefore needs no interpretation. The

rule in such cases is, that you must look alone to the terms used to explain their meaning. Judge Story says that "where the words are plain, clear, and determinate, interpretation, if at all, should be allowed with great caution, and only from necessity, either to escape some absurd consequence, or guard against some fatal evil." *Com. on Con.*, 136. Why the necessity for an interpretation of this amendment? There is certainly no absurd consequence to escape, unless it be contended that it is an absurd consequence to allow the voters of the circuits to elect their judge: no fatal evil to guard against unless that be one, for the whole purpose of the amendment is to do this and nothing more. But, on the other hand, if this plain, unambiguous amendment is to be construed so as to vacate the office of circuit judge, let us see what absurd consequences and fatal evils will follow. It will, in effect, be to repeal that clause in the constitution which ordains that the circuit judges shall hold their offices for four years, and until their successors are elected and qualified, and by vacating the office will suspend the whole circuit court system for an indefinite period. Therefore, so far from resorting to interpretation to escape absurd consequences and fatal evils, it must be resorted to in order to produce them. Without either admitting the necessity or the propriety of resorting to interpretation to ascertain the meaning of an instrument so clear and definite as this is, for the purpose of further illustration, we will test it by the established rules in such cases. Story says all instruments are to be construed according to the sense of the terms and the intention of the parties. We have seen that nothing can be deduced from the sense of the terms relating even remotely to the office of circuit judge or to the incumbent, only so far as relates to the power to elect. In determining the intentions of the framers of the amendment, we must keep in view the constitution as it stood at the time the amendment was made, the evil to be remedied by the amendment, and the amendment proposed, by which the evil is to be remedied. No interpretation should be allowed which would conflict with any other provision of the constitution, or which is not abso-

lutely necessary in order to give effect to the proposed amendment. On the contrary, such construction should be given as will, if possible, leave all the other provisions in the constitution unimpaired and in full force. Here the evil to be remedied was power conferred on the Legislature to elect judges: the remedy, to confer that power on the voters of the several circuits. These ends may be accomplished without violating any other portion of the constitution, and therefore no such construction should be tolerated.

It has been contended with much earnestness that the power to elect circuit judges was a delegated power emanating from the people through their constituted agent, the convention: and that the same power, being vested in the Legislature sitting in convention on the amendment, has withdrawn this power from the Legislature and conferred it on the voters of the judicial circuits; and inasmuch as the sovereign power which elected the judges was withdrawn from this agent who elected them, their power as judges necessarily ceased: in other words, that because the Legislature ceased to have power to elect judges, those which had heretofore been elected by that body must go out of office also. Plausible as this argument appears at first glance, upon closer examination it will be found, if logical in its structure, wholly incorrect in its premises. It is true that if the power which created the office had withdrawn it the office would have fallen, and, as a consequence, the incumbent would have ceased officially to exist, because, in that event, there would have been no office to fill. And it is likewise true that when the constitution transferred its power to elect judges from the Legislature to the voters of the circuits, it vacated their office as agents: but it by no means follows that because the power given an agent is revoked, his acts done in the fullness of that power are affected. True his power ceased, he could act no longer; all subsequent acts would be void. But no principle is better settled than that the acts of the agent, done in pursuance of his delegated authority before his power is revoked, are valid. The validity of a deed once executed in accordance with

the power given, is not affected because the principal choose to change his agent; and it is equally clear that an election held by the Legislature before their power was revoked or transferred to other agents, (the voters of the circuits,) remains just as valid as if no change had been made. The error in the premises consists in this: that, in laying the basis for an argument, the agent is made to assume the position which the office should. If the office had been withdrawn then truly the official power of the judge would cease; but neither the office nor the incumbent are affected by the change of agents to make future elections.

As regards the time when this amendment is to take effect: As a general rule it is true that legislative acts, and perhaps some of the provisions of the constitution, take effect (in the absence of any stipulated time in the act) from their passage; and if this position be qualified so as to make the amendment take effect at the time which may be prescribed by law authorizing the voters of the circuits to hold elections, I shall not dissent from it. But if it is to be understood that a power is conferred upon the voters, instantly to be exercised by them, independent of legislative authority, whilst we recognize the existence of an organized civil government, I am at a loss to conceive how it is possible for these voters to exercise the powers thus conferred. Is it not much more reasonable to suppose that this amendment was made in direct reference to such legislation as might be made to give it effect. There are many provisions in the constitution like this: for instance, it is provided by the constitution that the qualified voters of each township shall elect a constable, yet surely no one would seriously contend that the voters of a township (portion of an organized State government) could, in the absence of all law for that purpose, under this constitutional grant, hold a valid election.

It has been argued that, as the third judicial circuit, in which the defendant presides, has been re-organized, and its territorial limits now consist of a portion of several districts, the circuit is, for that reason, abolished. This question is not fully presented upon the issue now before this court; but, as the ground has

been assumed and is so intimately connected with the question before the court, it may be well to examine it. The constitution confided the judicial power of this State to a supreme court, to circuit and county courts, and to justices of the peace. After ordaining that the judicial power should be thus distributed, it confided to the Legislature the power to lay off and establish circuits and elect the judges of the circuit courts; (*Art.* 6, *Secs.* 4, 7;) from which it will appear that the judicial power is confided to certain courts to be brought into existence by legislative will. The effect of this ordination is, that in the exercise of the power to establish courts, that body is limited to these as the courts to which judicial power shall be given, and by other provisions of the constitution each court is assigned its appropriate jurisdiction, leaving the Legislature unlimited in the exercise of its power either in respect to the district or the qualifications of the judge, only (since our late amendment to the constitution) that district is to be composed of contiguous counties, and that the judge elected to fill the office so created should be at least twenty-five years of age.

In view of all the constitutional, as well as the legislative, powers in giving existence to the circuit court system and establishing the courts, it is a matter not altogether clear whether they should be considered as having been established by the constitution or by the Legislature. I am of opinion, however, when the district is laid off, an office is thereby created, and provision at once is made to have it filled. When once filled the constitution, by various provisions, interposes its protection to the court with a view to render it, as far as practicable, independent of the popular branch of the government, so that whilst the office exists the judge is protected from legislative encroachment. But, so far as regards the office, the very nature of the trust reposed in the Legislature, as well as the necessity which induced the framers of the constitution to confide such power to the Legislature, strongly indicates that the power to create, to alter, or abolish, must, of necessity, be vested in that body. The circuits are laid off for public convenience, and may be enlarged,

diminished, or abolished, when the public interest requires it. This point has been decided by the court of appeals of Kentucky. The decision is found in 4 *Dana's Rep.* 522, *Tesh vs. The Commonwealth.* "The constitution of Kentucky ordains that the judicial power of the commonwealth is vested in a supreme court established by the constitution and in such inferior courts as the general assembly may from time to time erect and establish." In the exercise of the power conferred by their constitution, the Legislature of Kentucky established the city court of Louisville. Chief Justice ROBINSON, in delivering the opinion of the court in that case, said "there can be no objection to the constitutionality of the city court of Louisville, which can, in any degree, be plausible, unless it be that which has been urged in this case, that the Legislature had no power to limit the duration of the court. But that objection cannot prevail. A court established by the Legislature may be abolished by legislation. The court of appeals being ordained and established by the constitution cannot be abolished by any other power than that of the people in convention; but all inferior courts, being created by the Legislature, must depend for the continuance of their existence on legislative will." The principal difference between the constitution of Kentucky and ours is, that whilst our constitution limits the Legislature in the distribution of power to certain courts, the constitution of Kentucky gives an unlimited power to their Legislature. This decision settles the question that where the Legislature creates it can alter or abolish, and, from the striking analogy between that constitution and ours, has a strong bearing on the question whether the court is to be considered as having been established by the constitution or by the Legislature.

A different construction would be wholly inconsistent with the intention of the framers of the constitution. The power was evidently conferred upon that body because, being frequently assembled, it would be enabled, from time to time, as necessity required, not only to lay off and establish new districts, but alter or abolish such as had been established, so as to suit pub-

lic convenience and facilitate the due administration of the law. To assume that when a circuit was once established it could not be altered, would be wholly at variance with the spirit and intention of the other provisions of the constitution, and would throw the circuit court system into confusion. Suppose all the circuits to be laid off at this time. If they become permanent, what is the effect of establishing a new county? (This the Legislature may do.) The result must be that for each new county a circuit must be established, and under the constitution, before the late amendment, counties would have necessarily remained without circuit courts until five contiguous were established. This power then, of establishing, altering, and abolishing, must, of necessity, exist in the Legislature.

Under our system of government office is derived, directly or indirectly, from the sovereign power of the State (the people), is held for the public good, and, whilst the incumbent is protected in his rightful exercise of it during the term for which he was commissioned, yet it is with this implied reservation that, when the public interest no longer requires the continuance of the office, it is not to be kept in existence to subserve his private interests. The doctrine of vested rights in office as against the State is not recognized as applicable to office here.

But whilst I have said that the Legislature have the power to alter or abolish the circuits, and that when the office is abolished it is necessarily vacated, I am not to be understood as deciding that a mere alteration, or change, or re-modeling a district, necessarily vacates the office whilst its identity exists in fact. Such is not the effect of a change, however it may be attempted, whether by enlargement or diminution. As well might it be contended that, because one of the members was taken off, the body could not exist, or that to add an additional field destroys the identity and existence of the farm. It may become a matter of much doubt and perplexity to determine to what extent alterations may be made without destroying the identity of the circuit. Each case must be determined according to its own peculiar circumstances: no general rule can be made to apply. And

whilst the discretionary power is vested in the Legislature, the constitution has thrown around the circuit courts such protection as will prevent this power from being so used as to encroach upon the judicial department by using this as a means of reaching an officer who may incur the displeasure of that body.

I am, therefore, of opinion that the office of circuit judge was in no respect affected by the amendment: that the effect of the amendment of the constitution was simply to confer upon the qualified voters of the several judicial circuits the power to elect their judge at such time and in such manner as might be prescribed by law: that such election can only legally take place from time to time in districts where the office may become vacant by death or resignation, or where the term has expired for which the incumbent was elected: and, consequently, that no valid election can be held in any district in which there is no vacancy.

The defendant has shown sufficient authority to entitle him to exercise the office of judge of the third judicial circuit. The demurrer must be overruled, and the defendant recover costs.

SCOTT, J., *dissenting*. Having been unable to coincide with my brother judges in some of their views touching the questions decided in this case, and, especially, disagreeing with them in their conclusions on the main question, the duty of reducing my reasons, for dissenting, to writing, has been devolved upon me by the statute; and, as I shall go at large into the whole subject as it presents itself to my mind, and may be therefore unnecessarily diffuse, my present purpose is to avail myself of the vacation to re-write these views in a more condensed form for the Reporter.

I shall first take a rapid glance at our judicial system, as that will enable me, with some brevity, to present my views as to the effect of the recent amendments to the constitution, and will serve to elucidate the few remarks that I intend to make in that connexion.

While this system, which the people of this State in their sovereign capacity "instituted for their peace, safety, and happiness," amply attests their wisdom and love of civil liberty, it contemplates duties by those functionaries entrusted with its motive power, at once difficult, arduous and responsible. Although a beautiful fabrick, constructed with infinite skill, and, in many of its minutest parts altogether finished, necessarily, from the nature and state of things, it was incomplete as a whole when it passed from their hands. And the duty of giving to it its finishing strokes was entrusted to agents constituted by the same instrument which presents to us not only this system, but the entire scheme of our State government. So far as this tribunal is concerned, not only is it erected by the constitution, but the qualification and number of the judges, who are to constitute it, are fixed, the duration of their offices respectively ascertained, its powers defined, its territorial jurisdiction made commensurate with the geographical limits of the State, and, in fine, little left undone to make this portion of the system complete, except the exercise by the Legislature of delegated powers in the filling of the offices of the three judges, and in fixing the times and places for the holding of its terms.

But, to give effect to those provisions which contemplate the administration of justice in the circuit and county courts, and by justices of the peace, more extensive duties were imposed on the Legislature. Circuits, counties, and townships, were here indispensable prerequisites, and these were, for the most part, to be created by the Legislature, either directly or indirectly, and are all placed by the constitution within the range of legislative discretion to establish, abolish, enlarge, or diminish, as the exigencies of the public convenience might seem to demand, not beyond the constitutional confines of this discretion. As there were counties, (recognized by the constitution as the creations of legislative power,) these had to be "divided by the general assembly into convenient circuits, each to consist of not less than five, nor more than seven, counties, contiguous to each other," before a circuit judge could be elected for each of the

circuits. Until these two legislative steps had been taken the office of circuit judge sprung not into being, although provided for by the constitution, and is therefore, necessarily, the direct result of constitutional exercise of legislative functions. But when thus in being it was to be filled by the exercise of the same sovereign delegated powers that filled the office of supreme judge, an office that results not from legislation direct or indirect; but is created by the constitution itself. But when the office of circuit judge is thus filled, the officer looks directly to the constitution for the measure of the duration of his office, for its powers, its capacities, its duties, its disabilities, its independence, and its responsibilities. Such also is substantially the result as to the office of judge of the county court and justices of the peace.

Nor are all the energies of this system yet aroused and developed, and that its capacities, already so ample, may be still further expanded, to the end that every reasonable desire of equity and justice may have full scope for gratification, provision is made by the constitution for appropriate additional instrumentalities. Corporation courts may be erected and vested with such jurisdiction as may be deemed necessary, and, whenever deemed expedient, courts of chancery may be erected. But no provision is made in respect of the offices of those who are to administer justice in these tribunals, other than that general one relating to all offices not "directed" by that instrument, but only authorized to be created whenever the exigencies of the public interest shall seem to demand them, which requires that, before such officers shall enter upon the duties of their respective offices, they shall take "an oath or affirmation to support the constitution of the United States and of this State, and demean themselves faithfully in office;" and thus, although these offices are the direct offspring of legislation, and much of their very elements and attributes are more of legislative than of constitutional creation, yet, like others in the judicial department not directly created by the constitutiou, and perceptibly interwoven into the organic web itself in distinct and well defined

colors, those who fill them must, in the same sense that the circuit judge looks to the constitution for his mantle and his chart, also look to that instrument not only for their appropriate place within this system, but also for the confines of their sphere of action as well as for the great features of their offices, and for their very soul and life in the aspect of authority.

In view, then, of this judicial system, and of that entire scheme of our State government, of which it is one department, co-ordinate and co-equal with the legislative and executive, and of our federal organization, regarding all as one harmonious whole, the duty is devolved upon me to determine and declare the effect of the two amendments of our State constitution recently adopted, so far, at least, as they may affect the judges of the circuit courts of this State, who were then in commission, and whose terms of service had not expired. Did these amendments have the effect to oust those judges from office, or are they still the lawful circuit judges for the residue of their constitutional terms of office?

The one amendment is in the following words, to wit: "That the qualified voters of each judicial circuit in the State of Arkansas shall elect their circuit judges." The other amendment is in these words, to wit: "That the general assembly of the State of Arkansas shall not be restricted as to the number of counties that shall compose a judicial circuit in this State." There can be no doubt of the right of the people of this State, at any time, to alter, reform, or abolish, their government in such manner as they may think proper, in whole or in part, and that this right is unqualified save only by the federal constitution, and may be exercised at any and all times—a principle that lays at the foundation of all American governmental institutions, and is so inseparably connected with the idea of both their form and nature that even had it not been found in the second section of the bill of rights, among those "great and essential principles of liberty and free government," which it was the declared purpose of that instrument to "recognize and unalterably establish," its existence could never have been questioned by any one at all

versed in our history as a people. And there can be as little doubt that amendments, made to the constitution in this constitutional mode, are as much a part of the constitution as if they had been originally incorporated in it, and that they must, necessarily, from the nature of a paramount law, overthrow and abrogate whatever state of things in existence, or laws in force, at the time of their adoption, that may be inconsistent with their instantaneous operation, unless, simultaneous with their adoption, provision be made to restrain or postpone their operation, or unless there be other provisions in the constitution, of which the amendments become a part only, which, either expressly or by fair intendment, have a like restraining influence, and even as to such all the presumptions of law are in favor of the instantaneous operation of the amendments. To this test I will first subject the amendment which removes from the Legislature all restrictions as to the number of counties to compose a judicial circuit. If there be any provision of the constitution that can, by a possibility, have a restraining influence upon this amendment to overturn the presumption of law in favor of its immediate operation, they can only be found in those provisions in respect of the development of the office of circuit judge, or of the incumbency of that office; for, it being manifest that the office of this amendment is not to resume by the people any power that had been before delegated to the Legislature; but, on the contrary, to confer power in removing limits that had been before fixed to the exercise of legislative power relating to the construction, re-organization, and abolition, of the circuits, and thereby allow more enlarged scope for the exercise of powers in reference to these objects, it necessarily follows that obstacles to the instantaneous operation of this amendment can only be found, if found at all, in matters that touch either the officer or the office of circuit judge; both of which, we have seen, are developed alone by legislation. Can either the one or the other of these interpose any obstacle? Clearly not: for, besides the consideration that the instantaneous life of this amendment could not, by possibility, in any way, touch the one or the other,

until the Legislature should, in their discretion, go beyond the bounds of their old limits; when they should go beyond these bounds they would effect only the identical same end that they could have, before the adoption of the amendment, effected in another mode, by the use of means already within their power, as has been seen in the glance which I have taken at the whole judicial system, the office, and indirectly the officer, being already within the range of the constitutional powers of the Legislature. For while the constitution, with the one hand, provided the Legislature with the power to create the office, with the other, in a mode as completely within its pale, it gave ample power for its destruction; and, as this amendment does not create, but only allows greater scope for the exertion of these powers of destruction, which were before complete but restricted to less latitude, there can be nothing found here to overturn the presumption that this amendment must have instantaneous free course; nor will there be found any thing connected with the officer that can have this effect, for if he were even to attempt to set up any proprietary interest or private property in his office as against the public, which I would be slow to regard, he could not pretend to any such beyond the actual existence of his office.

And having disposed of this amendment, I will proceed to subject the other to a like test, and determine, if I can, whether it can be held in abeyance. But, before I do so, I will endeavor to develope several apposite principles, and make an effort to apply them all before I arrive at my final conclusion.

I have remarked that the idea of the instantaneous operation and effect of an amendment of the constitution is inseparably connected with the idea of a paramount law, and that the presumption of law must be always in favor of this construction, and that they must necessarily have such effect, unless this presumption of law is repelled by at least one of the two opposing obstacles I have indicated, and it is not pretended that more than one of these obstacles exists as to the amendment which is now to be considered. And I will here take the occasion to remark that there is an essential difference between the character

of this amendment and that which I have just considered. For while that, in effect, took no power from the Legislature, but gave enlarged scope for the exercise of power before delegated to that body, this, on the contrary, in express language and by inevitable necessity, withdraws sovereign powers that had been before delegated and restores them to the people. No one will, for a moment, doubt the correctness of the proposition which I have assumed: that the presumptions of law are always in favor of the immediate operation and effect of the organic law, when applied to a convention of the people assembled for the purpose of remodeling the entire State government; or, for a moment, doubt that the new constitution adopted by such convention would be in force from the moment of its adoption, unless provision should be made in the instrument itself to postpone its operation and effect to a future day. And I will take the occasion here to remark that, so far as my research has extended, with all the facilities afforded by the able and industrious counsel, I have found that it has been the uniform course in all the States of this confederacy, not only where the entire State government has been remodelled, but also in cases where mere amendments to the constitution have been adopted, which, like this one, withdraws sovereign powers, or which necessarily disorganizes some part of the existing government, to adopt simultaneously, with such constitution or such new amendment, a schedule, or proviso, to sustain the old state of things, and prevent *pro tem.* the disrupting influence of the new constitution or amendment. Nor would any one doubt in the case of a convention just put, but that the adoption of the new constitution had abrogated the old one, and dissolved, into its original elements, the government that had been constructed and had existed under its authority. Nor would less doubt arise as to any of these results merely from the fact that no new principle had been incorporated into the new constitution, but the changes made consisted simply in a different combination, or a different application in the new, of all the identical same principles that were found in the old constitution.

When this State government was first instituted, certain sovereign powers were delegated and others were reserved, and certain natural rights were surrendered for the common weal, that civil powers and rights might thereby be exerted, grow up, and be preserved. Now it will be readily admitted that when all the sovereign powers that were delegated shall be resumed, and all the sovereign authority that was bestowed shall be withdrawn, the entire governmental superstructure reared by those powers upon this authority must instantly be destroyed. Can it be less true that where a given sovereign power that was delegated shall be resumed, that the superstructure that was reared upon that particular authority, and by that particular sovereign power, must also be destroyed? Should the people of this State desire to remodel their entire State government, they would, in the exercise of some of the sovereign powers which they have reserved, resume all the sovereign powers that they had delegated, and these, added to those that they had reserved, would place them in the possession of the entire sovereign powers and all their natural rights, except such as have been surrendered and delegated to the federal government, and with these they would rear a new State government, and delegate to it such powers as they might elect. Now if, in case in this scheme of government, it should be found expressed in the written constitution adopted, that it was "instituted for the peace, safety and happiness of the people," and there was found no other expression in it, whatsoever, to indicate the time when it should be put into operation, would not this avowal of the objects for which it was instituted be a ground for a strong presumption that it was designed that it should immediately go into effect? And would any one, for a moment, stop and hesitate as to this on the ground that it was a remedial measure, and ought not to be construed to act retrospectively, because there was found "no express words or declaration plain of such intention?" If any such were found thus to hesitate, and, from this consideration, to argue that it was the intention of the people who adopted this new constitution to postpone its operation

until all the officers under the government had either died or their terms of office under that old government had expired, it would be necessary, as I think, in order that that objection might be fully answered, to resort to the undoubted principle that the adoption of the new government had, *ipso facto,* ousted all such officers, because it could be overrode, as I think, by considerations of the same level with the objection, because that rule, as to remedial statutes, can have no reference to organic law, inasmuch as in every case of its legitimate application, private rights, either natural or civil, are contemplated, and it is designed to guard such from unjust invasion; but, in matters pertaining to organic law, such rights are not contemplated, otherwise than as altogether subordinate to, if not left entirely out of sight of, the great matter of public and general interest which organic law contemplates. And if the rule could have reference to organic law, and was applied for the purpose of extracting intention, would not all the presumptions that it could raise against the immediate operation of the organic law, be met and overcome by the still stronger presumption in fact that must arise from the expressed great objects of the enactment of the organic law, to wit: the "peace, safety and happiness of the people;" to which might be added the presumptions that would arise from considering the mischief and the remedy. If then such a presumption of the immediate operation of an entire State government should arise from such an expression found in its constitution, and could not be met and overcome by any presumptions of law, even if applicable, arising from any considerations of the remedial nature of the new government, can it be less true of any amendment that might be subsequently made to a constitution (into which the amendment is written in contemplation of law) in which constitution these very words are found in its most conspicuous part? Nor would any doubt exist as to whether the old government had expired; nor would the presumption of the immediate operation of the new one, which we have shown to exist, be in any wise repelled from the fact that the new government exhibited no new principle, but

only a different combination or application of the same principles that were exhibited in the old one.

Although I heartily concur with the chief justice, concurring, as he does, with Judge Story, in this connexion, that the constitution is a practical instrument, designed for the practical purposes of life, to be read and understood by the people, and must not be regarded as the depository of occult mysteries only to be developed by the agency either of the wand of eastern legerdemain, or of abstract and recondite philosophical disquisitions, the very description of which would have to be described, I still entertain the opinion, in which he doubtless concurs with me, that this instrument is not to be put entirely without the pale of the rules of law, when its meaning is to be interpreted by a court of justice. And regarding the constitution and the question before me in that light, I should find in addition to the presumptions of law in favor of its immediate operation, which, I have shown, are inseparable from the idea of a paramount law and to that other presumption that I have shown must arise from the great object for which the government was instituted, so emphatically expressed in the bill of rights, another still stronger presumption, in fact, inevitably arises from considerations touching the mischief and the remedy which never fail to throw some light in a search for intention. If an ordinary statute is to be always so construed as to suppress the mischief and advance the remedy, how much stronger should this general principle be applied to the construction of an organic law, when it is borne in mind that the people can never be considered as having entered upon a work of such vast importance as that of changing their organic law for light and fanciful reasons, but only for those of deliberate and grave import. And when this is considered, would it not be most unnatural to presume that the mischief that they designed to suppress was to be, in effect, the work of future years, and was not to avert evils from themselves or to secure their own rights; and, especially, would not such a presumption appear unnatural in case the term of office, instead of being four years, should be of the duration of good behavior or for life?

And yet the principle would be the same, as that would place the people in the extraordinary attitude of doing the grave and weighty work of changing their organic law altogether for the benefit of posterity. Nor could the weight of all these presumptions be, in any manner, overcome by any that could be reared on so slim a basis as any supposed proprietary right or private property in an office, as against the public, or on the rule of law as to the prospective operation of remedial statutes, as I have shown that this rule, contemplating, as it does, private rights, can have no legitimate application to the construction of organic law; much less any that could be based on any possible distinction between the doing of an act, and at the same time accompanying the act done by a legal exposition of its necessary import, and the doing the same act and leaving the legal exposition of its necessary import to be unerringly spoken by the law: or, in other words, between the doing an act and at the same time performing a work of supererogation in declaring its legal effect and the doing of the same act without doing such work of supererogation. And, therefore, had I no other resource but considerations of this character, to light my way to a conclusion satisfactory to my own mind as to the main question, those which I have touched, but not sought either to enlarge upon or to multiply, would carry me to the conclusion that the true construction of the amendment I am now considering, would be that which would vacate the offices of the circuit judges in this State, unless I could be convinced that the object of the amendment, ratified in 1846, was not only designed for the ordinary operation of the government, but also for extraordinary emergencies, such as this would be, and then I could give my sanction only to the idea that that might possibly keep these judges in office until the new judges should be elected, as provided for by the act of the last session of the Legislature. But I am not left thus to feel my way to a satisfactory conclusion by dubious lights; but have only to appeal to a great principle, which I have already invoked, but not yet applied; and, to my mind, the light of meridian day is thrown upon my pathway.

This State government, with all its machinery, as it existed before the adoption of this amendment, was a superstructure resting upon the constitution. This constitution was not only the foundation, but also the frame-work of the government. And not only was it the foundation and frame-work of the government, but it was itself even some of its more minute and finished parts. And not only was it all this, but it was also the embodiment of all the capacities for the further construction of an entire government, to be progressed in, from time to time, as the exigencies of the public interest might require, until it should be ultimately completed in all its parts. In this unfinished condition, in which it was so partially fashioned by the whole people of the State in their sovereign capacity, it was rested upon their authority which gave it life; and to it they delegated some of their own sovereign powers, to be held and used in trust for themselves. It was first necessary to use these sovereign powers that had been so delegated, in the further fabrication of the government, to fit it for the end designed to be subserved. To do this, such offices as were contemplated, but had not been in fact fashioned out, had to be constructed by means of these delegated powers. Then, by the use of these same powers, these offices had to be filled, for they could be filled by no other powers, as this government had none besides these. So, having been erected by the people, and by the instrumentality of their delegated powers, given life and power by their authority, and armed with their strength, it is their own creation and subject to their sovereign will. By that means it came into being, and by that same will it may be rightfully altered or destroyed. Should it be this sovereign will, at any time, to withdraw this authority, and resume all the powers delegated, the entire government would, instantly, rightfully, and necessarily, come to an end. No living vestige would remain, either in morals or physics, of a great corporation, now so full of life and power. So, should it be, at any time, that will to pull down and re-construct any one of these departments of the government, leaving the other two untouched, they could rightfully do this; and, in-

stantly, after the work should be done, nothing would remain of what was once the entire judicial department, for instance: the whole having been dissolved and passed into nonentity. And so of a single office within this department: that, for instance, of the office of judge of the supreme court, leaving all else in this department, and in the entire government, untouched. And so of the constitutional tenure of that office, leaving the office untouched. For the constitutional tenure of the office is as much a part of the living organization of the judicial system as the office itself, or any other part of its organization. So also, to my mind, is the appointing, or constituting, the officer as palpably a part of the organical structure of this system. This constitutive feature of the system was formed, fashioned, constructed, fixed, and authoritively stamped as much as any other feature in the system. It is an efficient authoritive instrumentality: it is an essential, created, artificial material that is woven into the web of the judicial system, and is necessarily a part of its organization. It is much more than form or manner, as whether as a means for the use of this instrumentality ballot or open vote be adopted, and is therefore substance, as whether the appointing power reside in the governor, in the senate, in the legislature, or in the people. It is not natural or incidental: it is artificial, and itself a principal; and a judge, coming in by any other door, was not a part, and could not be known or have place in, the system. It follows, then, that the annihilation of this feature of the system necessarily works a substantial disruption and delaceration of the living organism as sensible and in the same sense as the annihilation of an office or its tenure, and cuts the connecting link between the judge and the system.

How is it that this mighty fabric of government, proudly standing forth like some dome of antiquity, an apparently immortal monument of skill, wisdom, and refinement; full of life, power, and benevolence; and second, in our love and affection, only to Deity himself, can suddenly fall into ruins, even while we gaze upon it? The reason can be found only in an approximation, or assimilation, to a principle which, the divines teach us, governs

the universe, and presents the true distinction between governmental and private agencies; that the same quantum of true sovereign will and power that spoke the universe into being, has to be continually exerted to keep it in being. Exert this true sovereign will, and withdraw this continuing stay of true sovereign power, and instantly, as "God said let there be light and there was light," this so much mightier creation is a lifeless ruin.

If the whole governmental organization be subject to this law, can one of its parts claim exemption? Will any one pretend to assert the mathematical absurdity that the part is greater than the whole, or more immortal? Shall the judicial department claim exemption from this law, and stand proudly erect when the executive and legislative departments are in ruins? Shall the judge of the supreme court wear his robes of office and waive the wand of his power, when his office has ceased to exist? Or, shall the judge of the circuit court exercise his functions, when, for want of the continuing sovereign will and power of the people, whereby his life's blood flowed to him, he has been sloughed off from a judicial system of which, in his official character, he was once a part of its organism? In my opinion, as well might the judges of antiquity rise up, shaking the dust of centuries from their robes of office, and claim a place in our present judicial system on the ground of legal identity.

Then, in the light of these views, it is my opinion that all the circuit judges in this State, who were commissioned at the date of the ratification of the amendment to the constitution, that I have been considering, were thereby ousted from office, and that no such official personages, as they claim to be, are now known to the judicial system of this State; and that the judicial system now existing provides for the administration of justice by no other judges than such as shall be constituted by the people of the several circuits. Judges otherwise constituted have no place in the system, and can exercise no authority.

And I will remark, in conclusion, although it is perhaps unnecessary, as it is an inevitable sequence from the position I occupy, that it is my opinion that the amendment to the consti-

tution, ratified in 1846, can no more apply to a vacancy created as these have been, than it could apply to a vacancy occasioned by a removal from office by impeachment.

STATE VS. FLOYD.

In November, 1846, defendant was elected judge of the seventh circuit, composed of the counties of Crawford, Franklin, Johnson, Pope, Scott, Yell, and Conway, for the term of four years. By an act of December 29th, 1848, the *judicial circuits* were re-arranged, reduced from eight to six; the counties of Scott, Crawford, Franklin, Johnson, Carroll, Newton, Madison, Washington and Benton, declared to constitute the *fourth* circuit, and defendant assigned to that circuit. HELD, that though the number of defendant's circuit was changed, from *seventh* to *fourth*, yet its identity was preserved, as it embraced a majority of the counties of his original circuit, including the county of his residence, and that he was rightfully judge of the fourth circuit under the new arrangement.

That such a change in his circuit did not abolish his office.

On Writ of Quo Warranto.

The facts are stated by the Chief Justice.

CLENDENIN, Attorney General.

E. H. ENGLISH and RINGO & TRAPNALL, for defendant. The recent amendment to the constitution, declaring that the people shall elect their circuit judges, did not vacate the office of defendant. *State vs. Scott, ante.* In this case, we will regard that point as settled.

The State alleges that the defendant was elected judge of the *seventh* judicial circuit, that the act of Dec. 29, 1848, reorganizing the circuits, &c., abolished the *seventh* circuit, and there-

fore he is out of office; and that so much of said act as undertakes to assign him to the fourth circuit is void. The defendant insists that said act did not abolish his office, but merely changed the field of his labors—simply changes the territory over which he is to exercise the duties and powers of his office. This is the issue, and it must be settled by a recurrence to first principles, there being no adjudicated cases precisely in point.

In settling questions arising out of our organic law, it is necessary to keep in view the objects of the people of this country in ordaining written constitutions—the evils of the British government of which our forefathers complained, which drove them to the new world, led to their independence, and against which they designed to protect themselves and their posterity by written constitutions.

In England, says Mr. Blackstone, *Book* 1, *p.* 271–2, the king is the fountain of honor, *office*, and of privilege—he is really the parent of them. He is, says the same learned author, (*Ib.* 266–7–8,) the fountain, the distributor, of justice, and has alone the right of erecting courts of judicature, and appointing judges as his substitutes, or delegates, to hold the courts. Hence the judges in England held office at the pleasure of the crown, and history abundantly attests that a state of dependence upon the king too often made them the mere instruments of oppression. One of the great objects of the people of this country, therefore, in establishing written constitutions, was to secure the independence of the judiciary, and the consequent impartial administration of justice. This must be borne in mind in the investigation of this case.

It may be well to settle here the questions: What is an *office?* What is the *office* of circuit judge? Whence does it derive its existence? How is it created? How far does it depend upon the Legislature for creation, and the continuance of its existence? In other words, how far is the *judiciary dependent* on the *Legislature?*

Sovereignty, says Blackstone, (*Book* 1, *p.* 49,) is the power to make laws. In this country it may, more properly, be defined

the right, or power, to govern, including the power to make, administer and execute laws. This sovereignty, or right to govern, is in the people at large. Our State constitution divides the powers of government into three departments: the legislative, executive, and judicial; and delegates each division of power to a separate body of magistracy. (*Art.* 3, *sec.* 1.) It further sub-divides each of these divisions—carves them out, as it were, into *offices*. An office may, therefore, be defined, a portion of sovereignty set apart, by the constitution, to be delegated to, and exercised by, an individual, for the public good, or to carry out the objects of government. See *Dorsey's case*, 7 *Porter* (*Ala.*) *R.* 293.

In making these divisions of the powers of government, it may be seen, by examining the frame-work of the constitution, the design was to make them independent and co-ordinate, in order that each body of magistracy might look alone to the constitution for the tenure of office, and not occupy dependent positions.

The judicial department is sub-divided into *offices* thus: a supreme court, circuit courts, county courts, probate courts, corporation courts, and justices courts; and the amount of judicial power contained in each of these sub-divisions, or offices, is defined. (*Art.* 6.) The second section of this article defines the jurisdiction of the supreme court; and the seventh section fixes the tenure of the office, the qualification of the judges, &c., leaving nothing for the legislative department to do but to select the individuals who are to fill the office, and nothing for the executive to do but commission them; and the moment they are elected, and commissioned, they become independent of the other departments, and look alone to the constitution for the tenure of their office.

So the third section of the sixth article *creates* and defines the *office* and powers of circuit court, and the seventh section prescribes the qualifications of the judge, fixes the tenure of the office, and but two things remain to be done by the Legislature: to divide the State into convenient circuits, and elect the judges; in other words, to select the persons to exercise the office which

is carved out by the constitution, and fix the territorial boundaries in which they are to perform its duties; and, by the recent amendment, the power to elect the judges is restored to the people. Under the single power, therefore, to divide the State into judicial districts, it is sought to make the official tenure of the judges wholly dependent upon the Legislature.

The framers of the constitution anticipated an increase of population, and of the number of counties, and had necessarily to entrust to the Legislature the power to arrange the judicial circuits as public convenience might require; but it was never designed that this power should be exercised in disregard of another provision of the organic law securing to the judges a tenure of four years.

The fourth section of the sixth article provides that the "State shall be divided into convenient circuits, each to consist of not less than five nor more than seven counties contiguous to each other, for each of which a judge shall be elected, who, *during his continuance in office*, shall reside, and be a conservator of the peace, within the *circuit for which he shall have been elected*." And the 8th section provides that the "circuit judges shall be elected for *four years* from the date of their commissions."

Under these provisions the defendant was elected, in November, 1846, judge of the *seventh* circuit, composed of the counties of *Crawford*, *Franklin*, *Johnson*, *Pope*, *Scott*, *Yell*, and *Conway*, for four years; and, by a fair and reasonable construction of the fourth section of article six, he had a right to exercise the office of judge, in the circuit *for which he was elected*, for the constitutional term, and the Legislature could not change that circuit until the expiration of his term. Had this interpretation of the fourth section been adopted, the circuits would have been permanent for four years at least, and could not have been changed at every session, as they have been, producing confusion and inconvenience to judges, bar, and people. Under this construction the circuits could have been arranged in advance of the election of the judges, and could have been re-arranged every four years if public convenience required it. But, however rea-

sonable this construction may be, it is not necessary for the defendant to rely upon it to make out his defence.

We come now to the question, can the Legislature abolish a circuit, for which a judge has been elected, before the expiration of his term, so as to deprive him of his office? Though the defendant does not rest his case upon the denial of such power, yet he may, with much plausibility, take this position. That the Legislature cannot abolish the *office*, is manifest, because it is established by the constitution. The proper inquiry is, can the Legislature deprive the judge of the office, by abolishing his circuit; or, in other words, taking from him the *field* of his labor?

The recent amendment to the fourth section of article six declares that the Assembly shall not be restricted as to the number of counties which may be put into a judicial *circuit*. If the effect of this amendment is to confer upon the Legislature the power to abolish a circuit at pleasure, and at any time, regardless of the tenure of the judges, then the independence of that branch of the judiciary is gone. They are mere tenants at the will of the General Assembly. True, circuits are established for public convenience, and no doubt may be discontinued when public good requires it; but, in discontinuing them, the constitutional rights of the judges are not to be disregarded. In *Tesh vs. Commonwealth*, 4 *Dana*, 522, and *Bruce vs. Fox*, 1 *Dana*, 452, it was held that if an office is created by statute, the Legislature may abolish it, and thereby oust an incumbent; but if the office is established by the constitution, it is otherwise. Here, the defendant, when elected, looked to the constitution for the tenure of his office, and not to any statute. In *Ohio vs. Choate*, 11 *Ohio R.* 512, it was decided that the assembly could not legislate an associate judge of the county court out of office by changing the boundary of his county, and throwing his residence into an adjoining county. That was a stronger case than this, for here both the old and new circuit embrace the residence of Judge Floyd.

Grant that, in this country, there is no property in office, yet the officer has a constitutional tenure which must be regarded. When a lawyer gives up his practice, goes upon the bench for

four years, and makes his arrangements to continue there for that time, surely it was never intended that the Legislature should have power to put him out of that office at pleasure, regardless of the injury and inconvenience it would visit upon him. While public good is paramount, the constitutional rights of the officer are not to be overlooked. The object of the amendment may always be accomplished by abolishing a circuit when the office is vacant, or by making the act take effect at the expiration of the term, which was done in this case, as we shall presently see.

But conceding that the Legislature have the power to abolish a circuit, and thereby oust the judge, it is manifest, from the face of the act in question, that they did not design to deprive defendant of his office. At the time the act was passed, it was notorious that Sneed, judge of the fourth circuit, had moved to Texas, and besides his term had expired. There was also a vacancy in the eighth circuit. The Legislature, knowing these facts, re-arranged the circuits, reduced the number to six, and expressly provided that the defendant, who was judge of the *seventh* circuit, should be judge of the *fourth*, under the new arrangement.

The seventh circuit consisted of the counties of *Crawford*, *Franklin*, *Johnson*, *Pope*, *Scott*, *Yell*, and *Conway*. The counties put into the fourth circuit, by the act of 29th December, 1848, to which defendant is assigned, are *Scott*, *Crawford*, *Franklin*, *Johnson*, *Carroll*, Newton, Madison, Washington and Benton.

Thus *four* of the counties (making a majority) which composed the seventh circuit, are embraced in the *fourth*, including *Johnson*, the county of defendant's residence.

Certainly changing the *number* of defendant's circuit from *seventh* to *fourth*, did not oust him from office. If the next Assembly were to pass an act reversing the numbers of the circuits, calling the *sixth* the *first*, and so on through, it would be absurd to conclude that such a change would oust all the judges.

If changing the number (or *name*) of defendant's circuit, did not oust him, does the change made in the counties which compose

it? His present circuit embraces *four* of the original counties, *three* have been cut off, and five added. If such a change of a circuit will deprive a judge of his office, (contrary to the expressed intention of the Legislature,) what less change will do it?—where is the fatal point to be fixed? We think if the Legislature can change the circuit at all, it may make a total change. If no change can be made, the act of 29th Dec., 1848, is void, and the defendant is judge of his original circuit. If a change may be made, and such change ousts the judge, then all the judges are out of office, for said act changes all the circuits.

If the change made in defendant's circuit put him out of office, then the alteration made in the fifth circuit ousted Judge Feild, for the change in Feild's circuit is about as great as that made in defendant's. Feild was elected judge of the fifth circuit, composed of the counties of Saline, Pulaski, Prairie, White and Perry. The act of 29th December, 1848, puts Saline, Pulaski, Prairie, Conway, Pope, Yell and Perry in the fifth circuit, dropping one county, and adding three others, making a change of four counties. There are but four of the original counties in Feild's circuit, and there are four of defendant's original counties in his new circuit. A similar change was made in the other circuits; and if Floyd is out of office, the other judges are out, and if they are in, he is in. Yet the Attorney General does not pretend that any other judge is ousted by the act in question.

The only difference is, that the *name* of defendant's circuit is changed. Well, there is nothing in a name! If the act had called the *fifth* the *fourth*, and assigned Feild to the fourth, surely that would not have deprived him of his office.

The Legislature did not intend to oust defendant by the act of 29th December, 1848, as shown upon its face. He is protected in his office by great constitutional guarantees; and we respectfully contend that to oust him would be establishing principles subversive of the independence of the judiciary; and though in future they will receive their offices from the people, yet in fact they will be tenants at the will of the Legislature, and may be driven to the degrading practice of hanging about that body, and

electioneering, to prevent their circuits being abolished, by that spirit of change which unhappily pervades our legislation.

WALKER, J. Did not sit.

JOHNSON, C. J. The writ issued in this case commands William W. Floyd to appear before this court, and to show by what warrant and authority he holds and exercises the office and franchise of judge of the fourth judicial circuit in this State; and then avers that, by an amendment to the constitution and the act passed in pursuance thereof, the judicial circuit for which he was elected judge has been abolished, and that, by such abolishment of the circuit, he had ceased to be one of the circuit judges of the State of Arkansas. The defendant appeared in obedience to the mandate of the writ, and filed his response. He alleges, by way of response, that he was elected judge of the seventh judicial circuit of said State, by the General Assembly, on the 30th November, A. D. 1846, for the term of four years from the date of his commission, and that he was duly commissioned, by the governor of said State, as such judge, on the day of his election; that, by an act passed on the same day of his election, it was declared, the counties of Crawford, Franklin, Johnson, Pope, Scott, Yell and Conway, should constitute the seventh circuit; that, by an act of 29th of December, 1848, entitled "An act to divide the State into judicial circuits," &c., it was declared that the counties of Scott, Crawford, Franklin, Johnson, Carroll, Newton, Madison, Washington and Benton, should constitute the fourth circuit, and that the judge of the seventh circuit should be judge of the fourth circuit. He further stated that a majority of the counties which composed the seventh circuit, including Johnson county, the county of his residence, were, by the act aforesaid, put into the circuit called the fourth by said act; that, at the time of the passage of said act, the circuit called the fourth, under the previous arrangement of the circuits, had no judge; that Judge Sneed had vacated his office by removal to Texas, and that his constitutional term had actually expired, and that

the General Assembly had re-arranged the circuits with a full knowledge of the vacancy, as was shown upon the face of the act of the 29th of December, 1848. Upon this state of facts he insists that his office, as judge of the seventh circuit, has not been abolished, as suggested by the writ; but that a change has merely been made in the number and territorial boundaries of his circuit; by which change the Legislature did not design to abolish his office, nor was such the effect of the change. He therefore submits that, by virtue of his election, and commission, and by virtue of the constitution of the State, and the act of 29th of December, 1848, he rightfully exercises the office of judge of the fourth judicial circuit of this State, and prays to be discharged, &c. To this response, the Attorney General interposed a demurrer: the legal effect of which is to admit the facts, but to deny their sufficiency in point of law.

The only question really involved in this case relates to the constitutionality of the act of the 29th of December, 1848, so far as it operates upon the seventh circuit. It is conceded, by the demurrer, that the defendant was elected to the judgeship of the seventh judicial circuit of this State, by the General Assembly, on the 30th of November, 1846, for the term of four years from the date of his commission, and that he was duly commissioned, as such judge, on the day of his election, by the governor of the State.

In order to a full solution of this question, it will be necessary to refer to the constitution as it existed at the date of the defendant's election, and also to such changes as have been subsequently made in that instrument. The sixth article of the constitution declares that "the judicial power of this State shall be vested in one supreme court, in circuit courts, in county courts, and in justices of the peace:" that "the supreme court shall be composed of three judges, one of whom shall be styled a chief justice, and two of whom shall constitute a quorum, and the concurrence of any two of said judges shall, in every case, be necessary to a decision;" and that "the supreme court, except in cases otherwise directed by the constitution,

shall have appellate jurisdiction only, which shall be co-extensive with the State, under such restrictions and regulations as may, from time to time, be prescribed by law:" that "the State shall be divided into convenient circuits, each to consist of not less than five nor more than seven counties contiguous to each other, for each of which a judge shall be elected, who, during his continuance in office, shall reside and be a conservator of the peace within the circuit for which he shall have been elected." And further, that "the General Assembly shall, by joint vote of both houses, elect the judges of the supreme and circuit courts, a majority of the whole number, in joint vote, being necessary to a choice;" and that "the judges of the circuit court shall be at least twenty-five years of age, and shall be elected for the term of four years from the date of their commissions." These are believed to be all the constitutional provisions, bearing upon the question, that were in existence at the date of the election and commission of the defendant. The Legislature, at its last session, whilst in the exercise of their conventional powers, adopted an amendment to the original constitution, by which they repealed that portion of the fourth section of the sixth article which restricted the circuits to not less than five nor more than seven counties. The same body, at the same session, under the authority of this amendment, and in their capacity of legislators, proceeded to re-organize the circuits throughout the entire State, and, in the re-organization, not only parcelled out some of the circuits as they then stood, but actually reduced the number from eight to six. In the act of re-organization an express provision is made that, in case this court shall decide that another amendment of the constitution, by which the power of election is transferred from the Legislature to the people, does not so operate as to oust the judges whose constitutional terms had not expired, that then, and in that case, the judge of the seventh should be the judge of the fourth circuit. The legal effect of that amendment has already been determined by this court in the case of *The State vs. William C. Scott.* It was there held that the amendment did not, *per se*, oust the judges, but

that they were entitled to hold and execute their respective offices during the constitutional term for which they were elected.

The principle settled in that case, admitting that the Legislature did not exceed their constitutional limits in the re-arrangement of the circuits and in transferring the judge of the seventh to the fourth circuit, might be considered as conclusive of the whole question. But herein lies the point to be determined, and it is not without its difficulties. It is apparent that, in case the Legislature possessed no constitutional power to change the name and to destroy the identity of the seventh circuit, that then although the defendant may be nominally acting as judge of the fourth, yet, as it stands admitted by the demurrer that he is still resident in the county of his former residence, and that that, with three others now composing a part of the fourth, constituted a majority of those embraced within the seventh circuit, he, although nominally the judge of the fourth, is not such in reality so acting; but that he, as of right he ought to be, is, and is acting as, the judge of the seventh circuit. I consider the proposition clear and unquestionable that, in case the circuit judges can be said to have any constitutional rights as applicable to their offices, they are entitled to all such as are secured by that entire instrument as it stood in all its parts at the time of their election and commission. The defendant has an undoubted right to all the guarantees of the constitution as they existed at the date of his commission. What are those guarantees? They are to be found in the following provisions, to wit: "The State shall be divided into convenient circuits, each to consist of not less than five nor more than seven counties contiguous to each other, for each of which a judge shall be elected, who, during his continuance in office, shall reside and be a conservator of the peace within the circuit for which he shall have been elected," and that "the judge of the circuit court shall be at least twenty-five years of age, and shall be elected for the term of four years from the date of his commission." He is elected, then, for the term of four years from the date of his commission, and he is expressly required, during his continuance in office, to reside and

be a conservator of the peace within the circuit for which he shall have been elected. These provisions, it will be perceived, are clear and imperative, and the judge is just as much bound to reside within the limits of the circuit to which he shall have been elected as the Legislature are to arrange the circuits and elect an incumbent for each. If this proposition be true, and it is too clear to admit of cavil, where is the power in the Legislature, either by modifying or destroying the circuit, to disable the judge from residing within it, and thereby rendering obedience to the positive requirements of the constitution?

But it is contended that the Legislature, having created the offices of circuit judge, necessarily possesses the power to destroy them at pleasure. It will be admitted, as a general rule, that the powers of creation and destruction are inseparable; yet this rule must necessarily be subject to certain exceptions, in cases where the power of creation is exercised under constitutional restrictions. For example, the Legislature undoubtedly possesses the power to enact, or, if it be more proper so to speak, create a law, and their power of repeal or destruction is equally clear; yet this, by no means, proves that they, by such repeal, can destroy, or even impair, such constitutional rights as may have been acquired under it. The constitution establishes a circuit court system, and confers upon the legislature the power to divide the State into convenient circuits, and also to elect a judge for each. It may be conceded, and the true doctrine is believed to be, that, by the exercise of this power, the office itself is actually evolved, and put into active operation. But the moment the office is evolved and receives shape and mould, by the hands of the Legislature, all the constitutional guarantees, *ipso facto*, attach themselves to it; and, for the purposes of the incumbent during the time prescribed, it is just as much a constitutional office as that of the supreme judgship, or any other, created directly by the constitution itself. But here it is objected that to hold thus is to sanction the doctrine of vested rights in a public office. To this I answer, that the rights claimed by the defendant do not arise out of a mere legislative act, but that they

result directly from, and are secured to him by, the constitution of the country. A right conferred upon a party by an exercise of legislative power becomes so completely vested as not to be susceptible of divesture by mere legislative authority, and, for a much stronger reason, would it not be when secured by the organic law itself. The doctrine of vested rights is not relied upon to sustain the position taken by the defendant, nor could it be, unless it should go to the extent to deny the power of the people in convention to oust him from his office. This is not pretended; but, on the contrary, such power is fully conceded. But, to illustrate this principle more clearly, let us suppose that the Legislature, after having fixed a judge's salary, should attempt to abolish, or even to diminish it during his constitutional term or office. Such an act would be admitted by all to be a clear and palpable violation of the constitution, and consequently void. The question then arises here, in what respect is the amount of his salary, when fixed by the Legislature, more firmly secured than his territorial limits and the identity of his circuit? The salary cannot be said to have been created by the constitution, but is clearly the mere creature of law; and yet it would not be pretended, for a moment, that the Legislature could ever diminish it during the time for which the judge shall have been elected. The two cases stand upon a perfect parity of reason, and they are both alike entirely beyond legislative control for the term prescribed by the constitution. I conclude, therefore, from all the provisions of the constitution, when taken and construed together, that when the Legislature arranged the seventh circuit, and designated the counties which composed it, and filled it by the election of the defendant, their power over it ceased during his constitutional term.

But here I am met with an argument based upon necessity and public policy. It is contended that, unless the Legislature should be permitted to add to or diminish a circuit, new counties must necessarily be left without courts, and that such a state of things would be productive of great inconvenience and much injustice to the public. To this I respond, that, if such should

be the result, this court could not, with any degree of propriety, be held responsible for it. The people of the State, in the rightful exercise of their sovereign powers, ordained and established the constitution; and the only duty devolved upon this court is to expound and interpret it. But I imagine that the evil anticipated would not necessarily exist, as the Legislature would have the undoubted right to designate, in advance, the circuit to which a new county or counties should be attached upon the happening of a vacancy, or upon the expiration of a constitutional term of the incumbent.

The defendant rests his defence also upon another and distinct ground, and that is, that, although the seventh circuit shall be considered as abolished, yet the Legislature did not intend to oust him, but expressly provided for the event, and transfered him to the fourth circuit. True it is that the act clearly evinces the intention to continue him in office, in case that he should not be ousted by the operation of the amendment by which the power of election was transferred from the Legislature to the people. However, with their intention I conceive this court has but little to do. The question before us is not one of legislative intention, but of constitutional power. It is obvious, from the express words of the act, that the Legislature did not intend to deprive him of a circuit judgship, although the one for which he had been elected should have been abolished; yet, had such been the legal effect of their acts, the transfer would have been without constitutional sanction, and consequently he could not have enjoyed the fruits of their kindness. If the seventh circuit was actually abolished, and the fourth erected out of the whole, or even a part, of it, the Legislature most clearly possessed no power to fill the latter by a mere transfer, but would have been confined to the constitutional mode of election. If they could transfer the judge of the seventh to the fourth circuit, they could also transfer him to the first or to any other within the limits of the State. This they most unquestionably could not do. I will suppose, for the sake of illustration, that, instead of re-organizing the circuits throughout the State, and reducing the number

from eight to six, they had merely reversed the order of their number, can it be possible that any one would insist that they could have driven the judge of the eighth circuit out of the one for which he was elected, and have compelled him either to resign or take up his residence in the first? I consider the proposition too monstrous to entertain for a moment. The language of the constitution is clear and imperative that he shall reside and be a conservator of the peace within the circuit for which he shall have been elected during his continuance in office. It is not the number that constitutes the circuit, but the counties of which it is composed. The number is used purely and solely to distinguish the one from the other, and consequently a mere change of name or number cannot affect the integrity or identity of the circuit.

I am, therefore, of opinion that, although the defendant is acting nominally as the judge of the fourth, he is in reality acting as the judge of the seventh circuit, which he is, of right, authorized to do; and that consequently he is not guilty of usurpation of office, and ought to be discharged.

SCOTT, J. In this case I shall treat as closed the constitutional question settled by a majority of this court in the case of *The State vs. William C. Scott.* Not that my views, adverse to the correctness of that decision, have, in any degree, changed: on the contrary, my convictions remain clear that the question was erroneously decided; but because I entertain the opinion that, unless a decision of this tribunal, upon a constitutional question, is likely to be revolutionary in its effects, or to inflict some serious wound upon the liberty or the safety of the citizen, the public interest will be better subserved by yielding to its authority, and thus promoting that certainty of the organic law which alone can be the mother of public confidence and repose, than to wage single-handed a war of argument and opinion that can only beget a distrust of judicial stability, which will not fail to be prolific of litigation, and may be sometimes even still more mischievous in discouraging public measures of the highest im-

port. But, while this will be my course on the present occasion, seeing nothing in the decision of the question referred to indicative, in my judgment, of the serious consequences alluded to, I will endeavor, in my opposition to decisions subversive of public or individual liberty, or of personal security, which may tend to destroy the great land marks of the constitution, should any such ever be made, to be at all times unyielding. In this position, taken after much deliberation, I am fully sustained by the views of an eminent judge, the Hon. BRISCOE G. BALDWIN, of Virginia, one of the judges of the supreme court of appeals of that State, whose purity of life, accuracy and great learning in the profession, self-possession and soundness of judgment, entitle his opinions to profound respect. He says "it is difficult to conceive any thing more mischievous than fluctuations and vibrations of the highest judicial tribunal upon the organic law of the State, for the tendency is to shake the foundations of society and throw it into confusion and anarchy. A decision of a supreme court, on such a question, ought not to be departed from, however unsatisfactory to succeeding, or even the same judges, without the gravest, most cogent and highest considerations. There doubtless may be cases in which such a decision ought to be repudiated, as, for example, where the effect is likely to be revolutionary, or where it inflicts a serious wound upon the liberty or safety of the citizen. In such emergencies it is the duty of every sentinel upon the ramparts of the constitution to sound the alarm and defend the citadel, though others may have proved faithless or recreant. But, if the principle asserted, however erroneous, be not vitally dangerous or mischievous, it is far better to bow to the constituted authority, and leave the redress to the people, or those whom they have appointed to change or modify the organic law."

And, having disposed of this question, I have but to announce, in the briefest possible terms, that, although in the views of the chief justice, presented in his opinion just read, I have not been able to concur, entertaining, as I do, the opinion that consistently with the genius of our government, as I understand it, no public

officer can rightfully claim any proprietary interest, or private property, as against the public, in any office, and that, under our constitution, the unrestricted powers allowed to the Legislature, in reference to the circuits, necessarily include the power to abolish any of them at their pleasure, and thereby dispense with the office of circuit judge, evolved from the constitution in its creation, whenever, in their discretion, the exigencies of the public interest might require the abolition of any circuit; nevertheless, I fully concur with him on the main question, basing my concurrence upon the ground that the act of the Legislature, approved the 29th December, 1848, entitled "An act to divide the State into judicial circuits," &c., (*Pamphlet Acts, p.* 49,) did not abolish the circuit for which Judge Floyd was elected, and that consequently his office is still in legal existence.

It is manifest, from the most cursory glance at the act in question, that it was not the intention of the Legislature to dispense with Judge Floyd's official services, and these could be retained only by preserving his circuit; which alone, in my opinion, sustains the legal existence of his office; and consequently, if the legal effect of the act was to destroy his circuit, the Legislature did what they did not design to do. It is true that the numerical designation of the circuit, which embraces his residence, has been changed from the seventh to the fourth; but this is a matter of exceedingly slight import, when it is remembered that the State is now divided into but six circuits instead of eight, and that numerical designation is but form and not substance, and at most but one of various means of identity. All must admit, whatever may be their views of the constitutional powers of the Legislature to abolish circuits, that it was designed by this act to abolish but two of the eight, and to divide out the whole of the counties among the remaining six. The act, then, should be construed, if practicable, so as to give effect to this intention.

Had this act provided, in express terms, 1st. That the fourth and eighth circuits should be abolished: 2d. That the seventh circuit should be hereafter designated as the fourth circuit: and 3d. Had parceled out all the counties in the State among the six

remaining circuits, no one would have doubted but that the seventh circuit actually remained, although its numerical designation had been changed. And, in my opinion, this is precisely the legal effect of the act that has been passed; and to give it any other interpretation will pervert the manifest intention of the Legislature. Why is it to be inferred that the fourth and eighth circuits, as heretofore designated, have been abolished? As to the eighth, the counties of which it was constituted have been divided to two adjoining circuits severally retaining their former numerical designation; and as to the fourth, while some of the counties, of which it was constituted, have been added to a circuit whose numerical designation has not been changed, the others have been added to a circuit whose judge is expressly recognized by the act, whereby a circuit is necessarily pre-supposed on the presumption of law that, in this, the Legislature acted within a constitutional power they possessed; forasmuch as if a circuit be not pre-supposed, the recognition would be nugatory. And the act also recognizing three other judges in connexion with their respective circuits, neither of whose numerical designations has been changed, the inference is inevitable that the fourth and eighth were abolished, as each one of the remaining six is by the act recognized and identified.

It is, therefore that, placing the construction indicated upon the act in question, I hesitate not to declare it as my opinion that Judge Floyd is the rightful judge of the circuit now numerically designated as the fourth, being identically the same circuit in contemplation of law that was at the time of his election numerically designated as the seventh circuit; and consequently I concur with the chief justice that he is not guilty of usurpation, and ought to go hence, and recover his costs.

PULASKI COUNTY VS. LINCOLN ET AL.

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The county court has the power to provide a house for the poor, and may appoint commissioners to select and contract for a site therefor, and when the acts of such commissioners are ratified by the court, they become as valid as if done directly by the court.

Where such commissioners contracted with the presiding judge of the court for a site for a poor-house, the presiding judge (being interested) and the two associate justices could not confirm the purchase.

It requires the presiding judge and the two associate justices to hold the court, and the presiding judge being incompetent, the act of the court so organized was void, though the presiding judge did not vote on the question.(*a*)

Nor could the contract of such commissioners be confirmed at a special term of the court, held on the second Monday in November, to act on the delinquent list of the collector: such court being held for a special purpose, other business could not legally be done.

Where three commissioners are appointed to contract for a site for a poor-house, two of them cannot make a valid purchase.

A county warrant issued by order of the court, for such purchase, so illegally confirmed, may be cancelled by bill in chancery at the suit of the county.

Appeal from the Chancery side of Pulaski Circuit Court.

BILL IN CHANCERY, brought by Pulaski County, against Lincoln, King, Moore, Martin, Inglish and Pendleton, determined in the Pulaski circuit court, in June, 1846, before the Hon. J. J. CLENDENIN, then one of the circuit judges. The court refused the relief sought by the bill, and complainant appealed. The facts are stated in the opinion of this court.

WATKINS & CURRAN, for the appellant. Admitting the order of the court, of the 1st August, 1843, appointing commissioners, to be valid, yet the purchase of the land from Lincoln, and the

(*a*) In the absence of the presiding judge, a majority of the justices of the county should be present to hold the court. *Ferguson vs. Crittenden County*, 1 *English's R.* 479. REPORTER.

whole proceedings connected with such purchase, are mere nullities. The order of the 20th of October, made by the court, of which Lincoln was presiding judge, if final, was void, it being a palpable violation of the constitution and of law for a judge to sit in his own cause; if interlocutory, the validity of the acts of the commissioners depended upon the subsequent confirmation by the court. The order made at the special term of the county court, held on the second Monday in November, purporting to confirm the purchase, was void: because, 1st. Lincoln was the presiding judge, and therefore disqualified, and this although he may not have voted on the question, as it was not a constitutional court without his presence, (*Ferguson vs. Crittenden County*, 1 *Eng.* 480;) 2d. Because, at the special term the court possessed no power by law to do any thing except act upon the collector's delinquent list. *Digest, chap.* 139, *sec.* 73.

S. H. HEMPSTEAD, contra. In a legal sense, Lincoln did not preside in the trial of a cause in which he was interested: the utmost extent of the rule is, that a man shall not hear and determine any question in which he has a direct interest, (3 *Burr.* 1856. *Cro. Eliz.* 654. 2 *Tidd*, 770. 1 *Salk.* 397. 2 *Rall abr.* 92 *A.*) To try and determine implies direct action, the exercise of discretion, the decision of questions of law, and the rendition of judgment, (2 *Salk.* 607. *Holt*, 517. 1 *Salk.* 201, 396. *Hard.* 503,) and as Lincoln did not vote nor take part in the proceedings relative to the sale, he did not sit in his own case. The county court being organized, the associate justices could carry any measure, though the presiding judge might oppose and vote against it. (*Ex parte Rogers*, 7 *Cow.* 526, *and note* (*a*). *Wilcock on Corporations, sec.* 814, *p.* 312. *Ram on Legal Judgments*, 9 *Law Lib.* 18. *County of Pulaski vs. Irvin*, 4 *Ark.* 486.) The presiding judge and two justices of the peace constitute a quorum, (*Digest, p.* 309;) they are necessary to organize the court; but, when thus organized, a majority must necessarily govern; otherwise, instead of having one vote, his dissent would overrule the opinions of his two associates, which would be in violation of the

constitution and law, (*Const., art.* 6, *sec.* 9, 10, 11. *Digest*, 309,) and destroy the very existence of the county court. (*Ferguson vs. Crittenden County*, 1 *Eng.* 480.)

The law directing the county court to be held on the second Monday in November, to act on the delinquent list and settle with the collector, does not prohibit the transaction of other necessary business, (*Digest, chap.* 139, *sec.* 73;) and when organized it is, to all intents and purposes, a county court, clothed with all the powers which belong to it at a regular term. The county court may appoint agents for the purchase of real estate, whose contracts become binding and obligatory upon the county, (*Digest, chap.* 41.) The purchase by the commissioners appointed at the regular October term, was binding on the county, and required no confirmation; and the action of the court at the November session, if invalid, could not affect the contract for *utile per inutile non vitiatur.*

WALKER, J. This case was submitted to the chancellor upon the bill, answer, replication, and exhibits, under an agreement of record, that the statements and allegations in the bill be taken as true, and that the defendants' answers also be taken as true so far as they are responsive to the bill. The facts, as disclosed by the record, are, that, on the first day of August, 1843, the county court of Pulaski county appointed William Brown, Sr., Jared C. Martin, and William K. Inglish, commissioners to inquire into the expediency and practicability of establishing a poor-house for the use of said county, and to inquire if a suitable piece of land could be obtained, for that purpose, in the neighborhood of Little Rock by donation or otherwise, and report to the next term of said county court: that afterwards, on the 20th day of October, 1843, and, whilst said court was in session, Jared C. Martin and William K. Inglish, two of said commissioners, reported to said court that they deemed it practicable and expedient to have such house built, and recommended the purchase of land for that purpose, stating that no donation could be obtained, but that defendant Lincoln owned a forty acre

tract of land which would answer; which report was, on the 20th of October, 1843, adopted by said court; and thereupon said court appointed said Martin, Inglish, and Henry F. Pendleton, commissioners, with power to select and purchase a suitable site for the erection of said poor-house, and that they should report their proceedings to the next term of said court: that, at special term of said county court, held on the second Monday in November, 1843, it being a special term of said court, authorized by law for the sole purpose of acting on the delinquent list and settling with the collector, said Inglish and Pendleton, two of said commissioners, reported to said court that they had selected and purchased from defendant Lincoln, forty acres of land, in the vicinity of said city, as a suitable site for said poor-house, at the price of $400: that defendant, Lincoln, and wife, had executed a deed for the same; which report and deed were accepted by said court, and the report adopted, and the sale approved; and said court further ordered that a warrant issue to said Lincoln for the sum of $400, which was done: all of which orders and proceedings in said court were had and made whilst said Lincoln, as presiding judge, and King and Moore, as associate justices, presided, and held said court, being the sole judge and justices of said court therein presiding: that, at the January term, 1844, of said county court, by the order, decision, and judgment of said court, said purchase was disaffirmed, rescinded, annulled, and set aside, and said report rejected, the deed ordered not to be recorded, and suit ordered to cancel the scrip, and set aside the proceedings. And such is substantially the relief sought. Lincoln, King, Moore, Martin, Pendleton, and Inglish, are made defendants to the bill. The material issue is between defendant Lincoln and the county of Pulaski.

There can be no doubt but that the county court had jurisdiction over the subject of providing for the comfort and support of the poor of their county, and must necessarily exercise this power under a sound discretion, as circumstances require: nor can there be a doubt that the court may, for their own conve-

nience, and to facilitate the object in view, appoint commissioners, whose acts, in the exercise of the power conferred upon them, when confirmed and ratified, are as valid as if done directly by the court. The statute has expressly provided for the appointment of such auxiliary agents, (*Digest, sec.* 8, *p.* 287,) and the ninth section declares all acts duly executed under such authority valid.

It is contended for the county, 1st. That there was no competent court, the presiding judge being incompetent, and therefore the proceedings are void: 2d. That the contract was consummated by a special county court, so limited in jurisdiction as not to embrace this subject, and for that reason also their acts are void.

The statute provides that "the presiding judge of the county court, and any two justices of the peace of the county, shall be a quorum to transact business." *Digest, sec.* 4, *p.* 309. In this case, the record, in every instance, shows a competent court in numbers, but it is contended that the presiding judge was interested in the subject matter before the court, and was therefore incompetent to sit as a member of the court. If this be true in point of fact, the objection is a good one. The constitution ordains that "no judge shall preside on the trial of any cause in the event of which he may be interested, or where either of the parties shall be connected with him by affinity or consanguinity within such degrees as may be prescribed by law." *Art.* 6, *sec.* 12. The statute provides that "no judge of the circuit court, justice of the county court, or judge of probate court, shall sit on the determination of any cause or proceeding in which he is interested." *Digest, sec.* 16, *p.* 316. These express constitutional and legislative prohibitions are too plain to require comment. Let us see, then, in what instance, if at all, this judge did preside in a cause in which he was interested. It will scarcely be contended that he was interested in the first order made, which was simply to inquire into the propriety of establishing a poor-house; nor can it be said that he was interested in the order appointing commissioners to select and pur-

chase a site for such poor-house. It is true that, in the first report, the commissioners reported that the only situation, which they could find suitable, was the property of the presiding judge of the court, and it is likewise true that they were immediately appointed by the court (of which the presiding judge was a member) to select and purchase a site; but in this the presiding judge cannot be said to have been interested. Had he ordered them to buy the tract of land recommended in the report, it might, with much propriety, have been argued that he was interested. These circumstances, connected with the fact that the commissioners did contract for the same land referred to in their report, had fraud been charged, it might have aided in fixing it upon the defendant. There is, however, no charge of fraud in the bill, and if there had been, the answer positively denies it. The order, therefore, appointing these commissioners to select and purchase a suitable site for the building, was not an order in which the presiding judge can be said to have been interested, and being a subject within the jurisdiction of the court was a valid order. From the terms of the order, however, as well as from the nature of the trust, we are of opinion that the county court never contemplated conferring an absolute and unconditional power upon the commissioners, but that, when the terms were stipulated and agreed upon, they should be reported to the court for their confirmation or rejection; because, at the close of the order appointing them, they say, "the court will pay for such site what the commissioners report necessary for the same and the court deem reasonable." Here the court expressly reserves to itself the right to determine whether it was a reasonable or an unreasonable contract, and this right to determine necessarily carries with it the right to reject a contract, which they deem disadvantageous or unreasonable. The commissioners, as by their own report is shown, never did make an absolute purchase, but say that they have selected certain land which was purchased of defendant Lincoln, and that a deed is transmitted with the report, and closes thus: "And your commissioners would ask that a warrant forthwith be issued for said

amount, and also that the court ratify the purchase this day, so that your commissioners can proceed to have buildings erected." When it is remembered that the defendant, Lincoln, was well advised of all the orders, and the nature and extent of the power conferred, it is conclusive, to our minds, that the final consummation of the contract was made to depend upon the approval or disapproval of the court.

It becomes necessary to determine then whether this special court had or had not jurisdiction over the subject of the report; and, if it had, whether the court, as it was organized, was a disinterested and competent court to approve and adopt the report, and order the purchase money to be paid by the county. The statute provides "that if there is no regular term of the county court in any county in the month of November, in such case a special term of said court shall be held, in such county, on the second Monday in November, in each year, for the purpose of acting on the collector's delinquent list, and at such special term the collector shall make settlement as required by this act at a regular term." *Digest, sec.* 73, *p.* 882. This act was designed for a special purpose, limited to a particular case, and it must be limited to that, or remain without limitation; because there is as much propriety in applying the exception to one case as another and to all as any one. It is recognized and held by this court, in the case of *Lawson, sheriff vs. Pulaski County*, as a special court of limited jurisdiction. 3 *Ark.* 1. In the case of *The State vs. Dunn*, (2 *Ark. Rep.* 229,) it was held that where a special term is ordered, its jurisdiction is limited to the particular case which it is called to try, and can take no jurisdiction of any other; and such is the construction we will adopt in this case.

But if in this we were in error, it is manifestly clear that the court, as organized, was wholly incompetent to affirm the sale, or direct the purchase to be paid for by the county. We have seen that it requires the presiding judge and two associate justices to constitute a legally organized court. The argument, that two of them were competent to decide a question, and that the presi-

ding officer did not vote, cannot, we apprehend, affect the question in any respect. It is not whether a majority of a court can or can not carry a question, but what number is necessary to constitute a court. It requires a certain number of the members elected to the Legislature to convene in order to organize that body, still when organized a majority of that number can pass an act. A majority of the quorum, however, would not constitute a legally constituted legislative body for business; and an act, though passed by a bare majority, is, nevertheless, the act of the whole assembly; and so with the court: it could not have existed a moment without the presence of all three of the presiding officers; and every act done was the act and judgment of the whole court. The presiding justice may truly not have voted, yet his presence and influence might have weighed heavily in the determination of the case. The object of the constitutional restriction is to secure an impartial administration of justice, and nothing could be better calculated to bias the judgment of the court than for its members to be directly interested in a matter of bargain and sale to one of them.

It is argued that, admitting it to be true that there was no competent court to adopt and approve the report, and direct the payment, and that the presiding justice was so interested in the subject of their deliberations as to render the court incompetent to act on the report, still the contract is valid, having been completed and closed by competent parties before the sitting of the special court. This argument has been anticipated by the opinion already given, with regard to the extent of the power conferred on the commissioners.

But there is a question which arises out of the manner in which the commissioners performed their trust, which it becomes important to consider. This was a special agency delegated for a particular purpose, and must be strictly pursued. 2 *J. R.* 48, 5 *id.* 56. 26 *Wend.* 192. 1 *Wash. C. C. R.* 174. It was a power conferred on three commissioners jointly to do a certain act. The rule is, that, where there are joint agents, they must all join in executing the agency. 6 *Pick.* 198, 3 *id.* 232. 12 *Mass.*

185, *id.* 189. STORY says "that where an authority is given to two or more persons to do an act, the act is valid to bind the parties only when all of them concur in doing it, for the authority is construed strictly, and the power understood to be joint and not several." *Story on Agency*, 46. This power was executed by only two of the commissioners, as stated in the bill, (which, by agreement, is taken as true,) and as proven by the exhibits. If this be true, the authorities are clear and conclusive that two of the commissioners were incompetent to execute this trust, and that their acts are not binding on the county, and are void.

This being the case, according to the facts presented by the record, the defendant, Lincoln, has procured to be issued, and possessed himself of, a county warrant for four hundred dollars without consideration and contrary to law: which warrant, the county prays may be re-called and cancelled, or other adequate relief afforded her. In view of the whole premises, we think the county entitled to the relief sought.

The decree of the circuit court must be reversed and set aside with costs, and the cause remanded with instructions to said court to render a decree for the complainant in accordance with the prayer of the bill.

BURKE VS. HALE.

A tenant cannot dispute the title of his landlord.

The limitation section of the forcible entry and detainer law (*Digest, chap.* 71, *sec.* 18) must be construed in connection with the third section, giving the remedy to landlords against tenants, so as to give effect to both sections.

Under such construction, the limitation section does not commence running in favor of one in possession under a lease, until the expiration of the lease.

The lessor has no cause of action against the lessee, or an under-tenant, until the expiration of the lease, and a construction of the 18th section that would make it bar the action of the lessor before it accrues, would be absurd.

Appeal from the Hot Spring Circuit Court.

On the 27th day of April, 1846, John C. Hale commenced an action of unlawful detainer against Charles Burke, in the Hot Spring Circuit Court, and the cause was tried at the March term, 1847, before the Hon. C. C. SCOTT, then one of the circuit judges.

The action was brought to recover possession of improvements, consisting of several cabins, situate in the Hot Springs valley. The declaration alleges, in substance, that, on the 1st day of Sept., 1844, Burke came into possession of the improvements in question under contract with one F. L. Udy, the lessee of the plaintiff: that the lease from plaintiff to Udy, under whom Burke held, expired on the first of November, 1845, when plaintiff was entitled to possession, but that Burke refused to deliver up the premises to plaintiff after demand in writing.

The defendant pleaded, 1st, not guilty, and 2d, "that he had been in the peaceable and uninterrupted possession of the said premises for three years immediately preceding the filing of the complaint of the said plaintiff." The cause was submitted to a jury, on issues to these pleas, and verdict for plaintiff.

Defendant excepted to the decisions of the court in giving and refusing instructions to the jury, and took a bill of exceptions sitting out the evidence, &c., from which it appears:

Plaintiff proved that, on the 7th March, 1846, he made a demand, in writing, upon defendant, of the premises in question, and that he refused to surrender the possession. He then read to the jury, after proving the execution thereof, a written agreement made between F. L. Udy and himself, on the first day of August, 1842, by which plaintiff leased to said Udy a certain lot of ground situated in the Hot Springs valley, and described in the declaration, for the term of three years and three months from the date of the agreement, on conditions that Udy would erect thereon a dwelling-house and such necessary out-houses as he might think proper, and return the same to plaintiff at the

expiration of the lease. To this agreement defendant was a subscribing witness. It was then proven that, in pursuance of the above agreement, Udy erected the improvements in controversy in the fall of 1842: that defendant Burke assisted him in the erection thereof; and about the time the buildings were completed, and after Udy had gone into them, defendant went into them as a partner of Udy in a cake shop: that Udy and defendant occupied the improvements jointly until some time in the year 1844, when Udy went out of them, and defendant continued sole occupant until the suit was brought. This was the substance of all the evidence introduced on the trial.

At the request of plaintiff, the court instructed the jury as follows:

"1st. That, if the jury believe, from the evidence, that Udy leased the premises in question from plaintiff, and that the defendant entered under Udy, and continued to hold until demand, and that the demand in writing was made upon the defendant before the commencement of this suit, they are bound by law to find for the plaintiff upon the first plea in this case.

"2d. If the jury believe, from the evidence, that the defendant entered upon the premises in question under Udy, that, in ascertaining whether the defendant had peaceable and uninterrupted possession for three years, they can only compute from the time of the expiration of the term for which Udy leased the premises, and that unless they believe that the defendant has had such possession for the term of three years after the expiration of Udy's lease, and before the commencement of this suit, they are bound by law to find for the plaintiff on the second plea.

"3d. That, unless the jury believe, from the evidence, that the defendant had adverse possession in his own right, for the period of three years next before the commencement of this suit, they are bound by law to find for the plaintiff on the second plea.

"4th. That if the defendant entered under Udy, who held under the plaintiff, he cannot dispute the plaintiff's right.

"5th. That if Udy held possession of the premises in question

under the lease, which has been read to the jury, such possession is in law deemed to be the possession of Hale.

"6th. That it is not necessary that Hale should show any title to the land in question; it is sufficient for him to prove that he is entitled to the possession, and that he can be entitled to the possession of the improvements notwithstanding the legal title to the land is in the United States."

The defendant's counsel moved the following instructions:

"1st. If the jury believe, from the evidence, that the defendant, Burke, had three years peaceable and uninterrupted possession of the property in question immediately preceding the filing of the complaint in this case, they should, by law, find a verdict for the defendant.—[Refused.]

"2d. If the jury believe, from the evidence, that the plaintiff, Hale, was not in possession of the premises in controversy at some time within three years next before the filing of the complaint in this case, they should by law find for the defendant.—[Refused.]

"3d. That, unless the plaintiff, Hale, has proved his right to the possession of the premises in controversy, he is not, by law, entitled to a recovery in this case.

"4th. That, unless it has been proved to the satifaction of the jury that the defendant, Burke, came into the possession of the premises under Udy, they must presume that he took possession in his own right, and adverse to the plaintiff, Hale.

"5th. That the plaintiff, Hale, in order to entitle him to a verdict in this case, must have proved to the satisfaction of the jury that he had the right to the possession of the property in controversy at some time within three years next preceding the filing of the complaint in this case.

"6th. That the legal title to the Hot Springs, the lands upon which the improvements in controversy are situated, was reserved to the United States by an act of Congress before the date of the lease read to the jury, and every one has equal rights to settle thereon, unless some person previously had actual possession

within enclosures or buildings, in which case such persons would have the better right."

The court refused the first and second instructions asked by defendant, and gave the others; and to the giving of the instructions moved by the plaintiff, and the refusal of the first and second asked by defendant, the defendant excepted. Defendant appealed.

FOWLER, for the appellant, relied upon the twelfth section of the act of January 10, 1845, (*Digest, sec.* 18, *p.* 538,) and argued that in the form of action adopted in this case, the possession need not be adverse to enable the defendant to avail himself of the statutory bar.

ENGLISH and WATKINS & CURRAN, contra, contended that the three years peaceable possession contemplated by the act must commence from the expiration of the lease, and be adverse to the claimant, and referred to *vol.* 2, *United States Digest*, title *Limitation, p.* 802, *art.* 2. 3 *J. J. Marsh.* 363, that the tenant nor those claiming under him can dispute the landlord's title. *Arch. Nisi Prius, vol.* 2, *marg. p.* 304.

SCOTT, J. Not sitting.

WALKER, J. The solution of a single question will determine this case. Are three years peaceable and uninterrupted possession of lands and tenements next before the commencement of the action, whether held as tenant under the plaintiff or by adverse title, a bar to the plaintiff's action?

The material facts in reference to this point are, that the plaintiff, on the first of August, 1842, leased to one Udy the premises in dispute for the term of three years and three months, by virtue of which Udy entered and occupied the premises for a time: that thereafter the defendant entered upon and occupied the premises with Udy: that the defendant and Udy were partners in a cake shop on the premises: that Udy removed from the

premises before the lease had expired, leaving defendant sole occupant, who contiduced to occupy the same until the commencement of this suit. The issue was not guilty and limitation. At the instance of the plaintiff, the court, leaving the facts to be weighed by the jury, instructed them "that if Udy held as tenant under the plaintiff, and defendant entered and held under Udy, he cannot dispute the plaintiff's right to the premises; that in such case they should consider the statutory limitation as commencing at the termination of the lease; and that the three years possession must be adverse possession, or it is no bar to the action." The court refused to instruct, at defendant's instance, that three years peaceable and uninterrupted possession next before the commencement of the suit was a bar to the action.

We are of opinion that a tenant cannot dispute the title of his landlord.

The other branch of the instructions given by the court presents more difficulty, and must be determined by the terms used, and the proper application of the limitation intended to be imposed upon the different classes of cases embraced under the statutory remedy. The statute says "three years peaceable and uninterrupted possession of the premises immediately preceding the filing of the complaint, may be pleaded in bar of the action." These terms, taken literally, embrace every cause of action provided for by the statute, and if this literal construction be found not to conflict with the other provisions of the act it should prevail. If, however, upon examination of the act, a literal construction would defeat the remedy designed to be afforded, such construction, if practicable, should be given to this section as will afford a remedy for every class of cases designed to be embraced under the statute. By reference to the statute it will be found that the second section gives a remedy for tortious entry and detainer of every grade, and for cases of peaceable entry and forcible dispossession, whether by actual force or otherwise. The third section provides for a distinct class of cases unattended with force, and is designed as a summary possessory remedy

for forcible detainer alone. It provides that "when any person shall wilfully and with force hold over any lands, tenements, or other possessions, after the termination of the time for which they were demised, or let to him, or the person under whom he claims, or shall lawfully or peaceably obtain possession, but shall hold the same unlawfully by force and after demand made in writing for the delivery of possession thereof by the person having a right to such possession, his agent or attorney, shall refuse or neglect to quit such possession, such person shall be deemed guilty of a forcible detainer." Here is a distinct class of cases, where the defendant acquires possession lawfully and perhaps most frequently under contract, and holds over after the term of his lease has expired (as in the case now before the court.) If this limitation clause be literally construed, its effect will be to render the third section of the statute inoperative in most instances which will arise under it. To demonstrate this, suppose A. lease to B. his farm for one year, B. enters and at the close of each year pays to A. his rent, and renews his covenant for four successive years, at the end of which time A. declines renting, and demands possession. Here, B. had four years peaceable, uninterrupted possession, and, although the third section expressly embraces his case, by a literal construction of the eighteenth section, the plaintiff is barred of his remedy. For further illustration, we will state a still stronger case, it is the case before us: A. leases to B. his lot of land for three years and three months, B. has a right to retain it under his lease for that time, and A. is bound by his contract to leave him in quiet possession; on the day the lease is out A. demands possession, B. (if this construction be allowed) would reply, your right of action under the law has expired three months since.

In addition to the palpable inconsistency which must arise between the sections giving the right of action and limiting the time for its commencement, this construction conflicts with all the principles upon which the statutes of limitation rest for their existence. "The law of nature," says Vattel, "orders all to respect the right of property in him who possesses it, because

it is for the peace, safety, and advantage of human society. For the same reason nature requires that every proprietor who, for a long time and without reason, neglects his right, should be presumed to have entirely renounced and abandoned it." So limitation in debt rests upon the presumption from lapse of time that payment has been made: and in actions for real estate, on the presumption of title from long acquiescence in possession. But how is it in these cases? Here the landlord leases his land and receives the rent annually, or his house and receives a monthly rent, or his farm for a term of years, and on the day the lease expires he asserts title, surely no presumption can arise of acquiescence in either title or possession; and yet it is contended, for the appellant, that they are embraced within the provisions of this statute: we are clearly of opinion, not; and that a more liberal construction should be indulged, such as will leave the remedy intended to be afforded by this statute unimpaired. This can be done, according to Blackstone, by examining "the effects and consequences, and consulting the spirit and reason of the law." The statute, according to its literal construction, was designed to apply to all the cases enumerated in the second section, as well as all those in the third section, except in cases where the defendant enters under contract or agreement with the plaintiff, or one who holds under him; in all of which last mentioned cases the statute is to be considered as beginning to run from the day when the lease or contract terminates.

We are, therefore, of opinion that there is no error in the judgment of the circuit court, and the same is affirmed with costs.

PILE ET AL. EX PARTE.

A judgment upon a forfeited delivery bond, on motion, without notice to defendant, actual or construction, is utterly void, as repeatedly held by this court.

The revival of such void judgment on *scire facias*, imparts no validity to it, though the defendant appear and plead to the writ.

Complainant's bill being verified by affidavit, the facts therein stated are taken as true for the purpose of granting an injunction, and the circuit judge having refused an injunction, where the complainant made a sufficient showing therefor upon the face of his bill, this court awarded a mandamus to compel him to grant the injunction.

Application for Mandamus.

Application for mandamus to compel the Hon. JOHN QUILLIN, judge of the sixth circuit, sitting in chancery for the county of Ouachita, to grant an injunction in a cause there pending, in which he had refused an injunction. The facts are stated in the opinion of this court.

PIKE, for the petitioners.

WALKER, J. This case comes up on petition for mandamus. It appears that the petitioners presented their bill to the circuit court of Ouachita county, at the September term, 1848, and thereupon moved the court to grant them an injunction in accordance with the prayer of their bill: the object of which was to injoin defendant Stith, as trustee, from selling certain real estate and slaves, conveyed to him in trust, to secure the payment of a note executed by petitioner Pile, to defendant Moss, and cause said note and deed to be given up and canceled; which note and deed are alleged to have been executed for no other consideration than to prevent a sale and sacrifice of petitioners' property under a judgment and execution which are represented as being void, and which, they aver, had in truth been paid.

The question presented for the consideration of this court is, do the facts, as disclosed by the bill, entitle the petitioners to the relief sought.

The validity of the original contract, and the judgment rendered on it, are not complained of. Execution was issued and returned with a forfeited delivery bond, upon which, by mere motion, without notice to the obligors, and without their having appeared to the action, judgment was rendered against them for the amount of the former judgment with ten per cent. interest, and also ten per cent. on that amount, as damages, together with the costs of both suits. So far as the validity of the judgment is concerned, the facts are substantially the same as in the case of *McKnight vs. Smith*, 5 *Ark.* 410, where it is said that "notice, actual or constructive, is necessary to give the court jurisdiction of the person, and, unless it is acquired in some mode, the judgment is a mere nullity." The repeated adjudications of this court, sanctioned by the highest judicial tribunals of our sister States, not less than the plain dictates of natural justice, have settled the question that judgment should not be passed upon the rights of the citizen without affording him an opportunity to defend. In this case, the circuit court having acquired no jurisdiction over the person of the defendant by notice, either actual or constructive, the judgment is utterly void. Subsequently an attempt was made to revive that judgment by *scire facias*. The order is in the following language: "Wherefore it is considered, by the court, that the plaintiff have execution for the judgment aforesaid." The legal effect of a judgment on a *scire facias*, where judgments remain without process or satisfaction, is to remove the presumption of payment arising from lapse of time. It adds nothing to the validity of the former judgment, but simply leaves it as it was when rendered. The *scire facias* is dependent for its legal existence upon a valid judgment; without it, the whole proceeding, by *scire facias*, is a nullity. It is, therefore, perfectly immaterial to the merits of this case whether the defendants appeared to the writ of *scire facias* or not.(*a*) The per-

(*a*) The transcript in this case shows that defendants pleaded *nul tiel* record to the *scire facias*, to which issue was taken, finding for plaintiff, and judgment of revivor.—REPORTER.

mission to issue execution presupposes a valid judgment, and if there be none, the rights of the parties are not affected by it.

If it be true that the judgment and order for execution to issue are void, and that they are, we entertain no doubt, and that the debt has been paid, with interest and costs, it is manifestly clear that, in equity and good conscience, the complainants should not be compelled to pay it again. And the wrong is still more aggravated, when it is remembered that it is not alone the original debt of $258 70, with interest, which is claimed, and which is alleged to have been paid some years since, but the sum of $680 80, with ten per cent. interest, since the 24th of February, 1848: a considerable amount of which is costs and damages assessed on a void judgment. Whether the facts set forth in the bill be true or not, it is not for this court to determine; the bill is sworn to, and, for all the purposes of this application, must be taken as true. If the chancellor has not power to afford relief in this case, it is difficult to conceive to what other tribunal the petitioners should have applied for relief. Having never been before the circuit court, they could not have waived any legal right there. The doctrine, therefore, of vigilance and defence at law does not apply to this case. No effort is being made to enforce the collection of the judgment, or supersedeas might relieve them as in the case of *Wood, Ex parte*, 3 *Ark. Rep.* 532. No execution is hanging over their estate—a motion to quash or supersede would be unavailing. No suit is proposed on the note or deed, consequently no plea to the consideration, or other defence, can be interposed. Such being the case, the principles of equity, as well as the express provisions of our statute, which provides "that courts of chancery shall exercise jurisdiction in all cases where adequate relief cannot be had at law," entitle the complainants to relief. This principle is not, however, to be considered as extending to cases of negligence or unskillful defence at law, nor to cases of concurrent jurisdiction, in which an unsuccessful defence at law has been made.

The court is of opinion that an injunction should be granted

in this case; and direct that a mandamus be issued in accordance with the prayer of the petition.(*a*)

WEAVER VS. CALDWELL'S EX'R.

The admission by the court of irrelevant evidence, is no cause for new trial, where it could not have influenced the verdict.

The execution of a note raises a strong presumption that pre-existing accounts between the parties have been settled.

But the execution of a note raises no presumption that a bill of exchange of a prior date has been paid.

The presumption of payment does not attach where the opposing evidences of debt are of equal dignity.

By statute, (*Digest, Tit. Assignments, sec.* 7,) where plaintiff sues as assignee by indorsement in blank, defendant is entitled to fix the assignment on such day as will be most to his advantage.

Writ of Error to Pulaski Circuit Court.

This was an action of debt brought by Weaver, as assignee of Pitcher, Officer & Co., against James H. Caldwell, as executor of Charles Caldwell, deceased. The suit was commenced in the Saline Circuit Court, in September, 1845; venue afterwards changed to the Pulaski Circuit Court, where it was determined in June, 1847, before the Hon. WILLIAM H. SUTTON, then one of the circuit judges.

The declaration alleged that, on the 6th day of July, 1844, Charles Caldwell, defendant's testator, executed to Pitcher, Officer & Co., a writing obligatory, of that date, for $438 03, payable one day after its date, with interest at eight per cent. per annum until paid; and that afterwards, to wit: on the day and

(*a*) NOTE. Petition for reconsideration, by Watkins & Curran, counsel for Moss and Stith, overruled. REPORTER.

year aforesaid, said Pitcher, Officer & Co. assigned the said writing obligatory to plaintiff Weaver.

The defendant filed three pleas: 1st. Payment of $300, part of the debt sued for, by Charles Caldwell, in his lifetime, to Pitcher, Officer & Co., before the assignment of the bond to Weaver, to wit: on the 6th July, 1844:

2d. Payment of the whole debt sued for, by Charles Caldwell, to plaintiff, after the assignment:

3d. A plea of set-off, alleging that Pitcher, Officer & Co., before and at the time of the death of Charles Caldwell, and before the assignment by them of the bond sued on to Weaver, to wit: on the 6th July, 1844, were indebted to said Charles Caldwell in the sum of $300, upon and by virtue of a certain bill of exchange, bearing date of 16th January, 1844, made and drawn by one Lewis Milliner, upon, and then accepted in writing on the face thereof by, said Pitcher, Officer & Co., whereby said Milliner requested them, at sight thereof, to pay to the said Charles Caldwell, or order, $300 for value received, and charge the same to account of said Milliner; also, in the further sum of $300, money loaned, advanced, had, and received, &c., by Charles Caldwell, to, for, and by, Pitcher, Officer & Co., before the assignment, &c.

Plaintiff replied to said pleas in short upon the record, and defendant took issue to the replications. The cause was submitted to the court, sitting as a jury, and the court found for the plaintiff on the issues to the first and second pleas, allowed defendant a credit of $300, on the plea of set-off, and rendered judgment in favor of plaintiff for the balance due on the obligation sued on. Plaintiff moved for a new trial, on the grounds that the court permitted defendant to introduce incompetent and irrelevant evidence, on the trial, against his objections, and that the verdict was contrary to law and evidence. The court refused a new trial, plaintiff excepted, and set out the evidence. It appears, from the plaintiff's bill of exceptions, that, on the trial, the defendant, after proving the genuineness of the signatures of the respective parties thereto, offered to introduce, as evidence, the following instrument:

"PITCHER, OFFICER & CO.: At sight, please pay Charles Caldwell, or order, three hundred dollars, for value received, and charge the same to account of your ob't serv't.

16th Jan'y, 1844. LEWIS MILLINER."

Upon the face of which is written: "*Accepted*—Pitcher, Officer & Co."; which acceptance was proven to be in the handwriting of James Pitcher, then one of the firm of Pitcher, Officer & Co. To the admission of which instrument, as evidence, plaintiff objected, but the court overruled the objection.

Defendant then offered to introduce, as evidence, after proving it to have been made out, and receipted in the handwriting of Officer, one of the firm of Pitcher, Officer & Co., an account made by Charles Caldwell with Pitcher, Officer & Co., for merchandize, &c., &c., composed of various items, commencing 9th October, 1843, and running to 11th March, 1844, at the bottom of which was written: "Little Rock, July 6th, 1844: Received payment by note—Pitcher, Officer & Co." To the introduction of which plaintiff objected, but the court overruled the objection. Defendant then proved that said Charles Caldwell had large dealings with the firm of Pitcher, Officer & Co., and that they were his general agents for shipping cotton in the years 1842, 1843, and 1844; which was all the evidence offered by defendant to sustain the issues on his part.

Plaintiff then proved that said Charles Caldwell executed the writing obligatory, described in the declaration, July 6th, 1844, for the sum, to the persons, payable, and bearing interest, as alleged in the declaration, which obligation was admitted in evidence; and the assignment thereof to the plaintiff was proved, the same having been endorsed by Pitcher, Officer & Co., to plaintiff by blank endorsement. It was also proved, by a witness well acquainted with the late James Pitcher, that he was loose in mercantile business, but had a remarkable memory, and could recollect the run of business that would confuse almost any one else. It was also proved that said James Pitcher died in September, or October, 1844, and said Charles

Caldwell in November of the same year. Also that the bond sued on had been presented to defendant, regularly probated, for allowance before suit brought, and he refused to allow the same unless the amount of the above draft was deducted, which plaintiff refused to do. The above was all the evidence. Plaintiff brought error.

S. H. HEMPSTEAD, for the plaintiff, contenned, that the writing obligatory executed to Pitcher, Officer &c., apparently in settlement of all transactions between them and Caldwell, after the acceptance of the bill of exchange by Pitcher, Officer & Co., implied an indebtedness on the part of Caldwell, and the extinguishment of the bill, for that it could not be reasonably supposed that Caldwell would give his note without first bringing forward all the credits to which he was entitled, (2 *Stark. Ev.* 688,) and that this presumption must stand until overthrown by proof from the opposite party, which had not been done. He contended that it was like the case where a receipt in full was given, which might be explained it was true; but without satisfactory explanation the demand was presumed to be satisfied. *Sheehy vs. Mandeville*, 6 *Cranch R.* 253. 2 *Cond. R.* 363. *Alvoord vs. Cooper*, 9 *Wen.* 323. And so in this case, it must be presumed that all indebtedness, on both sides, whether by bill, open account, or otherwise was stated and brought forward, the balance struck, and the obligation of Caldwell given in adjustment of it, and that the bill of exchange claimed by way of set-off had been paid.

WATKINS & CURRAN, contra. The blank endorsement to Weaver of the note sued on, will be taken as may be most advantageous to the defendant below; and as made after the acceptance by Pitcher, Officer & Co. of the bill of exchange pleaded as an off-set. *Digest, Title, Assignments, sec.* 3, 7.

Giving a bond and mortgage furnishes a presumption of a liquidation of all accounts before their dates between the parties, (*Chewning vs. Proctor*, 2 *McCord Ch. Rep.* 11, 15,) but this

presumption may be repelled by proof. The giving of a note raises no presumption that a prior note or acceptance of the payee had been paid. If the fact of payment be doubtful, the possession of the entire instrument by the creditor affords a presumption that it is still unsatisfied. *Brembridge vs. Osborne*, 1 *Stak. Cas.* 374. *S. C.* 2 *Eng. Com. Law Rep.* 433. 1 *Green. Ev.* 43, 44.

If a presumption existed that the bill was settled by the giving of the note, the presumption was repelled by the production of the account between the parties at the time of making the note, —the settlement of the account showing that the bill was not included.

JOHNSON, C. J. The point first raised in the progress of the trial below, relates to the propriety of permitting the defendant to use, as evidence, an account of Pitcher, Officer & Co. against him. The account most assuredly could neither prove nor tend to prove either of the issues tendered by the pleas. The plaintiff did not count upon it, nor had he made such a showing as called for it, or even authorized the defendant to use it. It was, therefore, wholly irrelevant under the issues, and, consequently, the court should have excluded it. The court therefore clearly erred upon this point; yet, as the account could have had no possible influence upon the verdict, it is not sufficient cause for a reversal of the judgment.

The next and main question involves the correctness of the decision in admitting a bill of exchange, purporting to have been drawn by Lewis Milliner, upon Pitcher, Officer & Co., and in favor of the testator of the defendant. The argument is, that the execution of the instrument sued upon, it being subsequent, in point of time, to the date of the bill of exchange, raises a presumption of its payment. We cannot recognize the correctness of this doctrine. It is conceded that the execution of a note furnishes a strong presumption in favor of a liquidation of all accounts, before its date, between the parties. This legal presumption is predicated upon the fact that the note is higher in

grade as evidence; and such being the case, it is entirely reasonable that it should be regarded as a final settlement of all prior accounts, and that such presumption should prevail unless rebutted and overturned by competent proof. The presumption of payment cannot attach where the opposing evidences are of equal dignity. We do not conceive it necessary to examine the doctrine of presumptions any further, as it is not necessary to the decision of this case.

The present plaintiff rests his claim upon a blank assignment, and under our statute the defendant is entitled to fix the assignment on such day as shall be most to his advantage. The bill, it is admitted, was drawn before the execution of the note, and, consequently, before the endorsement to the plaintiff; yet it does not follow that the acceptance, which fixed the liability of the assignors was prior in point of time to the date of the note or subsequent to that of the endorsement. It would be manifestly to the advantage of the defendant to suppose that the endorsement was made subsequent to the acceptance of the bill, and there is nothing in the record that conflicts in the least with that supposition. Upon this hypothesis the bill would have been good as a set-off in an action by the assignors of the note, and as a matter of course is equally available against the plaintiff, as it was passed to him subject to every legal defence that then existed against it.

But a still stronger view of the case, in favor of the defendant, is easily conceivable. We will suppose that the testator, who was the payee of the bill, did not long retain the possession, but that he parted with it in the course of trade, and even remained out of the possession until the execution of the note, which is now the subject of this suit. This might all have taken place, and yet he might again have possessed himself of it before the endorsement of the note, and thereby placed himself in the same state and condition that he occupied before he parted with it. Upon the supposition of either state of case there can be no doubt of his right to use the bill as a set-off to the note. We are clear, therefore, that there is no error in this branch of the

case; and that therefore the judgment of the circuit court ought to be affirmed.

The judgment of the circuit court of Pulaski county, herein rendered, is therefore, in all things, affirmed with costs.

BANK OF THE STATE VS. KERBY ET AL.

DEBT against three on a joint and several promisory note; *nil debet* by one, issue, verdict and judgment in his favor: no judgment as to the other two. HELD, that, inasmuch as the plea of the one enured to the benefit of the others, the judgment was, in effect, in favor of all, and the writ of error was properly sued out against all.

Nil debet, not sworn to, under our statute, (*Digest, p.* 812, *sec.* 103, 105,) does not put in issue the execution of the note.

Nor is the law different where a party executes a note by making his mark.

Writ of Error to Washington Circuit Court.

The Bank of the State of Arkansas brought an action of debt, in the Washington Circuit Court, against Henry F. Kerby, William Munkers, and William Buchanan, upon a promisory note executed to the Bank by Kerby, as principal, and the other two defendants as his securities, for $410 64, due 23d September, 1844. (The cause was tried at the November term, 1847, before SNEED, judge.) The defendants were all regularly served with process. Defendant Buchanan did not appear; Kerby appeared and filed a separate plea of the statute of limitation, and Munkers filed separate pleas of the statute of limitation, and *nil debet*, not sworn to. To Munkers' plea of limitation (that the cause of action did not accrue within *two* years, &c.) a demurrer was sustained; issue was taken to his plea of *nil debet*, the issue submitted to a jury, verdict in his favor, and judgment of the court "that the said William Munkers go hence fully acquitted of

the debt in the plaintiff's declaration mentioned, and that he recover of said plaintiff all his costs in this behalf expended." No judgment as to the other defendants.

The plaintiff took a bill of exceptions, from which it appears that, upon the trial of the issue to Munker's plea of *nil debet*, the note sued on being the only evidence introduced by the plaintiff, the court, on the motion of Munkers, charged the jury as follows: "If plaintiff did not prove that defendant Munkers made his mark, which appears in said note between his christian and surnames, they must find for Munkers.

"Where defendant does not himself write his name to a note, but makes his mark, if unattested by a witness, the plea of *nil debet* puts in issue the execution of the note, and, before plaintiff can recover thereon, the execution thereof must be proven by extrinsic evidence." To which instructions plaintiff excepted.

The plaintiff sued out of this court a writ of error, in substance, as follows:

"THE STATE, &c. ——: TO THE CLERK, &c. ——. Because, in the record and proceedings, and also in the giving of judgment, in a suit, which was in said circuit court, before, &c., between The Bank of the State of Arkansas, plaintiff, and Henry F. Kerby, William Munkers, and William Buchanan, defendants, of a plea of debt, manifest error has intervened, to the damage of the said plaintiff, as he alleges: you are, therefore, commanded that, if final judgment be therein given, you send to the supreme court, under your official seal, the record and proceedings aforesaid, together with this writ, on, &c., at, &c.; that the record and proceedings aforesaid being inspected by the supreme court, it may cause to be done therein what, according to law, ought to be done, and that, &c. Witness, LUKE *E.* BARBER, Clerk," &c.

D. WALKER, counsel for defendant, filed a motion to quash the writ of error on the grounds that it appeared, from the record, that there were three defendants regularly served with process in the court below, and issue and judgment thereon as to one of

them only, and, the judgment being against one of said defendants only, the writ of error was improperly sued out against the other two, who were not parties to the judgment.

LINCOLN, contra, moved the court to amend the writ of error by striking therefrom the names of Kerby and Buchanan, against whom there was no judgment in the court below, and to permit the case to proceed as to Munkers. On which motions, the following opinion of the court was delivered.

SCOTT, J. (On motion.) The defendants base their motion, in this case, to quash the writ of error, upon a supposed variance between it and the judgment of the court below, as shown by the transcript, and refer to the cases of *Miller vs. Heard & Co.*, 1 *Eng.* 73. *Gasquett et al. vs. Berry, ib.* 246. *Jackson vs. Wight, ib.* 287, and the *State for the use of Robertson, Mss.*, as presenting authority conclusive of this question. All these cases proceed upon a settled rule of the common law courts, which our statute but re-enacts, which is not only that no person not a party or privy to the record can sue out a writ of error, but the writ must be brought in the names of all the parties against whom the judgment was given; and this, notwithstanding the death of some of the parties, in which, when the survivors brought the writ, the deceased party had still to be named and his death alleged. And the reason of this common law rule was two-fold: that is to say, that the writ of error might agree with the record, and at the same time prevent vexations and delay in suing out successive writs of error. And although one of several defendants might be unwilling to join in suing it out, still it had to be sued out in the name of all, and those who refused to appear, and assign errors, had to be summoned and severed, and were thereby cut off from the right afterwards to sue out a writ of error. And even in case where one defendant in tort was acquitted, though he need not be joined, because it could not be said that the judgment was to his damage, nor that he could ever vex the plaintiff with another writ of error, still the suit

had to be described in the writ of error according to the record, and uniformly, where the writ failed to correspond with the record, it was quashed. 2 *Saunders* 101 *c*. *Carth.* 8. 1 *Lord Raym.* 71. *Saund.* 101 *f*.

So the same two-fold reason required that the writ of error should set out all the names of those in whose favor the judgment was rendered; for, besides the consideration of conformity and agreement with the record, although a party in whose favor a judgment might be rendered would not generally be aggrieved, and could not therefore sue out a writ of error, yet his rights were to be passed upon, and moreover it often happens that it was necessary for him to reverse a judgment, even when it appears to be rendered in his favor, as where there is an error in the judgment prejudicial to him, or where the judgment was for a less amount than he had a right to demand: and besides, the common law regarded a judgment as an entire thing, and would not reverse it as to a part and affirm it for the residue, (2 *Saund.* 101 *v.*,) or reverse a judgment as to one and affirm it as to another, (4 *Randolph*, 386); and thus the other reason of the rule, in regard to vexation and multiplicity of actions, as well as that contemplating conformity to the record, had place. 2 *Tucker's Lectures*, 234—Illustrating in all this two favorite principles of the common law, harmony in the proceedings, and disfavor to multiplicity of actions.

In this case the writ of error agrees with the record in the names of all the parties to the suit below, but it is insisted that, inasmuch as the judgment in that suit was, in its terms, only in favor of one of the defendants, and that no judgment appears to have been rendered as to the other two defendants, that this variance between the writ of error and the judgment is as fatal as if the variance arose from the omission of any one or more parties to a suit where the judgment, in its terms, embraced all the parties. If the proceeding in error contemplated exclusively an examination for "errors in the giving of judgment" in the court below, and had no eye to errors in any other part of the "record and proceedings" of the court below in the suit, this po-

sition would be more tenable: but contemplating, as it does, a correction of errors as well in the "record and proceedings of the suit" below as in the giving of judgment in that suit, the objection has less force. And besides, when the name of a party to the judgment would be omitted, the object of the law, in preventing multiplicity of action and speedily putting an end to litigation, would be thwarted; and, moreover, errors, if examined in such a case, would be looked into in the absence of a party whose rights are concerned; and in that case also, as no notice would have been served on such omitted party to join in errors, if willing, or, to be severed, if unwilling to hear errors assigned, the process could not be amended by inserting such omitted names in the writ of error, and thereby bring new parties on the record, although the law authorizes amendment in any "process, pleading, or proceeding, in form or substance, for the furtherance of justice," as held in *Gasquett et al. vs. Berry*, 1 *Eng.* 249. While, on the other hand, if the writ of error conformed to the suit below in the names of all the parties, although the judgment in that suit should not in its terms extend to all the parties to the suit, the object of the law before mentioned would be subserved; and, moreover, all the parties, whose rights are affected by the judgment below, either in its terms or its legal effect, being before the court of errors, any want of agreement between the writ of error and the record, if such did exist, could be remedied by amendment within the reason of the refusal to amend in the case of *Gasquett, &c. vs. Berry*, and therefore the alleged variance in this case, if it did not for other reasons, seem to savor more of form merely than substance, could not be regarded as sufficient to authorize the quashal of the writ, especially when the other side applied for leave to amend by striking out one or more of numerous parties all regularly before the court. But the supposed variance in this case is evidently more seemingly so than in fact.

The transcript certainly does, in its terms, show only a judgment in favor of William Munkers; he alone of the three defendents is adjudged to go hence acquitted of the debt in the

plaintiff's declaration mentioned, and have and recover from the plaintiff all his costs in that behalf expended, and there is in terms no judgment that either of the other defendants go hence or that they recover their costs. But what is the legal effect of this judgment so, in its terms, rendered in favor of Munkers only? Does it not inevitably, at the same time that it discharges Munkers, also discharge the other two defendants from the plaintiff's action, and send them away without day? It is not like a case where a verdict only has been found, but no judgment rendered upon it: there the plaintiff may move to set it aside, or to arrest the judgment; in a word, he may still move as his action is not yet at an end. Not so, however, in the case before us, where the sentence of the law has been actually pronounced, imperfectly, it is true, in the terms in which it has been pronounced, but nevertheless the conclusions of the law from the premises of law and fact, have been by the court actually pronounced, and therefore it cannot be said that judgment has not been given. Nor can it be said, in any just sense, that the judgment pronounced was a mere interlocutory judgment, for surely no judgment, that at once dismisses a defendant from court, discharges him from the plaintiff's action, concludes his rights in respect of the subject matter in controversy, and adjudges his costs, can be considered as interlocutory merely. *Campbell vs. Sneed*, 5 *Ark. Rep.*, 498. And such a judgment, in an action in form *ex contractu*, with certain exceptions that we shall point out, although in its terms in favor of one defendant only, is necessarily in legal effect and substance a judgment in favor of all: resulting from the doctrine correctly laid down in the case of *Bruton et al. vs. Gregory*, 3 *Eng.* 180, where the court say, "If two are sued jointly, one of whom makes default and the other appears and interposes a successful defence to the action, there can be no doubt but that the plea of the one appearing will enure to the benefit of the other, and that he will also be entitled to his discharge." This, of course, with the qualification and exception that the matter of discharge was subsequent to the making of the contract; such, for instance,

as a decree of discharge in bankruptcy; and a like exception would obtain in case the suit were against two executors and the plaintiff should fail against one of them on the plea of "plene administravit:" and so also in debt against several on a penal statute at the suit of a common informer, 2 *Tucker's Lectures*, 213. Nor can this conclusion be avoided on any hypothesis that, although this be true, such successful defence could not have this operation until the sentence of the law to this express purport be actually pronounced by the court, for here the sentence of law, in inevitable legal effect, has been actually pronounced. No one will pretend that the legal effect of a judgment in creating a lien upon land, is less so, because the judgment, in its terms, did not so declare; and when the direct effect of the judgment pronounced upon the plaintiff's action is considered, the proposition is plain. That direct effect was to put an end to that action; from that moment the plaintiff could proceed no farther; the very term "action," implies a state of action or motion: after the judgment that was rendered the plaintiff could move no farther: the "remedy he sought to recover," was adjudged against him. He could proceed no farther against any of the defendants; in a word, his action was at an end, and the condition of things was completely within the legal idea of a final judgment, erroneous and imperfect it is true, but not the less final in its legal effects upon the remedy sought by the plaintiff. And so far as the want of completeness of the judgment was concerned in its legal effects, it was purely formal and not substantive; for how could the want of a formal judgment of discharge affect the two defendants? The plaintiff could demand nothing of them, they could never afterwards be adjudged in default, for nothing further could be required of them, they having answered the legal purpose for which they had been summoned in court. They had been summoned there to hear what the plaintiff could legally allege againt them, make defence if they chose, and abide the sentence of the law, with the privilege to plead separately, and the right to require that, if either should make successful

defence to the plaintiff's action, that defence should enure to the benefit and discharge of all. Such successful defence was made, and the sentence of the law as to its sufficiency was declared, and when that was done, all the defendants in contemplation of law instantly departed the court, for the law required their presence no further, nor did their own interest require it, for nothing further could be done against them, and nothing further substantially in their favor, other than was already done. It is true they might have claimed a judgment for costs in their favor; but this being for their own advantage, and against the plaintiff, they could waive it at their own election, and the plaintiff, being paralysed, could do nothing. The finality of a judgment on the merits, while it has especial reference to the concluding of the essential rights of the parties in respect to the subject matter in controversy, has no connexion with the correctness or completion of such judgment in respect of form or incident, otherwise but few judgments at law would be final. In a more general sense, it has more immediate reference to the giving or refusing of the remedy sought, whether incidentally in the progress of the cause, or at its termination. Sir WILLIAM BLACKSTONE says "final judgments are such as at once put an end to the action by declaring that the plaintiff has either entitled himself, or has not, to recover the remedy he sues for." And this court, in the case of *Dyer vs. Hatch*, 1 *Ark.* 345, in putting its face strongly against such a practice as vexatious and abhorrent to the law's disfavor of multiplicity of action, plainly intimates that the entering up of final judgment for costs, upon the decision of incidental questions or motions in the progress of a cause, creates the foundation for suing out writs of error to reverse such judgments which seem to be considered as distinct from and independent of the final judgment on the merits, which would not be in any way affected by an error in any such independent final judgment on incidental questions. If it be true then, as we have shown by the reference to 2 *Saunders*, 101 *v.*, that a judgment is an entire thing, and that an independent final judgment may be rendered for costs, it will follow that, if the court below were now to go

on and render a judgment of discharge in favor of the two defendants whose names are not specified in the judgment already rendered, and a judgment in their favor for costs, such would be an independent final judgment, and would be no completion or finishing of the judgment already rendered, and could make it no more final or complete than at present.

In the light then of these views, it is our opinion that there is no variance between the writ of error, in this case, and the transcript of the proceedings and judgment of the court below sent up, and the motion to quash must be therefore refused.

LINCOLN, for the plaintiff, relied upon *sec.* 103, 105, *Digest, p.* 812, to show that the court below erred in the instruction to the jury.

D. WALKER, contra.

SCOTT, J. The instructions given by the court below to the jury, were clearly erroneous. The declaration was founded upon a note in writing charged to have been executed by the defendant, of which forfeit was made. The plea was *nil debet,* but was not verified by affidavit, consequently the execution of the writing was not put in issue. *Digest, p.* 812, *sec.* 103, 105. The judgment of the court below must be reversed, and the cause remanded to be proceeded in according to law.

WALKER, J. Did not sit.

HARVARD LAW SCHOOL LIBRARY.

BROWNING ET AL. VS. ROANE ET AL.

The general rule requiring merits to be shown in order to relieve a party against a judgment by default, is well settled, (*Wilson vs. Phillips*, 5 *Ark. Rep.* 183,) but to this rule the courts have admitted exceptions.

For example, where a default is taken against a defendant before the expiration of the time allowed him to plead:

Or, where the defendant filed a plea, but the clerk omitted to notice the filing of record.

Or, where the plaintiff had filed a bill in chancery concerning the matter in litigation, and obtained defendant's consent for the cause to stand continued until the bill was heard, and afterwards took judgment by default whilst the bill was pending.

Appeal from the Clark Circuit Court.

Action of debt brought by Roane and others, as trustees of the Real Estate Bank, against Browning, Bozeman, and Thornton, on a promisory note due 21st December, 1840, and determined in the Clark Circuit Court, at the September term, 1846. The action was brought to the September term, 1845. At the return term the cause was continued, the record states, by consent of parties. No further entry appears of record until the September term, 1846, when the plaintiffs took judgment against defendant by default. On the next day after the judgment was taken, defendant's counsel filed a motion, and affidavit, to set it aside, and for leave to plead payment and limitation. The court overruled the motion, and they excepted. The substance of the affidavit filed in support of the motion to set aside the judgment by default, is stated in the opinion of this court. Defendants appealed.

P. JORDAN, for the plaintiffs. Upon a motion to set aside a judgment by default for irregularity, no affidavit of merits is necessary. (*Howell vs. Denniston*, 3 *Caine's Rep.* 96. *Depeyster vs. Warne*, 2 *ib.* 45. 3 *Cow.* 67. 9 *Wend.* 14.) Nor where the default is caused through misapprehension or accident. (*Van*

Alston vs. Brown, 1 *Cow.* 45. *Allen vs. Thompson*, 1 *Hill*, 54. 3 *Caine's Rep.* 132; *ib.* 134; 1 *ib.* 67. 10 *Wend.* 634. But even if it was necessary to show merits in the affidavit, they do appear in the facts that the cause had been continued on the motion of the defendant's in error to await the decision in the chancery cause; that the calling of the cause was a surprise to the plaintiffs; and that they offered to plead payment, which is a meretorious defence, and the statute of limitations, which is a good one. 5 *John. Rep.* 360. 1 *How. Miss. Rep.* 183. 1 *Eng.* 484. 10 *Wend.* 595.

PIKE & BALDWIN, contra. The affidavit sets up no merits at all; the statute of limitations is not a meritorious defence, and the affidavit does not aver that the plea of payment could have been sustained. The case of *Wilson vs. Phillips*, 5 *Ark.* 183, is relied upon.

SCOTT, J. Like the power to grant or refuse continuances, the power of setting aside defaults is a sound legal discretion inherent in all courts, and allowed for the express purpose of promoting the ends of justice; and should the circuit courts, in the exercise of this discretion, capriciously or arbitrarily disregard any important right belonging to either party, their judgments will be examined in this court, and corrected on appeal or writ of error.

It appears, from inspecting the whole record, including the bill of exceptions, that the defendants appeared, and, at the request of the plaintiffs, consented to continue the case at the September term, 1845, and thus, as held in *Rogers vs. Conway*, 4 *Ark.* 70, "made themselves parties to the record." At the succeeding term one of the counsel for the defendants, with a view of filing a plea of the statute of limitations, examined the papers, and, to the best of his recollection, found a plea already on file, the filing of which he supposed regularly noticed on the record. At that term, when the case was called, he answered that he was ready for trial, at which time the counsel for the plaintiffs sug-

gested to the court that the issue to be tried was on the statute of limitations, and that he had filed a bill in chancery to restrain the defendants from availing themselves of that defence, and continued the case to await the final decree in that chancery cause, and at the same term the defendants were ordered to answer that bill at the succeeding term. That the defendant's counsel did not suspect that any steps would be taken in the law case thereafter until the disposition of the chancery cause. That, at the next term afterwards, (during which the defendants did answer the bill in chancery,) and while that bill was still pending, the plaintiffs took a judgment by default in the law case, the defendants' counsel not hearing the case called. It appears, also, that the names of the defendants' counsel were entered upon the record as attorneys for the defendants on the return of the writ, and their names as such were continued thereon up to the time when the default was entered.

It was contended that the motion to set aside the default, was properly overruled, because the affidavit showed no merits, asking only leave to plead payment and the statute of limitations.

The general rule requiring merits to be shown in order to relieve a party against a default, is well settled, and has been recognized by this court in *Wilson vs. Phillips*, 5 *Ark.* 183; but to this rule the courts have sometimes admitted exceptions. In New York the rule is held only to apply to defaults that have been, in all respects, regular. When they have been irregularly entered, it has been only required of the party in default to point out the irregularity, and to excuse himself from negligence without showing merits. *Howell vs. Denniston*, 3 *Caine's R.* 96. *Thomas vs. Douglass*, 2 *John. cases*, 226. *Depeyster vs. Word*, 2 *Caine's R.* 45. And in that State, in some few cases, even where the default was regular, the courts have not applied the rule under the particular circumstances of each case, as where the party in default has been misled by the party taking the default, (*Steward vs. Atkins*, 3 *Cow.* 67,) or was under some particular misapprehension for which the party taking the default was plainly responsible,

(*Onley vs. Bacon*, 3 *Caine's Rep.* 132,) and a few other particular cases.

We refer to these decisions not to adopt or approve them, but only to show that this general rule, requiring merits to be shown in order to relieve a party against a default, like most of the general rules of law, has been sometimes held to have exceptions, not only in an entire class of cases, but in other cases depending upon their own peculiar circumstances, and, although we are unwilling to go to the length of all the New York decisions on this subject, it is obvious that the rule must have some exceptions, as it is easy to conceive of cases, as, for instance, where a default is taken against a defendant before the expiration of the time allowed him to plead, where every possible presumption of law that a default could raise against him would be entirely removed by merely pointing out such gross irregularity as that indicated in the case supposed whereby he has been deprived of a substantive right. And while, by deciding the case before us, we design to declare no rule to embrace numerous cases of exceptions, we are of opinion that this case, under its peculiar circumstances, is as fully without the general rule as the case supposed.

Looking at all the facts in this case, it seems most probable that a plea of the statute of limitations, upon which issue was taken, was really on file, but that the clerk had omitted to make it appear on the record, and has not copied it in the transcript for that reason. If this was true, as we think most probable from all the facts presented, it was grossly irregular for a default to have been entered before the issue was disposed of. If, however, this was not true, the act of the plaintiff in declining to take judgment for want of a plea, when he might have done so, and at that time voluntarily continuing his case until the final disposition of the chancery cause, and at the same time procuring an order requiring the defendants to answer the bill in chancery by the next succeeding term, if it did not amount to an election on his part to suspend the remedy by law, until he could get the aid he was seeking from the chancellor or abandon that course,

at the least the making of this apparent election, and directing the defendant's attention to the defence of the bill in chancery, naturally produced such misapprehension in the mind of the defendants' counsel as should have been considered by the court below, under all the circumstances, to have enlarged the time of pleading to the time of the decree in the chancery cause, or to the abandonment of that proceeding. And a judgment by default in the law case pending this state of things would be in little degree less irregular, and, if taken, all the presumptions of law against the defendants arising from default, would be fully repelled by merely showing all the circumstances without the showing of merits.

In either view, the legal rights of the defendants have been plainly invaded, and the judgment of the court below must be reversed, and the cause remanded to be tried on the issue made up, if there be one, and if not, with leave to the defendant to plead generally.

McLAIN SURV. VS. TAYLOR ET AL.

A judgment on a forfeited delivery bond, taken on motion, without notice to defendants, actual or constructive, is no bar to an action of debt on the same bond.

The sheriff may justify under process issued on such judgment, the court having jurisdiction of the subject matter, but not so with the plaintiff therein.

A demurrer having been sustained to the plea of former recovery in such case, the record of the first judgment cannot be introduced as evidence under other issues to which it is not applicable.

In such action, under a plea of payment, the sheriff may prove that he collected money by virtue of an execution issued upon the first judgment, and paid it to plaintiff.

In an action on a penal bond, where the breaches assigned are answered by pleas, and issues taken thereto, swearing the jury to *try the issues joined*, is equivalent to swearing them to try the *truth of the breaches:* they must also be sworn, however, to assess the damages. (*Digest, chap.* 120, *sec.* 5, 6.)

But, in such action, where judgment is taken on demurrer, by confession or default, it is indispensible to swear them to inquire into the truth of the breaches, and assess the damages. *Ib.* 5, 7.

Writ of Error to Pulaski Circuit Court.

This was an action of debt on a forfeited delivery bond, brought by Wm. F. Taylor, Albert Lee, and Lucius D. Pratt, against Allen McLain and Patrick Flanakin, in the Pulaski circuit court, and determined at the October term, 1846, before the Hon. WM. H. FEILD, judge.

The declaration describes the bond sued on as having been executed by the defendands to the plaintiffs, on the 11th February, 1840, in the penal sum of $400, conditioned, in substance, as follows: reciting that said plaintiffs had sued out an execution for $144 27, including debt, damages and costs on a judgment obtained by them against David Wright, in the Pulaski circuit court, at the September term, 1839, which execution had been placed in the hands of Lawson, sheriff, and was made returnable to the March term of said court, 1840; that Lawson had levied the execution on a slave, named Susan, the property of said Wright, and conditioned that the bond was to be void if Wright should deliver the slave to the sheriff at the courthouse on the first day of the term to which the execution was returnable. The said slave is alleged to be of the value of $150, and breaches assigned, that the slave was not delivered to the sheriff according to the condition of the bond, the bond returned forfeited, the execution unsatisfied; and the penalty of the bond not paid.

The defendant filed three pleas: 1st, a former recovery upon the bond by motion, setting out the judgment; 2d, performance of the condition of the bond; 3d, payment. The plaintiffs demurred to the first plea, on the grounds that the judgment of former recovery therein pleaded, was void, for want of notice, actual or constuctive, to defendants, which demurrer the court sustained. To the other two pleas, plaintiffs took issue. Then

follows a record entry thus: "Came the parties, &c., and on motion, it is ordered that a jury come to try the issues joined in this case, and thereupon comes a jury, *to wit:* Benjamin F. Hershey, &c. &c., twelve good and lawful men of the county, who were duly empanneled and sworn, well and truly to try the issues joined in this case, and a true verdict to render according to the evidence, and after hearing the evidence adduced, and argument, the jurors aforesaid returned the following verdict, *to wit:* 'We, the jury, find the breach assigned in the within declaration to be true, and find for the said plaintiffs on the issues joined, and assess their damages at one hundred and forty-three dollars and eighty cents.'" Judgment was rendered accordingly.

During the trial, the defendants took a bill of exceptions, from which it appears:

On the trial, plaintiffs offered to introduce as evidence, the judgment set up in their first plea, as a former recovery, and an execution which issued thereon, together with the sheriff's return, showing a levy and sale of property of Wright, the principal in the delivery bond upon which the judgment was taken, which the court excluded, and defendants excepted.

Defendants then offered to prove by Lawson, sheriff, that an alias execution issued to him on the judgment set up in the first plea, returnable to the March term, 1842, of said court, by virtue of which he levied upon, and sold, property of defendants to the value of $120, which sum he held in his hands for the plaintiffs, subject to their order; which the court refused, but permitted the sheriff, Lawson, to be sworn, and instructed him not to give any evidence to the jury of any money arising from the sales of property of defendants levied upon and sold by virtue of any of the aforesaid executions issued upon said judgment—that said judgment was null and void, and that plaintiffs would not be bound by any levy and sale of property made by him as sheriff by virtue of said executions—but to testify as to any payment made to plaintiffs, or their attorneys, by said defendants. The witness then stated that $39 25 had been received by plain-

tiffs' attorney, towards the satisfaction of the debt in the declaration mentioned, in accordance with the statement made in his return on the first execution, to which decision of the court defendants excepted.

Defendants brought error. Flanakin's death was suggested, and the cause proceeeed in the name of McLain, survivor.

JORDAN and RINGO & TRAPNALL, for the plaintiffs. The first amended plea sets forth a former recovery upon the same forfeited delivery bond, taken at the term at which the bond was forfeited on the motion of the plaintiffs in the court below; and though the judgment was voidable, the plaintiffs were entitled to process to execute it, and the court erred in sustaining the demurrer to the plea. If the court had jurisdiction of the subject matter and the parties, the judgment is binding until reversed. *Defour vs. Camfrouc*, 11 *M. R.* 607. 2 *N. S.* 292. 2 *J. R.* 590. 6 *J. R.* 377. 7 *J. R.* 224. 3 *Scam. Rep.* 106. 3 *Bibb.* 339. 4 *Scam. Rep.* 371. 2 *Peters*, 169. An irregularity in the judgment could be taken advantage of only by the party injured. 8 *J. R.* 361. 10 *J. R.* 381. 8 *J. R.* 333.

The sheriff was bound to levy the execution issued on the judgment upon the property of the defendants, (1 *Eng. Rep.* 236. 18 *John. Rep.* 49. 5 *Cow.* 176,) and they were entitled to have the money made on a sale of such property applied in discharge of the bond, whether the money was paid over or not. The court therefore erred in excluding the evidence offered on the trial. 4 *Ark.* 229. *Ladd vs. Blunt*, 4 *Mass. Rep.* 402.

The jury was neither summoned nor sworn to inquire into the truth of the breaches, but simply to try the issues, when, according to the statute, and the adjudications under it, (*Digest, chap.* 120, *sec.* 6, 7. *Adams et al. vs. State, use Wallace*, 1 *Eng.* 505. 2 *Ark. Rep.* 391. *Outlaw et al. vs. Yell, Governor, use Conant & Co.* 3 *Eng.* 345,) they should have been sworn as well to try the truth of the breaches as the issues joined, or damages sustained by the defendants.

FOWLER, contra. The evidence offered was properly excluded because the first plea, that of a former recovery, having been adjudged bad on the demurrer, there was no issue to which such evidence could apply. The demurrer was rightly sustained because the plea disclosed a judgment void on its face, according to the unbroken decisions of this court.

JOHNSON, C. J. The demurrer to the first amended plea of the defendant below, was correctly sustained. The plea alleged a former recovery upon the same cause of action and in a suit between the same parties. The document described in the plea, and relied upon as a former recovery, is not authorized by law, and is consequently void to all intents and purposes. The supposed judgment does not disclose such facts as to affect the defendants below with notice of the pendency of the motion upon which it was based, and, as a necessary consequence, they are not legally bound by it. This case is completely within the rule laid down by this court in the case of *McKnight vs. Smith*, 5 *Ark. Rep.* 410. The judgment set up as a former recovery, wholly fails to state either the condition of the bond, or facts which amounted to a forfeiture of it. Had these facts, which, by the statute are necessary to affect the party with notice, been stated with sufficient certainty so as to warrant the court in entaining jurisdiction of the parties, we would then presume in favor of the regularity of the judgment as being based upon sufficient facts to support it, unless the contrary affirmatively appeared. The doctrine laid down in the case of *McKnight vs. Smith*, was not altogether satisfactory to the profession at the time the decision was made, and from this circumstance we have been induced to review the grounds upon which it is based; and the result of our investigation is, that the more we examine it and reflect upon it, the more thoroughly we are convinced of its entire soundness and correctness. The proceeding by motion is clearly in derogation of the common law, and consequently must receive a strict construction.

It is urged that, inasmuch as the sheriff was protected in the

execution of the judgment, therefore the plaintiffs below should have proceeded under the first judgment to collect the money, and should not have harrassed the defendants with another suit. It is conceded that the sheriff would not have subjected himself to an action of trespass by enforcing the execution, as it appears from the record that the court had jurisdiction of the subject matter; yet this by no means proves that the plaintiff would be entitled to similar protection.

The court decided correctly in excluding the record, as, after the demurrer had been sustained to the first plea, there was nothing left to which that evidence could properly apply. The sheriff was properly permitted to testify as to any moneys that he had received and paid over to the defendants in error. It was not material whether the sheriff acted under a process based upon a void judgment or not, in case the money was actually paid over to the party entitled to receive it. Under the plea of payment, it was perfectly legitimate to show that the money claimed had been paid, and it was wholly immaterial through what channel the payment was made.

The last objection urged to the judgment and proceedings of the court below is, that the jury were not expressly sworn to inquire into the truth of the breaches and assess the damages sustained. The *5th*, *6th* and *7th sections of chapter* 120, *Digest*, provide that "when an action shall be prosecuted in any court of law upon any bond for the breach of any condition, other than for payment of money, or shall be prosecuted for any penal sum for the non-performance of any covenant or written agreement, the plaintiff in his declaration shall assign the specific breaches for which the action is brought": that "upon the trial of such action, if the jury find that any assignment of such breaches is true, they shall assess the damages occasioned by the breach in addition to their finding"; and that "if, in such action, the plaintiff shall obtain judgment upon demurrer, by confession, or default, the court shall make an order therein that the truth of the breaches assigned be inquired into, and the damages sustained thereby assessed at the same or next term, and the court

shall proceed thereon in the same manner as in other cases of inquiry of damages." This statute clearly contemplates two distinct classes of cases: the one where the breaches have been denied by plea and issue taken thereupon, and the other where the breaches are wholly undefended, as in cases where the defendant stands upon his demurrer, or confesses, or makes default. In the former case, in the event that the jury shall find any assignment of the breaches to be true, they are also required to assess the damages in addition to their finding: whereas, in the latter, the court is required to make an order, not only that the truth of the breaches be inquired into, but also that the damages sustained thereby be assessed. The record in this case shows that the jury were sworn well and truly to try the issues joined and a true verdict to render according to the evidence. The verdict is in the following language, to wit: "We, the jury, find the breach assigned in the within declaration to be true, and find for the said plaintiffs on the issues joined, and assess their damages at one hundred and forty-three dollars and eighty cents." The finding is in strict compliance with the law, but the question is whether it is responsive to the swearing. The jury, it is true, were not sworn, in so many words, to try the truth of the breaches, yet the oath which they took was substantially to that effect. They were expressly sworn to try the issues joined, and it was utterly impracticable to pass upon the issues presented by the pleading, without, at the same time, testing the truth or falsity of the breaches assigned in the declaration. The swearing, therefore, so far as the breaches were concerned, was fully sufficient, but it was radically defective in not embracing the assessment of damages. This construction is perfectly in unison with the cases of *Phillips & Martin vs. The Governor, &c.*, 2 *Ark. Rep.* 387, and *Adams et al. vs. The State, use of Wallace*, 1 *Eng. Rep.* 503. In both these cases there was an entire failure to swear the jury to try the truth of the breaches, or any thing of like effect, but simply, well, and truly to try or inquire into and assess the damages. In the case of *Outlaw et al. vs. Yell, Gov., &c., use of Conant & Co.*, 3 *Eng. Rep.* 353, this

court said "the three pleas upon which issues were formed were, in effect, but pleas of *nul tiel* record. The court was correct in finding the issues for the plaintiffs, but erred in assessing damages and in giving judgment. As demurrers had been sustained to all the other pleas, and plaintiff's cause of action left wholly undefended, the court, in finding the issues for the plaintiff, ought to have rendered an interlocutory judgment against defendants, and ordered a jury to be impanneled to inquire into the truth of the breaches and assess the damages." Where the action is wholly undefended, there being no issues made up involving the truth of the breaches, it would clearly be insufficient to require the jury to pass upon the issues joined, and nothing short of an oath to try the truth of the breaches, in terms, would satisfy the law.

The conclusion to which we have arrived then, is, that in cases where a defence has been interposed and issue taken upon it, it is all sufficient to swear the jury, either to try the issue, or to try the truth of the breach, and assess the damages; but that, where the judgment shall have been obtained upon demurrer, by confession or default, it is indispensable to require them to inquire into the truth of the breaches, and also to assess the damages.

We are, therefore, of opinion that the swearing them in this case is defective in not requiring the jury to assess the damages, and for that error the judgment ought to be reversed. The judgment is therefore reversed.

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CRUMBACKER VS. TUCKER & HAMILTON.

Goods were shipped on board of a steamboat, at New Orleans, to plaintiff, at Norristown, Ark.; by mistake, they were delivered to T. & H., at Little Rock, who sold a portion of the goods before they discovered the mistake; afterwards, they paid

the master of the boat for them, and sold the remainder of the goods. HELD, that payment to the master of the boat was no defence, by T. & H., to an action brought by the plaintiff against them for the price of the goods.

A common carrier cannot sell goods so as to divest the title of the consignee, and he may follow up the goods and recover them, or recover the price thereof of one who has purchased of the carrier, and sold them.

Writ of Error to Pulaski Circuit Court.

In April, 1847, E. C. Crumbacker sued Tucker & Hamilton, merchants and partners, before justice Hutt, on the following account:

MESSRS. TUCKER & HAMILTON,	
To *E. C. Crumbacker,*	*Dr.*
To 16 pieces Virginia Osnaburg muslin, mark [diamond] C., Norristown, Ark.; and sold by Messrs. Tucker & Hamilton, containing 475¾ yards *a* 10c.	$47 58
Carriage, insurance, &c. - - - - - -	3 00
	$50 58

Judgment of the justice in favor of plaintiff, and appeal by defendants to Pulaski Circuit Court, where the cause was submitted to a jury in November, 1847, FEILD, J., presiding.

Chase, witness for plaintiff, testified that, sometime in the spring of 1847, as the agent, and in behalf of Crumbacker, he called on defendant Tucker, and presented to him an account similar to the one copied above, and demanded payment; Tucker informed witness that Tucker & Hamilton had previously received, from the steamboat Uncle Ben, at Little Rock, a bale of domestic goods called Osnaburg muslin, which they supposed belonged to them; they opened it, and sold several pieces thereof, before they discovered their error; and they then found that the bale was not in their own mark, and belonged to some other person; that the Uncle Ben brought up said bale of goods from New Orleans, and delivered it, by mistake, with other goods of like

character, to Tucker & Hamilton. That said boat then went to Norristown, and other ports on the Arkansas river, the same trip; and when she returned again to Little Rock, the clerk of the boat called upon Tucker & Hamilton for said bale of goods, and they found that she was short to them several sacks of coffee on their bills of lading, and, in settling for the same, the boat received full payment of them for the said bale of goods so delivered by mistake to Tucker & Hamilton, and partly used, and as part payment for said deficiency in coffee—that, in that transaction, they fully paid and satisfied the Uncle Ben for said bale of goods. Tucker, moreover, said to witness that they would not pay the bill presented to him, because they had paid, or settled, with the Uncle Ben, for the same bale of goods; that they were not responsible to Crumbacker therefor, and that he must look to the Uncle Ben for the value of his goods. When witness presented the account to Tucker, for payment, as above stated, it was understood, by both Tucker and witness, that the bale of Osnaburgs in question belonged to Crumbacker: it was not disputed by Tucker, nor was there any objection to the amount of the bill; the goods had all been sold. Witness did not know how or when Tucker ascertained that the goods belonged to Crumbacker: but the fact was taken for granted, by both of them, when the account was presented; and the refusal to pay was put upon the ground that Tucker & Hamilton, before the Osnaburgs were all sold, and before witness presented the account, had fully paid the Uncle Ben therefor. Witness further stated that, sometime in the previous spring, Crumbacker had goods shipped from New Orleans to him at Norristown, which passed through a house, in Little Rock, of which witness was a member, and the goods were marked with a diamond C.; he believed that was his mark.

Ash, witness for defendant, testified that he was clerk for Tucker & Hamilton at the time the bale of goods in question was received by them. They were receiving other goods at the time, and thought it belonged to them. He opened the bale, and after a few pieces were sold, the mistake was discovered.

It was received from steamer Uncle Ben, and when she came down the river, Tucker & Hamilton paid her therefor. There was no mark on the bale except some letter in diamond. It contained the number of pieces and yards stated in plaintiff's account, and ten cents a yard was a low price therefor—about the cost of it in New Orleans.

Plaintiff, whilst introducing his evidence, produced the bill of lading for the goods in question, and proved the execution thereof, but afterwards declined reading it to the jury. The defendant then introduced it. The bill of lading is in substance as follows: "Shipped in good order, &c., by T. A. C. Green, on board of the steamboat called Uncle Ben, whereof —— is master, now lying in the port of New Orleans, and bound for Fort Gibson, to say, one bale of domestic goods, &c., being marked, &c., as in the margin [diamond] C. and are to be delivered in the like order, &c., at the port of Norristown, (the damages, &c., excepted,) unto E. C. Crumbacker, or to his assigns, he or they, paying freight, &c. In witness whereof," &c. Dated New Orleans, 11th February, 1847, and signed by the clerk of the boat.

The above is the substance of all the evidence introduced upon the trial. The court charged the jury as set out in the opinion of this court; the jury returned a verdict for Tucker & Hamilton; plaintiff moved for a new trial, which was refused, he excepted, took a bill of exceptions setting out the evidence and charge of the court, and brought error.

S. H. HEMPSTEAD, for the plaintiff, argued that it was a cardinal principle, that the owner of property could not be divested of it without his consent, express or implied, and that if the plaintiff was not entitled to recover in this case, that principle would be overthrown. *Long on Sales*, 166, 167, 168, 2 *Kent*. 323. The owner may maintain an action to recover the value of his property of any one into whose hands soever it may have come and who may have disposed of it. *Ibid.*

The precise question to be decided is, whether a common car-

rier can make a valid sale of property entrusted to him for transportation so as to deprive the owner of it. That he cannot, is plain; for, to sanction such sales would, in effect, legalise gross breaches of trust, and release purchasers from the obligation of looking to the title and purchasing at their peril. The very statement of the proposition is its own refutation. It is by our law actually a crime for any carrier to convert property to his own use, and as such punishable with imprisonment in the penitentiary, (*Digest, sec.* 5, 6, *p.* 339,) and to suppose that he can make a valid sale of it, under any circumstances, without the consent of the owner, is an insult to the understanding and in the face of all law.

In *Arnold vs. Halenbake*, 5 *Wend.* 34, which was similar to this in many of its features, it was expressly held that a common carrier was not clothed with the powers of a general agent, and had no authority to sell articles entrusted to his care for transportation, and that if he did the owner might maintain trover against the purchaser. The same principle is also laid down in 20 *Wend.* 267. A depositary has no authority to sell or pledge goods entrusted to him, and if he does the owner may reclaim them from any one in whose possession they may be found. *Story on Bailments, sec.* 92, *p.* 70. The sale of goods by a bailee to a bona fide purchaser, without authority, conveys no title, and the owner may recover the value from the purchaser. *Wilkinson vs. King*, 2 *Campb.* 335. *Loeschman vs. Machin*, 2 *Stark. R.* 311. 1 *Saund. Pl. and Ev.* 873. *Saltus vs. Everett*, 15 *Wend.* 475. *Pickering vs. Buck*, 15 *East*, 44. *Daubigny vs. Duval*, 5 *Term Rep.* 604.

Undoubtedly the owners of the steamboat are liable for the failure to deliver the merchandise according to the bill of lading, but that does not affect the plaintiff's remedy against the defendants, for he may pursue either or both remedies until he obtains actual satisfaction. *Tayloe vs. Thompson*, 5 *Peters*, 369. *West vs. Hyland*, 4 *Har. & J.* 200.

BERTRAND, contra. A sale by the boat to the defendants with-

out notice, would have been good against the plaintiff; for if a bailee of goods, having a special property in and possession of them, sell and deliver them to another, bona fide and without notice, the general property of the bailor is divested, (2 *Saund.* 47, *b. n.* 1. 6 *Bac.* 684. *Brook*, 216, 295); and a payment to the boat for goods, delivered by mistake, is a bar to any action by the owner. The carrier, in such case, is responsible for the conversion, (*Story on Bailments*, *sec.* 545); and having a special property in the goods may maintain an action against any one displacing his possession. (*Ib.*) A payment, therefore, by the defendants, into whose possession the goods came by mistake, and not by sale, to the carrier, who had a right of action for them, is a bar to the plaintiff's recovery.

JOHNSON, C. J. The main points presented in this case arise out of the instructions given by the court to the jury. The court gave three several instructions: 1st. That, unless the jury were satisfied, from the evidence, that Tucker & Hamilton acted as the agents of Crumbacker, they were bound in this action to find for them: 2d. That when the steamboat Uncle Ben failed to deliver said bale of domestic goods to said Crumbacker, she became liable to him upon his bill of lading: and 3d. That if Crumbacker had instituted an action for the specific goods, he might have recovered the goods in whose hands soever he might have found the same. The two latter instructions are doubtless correct in point of law: yet, as they are not applicable to the present case, they cannot be regarded as any thing more than abstract propositions. The first is clearly erroneous, as it falls infinitely short of the principles governing this case. It is true that, in case the defendants in error had sold the goods in question as the agents of Crumbacker, they would have been liable to him for the proceeds of the sale, yet it does not follow, by any means, that this is the only conceivable state of case in which they would have been liable to Crumbacker upon the supposition that he was the real owner of the goods. If the goods in controversy were received by the steamboat Uncle Ben, to be

conveyed to Crumbacker, and a bill of lading to that effect given by a party authorized to bind the boat, there can be no doubt but that the moment the goods were delivered to the boat, the property in the same passed to and vested in Crumbacker. To constitute a delivery in law, it is not necessary that it should be made to the buyer personally, or that the goods came to his corporeal touch; but it will be sufficient if they be delivered to an accredited agent, or servant, of the vendee, or a third person designated by him as the person who would receive them. The delivery should be made either according to the mode prescribed in the agreement, or, in the absence of any agreement as to the person or mode in which they should be delivered, the seller should follow the most usual and convenient practice, so as to give the buyer the benefit of every security which he could reasonably expect. (See *Story on Sales*, 245, and the authorities there cited.) So also the delivery to a common carrier will be a sufficient delivery to the vendee, although the right of stoppage *in transitu* still remains in the vendor. Thus, a delivery, by a consignor of goods on board of a general ship, or of a ship chartered by the consignee, is a delivery to the consignee. Nor does it matter, so far as the title is concerned, which party pays freight for the goods, the carrier being always considered as the agent of the buyer. In case of loss or injury of the goods, while in the hands of the carrier, the buyer alone will be entitled to an action against him, unless the freight be paid by the seller, in which case the latter may bring an action for non-delivery. Of course, if the seller expressly assume the responsibility of carrying the goods, he must bear the loss if they be destroyed or lost. (*Ib.* 246.)

There can be no question but that the steamboat received the goods in the capacity of a common carrier; if so, it now remains to be seen whether she had any power to sell them, and to pass a title to the vendee. If she had no authority to sell the goods, it necessarily follows that a bill of sale by her would be void as against Crumbacker, and as such his right of action against Tucker & Hamilton could not be affected by the question

whether she had received payment or not. There is a marked distinction which obtains between cases where sales are made of property to which the vendor has obtained a title by fraudulent means, and cases where the vendor has no title, and has obtained possession of the goods by felony or chance, or who holds them as a mere bailee. In the former class of cases where the vendor has obtained his title by fraudulent representations, or artifices, he can make a valid sale of the goods to a *bona fide* purchaser for a valuable consideration, so as to deprive the original owner of his power to reclaim them. The reason of this rule is, that where property is obtained with the assent of the real owner, however he may have been deceived, the contract is not void, but only voidable at the instance of the party deceived. A valid title, therefore, passes to the vendee, subject indeed to the avoidance of the contract by the vendor, but being perfectly good until such avoidance is made. If, then, the vendee should, while in possession of the goods and before the nullification of the contract by the vendor, sell to a *bona fide* purchaser for a valuable consideration, the sale would be binding as against the original vendor. If, however, the sale be without consideration, or be made to a person purchasing with knowledge that they were obtained with fraudulent representations, the original owner may follow the goods, or their proceeds, into the hands of such vendee. But where the vendor has acquired possession of goods without the knowledge, connivance, or assent of the actual owner,—as, where he has stolen, or found them; or where he holds them in a fiduciary capacity, with no express or implied right, obtained from the owner, to sell or otherwise dispose of them, as where he is a bailee or trustee, he cannot make a valid sale of them, so as to divest the owner of his right to reclaim them from any person having possession of them, although such person may have bought them *bona fide*. The reason which sustains this rule is, that until the owner either expressly or impliedly agrees to part with his rights of property, or does some act which operates to deceive the vendee into a belief that the vendor has a right to make a sale, his property is never divested

from him. Some voluntary act of divestment on his part, or some conduct from which his assent to the sale is legally implied, is necessary in order to enable any other person to make a valid sale of his property. When these principles are applied to the case before us, the result is easily foreseen and is inevitable.

That the property in the goods passed to and vested in Crumbacker, *eo instanti*, upon the delivery to the boat, is too clear a proposition to admit of serious controversy. And if so, by what authority, either express or implied, did the boat, or those having the control of her, make the sale to Tucker & Hamilton? There is certainly no evidence of an express authority, and, if any existed, it must be implied by law from the fact that the property was placed in the hands of the officers of the boat under such circumstances, or in such a manner as that the law would imply a right and power on their part to make a valid sale. Is it the custom and business of common carriers to sell goods, or are they usually employed in their transportation from one point to another? It is readily admitted that if goods should be placed in the hands of an auctioneer, or other person whose business it is to sell property, and that too without any authority expressly given to sell, a sale by such person would be valid to an innocent purchaser, and this upon the ground that the law would imply an authority, and consequently protect the purchaser. But not so with a common carrier. In such cases there is not the slightest ground for a legal presumption of authority, and consequently all persons who make purchases from them must look out for themselves and buy at their peril.

But it is contended that, inasmuch as the boat could have recovered the specific articles, that, therefore, she could also have recovered the consideration money in case of a sale: and that, therefore, Crumbacker could have no right of action against the defendants. The premises are not true when applied to the facts of this case, and consequently the conclusion is unwarranted by the law. If the articles had been taken from the boat without her consent, or delivered to the defendants by mistake

and not actually sold to them, there can be no doubt but that the boat, in virtue of her special property, would have been fully able to recover the specific articles, if still to be found, or their value, if converted; but no such right would exist in case of a sale, as it would be placing it in the power of the boat to take advantage of her own wrong, and at the same time to perpetuate a fraud upon the defendants. If the defendants actually paid the purchase money to the boat, they did so at their peril, and consequently such payment can constitute no defence to this action. But if, on the contrary, the price has not yet been paid, they are under no legal obligation to pay it to the boat, as she had no authority to sell, and consequently could convey no title whatever to the property. When there is a total failure of title on the part of the vendor, but without fraud, the purchaser may avail himself of such fact as a defence to an action for the consideration money, or he may wholly abandon the contract, or he may reclaim any portion of the purchase money which he may have advanced, provided that, within reasonable time after the discovery of the deficiency of title, he give notice thereof to the seller, and offer to return the goods.

It is clear, therefore, that in case the identity of the goods shipped to Crumbacker was established by proof, the verdict should have been for, instead of against, him. From this view of the legal principles applicable to this case, we are opinion that the judgment of the court below, in overruling the motion for a new trial, ought to be reversed.

The judgment is therefore reversed, and the cause remanded.

SLOCOMB RICHARDS & CO., EX PARTE.

Where a transcript presented to this court, on application for supersedeas, shows a regular decree, but the clerk in authenticating the transcript, after making the usual certificate, adds a statement of matters dehors the record, showing irregularities in entering the decree, such statement will not be regarded.

The statute does not require the circuit judge to sign the record of the preceding day every morning, but only at the close of the term, and the omission of the judge to sign the record, at the close of the term, will not invalidate judgments or decress of the term.

Though such omission would be gross negligence, and subject the judge to animadversion.

Application to set aside a Supersedeas.

This was an application to set aside and vacate a supersedeas granted by the chief justice in vacation to a decree of the Hempstead circuit court. The facts are stated in the opinion of the court.

WATKINS & CURRAN, for the motion.

JOHNSON, C. J. This is a motion to set aside the supersedeas heretofore granted. The ground, upon which the supersedeas was claimed and granted, was, that it appeared, from the certificate of the clerk, that the decree, though rendered by the court in term time, was not written out and spread upon the record until after the adjournment of the court. The decree, contained in the transcript before us, is regular upon its face; and consequently the only question to be decided is, whether the statement of the clerk is to be admitted to vary or explain his official certificate. He has certified "that the preceding ninety-nine pages contain a full and complete transcript of the record and proceedings in the cause therein mentioned," and then he proceeds with a statement that the decree rendered in said cause on the 24th of October, A. D. 1848, was made by the court, and

that he was directed to enter it upon the record of the court as of that day, under the direction of a solicitor of the court, as he did not know how to do it himself, but that the same was not spread upon the record until after the adjournment of the court and that the day's proceedings embracing the decree, have since been spread upon the record, and approved and signed by the Hon. George Conway, judge of said court. The clerk has certified that the ninety-nine pages preceding his certificate contain a full and complete transcript of the record and proceedings in the cause. This certificate is a strict compliance with the law, and all that he subsequently stated by way of explanation is merely gratuitous, and consequently cannot be recognized by this court as possessing the force and verity of an official act. It is mere surplusage, and must be rejected as constituting no part of the evidence requisite to authenticate the record. The clerk having certified the transcript in strict legal form, if the record be diminished, the party aggrieved is entitled to a writ of certiorari to have it made perfect, or if, on the contrary, it contains more than actually transpired before the court, the party injured is not without his remedy.

It has been objected against the decree, that it is void in consequence of a failure of the judge to sign the proceedings of the day on which it was rendered and entered upon the record. This objection, though it should be true in fact, of which we are not at present advised, could not invalidate the record in case decree was actually pronounced and entered upon the record in term time. The statute does not require the record to be signed every morning by the judge, and even if it did, the omission to do so would not produce the result contended for by the defendant. The 9th sec. of the 50th chap. of the Digest directs that "full entries of the orders and proceedings of all courts of record of each day shall be read in open court, on the morning of the succeeding day, except on the last day of the term, when the minutes shall be read and signed at the rising of the court." The provision of the Alabama statute is precisely the same in substance as our own, and the supreme court of that State

decided that a failure of the judge to sign the final adjourning order, would not invalidate the proceedings had during the term. The statute of Alabama declares "that the records of the respective courts within this State for each preceding day of every session shall be read in open court, in the morning of the succeeding day, except on the last day of the term, on which day they shall be signed by the judge presiding in said court." The court, in reference to this provision, said, "but as this act is merely directory and does not declare the record invalid, if either the reading or signing is omitted, we cannot arrive at the conclusion that it was intended to make these formalities essential." The clerk is the proper custodian of the records, and to him is confided the care of making them in proper form. The courts necessarily must possess the supervising powers to examine into and correct the errors which may occur. Full credence is to be given to the official acts of the clerk, yet if there should be reason to suppose that mistakes or omissions have been made in the course of completing any record, it is within the power of the proper court to rectify them, and place the record in its proper condition.

At the same time that we give it as our opinion, that a failure or even a refusal to sign the record, would not invalidate the proceedings of the court, we will unhesitatingly say that it would be gross negligence in the judge, and such as to subject him to the severest animadversion.

We are, therefore, of opinion that the writ of supersedeas was improperly granted, and that consequently it ought to be set aside. The writ of supersedeas heretofore issued is therefore set aside.

TAYLOR VS. RICARDS & HOFFMAN.

Where a garnishee obtains an injunction as to proceedings against him, it is no release of errors as to the defendant in the attachment: an injunction operates as a release of errors in the proceedings at law only as to the party obtaining it.

The truth of the affidavit, which the statute requires the plaintiff to file before obtaining a writ of attachment, cannot be disputed by plea in abatement.

An attachment bond signed by securities alone, is good without the signature of the plaintiff in the action.

Where plaintiff's name is signed to an attachment bond by one without authority, it is nevertheless binding upon the securities, and therefore a good bond.

A plea in abatement must exclude every conclusion against the pleader: therefore a plea that plaintiff's name was signed to an attachment bond by one without authority, must negative the ratification of the act by the plaintiff before the writ issued.

So far as *Kellogg et al. vs. Miller*, 1 *Eng*, *R.* 468, may conflict with the above principles, it is overruled.

Where two replications are filed to a plea, and finding for plaintiff on one which is an answer to the plea, it is no objection that an issue to the other was not disposed of.

Writ of Error to the Saline Circuit Court.

This case was determined in the Saline Circuit Court, at the March term, 1847, before SUTTON, judge.

John R. Ricards and Jeremiah S. Hoffman, late partners under the firm name of Ricards & Hoffman, of Baltimore, filed a declaration in debt against Steptoe B. Taylor, containing three counts: the first, on a writing obligatory for $1,000: the second, on a like instrument for $125 45: and the third, on an account for merchandise for $1,082 77. They also filed the affidavit of one Benjamin Orrick, that defendant Taylor was indebted to them in the sum claimed in the declaration, "and that the said Steptoe B. Taylor, the defendant, is about to remove out of the State of Arkansas." They also filed an attachment bond, in the form prescribed by the statute, signed "John R. Ricards, Jeremiah S. Hoffman, by B. Orrick, their attorney," as principals, and by Daniel Ringo and L. Reardon, as securities. There-

upon a writ of attachment was issued against the goods and chattels, lands and tenements of Taylor, which the sheriff levied upon goods found in the possession of Issac T. Cates, and summoned Cates as a garnishee. At the return term, Taylor filed two pleas in abatement, in substance, as follows:

"Defendant, by English and Watkins & Curran, his attorneys, comes, &c., and prays judgment of the said writ of attachment, because he says, at the time of the commencement of this suit, and at the time of making and filing the affidavit in this cause, wherein it is alleged that said defendant was then about to remove out of the State of Arkansas, and which affidavit was a prerequisite required by law whereon to found the issuance of said writ of attachment, to wit: at, &c., he, the said defendant, was not about to remove out of the State of Arkansas, as is above thereof alleged, and this the said defendant is ready to verify; wherefore," &c. (This plea was verified by Taylor's affidavit.)

"2d. And, for a further plea in this behalf, said defendant prays judgment of said attachment bond, and the condition thereof, and said writ of attachment, because he says that the said B. Orrick, who signed the names of the said plaintiffs to said attachment bond, had no competent authority to bind said plaintiffs in the matter of said bond, and in respect to signing the names of said plaintiffs to the said bond and condition, to wit: at, &c., and this, &c.; wherefore," &c.

To the first of said pleas the plaintiffs demurred, on the ground that the truth of the affidavit could not be disputed. To the second plea, they filed two replications: 1st. "That he, the said B. Orrick, who subscribed the names of said plaintiffs respectively to said bond, and affixed to their names respectively a scrawl, by way of seal, at the time of executing said bond, subscribing and sealing the same with the names and seals of said plaintiffs, was duly authorized by said plaintiffs, and had competent authority to execute said bond for, and in the name, of said plaintiffs; and by such bond to bind the plaintiffs to the

payment of the moneys therein mentioned; and of this they put themselves upon the country."

2d. "That they, the said plaintiffs, before the issuing of said writ of attachment, to wit: on the 14th day of October, 1846, at, &c., filed, in the office of the clerk of the circuit court of the county aforesaid, a bond, in double the sum of the debt sworn to, subscribed and sealed by Daniel Ringo and Lambert Reardon, as securities of said plaintiffs, to said defendant, bearing date the day and year last aforesaid, conditioned as the law requires, which bond the said plaintiffs now show to the court here; and they aver that said Daniel Ringo and Lambert Reardon, who executed said bond, as securities to said plaintiffs, to said defendant, at the time of executing said bond, and issuing said writ, were and still are good and sufficient and able to answer for, and pay, the amount of the penalty of said bond, to wit: &c., and this, &c.; wherefore," &c. *Ringo & Trapnall.*

To the first of said replications, defendant added his similiter, and answered to the second, and assigned for causes of demurrer: 1st. That the bond is not shown to be valid and binding upon the principals therein: 2d. A bond void as to part is void as to the whole; and a defence to the principal of the want of authority in the agent to execute, would be a defence as to the securities: 3d. That the attachment law requires a bond with security, and security without a principal cannot exist, and is not a bond binding upon any party."

The court sustained plaintiffs' demurrer to defendant's first plea, and overruled defendant's demurrer to plaintiffs' second replication to defendant's second plea. Defendant declined to plead over, plaintiffs entered a *nolle prosequi* as to the third count in the declaration, and took judgment for the amount of the two obligations declared upon in the first and second counts.

Taylor brought error, and, after assignment of errors, the defendants in error filed two pleas in abatement of the writ, differing in form, but in substance the same, alleging that, after they obtained judgment in the court below against Taylor, and filed allegations and interogatories against Cates as garnishee,

Cates filed a bill in the chancery side of the court, against defendants in error, Taylor and one Hudson interpleading for the goods attached, and praying injunction of the judgment, &c., as to the goods, and that they be placed in the hands of a receiver until the bill was determined; that the court accordingly granted an injunction, &c., as prayed by the bill, which, it was alleged, operated as a release of errors, &c.

To these pleas plaintiff demurred, on the ground that a bill for an injunction, by any person other than plaintiff in error, was, in law, no release of errors.

OLDHAM, J. (On motion, at *January term*, 1848.) An injunction operates as a release of errors in the proceedings at law only as to the party obtaining it. A garnishee, by obtaining an injunction against proceedings against him under the garnishment, cannot release errors that may have been committed in the action against the defendant in the attachment. A bare statement of the proposition exposes its fallacy. The demurrer is well taken to the pleas filed by the defendant in error, and is sustained.

ENGLISH and WATKINS & CURRAN, for the plaintiffs. The affidavit and bond of the plaintiff are pre-requisites for the issuance of a writ of attachment, (*Digest, chap.* 17, *sec.* 3, 4, 5, 6): being in derogation of the common law, the statute must be construed strictly. (*Desha vs. Baker*, 3 *Ark.* 519. *Hynson vs. Taylor, ib.* 555. *Smith vs. Block*, 2 *Eng.* 359.) If the affidavit be insufficient the defendant may except to it, if the defect be apparent on the affidavit, (*Digest, chap.* 17, *sec.* 29. *Heard vs. Lowry*, 5 *Ark.* 524. *Delano vs. Kennedy, ib.* 439); but where, as in this case, the plea sets up a matter of fact *dehors* the record, the only appropriate mode of presenting it is by a plea in abatement. *Didier vs. Galloway*, 3 *Ark.* 503. *Toly vs. Bower, ib.* 359.

In other States, the particular defence, *i. e.* that the defendant was not about to remove, or was not a non-resident, or was not about to remove his goods and effects, or did not so secrete him-

self so that the ordinary process of law could not be served on him, &c., has been sustained in abatement of the writ. *Hartshorn vs. Wilson*, 2 *Ham.* 27. *S. C. Ohio Cond. Rep.* 245. *Codwin vs. Hurford*, 4 *Ham.* 132. *Ohio Cond. Rep.* 752. *Ib.* 758. *Mantz vs. Hendley*, 2 *Hen. and Mun.* 308. *Wilcox vs. Mills*, 4 *Mass.* 218. *Jacobs vs. Mellen*, 14 *Mass.* 132. *Ib.* 199. 2 *Nott and McCord*, 323. *Plumpton vs. Cook*, 2 *Marsh.* 451. *Ib.* 249. But not a good plea in bar. *Meggs vs. Shaffer*, *Hardin*, 65, *and note.*

The second plea is good under the decisions of this court in *Kellogg vs. Miller*, 1 *Eng.* 469.

RINGO & TRAPNALL, contra. The only pre-requisite to the issuing the writ, as regards the affidavit, is, that it shall contain a statement of the fact of either of the alternatives mentioned in the statute, which the plea admits in this case. (*Digest, chap.* 17, *sec.* 3.) The right to the process does not depend upon the truth of the fact or proof of the defendant's intention to remove out of the State, which is rarely susceptible of direct proof, but upon the filing an affidavit that he is about to remove. (*Ib.*)

An attachment bond, executed by securities alone, is sufficient to justify the issuing of the writ. The statute merely requires a bond with sufficient security, (*Digest, chap.* 17, *sec.* 5,) and does not require the plaintiff to execute it. The contrary doctrine was held in *Kellogg et al. vs. Miller et al.*, (1 *Eng.* 468,) but that decision stands alone, and is opposed to most of the decisions made on statutes analogous: for instance, bonds for costs may be executed by securities without the plaintiff. (*Anonymous, Hardin's Rep.* 149. *Barnet vs. Warren, Circuit Court, ib.* 172. *Thorn vs. Savage*, 1 *Blackf.* 51.) So, likewise, as to appeal bonds, or bonds or bail in error. (*Barnes vs. Bulwer, Carth.* 121. *People vs. Judges of Duchess Co.*, 5 *Cow.* 35. *Ex parte, Halbrook et al., ib.*

WALKER, J. The defendant in the court below filed two pleas in abatement to the writ: 1st. That he was not about to remove out of the State, as alleged in the affidavit of the plaintiffs: and

2d. That the agent of plaintiffs, who signed the attachment bond for them, had no legal authority to do so. The plaintiffs demurred to the first plea, and the demurrer was sustained. The sufficiency of this plea will first be considered.

The statute requires of the plaintiff to file a declaration, an affidavit, and a bond with the clerk. The facts to be sworn to, the manner of taking the affidavit, the bond, its condition, and approval, are prescribed by the statute, after which it is (in the *6th sec. Digest*, 173) declared that, "on the requisites herein before prescribed being complied with, the clerk shall issue a writ of attachment, directed," &c. The plea questions the sufficiency of none of these pre-requisites, but tenders an issue upon the facts sworn to in the affidavit: at least, to so much of the affidavit as states that he was about to remove, &c. We are of opinion that the writ properly issued when the pre-requisites of the statute were complied with. The statute expressly makes the affidavit sufficient evidence of the facts, and does not contemplate a collateral issue of this kind, as may be fairly inferred from the fact that it in detail points out every step to be taken by all the officers and parties charged or connected with the suit or proceeding. It provides a bond not only requiring the party plaintiff not only to prove his demand on the trial at law, but the forty-seventh section also provides "that if it shall appear that such writ did not issue in accordance with the true intent and meaning of this act, the defendant may sue upon the bond and recover such damages upon a trial at law as a jury may assess." This section is evidently designed to save harmless the defendant if the writ issue contrary to the *true intent*, &c.; or, in other words, where the party was not about to remove, &c. The statute, moreover, provides that if the defendant desires to retain his property, he may file a bond with the clerk conditioned that he will appear and answer the plaintiff's demand, and will abide the judgment. Now, if the party be not really about to remove, as charged in the affidavit, this remedy in most instances is simple and easy. But again: the issue which is tendered by plea is of such a nature as to render it almost impossible to

arrive at any degree of certainty, by ordinary evidence, as to what is the real intention of the defendant. The plaintiff forms his conclusions, in many instances, from circumstances slight in themselves, and not such as to awaken suspicion in one less interested, for it is not unfrequently the case that the open declarations and intentions of the defendant are at direct issue with his real intentions, and it is only by close observation that a clue to real intention can be ascertained. The references which have been made by counsel to the decisions of several States under their own statutes, are not sufficient to warrant this court in adopting a similar practice under ours. We are, therefore, of opinion that the demurrer to the first plea was well taken.

The demurrer to the second replication to defendant's second plea presents for our consideration the sufficiency of both the plea and replication: because if the plea is not sufficient in law to abate the writ, it will be a matter of but little importance whether the replication is sufficient or not. It is true that this is a statutory proceeding, in derogation of the common law, and should receive a strict construction; yet there is a common sense view of this and all other acts, whether in derogation of the common law remedies or not, that should not be lost sight of, for it is not unfrequently the case that courts, by adopting this familiar and well recognized rule, feel that their sphere of action is so circumscribed as to force them into refined and unmeaning technicalities, such as defeat every valuable purpose of our most important and useful statutes.

This statute requires the "creditor to file with the clerk a bond to the defendant with sufficient security," &c. So, the same statute says the creditor shall file a declaration or statement in writing with the clerk, and again, that he shall file an affidavit, &c. To pursue the strict letter of the law here, in each instance the creditor should be the actor in proper person, but such never could have been the intention of the legislature. Nor can it, with more reason, be argued, that the creditor should do more than file a good and valid bond with good security, such as will be able to pay any amount of damages the defen-

dant may sustain. It is not in his mouth to complain whether they are bound as principle or security, so they are bound, and sufficient in estate to secure him from loss. But again: this matter of principal and security is only important as between themselves, because, independent of the bond, the plaintiff is bound to the value of his whole estate for any damage which may arise out of his wrongful acts.

It has been repeatedly decided, by the courts of our sister States, that a bond executed by securities alone in form according to their statutes, is a valid and substantial compliance with the statute. As in Kentucky, in cases of bonds for costs, (*Hardin*, 149,) and appeal bonds, (*id.* 173.) In Indiana, an appeal bond, executed by security alone, is good. 1 *Blackf.* 51. In Massachusetts a replevin bond, executed by two of four principals and two securities, is held sufficient. 14 *Mass.* 314. 5 *Cow.* 35. So, in our own State, a bond for costs executed by security alone is sufficient.

The sole purpose of all these statutes is to give to the defendant ample security. No construction should be indulged which would impair his rights in this respect. Neither the language nor the intent of the law implies that importance is attached to the particular persons who are to become bound. To indulge a limited construction of this act would materially affect the usefulness of the law without adding anything to the security afforded the defendant; for instance, where there are several joint creditors, who reside in different parts of the State or beyond the State, if it be required of them to execute the bond in person or by agent, before the writ issues, before the necessary bond could be procured, the exigency which invoked this summary aid would pass by, and the writ be of no use to the creditor. Wherefore, in view of the statute, in all its bearings, we are of opinion that a bond, in accordance with the statute in form, executed by sufficient security, whether signed by the principal or not, is a good bond under the statute.

It is contended, however, that the agent, who signed the principal's name to the bond, was not authorized to do so, and, for

that reason, it is voidable as to him, and being voidable as to him, the securities, not being joint obligors, are not bound by it. It is true that, at the common law, the plaintiff must sue all the makers of the bond jointly or each separately. Our statute has modified this rule, and under it any number, or the whole, may be sued. The common law doctrine is found in 2 *Tidd*, 803, and 1 *Chitty*, 30, and is founded on the rule that, as they are sued as joint obligors, the proof must sustain the allegation, and if one be discharged the allegation and the proof vary, and all are necessarily discharged. Thus, in *Tidd*, "the plea of one defendant for the most part enures to the benefit of all, for the contract being entire the plaintiff must succeed against all or none." Chitty says, in actions *ex contractu* against several, it must appear on the face of the pleading that the contract was joint, and that fact must also be proven on the trial. In a case where there was a discontinuance as to one defendant after service as to all, this court decided that it amounted to a discharge of the whole action, placing it on the ground that as the plaintiff has elected to treat the contract as a joint contract, he was bound by the election, and must recover against all or none, declaring, at the same time, that they could see no sufficient reason for the rule. —LACY, J., dissenting. *Frazier et al. vs. State Bank*, 4 *Ark. Rep.* 509. Subsequently, in the case of *Ashley vs. Hyde & Goodrich*, this court extended the rule, and made it embrace a case of implied assumpsit against two. The court, in delivering the opinion, admitted that no authority had been found in point, and grounded their opinion on the principle that as the action was for a joint assumpsit the proof must sustain the allegation, or both are discharged, or that proof of a joint contract would not support a judgment against one. So in the case of *Beebe vs. The Real Estate Bank;* and in a later case, *Brewton vs. Gregory*, 3 *Eng.* 178, where one defendant made default and the other pleaded, the issue being found for him, the court held that the party making default was entitled to the benefit of the successful defence of his co-defendant, and was thereby discharged. In all of these cases the court recognized the right of the party to treat

the contract as joint or several, and sue any number of the obligors, but that if he elect to sue any number of them, those sued are taken as joint obligors, and the proof must sustain a joint contract as to them. Our object in referring to these decisions is to show the ground on which they rest, which is, that in all actions of contract, notwithstanding the contract is several as well as joint, and the plaintiff may sue each separately or all, or as many of the parties to the contract jointly as he may think proper, when he has made his election, by instituting his action against all, or any number of the parties, he will be held to his election. There is no obligation whatever resting on the obligee to embrace more parties in his writ than are truly liable upon the bond, and should he do so, it is at his peril, for, if he fail to obtain a judgment as to one, the other defendants are discharged. There are many exceptions, we are aware, to this rule, and many very respectable authorities may be found, where a *nolle prosequi* as to part of the defendants has been entered after a joint plea and judgment against the others. (See 11 *Peters*, 86, and the cases there cited.) But it is unnecessary to refer to them. The doctrine, as settled by our own court, perhaps, adheres to the English common law principle as strictly as any court in the United States; yet, tested by these rules, it is evident that this bond is not within the rule there laid down. No issue has been taken upon this bond, no election to sue upon it as a joint bond has been made. The obligee may sue any number of them he pleases, and it amounts to no discontinuance. If, however, he so frame his pleading as to embrace parties not liable, it is his own folly, and he should abide the consequence. Here there is a good bond against two of the obligors; the plea is silent as to them, but simply avers that the agent had no power to sign the name of his principal. If we are correct in our conclusions that a bond executed by sufficient security, without the name of the principal to the bond, is valid; and that if it be there improperly, the validity of the bond, as to the securities, is not thereby affected, the conclusion is irresistible that the plea is defective in this respect.

But there is another ground on which it is very questionable whether the plea is or not sufficient. The plea only denies that the agent had sufficient authority to execute the bond for his principal: but all that is stated in the plea may be true, and still the bond may be binding on the principal: as, for instance, suppose, after the agent signed the name, but before the bond was filed, the principal had ratified and affirmed the act, the signature would, from that moment, have been his own as fully as if executed by himself. Pleas in abatement are construed strictly; they are required to be so certain as to exclude every conclusion against them. It is unnecessary to bestow time or consideration upon the sufficiency of the replication. It set up that a good and sufficient bond, signed by two securities, who were, and yet are, solvent and able to pay the penalty of the bond that had been filed before the writ issued. We have already decided such a bond good, and consequently that the replication was sufficient.

The case of *Kellogg et al. vs. Miller et al.*, has been relied upon by plaintiff in error. Although there is a striking similarity between the state of case presented upon the record in these two cases, yet it will be perceived that the question upon which that case was made to turn was materially different. The point was neither raised nor decided by the court, whether a bond, signed by securities alone, would, or would not, have been sufficient; nor was the liability of two of these obligors pressed before the court in that case. The replication contained an averment that the principal had subsequently ratified the act of the agent, and the court decided that such ratification, being made after the writ issued, came too late. So far, therefore, as these points may be considered as having been incidentally raised and decided in that case, they must be considered as overruled.

In conclusion: it is objected that the circuit court erred in rendering judgment in favor of the plaintiffs below, without first having disposed of the issue upon the replication to the second plea. The suit was brought on a liquidated demand for money; the court, therefore, had power to render judgment upon it without the intervention of a jury. As to the issue, the law is, in

regard to replications to pleas, that the plaintiff may file several replications to one plea, and if any one of them is good, it is sufficient to defeat the plea, just upon the same principle that any one of several pleas, if good, is a bar to the whole action. In this case there was a finding in favor of the plaintiffs on the demurrer to the second replication, and the judgment was properly rendered in their favor.

Let the judgment be affirmed with costs.

PHELAN VS. BONHAM.

The acts and declarations of a party are competent evidence when they afford any presumption against him.

A fact may be proven by secondary evidence if not objected to. *Wallace vs. Collins*, 5 *Ark. R.* 4, cited.

Where competent and incompetent evidence are introduced together without objection, none of it should be excluded by the court in charging the jury: the motion to exclude should be made immediately on its being introduced, and comes too late after other witnesses have been examined. *Johnson vs. Ashley*, 2 *Eng. R.* 473, cited.

To maintain replevin in the detinet, plaintiff need not prove a bailment. *Beebe vs. De Baun*, 3 *Eng. R.* 563, cited, and approved.

The owner of a posted animal cannot maintain replevin therefor, until he has proven his property before a justice, and paid (or tendered) the costs to the taker-up, as required by *sec.* 25, 26, 27, 28, 29, *chap.* 65, *Digest.*

Appeal from the Washington Circuit Court.

REPLEVIN in the detinet, brought by Bonham against Phelan, and determined in the Washington Circuit Court, in November, 1847, before the Hon. SEBRON G. SNEED, then one of the circuit judges.

The action was brought by the plaintiff to recover a grey

mare. The defendant pleaded: 1st, *non detinet:* 2d, a special plea, alleging that defendant came into possession of the mare by posting her as an estray under the statute, *absque hoc*, that he unlawfully detained her, &c.: 3d, property in himself: 4th, property in a stranger. Issues were taken upon the pleas, trial, verdict and judgment for plaintiff.

The defendant excepted to decisions of the court excluding evidence offered by him, and in giving and refusing instructions to the jury, and took a bill of exceptions setting out the evidence and instructions given and refused. The substance of the evidence is stated in the opinion of this court, the instructions follow:

At the request of the plaintiff, and against the objections of defendant, the court instructed the jury, "that if they believed, from the evidence, that plaintiff owned the property in the declaration mentioned at the time of the commencement of the suit, and before, and that he demanded the same from defendant, the same having come to his possession lawfully, and that defendant refused to give the property up, they must find for the plaintiff; that it is not necessary to prove a bailment, but is sufficient for plaintiff to prove that defendant got possession of the property lawfully, and, on demand by plaintiff, refused to surrender it."

The defendant, thereupon, asked the court to instruct the jury:

"1st. That, before plaintiff can recover, it is necessary to prove that the property in the declaration mentioned, was delivered by the plaintiff, or some other person for him, to defendant, with an express or implied contract to return the said property on request.

"2d. That if the jury believe, from the evidence, that defendant came into possession of said property, and held it without the consent of plaintiff, either express or implied, it does not amount to a bailment or delivery, and they must find for the defendant.

"3d. That if they believe that a demand was made, and defendant refused to deliver the property because the fees and dues

of posting and keeping were not paid, this does not amount to a refusal to re-deliver, and they should find for the defendant.

"4th. If they believe defendant came lawfully in possession of said property, and not from said plaintiff, they must find for defendant."

The 5th instruction asked by defendant is copied in the opinion of the court.

Which instructions the court refused to give, but charged the jury, "that nothing that was said, with regard to posting the mare, was evidence before them; that a demand and refusal, before commencement of the suit, must be proven, or the jury should find for defendant; that if the jury do not believe the mare in dispute to be the property of plaintiff, they should find for the defendant." Defendant appealed.

D. WALKER, for the appellant. The admissions of the plaintiff are legal evidence, (2 *Stark. Ev.* 28,) if they conduce to prove the issue, though not conclusive of the fact. 1 *Marsh. Ky. Rep.* 3.

The plaintiff was bound to sustain by proof the bailment as alleged in the declaration; and the court should so have instructed the jury; also, that if the defendant came lawfully in possession of the property, and not through the plaintiff they should find for the defendant. *Trapnall vs. Hattier*, 1 *Eng.* 18. *Town vs. Evans, ib.* 266. *Pirani vs. Barden,* 5 *Ark.* 81. *Ringo vs. Feild*, 1. *Eng.* 47.

The property having come into the possession of the defendant as an estray, the owner was not entitled to demand it until he had proved property and paid the charges in the manner provided for in the 25*th*, 26*th*, 27*th sec., chap.* 65, *Digest.*

Secondary evidence, if not objected to, is sufficient legal proof of a fact. *Collins vs. Wallace*, 5 *Ark.* 41.

SCOTT, J. We find several errors in the proceedings of the court below and will proceed to point them out.

The suit was instituted for the recovery of an animal, which

the plaintiff described in his declaration as a "grey mare," and to show property in himself he introduced several witnesses, who testified in substance on this point, that, some years before, the plaintiff had a sorrel mare colt foalded with a white spot in her face shaped like the letter Y: that the colt had remained of this description until it was something over a year old, when it then commenced at the ears and head to turn grey, and that before it strayed off, which was not until it was two years old, it had become to be no longer a sorrel, but of "a grey color formed of a mixture of white and sorrel heirs," and that the white had disappeared from its forehead, and that the witnesses believed the animal in controversy to be the foal. Afterwards, in the progress of the trial, when the defendant was producing his testimony, "he offered and proposed to prove by a witness that the plaintiff, on the day that he found the mare in dispute in possession of the defendant, inquired of the witness if he had seen his mare, representing her as having strayed away from him, and described her as being a sorrel mare with white in her face resembling the letter Y, and that the plaintiff, upon hearing of the mare in dispute being at defendant's, on the same day went there and claimed her as his;" but the court refused to allow him to make this proof.

Under the rule, "that all a man's acts and declarations shall be admitted in evidence when they afford any presumption against him," (2 *Stark. Ev.* 28,) it was certainly competent for the defendant to make the proof he proposed, for although it did not directly disprove, it certainly tended to disprove the plaintiff's pretensions to property—directly at issue—by furnishing the ground of a fair presumption, which the plaintiff might or might not have repelled, and it was therefore error to refuse to allow its production to the jury.

In another particular, touching the testimony, both in the instruction given in regard to it, and in the instructions asked and refused there was manifest error.

The plaintiff, in the course of making out his case, proving demand of the animal in controversy, and the refusal of the

defendant to deliver her, and in his endeavor to fix a bailment on the defendant, introduced parol evidence (to which no objection was interposed) tending to show that the defendant held possession of the mare as an estray, posted by him as such, and afterwards one of the defendant's witnesses also referred to this posting, and no objection was interposed. Now, although all this was secondary evidence of facts that, according to the rules of law, could have been proven, if objection had been interposed, only by the appropriate evidence of higher grade, yet having been produced to the jury without objection made, it could not be complained of by the plaintiff, as held in *Wallace vs. Collins*, 5 *Ark.* 41; and as some of the testimony accompanying and connected with this secondary evidence was strictly competent, none of it should have been rejected by the court after other witnesses had been examined, as no motion had been made to exclude it so soon as it was produced, as held in *Johnson vs. Ashley*, 2 *Eng.* 473, consequently the court erred in instructing "the jury that nothing that was said with regard to the posting of the mare was evidence before the jury." And also erred in refusing to instruct the jury as asked by the defendant, "that if they find from the evidence, that the mare in dispute was posted by the defendant and held by him as an estray, before he was bound to deliver the same, it was necessary for the plaintiff to prove said property before a justice of the peace, and to procure an order from said justice, requiring the said defendant to deliver the same to said plaintiff, and also that he should then and there tender the fees for posting and keeping the said animal, and if the plaintiff fails to produce this proof, the defendant was not bound to deliver the property, to the plaintiff, and they should find for the defendant;" as there was testimony properly before the jury on which this latter instruction would have been based.

The other instructions given to the jury, although in some degree inaccurate, were substantially correct.

The court properly refused to give the first and second instructions asked by the defendant. The third, although with some

modification it might have been properly given, nevertheless, in the terms asked, was properly refused. Most of the instructions refused, were doubtless based on the construction given to the 5th section of the Replevin statute, *Digest*, 842, (*sec.* 30 *of Rev. St.*,) by this court in the cases of *Pirani vs. Barden*, 5 *Ark.* 81. *Trapnall vs. Hattier*, 1 *Eng.* 18, and *Town vs. Evans*, *ib.* 266. But in the more recent case of *Beebe vs. DeBaun*, 3 *Eng.* 563, where the proper construction of this section was fully before this court, and was more deliberately examined, that favored in the three cases cited so far as replevin in the detinet is concerned has been in a great degree overturned, and the remedy in cases of unlawful detention much untrammeled, and the field of its operation greatly enlarged, and with this latter construction we are satisfied.

For the errors which we have pointed out in the case at bar, the judgment of the circuit court must be reversed, and the cause remanded to be proceeded in, not inconsistent with this opinion.

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WALWORTH VS. POOL.

It is a general rule that when one contracts to employ another for a certain time, at a specified price for the whole time, and discharges him, without cause, before the expiration of the time, he is bound to pay the whole amount of wages for the full time.

But this general rule has more special reference to the sustaining of the action, than to the admeasurement of damages to be thereby recovered.

In other words, although a tender and offer to perform, by the party not in fault, is equivalent to performance for the purpose of sustaining the action, the damages to be recovered are not universally and necessarily to be measured by the amount that was stipulated to be paid on actual performance.

But, for the most part, where these contracts concern personal property or personal services, the true rule of damages is the actual loss or injury sustained by the party ready and willing to perform.

Defendant may prove, in mitigation of damages, that after plaintiff's discharge, he found other employment of a like character for the balance of the time.

Where the damages assessed are manifestly excessive, the court will grant a new trial.

Appeal from the Chicot Circuit Court.

Assumpsit, by William B. Pool, against Horace F. Walworth, determined in the Chicot Circuit Court, at the November term, 1847, before the Hon. WILLIAM H. SUTTON, then one of the circuit judges. The action was commenced 29th March, 1847.

There were two counts in the declaration: the 1st, *indebitatus* assumpsit for work and labor done and performed by plaintiff for defendant: the 2d, a special count, alleging that, on the 30th day of December, 1846, defendant employed plaintiff to oversee his plantation, in Chicot county, for the year 1847, commencing on the 1st of January, 1847, and ending on the 1st of January, 1848, for which defendant agreed to pay him $500, and to furnish him with meat, meal, vegetables, &c., during the year. That, in pursuance of said contract, plaintiff entered upon his duties as such overseer, and served the defendant in that capacity until the 25th day of March, 1847, when defendant discharged him, without cause; and, although plaintiff was willing and offered to serve defendant for the remainder of the time, he refused to permit him to do so, &c.; concluding to the damage of plaintiff of six hundred dollars.

Defendant pleaded the general issue to the first count, and demurred to the second, on the grounds that it appeared, by said count, that the money therein claimed was not due until the 1st day of January, 1848; that said count was uncertain, informal, and insufficient; and that there was a misjoinder of counts and causes of action. The court overruled the demurrer, and the defendant rested. Plaintiff took judgment on the second count, entered a *nol prosequi* on the first, a writ of inquiry was executed, and plaintiff's damages assessed at $554. Defendant moved for a new trial, which was refused, and he excepted. The evidence, &c., is stated in the opinion of this court. Defendant appealed.

PIKE & BALDWIN, for the appellant. The general principle is, that where one contracts to employ another for a certain time, at a specified compensation, and discharges him, without cause, before the expiration of the time, he is, in general, bound to pay the full amount of wages for the whole time. (4 *Campb.* 375. 12 *Moore*, 552. *McCord*, 247.) But if the plaintiff, after his discharge, finds other employment, the amount which he receives therefor, during the time which the defendant is bound to pay him, must be deducted from his claim. (*Costigan vs. Mohawk & Hud. R. R. Co.*, 2 *Denio*, 609. *Hoyt vs. Wildfire*, 3 *J. R.* 518. *Emerson vs. Howland*, 1 *Mason*, 51. *Pullen vs. Stamforth*, 11 *East*, 232. *Kleine vs. Catara*, 2 *Gall.* 73. *Shannon vs. Comstock*, 21 *Wend.* 457. *Taylor vs. Read*, 4 *Paige*, 571): or, if other employment of the same kind, to be carried on in the same region, is offered to him, and he refuses to take it, the amount which he might have received will be deducted. (*Heckscher vs. McCrea*, 24 *Wend.* 304. *Costigan vs. Mo. & Hud. R. R. Co.*, 2 *Denio*, 609.

In an ordinary case, this court would not interfere as to the amount of damages; but where the jury totally rejects the evidence in mitigation, and decides in total disregard of the law, a new trial should be granted.

RINGO & TRAPNALL, contra. The verdict must be clearly against the weight of evidence so as to shock us at first blush, to authorize a new trial. (2 *Ark.* 360. 1 *Eng.* 86, 428. 1 *J. J. Marsh.* 6. 2 *ib.* 195. 3 *Bibb*, 313.) They must be so very excessive as to warrant an inference of prejudice, partiality, passion, or corruption. (5 *Cow.* 106.) The jury are the proper judges of damages, and their verdict will not in general be disturbed. *Gilbert vs. Berkenshaw, Lofft's R.* 771.

The measure of damages in this case was the amount to which Pool would have been entitled, if the contract had not been broken, and he had been permitted to remain the whole year. (See 4 *Campb.* 375. 1 *Stark.* 198.) The subsequent wages earned by him were entirely separate and independent of the previous contract, and the defendant should not have been per-

mitted to give them in evidence in mitigation of damages for breach of his own contract.

SCOTT, J. The only legitimate question presented in this case is, whether or not the court below erred in overruling the appellant's motion for a new trial.

The action was commenced on the 29th of March, 1847, and, having been continued at the May term, to which it was returnable, was finally disposed of at the November term of that year. The testimony, set out in the appellant's bill of exceptions to the refusal of the court to grant him a new trial, shows "that the defendant (below), about the last of December, 1846, employed the plaintiff (below) as an overseer, upon his plantation, for one year, from the first of January, 1847, agreeing to pay him for his services five hundred dollars, for the year, and to furnish him, and his family, with meat, meal and vegetables, which were worth per month, six dollars, or, for nine months, fifty-four dollars: that, in March, 1847, without any fault on the part of the plaintiff, the Mississippi river overflowed the plantation and destroyed the crop: that, after the plaintiff had served, as an overseer, for three months, having all the time discharged his duty in every respect, and being willing still to continue as overseer, the defendant told him he had no further use for his services, and discharged him at the end of such three months: that the plaintiff was, the next day, employed by another planter, as overseer, and his pay commenced, a day or two afterwards, for and at the compensation of three hundred and fifty dollars, for the residue of the year, and meal, meat and vegetables for himself and family, during the time, in which employ he still continued at the time of the trial, the contract still continuing, and some part of the compensation by his second employer having been paid him." And this being all the testimony, the court instructed the jury "that the testimony as to the plaintiff (below) being employed again, and the compensation received and to be received under his second employment, (all which was introduced by the defendant below,) was competent evidence in mitigation of

damages, but that the whole question as to the weight and effect of it was for the jury." Whereupon the jury found for the plaintiff (below) five hundred and fifty-four dollars, for which sum judgment was rendered.

From the amount of the verdict, it is manifest that the jury gave no weight at all to the evidence touching the second employment, but allowed the plaintiff the full year's pay, and also the further sum of fifty-four dollars, for meat, meal and vegetables, for nine months, at the rate of six dollars per month. With this statement of the case, we will proceed to the examination of the question presented.

There is no question as to the general rule, long and well established, that where one contracts to employ another for a certain time, at a specified compensation for the whole time, and discharges him, without cause, before the expiration of the time, he is, in general, bound to pay the whole amount of the wages for the full time. But this general rule has more especial reference to the sustaining of the action than to the admeasurement of the damages to be thereby recovered: or, in other words, while it is universally applied to the one and very frequently to the other, it is not in every case so applicable; or, to be still more explicit, although a tender and offer to perform, by the party not in fault, is equivalent to performance for the purpose of sustaining the action, the damages to be recovered are not universally and necessarily to be measured by the amount that was stipulated to be paid on actual performance, but, for the most part, when these contracts concern personal property or personal services, the true rule of damages is the actual loss or injury sustained by the party ready and willing to perform. In the language of Chief Justice MILLER, of the State of Maine, the "liability is limited to direct damages, which, according to the nature of the subject, may be contemplated or presumed from the result of his failure." And if this were not so, extreme injustice would often be visited upon those who are honest, and who, by events that could not have been foreseen and were beyond their control, would, without fault, be found in circumstances under which

they would be obnoxious to this iron rule were it unqualified as to damages. Doubtless this general rule is based on natural equity, as are all the rules of positive law, and, like most of these, has been sanctioned by long experience of its great utility in subserving and answering the ends of justice, and, so far as the maintaining of the action for the breach of any such contract is concerned, is perhaps unbending; but, to use it in all such cases as the sole rule for the admeasurement of damages, were to pervert it from the great end of its institution, and make it an instrument of injustice. Accordingly, in a numerous class of cases, that general rule has been displaced, as an admeasurement of damages, by that to which we have alluded, which is, by no means, subversive of that general one, and is manifestly based on principles of obvious equity, and which, perhaps, like many of the rules of the common law courts, has either found its way into these tribunals through the medium of the admiralty and equity courts, which had adopted it from the civil law, or else the exigencies of society, in a more advanced state of civilization and refinement, have developed it from the latent powers and capacity of the common law to subserve the great end of its mission to the Anglo Saxon race. Be this as it may, however, it is so fully recognized by the courts, and so well sustained by reason, justice, and authority, that we hesitate not to recognize it as a rule of the common law courts, and to apply it to cases like this now before us.

The general rule proceeds upon the idea that tender is equivalent to performance. For the purpose of founding the action this is true, and also true, *prima facie*, for the purpose of measuring the damages; but, for both purposes, it does, in fact, fall short of actual performance: else why declare specially? for, if it were, indeed, actual performance, you need not so declare. A man agrees to convey his farm, and the money is tendered, but he cannot give a title: this is not a case for damages, even for the loss of a good bargain; but the damages would be merely nominal. Yet, if the tender were the same in respect of damages as performance, to wit: actual payment, the vendee might

keep his money and recover of the vendor the value of the farm. "In cases where it becomes impossible for one party to perform, the other side is absolved from any obligation to move, and may sue immediately. That, too, is considered equivalent to performance by the side not in fault: and yet shall it be said that the whole sum to be paid for actual performance shall be recovered? Suppose in the case of a covenant to convey a farm, for a specified sum, and a deed tendered by the vendor, but refused by the vendee, and the vendor sell to another, shall he yet recover the whole price of the original vendee? It is admitted that, in some cases, where property is so tendered and the tender is not withdrawn, the price may be recovered; but this is upon the ground that the thing sold has an independent existence, and the *corpus*, not being perishable, and having legally passed by the tender and subsequent recovery, may still be actually delivered over whenever the vendee shall demand it." As in cases like that of *Bement vs. Smith*, 15 *Wend.* 492, where the vendor was to make a sulkey, deliverable at a certain time and place to the vendee. It was finished and tendered, but refused, and the vendor told the vendee he would leave it with Dr. Wolf, who resided in the neighborhood. The vendor was allowed to recover the price, —the court holding that he had an election to re-sell and recover what he lost by the re-sale, or to make the tender and keep it good, (that is, not to withdraw it,) and recover the whole original price agreed.

It is obvious that, in cases like these, there is more reason for confining the damages to the rule of the full price stipulated, than in the sale of personal services, because, in these cases, the *corpus* is tangible, and, when the party has been made to pay the full price, the *corpus* becomes his own by operation of law, and he may go and take it into possession, and use it, although he had before repudiated it. Not so, however, in the case of personal services: for the *corpus*, in these cases, being intangible, the payment of the full price, after the tender, gives the derelect party no right to have the services for which he has paid. True it is that this rule of election was doubtless designed mainly for

the protection of the innocent party, and would be especially valuable to him in cases where the derelict party might be in doubtful circumstances; but there is no rerson to suppose that it was designed for more than this; or, in other words, intended to enable him to act vindictively towards the derelict party.

In the case of *Shannon vs. Comstock*, 21 *Wend.* 457, the plaintiff declared on a contract between him and the defendant, whereby he had engaged to transport a number of horses for the defendant on a canal boat from White Hall to Albany, for the consideration of fifty-five dollars, to be paid him by the defendant, and averred his readiness and offer to perform and the neglect and refusal of the defendant. The plaintiff proved the contract as laid in the declaration, and that it was made on the 2d of June, 1836, and that the horses were to be embarked on the 3d June. It was further proven, "that on the third of June, about a dozen horses were embarked, but after their embarkation, they were so restive that it was impossible to keep them on the boat, and after remaining on board about an hour, the defendant took them off, and abandoned the idea of transporting the horses in that manner." The court below in that case, holding to the notion that the stipulated price to be paid for the transportation was the measure of damages, refused to hear any testimony going to show the actual damage, and the supreme court of New York, in reversing the judgment for that error, remark, Judge COWEN delivering the opinion of the court, as follows: "Here we have a contract to sell personal services and labor. On the vendee declining them, the vendor sells them to another, or converts them to his own use; in other words, he goes about his business in another direction, which fetches him the same, or nearly the same, or more perhaps than the agreed price which has failed. This is necessarily so, unless the vendor of the labor chooses to lie idle for the supposed length of time, which performance would have demanded. But this, he has no right to do. The rule on this subject is well laid down by *Mellon, Ch. J., in Miller vs. Mariner's Church*, 3 *Greenl.* 51, 55, 56." "In general, the delinquent party is holden to make good

the loss occasioned by the delinquency. But his liability is limited to direct damages which, according to the nature of the subject, may be contemplated or presumed to result from his failure. The purchaser of perishable goods at auction fails to complete his contract. What shall be done? shall the auctioneer leave the goods to perish, and throw the entire loss upon the purchaser? that would be to aggravate it unreasonably and unnecessarily. It is his duty to sell them a second time, and if they bring less, he may recover the difference, with commissions and other expenses of resale from the purchaser. If the party entitled to the benefit of the contract can protect himself from the loss arising from a breach at a reasonable expense, or with reasonable exertions, he fails in his social duty, if he omits to do so, regardless of the increased amount of damages, for which he may intend to hold the other contracting party liable." Upon which Judge Cowen continues to remark: "The reason and justice of these remarks are open to continual illustration in the affairs of men. A mason is engaged to work for a month, and tenders himself and offers to perform, but his hirer declines the service. The next day the mason is employed at equal wages elsewhere for a month. Clearly his loss is but one day, and it is his duty to seek other employment. Idleness is in itself a breach of social duty and of moral obligation. But if he continue idle for the purpose of charging another, he superadds a fraud which the law had rather punish than countenance." "Damages and interest," say the civil law and the continental writers, "are the loss which a person has sustained, or the gain which he has missed." And in concluding his remarks upon that case, he says, "the loss arose from mere misfortune. If the defendant had acted selfishly or fraudulently, this would have made a shade of difference against him. But all the witnesses concur that the failure was from causes which the defendant could not have anticipated, much less have controled." All this was repeated and enforced in *Hicksher vs. McRea*, 24 *Wend.* 309, where the court say, "by failing to perform and that promptly, I admit the defendants have subjected them-

selves to an action for damages. That, they do not deny; but it by no means follows that where a man has hired out the services of his person or property at a stipulated price, and the employer has failed to perform, the employee may, either by lying still or omitting to engage otherwise in the general line of his business, as a matter of course, subject his employee to a payment of the whole contract price." And after again repeating the language of the Chief Justice of Maine, on the subject of the duty of the innocent party to "protect himself from loss, by reasonable expense or with reasonable exertions," the court say, "a doctrine so sound in morals, I never could have suspected to be wanting in any department of the law."

These doctrines were again brought in review before the supreme court of New York, at May term, 1846, by the case of *Costigan vs. The Mohawk and Hudson Rail Road Co.*, reported in 2 *Denio*, 609, where a recovery of the whole stipulated price, sought by the innocent party, who had been employed as superintendant of a rail road for a year, was attempted to be resisted on the presumption that he might have engaged, although he did not actually engage in any other employment during the contract time, after having been discharged. And, after an examination of the cases, we have noticed, and numerous other cases, chancery, admiralty and common law, where this doctrine has been recognized and enforced, Mr. Justice BEARDSLEY, who delivered the opinion of the court, remarks: "In all the cases I have cited, the facts on which the delinquent party sought to bring the amount to be recovered below the sum agreed on, were proved or offered to be proved on the trial. Nothing was left to inference or presumption, and it was virtually conceded that the *onus* of the defence rested on the defendant. They are also cases in which the plaintiffs had either earned or received money from others during the time when they must have been employed in fulfilling their contract with the defendants, or in which they might have earned it in a business of the same character and description with that in which they had engaged with the defendants to perform. The principles established by the

cases referred to seem to me to be just, and although I have found no case in which they have been applied to such an engagement as that between these parties, still I should have no hesitancy, where the facts would allow it to be done, to apply them to such a case as this. But, first of all, the defence set up should be proved by the one who sets it up. He seeks to be benefited by a particular matter of fact, and he should therefore prove the matter alleged by him. The rule requires him to prove an affirmative fact, whereas the opposite rule would call upon the plaintiff to prove a negative, and therefore the proof should come from the defendant. He is the wrong doer, and presumptions between him and the person wronged should be made in favor of the latter. For this reason, therefore, the *onus* must, in all cases, be upon the defendant. Had it been shown in the case at bar that the plaintiff, after his dismissal, had engaged in other business, that might very well have reduced the amount which the defendant otherwise ought to pay. For this the cases I have referred to would furnish sufficient authority. But here it appears that the plaintiff was not occupied during any part of the time from the period of dismissal to the close of the year. Again: had it been shown, on the trial, that employment of the same general nature and description with that which the contract between these parties contemplated had been offered to the plaintiff, and had been refused by him, that might have furnished a ground for reducing the recovery below the stipulated amount. It should have been business of the same character and description, and to be carried on in the same region. The defendant had agreed to employ the plaintiff in superintending a rail road from Albany to Schenectady, and they cannot insist that he should, in order to relieve their pockets, take up the business of a farmer or a merchant. Nor could they require him to leave his home and place of residence to engage in business of the same character with that in which he had been employed by the defendant."

Such are some of the reasonings and some of the authorities on which the rule of damages which we have recognized, is based and sustained. The case at bar is fairly within the rule.

The employer was not in fault, nor was the employee. The crop was overflowed and destroyed by an unusual rise of the Mississippi river, and the services of the overseer were no longer needed; no other reason was shown for the discharge. A short time after, a day or two, he obtained other employment of the same character and description, in the same region of country, for the balance of the year, and, at the time of the trial of this cause in the court below, a portion of his wages had been paid him by his second employer.

Damages are, in general, and especially when the breach of the contract, for which they are sought to be recovered, has arisen from unforeseen and uncontrolable events, unmixed with selfishness and fraud, by way of full indemnity only, and while the rule in respect thereof, which we have recognized as applicable to the case before us, restrains them within the limits indicated, it by no means goes to the length of making any further claim to the earnings of the innocent party, during the period of the stipulated employment, than that these shall be justly and fairly considered by the jury in fixing the indemnity to be awarded by their verdict. In the case at bar, while there was so much direct testimony of facts, that, unrebutted, necessarily reduced the amount so much below the whole stipulated price for the whole year's employment, and no testimony showing selfishness, fraud, or insolvency, of the second employer, or other fact to be considered, in the opposite scale, from which it might seem that the finding had been against the preponderance of testimony only. Or the contrary, it being perfectly manifest that the verdict was found directly in the face of the law and the testimony, from which prejudice or partiality, at least, may be inferred, the court below therefore erred in overruling the motion of the defendant below for a new trial; and, for this error, the judgment must be reversed, and the cause remanded to be proceeded in not inconsistently with this opinion.

HOWELL ET AL. VS. MASON AS ADR.

Plaintiff filed a petition in debt on a note made to another, and writ issued: Afterwards he filed another petition on the same note, against the same parties, setting out an assignment of the note to himself, which was not alleged in the first petition, and writ issued. HELD, that the suits were distinct; that the last petition was not an amendment of the first, and might be filed without leave of court.

The defendants appeared to the second petition, and moved to dismiss for want of bond for costs, which motion was sustained; the plaintiff moved for a reconsideration of the judgment of dismissal, which motion was granted, and defendants then interposed further defence. HELD, that the granting of the motion to reconsider, was equivalent to setting aside the judgment of dismissal.

Afterwards, the death of the plaintiff was suggested by one of the defendants, and thereupon judgment that the suit abate; several terms afterwards, the suit was revived, on motion, in the name of plaintiff's administrator, and proceeded to judgment on the merits. HELD, that the judgment of abatement, though contrary to the statute, (*Digest, chap.* 1, *sec.* 7,) was final and erroneous, but not void, and that the proceedings and judgment subsequent thereto were *coram non judice*, null and void.

Writ of Error to Johnson Circuit Court.

On the 14th February, 1840, Henry Smith, *Senior*, filed in the office of the clerk of the Circuit Court of Johnson county, a petition in debt, stating that he was the legal owner of a note executed by John B. Howell and John Howell, to Henry Smith, *Junior*, setting out the note, and praying judgment for the amount thereof. He also filed a bond for costs, and sued out a summons against the makers of the note, returnable to the following April term of the court, which the sheriff returned served upon John Howell, and *non est* as to John B. Howell.

On the 25th of February, 1840, said Smith, *Sr.*, filed another petition in debt on the same note, against the same parties, setting out an *assignment* of the note to him by Henry Smith, *Jr.*, which assignment was not alleged in the first petition. On the filing of this petition, a summons was issued against defendants, returnable also to the April term following, and the same return made thereon by the sheriff as upon the first summons.

At the return term, on the 30th day of June, 1840, the record states "the defendants appeared," and filed a prayer for oyer of the obligation sued on, and also of the assignment thereon, which was granted by filing the original. Whereupon the defendants moved to dismiss the cause for want of a sufficient bond for costs, which motion was sustained by the court, and judgment rendered against plaintiff for costs. On the next day (July 1st) the plaintiff moved the court to restore the cause to the docket, which motion the court took under advisement. Then follows a record entry, of the same day, thus: "And now on this day came the parties, by their attorneys, and plaintiff moved the court to reconsider the judgment rendered in this case, on yesterday, which, after being argued by counsel, was sustained by the court."

Defendants then moved the court for a rule upon plaintiff's attorney to show his authority for bringing the suit, which the court refused, and they excepted.

Defendants then filed a plea in abatement, alleging that plaintiffs did not, previous to the issuance of the writ, pay the clerk's and tax fees thereon; which plea was not signed by defendants or their counsel. The plaintiff "moved the court to treat said plea as a nullity," which motion was sustained, and defendants excepted. No further steps appear to have been taken at the return term.

At the following term, December 23d, 1843, defendant, John Howell, by Paschal, his attorney, filed a suggestion of the death of plaintiff, supported by affidavit, and praying that the suit abate. Thereupon, the record states, "and this day *both* parties *appearing*, the defendant, by Paschal, his attorney, filed his affidavit suggesting the *death* of the *plaintiff*, whereupon it is considered that this suit abate." Here the cause rested until the 5th day of September, 1845, when the following entry appears of record:

"And now on this day comes Kinchen C. Mason, and (it having been suggested, and made to appear, at a former term of this court, that the plaintiff had departed this life) suggests that he

has obtained letters of administration on the estate of said plaintiff; and the court, being satisfied in the premises, it is ordered by the court that this suit be revived, and progress in the name of the said Mason, as such administrator; and it appearing to the court that this order was directed to be made at the last term of this court, but was omitted to be entered of record, it is ordered that this order be made now for then."

On the next day, the record states, the parties appeared, "and the defendant pleaded the general issue, in short upon the record, and, by agreement of the parties, he was allowed three months, from this day, to file his special plea or pleas, and this cause stands continued until the next term of this court."

On the 2d of September, 1846, the parties appeared, by their attorneys, again, and "the defendant, having withdrawn his plea by leave of the court, and having nothing to say in bar," &c., judgment was rendered, against both of the defendants, in favor of Mason, as Smith's administrator, for the amount of the note sued on, and they brought error.

The proceedings in the court below were had before the Hon. R. C. S. BROWN, then one of the circuit judges.

CUMMINS, for the plaintiffs. Admitting the power of the court to set aside its judgment, during the term, upon proper notice, (*Tidd's Pr.*, 1 *vol.*, 439, 454,) denied that the judgment dismissing the suit was ever set aside, or could be, without notice to the defendants.

The court having rendered a judgment abating the suit, that judgment, though erroneous and reversible, is not void, but binding upon the parties until reversed: and all subsequent proceedings were *coram non judice*, and void. *Walker & Faulkner vs. Walker*, 2 *Eng.* 554. *Byrd et al. vs. Brown et al.*, 5 *Ark.* 713. *Ashley vs. Hyde & Goodrich*, 1 *Eng.* 92.

FOWLER, also, for the plaintiffs. The amended or second petition is not a part of the record; the party could not amend with-

out leave of the court. *Digest, p.* 814, *sec.* 113, *et seq.* *Bently vs. Dickson*, 1 *Ark.* 169.

A suit shall not abate where the plaintiff dies before judgment, but the administrator may be substituted. (*Digest, chap.* 1, *sec.* 7); yet, if a final judgment of abatement be rendered, however erroneous it may be, it is not void, and must stand until reversed. The substitution of the administrator, without notice to the defendants, is erroneous, if not actually void. *Digest*, 98, 99.

BATSON and RINGO & TRAPNALL, contra. The first petition is no part of the record in this cause, and should not have been copied into the transcript: though, between the same parties, as the second, it was for a different cause of action, and if for the same, could be taken advantage of only by plea in abatement. The administrator was substituted in the place of his intestate in the manner authorized by law, and his right to prosecute the suit was never controverted in the court below, and cannot be controverted here. *Digest, chap.* 1, *sec.* 7, 16, 17.

JOHNSON, C. J. The second petition filed in this case cannot be considered in the light of an amendment of the first, and therefore the objection, that it is put upon the files without the leave of the court, cannot apply. It is true that the parties are the same in both petitions, yet the bases of the action are wholly different. In the first, the plaintiff counted upon the note as it was originally executed, and, in the second, he relied upon an assignment to himself. The ground of the two actions being essentially different, the latter could not be affected by the former without a plea showing that they were, in fact the same, and setting up the pendency of the one as a bar to the other.

The court below, on the 30th of June, 1840, on the motion of the defendant, dismissed the cause for want of a sufficient bond for costs. On the 1st of July, 1840, the plaintiff moved the court to reconsider the judgment dismissing the cause, which motion was granted. It is insisted that the granting of the reconside-

ration did not so operate as to vacate the judgment, and to restore the cause to the docket. We are clearly of opinion that such was the legal effect of the latter judgment, and, indeed if such had not been the effect in law, the subsequent appearance of the defendant and interposing a defence to the merits, would have amounted to a complete waiver of any right that he might otherwise have claimed under it. The instant the court granted the reconsideration, the case stood as though no decision had been pronounced, and it was then competent to have made the same or a different decision upon the same motion.

On the 23d of December, 1840, the following entry appears upon the record, to wit: "And this day, both parties appearing, the defendant, by Paschal, his attorney, filed his affidavit suggesting the death of the plaintiff, whereupon it is considered that this suit abate." The question that arises here is, whether this entry amounts to a final judgment. Is it merely an erroneous judgment, or is it an absolute nullity, and as such to be wholly disregarded in the further progress of the suit. The *7th sec. of chap.* 1, *of the Digest*, declares that "where there is but one plaintiff in an action, and he shall die before final judgment, such action shall not thereby abate, if the cause of action survive to the heirs, devisees, executor, or administrator, of such plaintiff, but such of them as might prosecute the same cause of action may continue such suit, by an order of the court, substituting them as plaintiff therein." True it is that this statute expressly declares that the action shall not abate by the death, but that it may be prosecuted to final judgment by the representatives of the deceased plaintiff, in case the cause of action be of such a nature as to survive. The notion has been started that, inasmuch as the statute has expressly and emphatically declared that the death shall not abate the suit, therefore the judgment of the court abating it is not simply erroneous, but that it is absolutely null and void. We are free to confess that we cannot fully comprehend the force of this argument. If the court had jurisdiction of the subject matter, and also of the parties, although the decision is in the very teeth of the law, yet it cannot be

said, with any degree of propriety, that that circumstance would invalidate the judgment of the court. If it were true that all judgments, that stand in direct opposition to the express letter of the law, are necessarily null and void, it would be difficult, if not utterly impossible, to discover the distinction between such as are erroneous and those that are merely void.

We are, therefore, of opinion that the decision of the court below, abating the suit, is a final judgment, and, whether correct or erroneous, binding upon the parties till reversed, and that consequently all the subsequent proceedings are *coram non judice*, and merely void. It is manifest, from this view of the law of this case, that the judgment brought into this court for reversal is a mere nullity, and consequently confers no jurisdiction upon this court. This case must, therefore, be dismissed for the want of jurisdiction.

BURTON'S ADR. VS. LOCKERT'S EXRS.

Walker brought suit against Moody, in Saline Chancery Court, for a family of negroes: Moody ran the negroes off: in the year 1836, Burton purchased Walker's interest in the suit, and agreed to give Lockert $250, to assist him in getting the negroes, on condition the suit was successful: Lockert accordingly obtained the negroes, and delivered them to the sheriff: the chancery suit was determined in February, 1844, and six out of eleven of the negroes decreed to Walker for the use of Burton's estate, who had, in the mean time, died: in July, 1844, Lockert presented his claim, for $250, to the probate court, for allowance against the estate of Burton: Burton's administrator objected to the allowance of the claim, 1st, because only a part of the negroes were recovered in the chancery suit, and Lockert was only entitled to compensation for his services *pro tanto:* 2d, that the claim was not presented to Burton's administrator for allowance within two years after the grant of letters: 3d, that, in October, 1842, Lockert became a bankrupt, and the claim passed to his assignee. HELD, that, inasmuch as Burton purchased the interest of Walker in the slaves, and the only condition upon which Lockert's claim was made to depend being the re-

covery of such interest, his claim could not be reduced by the failure of Burton to recover the whole of the slaves.

HELD, further, that the statute of *non*-claim (*Digest, ch.* 4, *sec.* 85) run againt the claim of Lockert, not from the time of the grant of letters of administration on Burton's estate, but from the accruel of the cause of action on the determination of the chancery suit for the slaves: that this statute, like other statutes of limitation, runs from the time the cause of action accrues.

HELD, further, that though the cause of action had not accrued when Lockert was declared a bankrupt, it was an inchoate demand, and passed to his assignee, and this though he omitted to include it in his schedule.

Appeal from the Pulaski Circuit Court.

William S. Lockert filed, for allowance and classification, in the Probate Court of Pulaski county, a claim, against the estate of Alexander Burton, deceased, for $250, for services rendered, by Lockert, to Burton, in recovering certain slaves. The account was duly probated, and had previously been presented to Burton's administrator for allowance, and by him rejected. At the July term, 1844, of said Probate Court, Burton's administrator (Beebe) appeared and interposed three objections to the allowance of the claim: 1st, as to the amount of the charge: 2d, the statute of *non-claim:* and 3d, the bankruptcy of Lockert; which objections are more fully stated in the opinion of this court. The Probate Court allowed the claim, Burton's administrator excepted, set out the evidence, and appealed to the Circuit Court.

The evidence was, in substance, as follows:

Lockert proved, by the deposition of Samuel J. Cook, Esq., that "Alexander Burton, having become interested in a certain suit of William C. Walker, against George Moody, in the year 1836, for a family of negroes, in the Saline Circuit Court, and said family of negroes having been run off by said Moody, the said Burton employed Lockert to assist him in the capture and re-taking of them, and agreed to pay him $250 if he, Lockert, would assist and get said negroes so run off, provided said Burton succeeded in said suit for them; said Lockert did go and assist in getting the negroes, and they were delivered to the sheriff of Saline county."

Lockert also proved that Hawkins, the original administrator

of Burton, had verbal notice of the existence of said claim from time to time, and within two years from the date of his letters of administration. That Burton only claimed the interest (whatever that might be) of Walker, in said suit in chancery, brought in the name of Walker, against Moody, for said family of negroes, which was finally decided at the February term, 1844, of the Saline Circuit Court. That the claim in question was not included in Lockert's schedule of assets in bankruptcy.

Burton's administrator proved that said suit in chancery, brought in the name of Walker, whose interest was claimed by Burton, was for the entire family of negroes in question, and that, by the final decree of the Saline Circuit Court, in chancery, rendered at the February term, 1844, said Walker, for the use and benefit of the estate of Burton, recovered six-elevenths of said negroes, or six slaves out of eleven, which six slaves were, at said term, specifically divided off and allotted to said estate. That Hawkins took out letters of administration upon the estate of Burton, on the 16th July, 1838, and continued to act as such administrator until the 19th August, 1844, when his letters were revoked, and letters granted to Beebe. That, on the 6th October, 1842, Lockert was, by decree of the District Court of the United States for the District of Arkansas, in bankruptcy, finally and fully discharged of and from all debts owing by him at the time of the presentation of his petition, on the 31st March, 1842, to be declared a bankrupt, according to the act of Congress in that behalf.

The circuit court, in June, 1846, (CLENDENIN, J., presiding,) affirmed the judgment of the Probate Court, and Burton's administrator appealed to this court. In the meantime, Brunaugh succeeded Beebe in the administration of Burton's estate, and, afterwards, Lockert's death was suggested, and his executor's substituted.

WATKINS & CURRAN, for the appellant, contended that, as Burton only recovered a portion of the negroes, upon the recovery of which the claim depended, in any view of the case the allowance in favor of Lockert could only have been *pro tanto:* that, as

the claim was presented for allowance before the contingency had occurred, he was not entitled to recover: but, if the claim was, in that respect, properly presented for allowance, still he could not recover, as more than two years had then elapsed since the the grant of administration: that all Lockert's intetest in the claim passed to his assignee in bankruptcy, although the claim was not embraced in his schedule, and his assets remain in the assignee, where they vested by operation of law upon the decree declaring him a bankrupt. 5 *Law Reporter*, 22, 23, *in re Cheeney. Ib.* 71, *in re Foster. Ib.* 307, *Ex parte, Newhall, assignee of Brown. Ib.* 322, *in re McCarty.*

RINGO & TRAPNALL, contra. Until the happening of the contingency upon which Burton bound himself to pay the sum demanded, Lockert had no debt or legal demand against him: the indebtedness of Burton and right of action of Lockert accrued when the decree was pronounced, so that Lockert, at the date of his bankruptcy, possessed no vested right to the demand, and was not bound to embrace the contract in the schedule of his effects, and could not lawfully have done so: as two years had not elapsed after the right of action accrued before Lockert presented his demand for allowance, the statute of limitations could not have run against him. *Pougue, use, &c. vs. Joyner*, 1 *Eng.* 244. *McDonald vs. Bovington*, 4 *T. R.* 825. 2 *M. & S.* 551. 4 *M. & S.* 333. 5 *Taunt.* 778. 1 *Bacon's Abr.* 425. 1 *Wash. C. C. R.* 178. 20 *John. R.* 153. 4 *Burr. R.* 2439. 1 *John. Cas.* 73. 6 *John. R.* 126. 15 *John. R.* 467.

JOHNSON, C. J. The administrator of Burton interposed in the probate court three several objections against the claim of Lockert; *First:* "That the alleged promise of Burton was contingent, depending upon the finding of the negroes, and also upon his success in the suit; and that upon the trial of the case he only recovered a portion of the negroes in controversy, and that in any event, the allowance to Lockert should be only *pro rata; Second:* That the alleged promise could not be enforced, because

the claimant had suffered more than two years to elapse since the grant of administration on the estate of Burton, without presenting his claim or giving any notice of it as required by law, and that consequently the same was barred: and, *Thirdly:* That on the 6th of October, A. D. 1842, Lockert was, by the decree of the district court of the United States in bankruptcy, for the District of Arkansas, finally decreed and finally discharged of and from all his debts owing by him at the time of the presentation of his petition, on the thirty-first day of March, A. D. 1842, to be declared a bankrupt, that the said claim was or ought to have been embraced in the schedule of his assets to be distributed among his creditors, and that during the course of the administration of his assets in bankruptcy did not, nor had he in any manner since become the lawful owner of the claim, and that consequently he had no right to demand the amount from the estate." These are all the objections urged against the allowance of the claim, and in case that either is well founded in law, it is clear that the judgment is erroneous, and consequently ought to be reversed.

It appears, from the testimony, that William C. Walker had instituted a suit in the Saline circuit court against George Moody for a family of negroes, that Alexander Burton, whose estate is sought to be subjected to the claim in question, after having purchased Walker's interest in the suit, made a contract with Lockert, and agreed that if he would assist him in getting the negroes, which had been run off by Moody, and in case he should succeed in the suit, he would pay Lockert for his services two hundred and fifty dollars. We think that, upon a fair construction of the contract, it would not be material as to the amount of the recovery, in order to fix the liability of Burton for the sum stipulated. He had purchased the interest of Walker, and the only contingency, upon which Lockert's claim was made to depend, was the recovering such interest. This view of the agreement is fortified by the fact that Lockert's service could neither be increased nor diminished by the amount of Burton's recovery. We think, therefore, that Burton's liability

was not made to depend upon the fact whether he recovered six-elevenths or the whole of the property in controversy, but that it became fixed upon the recovery of Walker's interest in the subject matter of the suit.

The second objection involves the construction of the statute prescribing and limiting the time within which claims are required to be presented against the estates of deceased persons. It is declared, by the last clause of the eighty-fifth section of chapter four, of the Digest, that "all demands not exhibited to the executor or administrator, as required by this act, before the end of two years from the granting of letters, shall be forever barred." This statute cannot be considered as any thing else than an act of limitations, and, if so, can operate only upon rights of action actually subsisting. Acts of limitation operate alone upon the remedy, and it would be flatly absurd to say that the remedy is destroyed before the right of action had accrued, and consequently before the remedy existed. To give the act in question such a construction as to bar an action upon a contract that only created an inchoate right and before any right of action had actually accrued, would be to place it in the power of the legislature to pass a law, not merely to impair the obligation of a contract, but actually to destroy the contract itself. The form of the affidavit required of all persons presenting claims against an estate is conclusive, to show that the law only contemplated such demands as had fallen due and were actually owing at the time of their presentation. The right of action had not only not arisen upon the contract in question, but on the contrary, the contingency upon which the debt was made to depend, had not happened at the expiration of the two years after the date of the letters of administration. It is not to be presumed that the legislature intended to deprive all persons of their claims against the estate of deceased debtors, in cases where their right of action had not arisen; and even if such had been the design, it could not have succeeded without a plain and manifest violation of the constitution of the United States.

The third and last objection is, that, inasmuch as Lockert had

obtained his final discharge under the bankrupt act, and that the contract in question had been made before he filed his petition for the benefit of that act, therefore he had no legal right to commence and prosecute the suit. It appeared, from the schedule of his effects, that the claim now sought to be enforced was not included. The administrator contends that, notwithstanding the omission of the claim in the schedule, the legal title, upon the rendition of the decree of bankruptcy, *ipso facto*, passed to and vested in the assignee, and that, from that instant, the bankrupt lost all control over it. The third section of the act declares that, "the assignee, in virtue of the decree of bankruptcy, shall become invested with all the property and rights of property of the bankrupt, and shall be vested with all the rights, titles, powers and authorities to sell, manage, and dispose of the same, and to sue for and defend the same, subject to the orders and directions of such court, as fully to all intents and purposes as if the same were vested in, or might be exercised by such bankrupt, before or at the time of his bankruptcy declared as aforesaid, and all suits at law or in equity then pending, in which such bankrupt is a party, may be prosecuted and defended by such assignee to its final conclusion, in the same way and with the same effect as they might have been by such bankrupt." It is clear that the circumstance of the failure of the bankrupt to insert any part of his effects in his schedule, cannot in any degree affect the title of the assignee. He does not depend upon the schedule for his title, for the law by its own mere force and operation passes the title to all his effects of whatsoever character or description to the assignee, and vests it in him for the benefit of the creditors of the bankrupt. The only doubt that could by possibility arise in relation to the matter is, whether it is such a right of property as, in the nature of things, could pass to and vest in the assignee. True it is, that, at the date of his petition, it had not matured into a debt, as the contingency, upon which it was made to depend, might or might not happen; yet we conceive, to say the least of it, it was an inchoate right and such as in the spirit and under the prolicy of

the bankrupt act was transferable to the assignee, and could be enforced by him when the contingency had happened which fixed the liability. We think it clear, that the ground of the last objection is fully tenable, and that for the error in overruling it alone, if there were no others, the judgment of the court below ought to be reversed.

The judgment of the circuit court of Pulaski county herein rendered, is therefore reversed, and the case remanded to be proceeded in according to law and not inconsistent with this opinion.

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CALDWELL'S EXR. VS. MCVICAR.

Where the holder of a bond gives day of payment to the principal, on a valuable consideration, without the consent of a security, the latter is thereby discharged both in law and in equity.

A notice to take depositions on "the 16th, 17th, and 18th days of March next, or on *any or each* of said days," is not sufficiently certain as to time. *Reardon vs. Farrington*, 2 *Eng. R.* 304, cited.

Where a party appears, by himself or attorney, and makes his appearance, cross examines, objects to a question, to the competency of the witness, or does any substantive act connected with the taking of the deposition, and it so appears in the deposition, regularly certified, he will not, at the hearing of the cause, be permitted to object that no legal notice had been given.

HELD, that a statement at the foot of a deposition, thus: "To all of which testimony, the said James McVicar, by James Yell, his attorney, objected as being illegal: Attest, H. Scull, J. P." was an extra-official act of the justice, and furnished no evidence of such an appearance as constituted a waiver of notice.

Appeal from the Pulaski Circuit Court.

Action of debt, by James McVicar, against James H. Caldwell, as executor of Charles Caldwell, deceased, determined in the Pulaski Circuit Court, (on change of venue from Saline,) in October, 1847, before the Hon. WILLIAM H. FEILD, judge.

The plaintiff declared on a writing obligatory executed to him, on the 16th of November, 1841, by R. C. Byrd, as principal, and William J. Byrd, William Field, and defendant's testator, as securities, for $1,200, due 1st of June, 1843. Defendant filed three pleas: 1st. Usury:

2d. That when the bond sued on became due, Byrd, the principal therein, was solvent; defendant's testator gave plaintiff notice to sue thereon, and he neglected so to do until Byrd became insolvent:

3d. That after said writing obligatory became due and payable, and before the payment thereof, by R. C. Byrd, the principal, or by the other makers thereof, his securities, to wit: on the first day of March, 1843, the said plaintiff, for a good and valuable consideration, to wit: the sum of six hundred dollars, agreed to be paid by the said Byrd to the said plaintiff, agreed to and with the said Richard C. Byrd, to indulge, forbear, and give day of payment of and upon the said sum of money, and interest, in said writing obligatory mentioned, to him, the said Richard C. Byrd, for a long space of time, to wit: for the space of one month next thereafter, without the assent of the said Charles Caldwell, in his lifetime, since then deceased; and, in pursuance of the said agreement, the said plaintiff did afterwards, to wit: on the day and year last aforesaid, for the space of one month then next following thereafter, forbear, indulge, and give day of payment to the said Richard C. Byrd, of and upon the said sum of money, and interest, in said writing obligatory mentioned, without the assent of the said Charles Caldwell, in his lifetime, since deceased. By means whereof, the said Charles Caldwell, in his lifetime, &c., became and was released and discharged of and from said writing obligatory, and from all liability to the said plaintiff, as one of the securities of and for the said Richard C. Byrd, the principal debtor therein: and this, &c. *Watkins & Curran.*

Plaintiff took issue to the first and second pleas, and demurred to the third, which demurrer the court sustained. The issues were submitted to a jury. To sustain the issues on his part,

defendant offered the deposition of Byrd, which was excluded on objections of plaintiff, and defendant excepted. Verdict and judgment for plaintiff, and defendant appealed.

WATKINS & CURRAN, for the appellant.

S. H. HEMPSTEAD, contra, contended that the deposition of Byrd was properly excluded, because the notice was insufficient, according to the decision in the case of *Reardon vs. Farrington*, 2 *Eng.* 366. The loose statement of the justice, just preceding his certificate, that the appellee, by Yell, his attorney, objected to the deposition as illegal, cannot be regarded or received as evidence, because the record expressly shows that "Hempstead and Johnson," and not Yell, were the attorneys of record of McVicar; and, as no other attorney than an attorney of record can be served with notice to take depositions, it follows, as a necessary consequence, that it is only the party, or such an attorney, who is competent to waive defects, or dispense with notice altogether. *Digest*, 432. *Johnston vs. Ashley*, 2 *Eng.* 471.

An officer who takes a deposition is charged by the statute with certain specific duties, and which are very clearly pointed out. *Digest, chap.* 55, title *Depositions*. Such facts, and such alone, as the law requires him to state, are received as evidence; but all others are rejected. 1 *Greenleaf's Ev.* 655. *Willes Rep.* 550. Even the certificate of the king, under his sign manual, of a matter of fact, has always been refused. *Id.* As to all matters which an officer is not bound to state or record, his certificate is considered as the statement of a private person, entirely extra-official, and cannot be received as evidence. 1 *Greenleaf's Ev.* 655. *United States vs. Buford*, 3 *Peters*, 29. *Cowen & Hill's Notes*, 702–741 *to* 1 *Phil. Ev., p.* 382–391. The certificate of a notary that no note of a certain description was protested by him, is inadmissible. *Exchange Co. of New Orleans vs. Boyce*, 3 *Robinson's Rep.* 307.

It is no part of the duty of the justice, nor does the law require him, to state the presence or absence of either party or their at-

torneys. As to who is, or who is not, the attorney of the adverse party, is a matter of fact which he is not required and cannot know, and any statement he may make with regard to it, must, according to the authorities cited, be incompetent. It is upon a like principle that it has been held that the statement of a notary, in his certificate, under his notarial seal, that due notice of protest was forwarded, is no evidence of that fact, (*Real Estate Bank vs. Bizzell*, 4 *Ark.* 182,) it being an extra-official statement. *Hyde vs. Benson*, 1 *Eng.* 400, asserts the same doctrine. The deposition, then, must stand or fall on the notice alone; because, granting, for argument, that Yell was cempetent to waive the defect in it, yet he did not waive any thing: but, on the contrary, his objection embraced it, and was equivalent to saying, "there being no notice, the testimony is illegal;" and consequently the deposition was properly excluded.

WALKER, J. The third amended plea of defendant was, by the circuit court, on demurrer, adjudged insufficient. The defence interposed by the plea is, that, after the bond sued on became due, and before any payment thereon, the plaintiff and Byrd, the principal in the bond, without the assent of defendant, who was his security, made an agreement, by which, for the consideration of six hundred dollars, which Byrd agreed to pay plaintiff, plaintiff agreed with Byrd to indulge, forbear, and give day of payment on said writing obligatory for one month: and that said plaintiff did forbear and give day, for that length of time, without the assent of defendant. The special causes of demurrer are: 1st, that the defence interposed is an equitable, not a legal, defence: 2d, that the contract to forbear was without consideration: 3d, that it is not averred that it was made without the assent of the defendant.

This question has been repeatedly presented to this court, and it may be considered as settled, that giving time, by a valid and binding agreement, by a creditor, to the principal debtor, without the assent of the security, operates as a discharge to him both in law and equity. *Stone & McDonald vs. State Bank*, 2 *Eng.*

141. This plea falls decidedly within the rule there laid down, and varies materially only in the averment that the agreement to forbear and the forbearance were made without the assent of the security. In a still later case, at the July term, 1848, the same question was presented, and, after a full examination of authorities, the principles settled in the case of *Stone & McDonald vs. The State Bank*, were affirmed. Being satisfied with the correctness of these decisions, it is deemed unnecessary to review the authorities, or comment upon them. The facts set forth in the plea are sufficient to bar a recovery against the defendant, and the circuit court erred in sustaining the demurrer.

A notice to take depositions on the 16th, 17th, and 18th of March next, or any or each of said days, is not sufficiently certain as to time. *Reardon vs. Farrington*, 2 *Eng*. 304.

It is true that where the party appears, by himself or attorney, and makes his appearance, cross examines, objects to a question, to the competency of the witness, or does any substantive act connected with the taking of the depositions, and it so appears in the depositions, regularly certified, the party will not, at the hearing of the cause, be permitted to object that no legal notice had been given. In this case, the only reference to the plaintiff's appearance, is found in a note at the foot of the depositions, and after they were closed and signed by the witness: "To all of which testimony, the said James McVicar, by James Yell, his attorney, objected as being illegal: Attest, H. Scull, J. P." This statement constitutes no part of the depositions, is not embraced in it, and, for aught that appears, may have been made after the depositions were closed. Whilst the law, in consideration of the trust and confidence reposed in its officers, and the high responsibility they are under in the discharge of official duties, gives full faith and credit to every act certified as having been done by them, that confidence only extends to such acts and duties as they are required by law to perform, and their certificate to a fact, not strictly performed in discharge of a legal duty, is entitled to no more credit than if made by a private citizen. The justice's certificate (had it been given to that extent) could not

have embraced the declaration of the attorney, or his objections, unless it affirmatively appeared that they were made in the progress of the taking of the depositions, and was part of the proceedings had whilst the justice was in the discharge of his official duty under the commission authorizing him to take and certify the depositions. The certificeate, however, in this case, simply verifies the depositions without reference to this after-statement. At the present term of this court, in the case of *Slocomb, Richards & Co. Ex parte*, it was decided, and we think correctly, that so much of the certificate of a clerk as related to the manner of making up and signing a record was extra-official and mere surplusage. The defect in the notice was not cured by an appearance in this case, and the depositions were correctly excluded.

The judgment of the circuit court is reversed and set aside, and the cause remanded to be proceeded in according to law, not inconsistent with the opinion of this court.

LEE VS. LEECH.

Previous to March 20, 1839, (the time *chap.* 91, *Rev. Stat.*, took effect,) there was no act of limitation in this State as to writings obligatory, and causes of action then existing on such instruments were not barred until after the expiration of five years from the time the act went into operation.

Debt on a penal bond, conditioned that defendant would convey to plaintiff a lot of ground, by a particular day, which he had sold to him for a specified price, and received the purchase money: breach, failure to convey. HELD, that on default of defendant, the court could not render final judgment for the purchase money specified in the bond with interest thereon, but should order a writ of inquiry as to the truth of the breach, and damages sustained, under *Digest, chap*, 120, *sec.* 7.

Writ of Error to Pulaski Circuit Court.

DEBT, by Leech, against Lee, determined in the Pulaski Circuit Court, in May, 1845, before CLENDENIN, judge. The action was commenced 9th of December, 1842, and the declaration was, in substance, as follows:

"John H. Leech complains of Bushrod W. Lee, of a plea that he render unto him the sum of $1,500, which he owes to, and unjustly detains from, him:

"For that whereas, heretofore, to wit: on the 17th day of July, A. D. 1833, at, &c., the said defendant and one John H. Cocke, since deceased, and whom defendant hath survived, by their certain writing obligatory, sealed, &c., of that date, acknowledged themselves held and firmly bound, unto said Leech, in the penal sum of $1,500, for the payment of which they bound themselves, their heirs, &c., jointly and severally, &c. Which writing obligatory was, and is, subject to a certain condition thereunder written, whereby, after reciting that whereas the above named Cocke had, that day, sold, to said Leech, a certain lot, or parcel of ground, situated in Little Rock, which was designated, on the map of said town, as, &c., [*here the lot is described,*] to have and to hold the said lot, or parcel of ground, as above described, to him, the said Leech, his heirs or assigns forever, in consideration of the sum of $75, the receipt whereof was thereby acknowledged, then, therefore, if the said Cocke should make, or cause to be made to said Leech and his heirs or assigns, a conveyance for said lot, in fee simple, by deed with general warranty, on or before the first day of May then next ensuing, then said obligation was to be void, else, &c. Yet, plaintiff avers that said Cocke did not, nor would, though often requested so to do, make, or cause to be made, on or before the first day of May next, ensuing the date of said writing obligatory, nor at any other time whatsoever, to the said Leech and his heirs or assigns, a conveyance for said lot, or any part thereof, conveying, in fee

simple, &c., by deed, with general warranty, &c., &c., or otherwise, howsoever, but herein, during his lifetime, wholly failed and refused, nor have his heirs, or legal representatives, or any other person or persons whatsoever, since his death, done the same, but, &c. And said plaintiff avers that, by means of said failure and refusal on the part of said Cocke, &c., the said sum of $75, the purchase money paid by plaintiff for said lot, with interest thereon from the date of said writing obligatory, hath been and is wholly lost to said plaintiff: by means of which said premises the said plaintiff hath sustained damages to a large amount, to wit: to the amount of $1,500: by means of which said breach the said writing obligatory hath become and is forfeited, and thereby an action hath accrued, &c. Concluding with the usual negation of the payment of the penalty of the bond.

Defendant craved oyer of the bond sued on, which was granted by filing the original, and he then pleaded that the cause of action did not accrue to plaintiff at any time within five years next before the commencement of the suit; to which the court sustained a demurrer, and then follows:

"And now on this day comes the said plaintiff, by attorney, and the said defendant saying nothing further in bar or preclusion of the said plaintiff's action; and it appearing to the satisfaction of the court here that this action is founded upon a penal bond, conditioned for the conveyance of certain land, by the condition whereof the damages recoverable in this action are ascertained and reduced to a certainty, and the truth of the breaches alleged in said declaration being admitted by the default of said defendant: it is, therefore, considered, by the court, that said plaintiff do have and recover of and from said defendant the sum of $1,500, in penalty as aforesaid, and that he have execution for the sum of $128 25 damages, ascertained as aforesaid, besides his costs," &c. Defendant brought error.

FOWLER, for the plaintiff. It was by law the duty of the court to make an order that the truth of the breach assigned be inquired into and the damages be assessed by a jury; and the ver-

dict so finding the breach true and assessing the damages must be entered on the record. *Digest, p.* 775, *sec.* 6, 7, 8. *Ib. p.* 809, *sec.* 81, 82. *McKiel vs. Porter*, 4 *Ark.* 534. *Prattle vs. Cabanne*, 9 *Miss. Rep.* 166. 5 *Ark.* 640. 2 *Ark.* 390. 1 *Eng. R.* 505.

CUMMINS, contra. Every fact necessary for the recovery of damages was admitted by the deed, and no other evidence could have been adduced upon an inquiry: the purchase money and interest, in such case, should be considered as liquidated damages, (*Smith vs. Smith*, 4 *Wend.* 468. 13 *Wend.* 587. 7 *J. R.* 72,) and are fixed by law as the damages. *Kelly vs. Church of Schenectady*, 2 *Hill*, 105. *Kinney vs. Watts*, 14 *Wend.* 41. *Armstrong vs. Percy*, 5 *Wend.* 535.

The default admitted the facts charged, and the law fixed the damages. *Leech & Gibson vs. Pirani*, 5 *Ark.* 118.

As to the plea of the statute of limitations, see *Lucas vs. Tunstall*, 1 *Eng.* 443.

JOHNSON, C. J. The plea of the statute of limitations was clearly demurrable, as it is manifest that, although five years had elapsed since the cause of action arose, yet it was no bar to the action, because there was no law limiting the time within which it should have been brought until the 5th of March, A. D. 1838, and five years had not elapsed from that period before the institution of the suit. The court below, in rendering the judgment, treated the instrument sued upon as a bond for liquidated damages, and, upon that view of it, proceeded to pronounce the judgment without the intervention of a jury. It is this portion of the record that requires our special attention. The bond described most clearly contains a penalty, the object of which is to enforce the undertaking of the defendant below, or, in case of his failure or refusal to perform his covenant, to indemnify the plaintiff. A penalty, in the nature of liquidated damages, is never designed to secure the payment of a less sum or to remunerate the party in damages. The amount stipulated as the penalty is itself the measure of damages, and, that sum being

ascertained and settled by the parties to the contract, there can be no necessity for a jury to reduce it to a certainty by their verdict. It certainly would not be contended that the penalty expressed in the bond in question was agreed upon and settled by the parties as the measures of the damages to which the obligee would be entitled upon the failure of the obligor to perform his covenant. The judgment recites that the sum to which the plaintiff below is entitled, is ascertained and reduced to a certainty by the condition of the bond. The condition of the bond is in the usual form, and evidently designed for no other purpose than to secure the conveyance of the land described in it. True it is that the amount of the purchase money is specified in it, and its receipt acknowledged, yet this cannot be said to amount to an ascertainment and liquidation of the sum recoverable upon a forfeiture. It is, in strictness, a penal bond, with a condition annexed, and, in any action upon it, the only proper subject of inquiry would necessarily be the breaches of the condition and the damages thereby sustained. The 120th chapter of the Digest declares that "when an action shall be prosecuted in any court of law upon any bond for the breach of any condition other than for the payment of money, or shall be prosecuted for any penal sum for the non-performance of any covenant, or written agreement, the plaintiff in his declaration shall assign the specific breaches for which the action is brought:" that, "upon the trial of such action if the jury find that any assignment of such breaches is true, they shall assess the damages occasioned by the breach in addition to their finding:" and that "if, in such action the plaintiff shall obtain judgment upon demurrer, by confession or default, the court shall make an order therein that the truth of the breaches assigned be inquired into and the damages sustained thereby assessed at the same or the next term, and the court shall proceed therein in the same manner as in other cases of inquiry of damages." The plaintiff in this case obtained judgment upon demurrer to the plea, and there can be no doubt but that the court should have made an order for a jury to come either at that or the next term to inquire into the truth of the

breaches assigned, and to assess the damages sustained. The omission to make such order, we consider a fatal error, and for which the judgment ought to be reversed. The judgment is therefore reversed.

RAPLEY & CO. VS. PRICE, NEWLIN & CO.

On the 17th March, 1847, R. & Co. executed a power of attorney to C., authorizing him to confess judgment on a note in favor of P. N. & Co., with a proviso that if they paid $560 on the note on or before the — day —, 1847, the power was thereby to be revoked; C. confessed judgment on the note 22d June, 1847. HELD, on error, that the blank date in the power of attorney might be supplied by parol evidence, and that this court would presume in favor of the judgment below, that it was done, the contrary not affirmatively appearing.

HELD, further, that the attorney was not bound to prove that the payment mentioned in the power was not made.

HELD, moreover, that, inasmuch as it did not affirmatively appear of record that the execution of the power was proven before the judgment was confessed, the court had no jurisdiction of the persons of the makers thereof, and the judgment was invalid.

Writ of Error to Pulaski Circuit Court.

Judgment by confession, taken in the Pulaski Circuit Court, at the April term, 1847, before the Hon. WILLIAM H. SUTTON, judge. The transcript shows the following proceedings in the court below:

"*Proceedings had June* 22, *A. D.* 1847.

Callender Price, Thomas S. Newlin, and Benjamin Marshall, partners uner the style of Price, Newlin & Co., *Plaintiffs*, *vs.* Charles Rapley and Abraham Rapley, partners under the style of Charles Rapley & Co., *Defendants*.	IN ASSUMPSIT: CONFESSION OF JUDGMENT.

At this day appeared the said plaintiffs, by E. Cummins, their at-

torney, and file their declaration herein, and also a power of attorney, in writing, authorizing and empowering the said Ebenezer Cummins to appear before the court here, and confess judgment in favor of said plaintiffs in this behalf:

Whereupon, comes the said defendants, by their said attorney in fact, Ebenezer Cummins, and here, in open court, say that they cannot deny but that they are justly indebted to said plaintiffs in the sum of fourteen hundred and five dollars and twenty-two cents, the balance due on the promisory note mentioned in said plaintiffs' declaration, with interest thereon at six per cent. per annum from this date until paid, in damages, and thereupon confess a judgment in favor of said plaintiffs for that amount. And it appearing to the court that the proper affidavit has been made and filed by said plaintiffs: it is, therefore, considered and adjudged, by the court, that said plaintiffs do have and recover of and from the said defendants the said sum of," &c. Judgment for the amount above named, with costs, in the usual form.

Then follows plaintiffs' declaration above referred to, in the usual form in assumpsit, on the note named in the judgment. Then this power of attorney:

"Know all men by these presents, that we, Charles Rapley and Abraham Rapley, partners under the style of Charles Rapley & Co., for divers good and sufficient considerations, do hereby constitute and appoint Ebenezer Cummins, Esq., our true and lawful attorney, for us, and in our names to appear before any court having jurisdiction thereof, and then there acknowledge and confess judgment against us for, and upon the promisory note set out and described in the annexed and foregoing declaration, deducting therefrom the sum of $300, paid thereon 11th August, 1846, and $136, paid thereon the —— day ——, 1846, for balance of principle and interest due thereon; and this power is to be irrevocable: *Provided, however*, If we pay on the said note, on or before the —— day of ——, 1847, the sum of $560, then this power is to be revoked and ineffectual upon such payment being made, and the same to be void, and if such payment

be made at or before the time aforesaid. Witness our hands and seals, this 17th day of March, 1847.

CHARLES RAPLEY, [SEAL.]
ABRAHAM RAPLEY, [SEAL.]

This power is not to be executed until the 1st of May, 1847.

E. CUMMINS."

Then follows the note upon which the judgment was confessed, and an affidavit, by E. Cummins, made in open court, "that there is no fraud in the transaction in respect of entering the judgment on the within declaration, and that the sum of $1,405 22, as I verily believe, is now justly due on the claim within described by Charles Rapley and Abraham Rapley, to the plaintiffs therein mentioned." Defendants brought error.

RINGO & TRAPNALL, for the plaintiffs. The act of an attorney in fact not within the terms of the power, is void, (*Story's Com. on Agency*, 66, *s.* 68, 69,) it must appear on the record, by the power produced and filed, that the attorney in fact is authorized to appear, at the time when, and in the court where the confession is made, otherwise the court has no jurisdiction over the principal and the judgment is void. (*McKnight vs. Smith*, 5 *Ark.* 406.) The period within which the payment was to be made, and until default in which the judgment could not be taken, being the —— day of ——, 1847, the party had until the last day of that year to make the payment, (3 *Stark. Ev.*, 1000, 1001,) the blank created a patent ambiguity, which could not be explained by parol. (1 *Pothier*, 51, 52; 2 *ib.* 182.) But if the ambiguity could be explained, the record must show that both the day of payment and the default to pay on that day were established by proof, otherwise the court had no jurisdiction of the matter. *Breckenridge et ux. vs. Duncan et al.*, 2 *Marsh.* 50. *Lit. Sel. Cas.* 39. 3 *Stark. Ev.* 1000, 1001. The non payment of the money being a condition precedent to the execution of the power, and the judgment being confessed before the happening of the contingency, the act was unauthorized and the whole proceeding *coram non judice* and void. *Story's Com. Agency*, 73,

s. 76, 79, 72. 1 *Peters Rep.* 290. 11 *J. R.* 169. 2 *Cow.* 195. 2 *Bos. & Pul.* 13. 7 *John. Ch. R.* 32.

CUMMINS, contra. The judgment was confessed according to *sec.* 137, 138, 139, *chap.* 126, *Digest.* The power of attorney refers to the declaration and makes it a part of the power. The recital of one deed or paper in another makes the former part of the latter, (9 *Cow.* 86,) so the declaration became part of the power. A deed, if any doubt exists, is always construed most strongly against the maker. (16 *John. Rep.* 172.) So if there be doubt as to the time of executing the power, the law would allow its execution at the earliest time. (8 *J. R.* 394.) But the declaration, power and agreement as to the time, are all to be taken and construed together, and then there is no doubt. (1 *John. Cases*, 91. 15 *J. R.* 458. 8 *Cow.* 274. 1 *Blackf. Rep.* 233. 7 *Wend.* 345.) The presumption is very strong that the court below acted correctly; and as the blank was a latent ambiguity which could be explained by parol, and the testimony in relation to it would not appear of record, the court will presume in favor of the judgment that the court below had sufficient testimony.

JOHNSON, C. J. The only cause assigned for error, which we deem it material to notice, relates to the power of the attorney in fact to confess the judgment so as to bind the plaintiffs. The objection is that, although the attorney was only authorized to confess the judgment, in case the plaintiffs should fail to pay the sum of five hundred and sixty dollars, on or before the —— day of ——, 1847, yet, the judgment was confessed on the 22d day of June, A. D. 1847. The argument is that, inasmuch as no day nor month was specified, therefore the plaintiffs were entitled to the whole of the year of 1847 to make the payment, and thereby to defeat the execution of the power. The question here presented is, whether the true dates were capable of being supplied by parol proof, because if so, the legal presumption is, that such proof was made before the court as such a

presumption would be necessary to support the judgment. It is not true, that the attorney was required to show that the five hundred and sixty dollars had not been paid, as this, in the nature of things, would have been utterly impracticable. We think that it was clearly competent for him to establish the true dates by parol evidence, and consequently, that in the absence of such proof to the contrary, the presumption is that such proof was made, and the same presumption equally holds in respect to the non-payment of the sum which was to defeat the power. The authority of the attorney to confess the judgment at the time the confession purports to have been made, is strongly inferrible from the power itself, coupled as it is with the declaration. The power purports to have been executed on the 17th of March, 1847, and expressly refers to a note set out and described in the "annexed and foregoing declaration," which declaration was brought to the April term, 1847. The suit having been brought to the April term, it is but fair to presume that, unless the amount stipulated to be paid, which was to operate as a defeasance of the power, was actually received during that term, he would have insisted upon a judgment for the amount then due upon the note.

But these presumptions can arise alone upon the supposition that the court had first acquired jurisdiction of the subject matter and of the parties. Was such the case? It is clear that if the court had jurisdiction of the persons of the plaintiffs, it must have acquired it by means of the power of attorney, which purports to have been executed by them. Did the power carry its own verity and authenticity upon its face, or did it require proof *aliunde?* True it is that our statute provides that "where any declaration, petition, statement, or other pleading, shall be founded on any instrument or note, in writing, whether the same be under seal or not, charged to have been executed by the other party, and not alleged therein to be lost or destroyed, such instrument shall be received in evidence, unless the party charged with having executed the same deny the execution of such writing by plea, supported by the affidavit of the party pleading,

which affidavit shall be filed with the plea." Thus it will appear that the instrument which is declared upon, and upon which the party relies as the basis of his action, is made by this statute to carry a presumption of its genuineness upon its face, and which presumption is all-sufficient for the purposes of the plaintiff unless rebutted by an affidavit of the defendant. This statute is an innovation upon the common law, and, as a matter of course, cannot be extended so as to embrace other instruments than those specially enumerated. The power of attorney was not introduced to the notice of the court as an instrument constituting the foundation of the action, but simply as a collateral paper, and, as a necessary consequence, could not be legally admitted as evidence of the facts contained in it, until a foundation was first laid for its introduction. The parties by whom it purports to have been executed were neither actually, nor in construction of law presumed to be, present to dispute its validity in case it were subject to be impeached: and therefore the absolute necessity for exacting extrinsic evidence of its authenticity. Without the power of attorney, and that properly established to have been made and executed by the parties, it is clear that the court could not assume jurisdiction of the persons of the plaintiffs, and, that being assential to the jurisdiction, no presumption can be indulged that such proof was actually made before the court. This doctrine was fully borne out by the supreme court of Alabama, in the case of *Hodges and Picket vs. Ashurst & Sons*, and *Bissell and Carville vs. Carville & Co.:* the first reported in 2 *Ala. Rep. N. S., p.* 303, and the second in 6 *Ala. Rep. N. S., p.* 503. In the first of these cases the court said that "in the case at bar the judgment entry is very inartificial and untechnical, yet we think it may be sustained. It recites a written authority to the attorney to make the confession, the proof of that authority and the sum for which the judgment was to be rendered. This seems to have been followed in the *cognovit* and entry which gives effect to it. It would certainly be a safer proctice, where a judgment is confessed under a letter of attorney, to set out the authority *in extenso*, that the regularity of

the proceeding may appear from an inspection of the record, yet as no rule of law requires this, we cannot say that the confession was unauthorized where the judgment contains all the essensentials requisite to its validity." In the latter case, the judgment entry recited the appearance of the defendants, by J. P. S., who confessed a judgment for them under a power of attorney, which was filed with the papers in the cause. The court, in that state of case, held: 1st, that the defendants, having appeared by attorney, could not object to the want or irregularity of the service of process: 2d, that the mere production of the power of attorney did not make it a part of the record, but that the recital of its contents was sufficient to support the judgment: 3d, that it was not a conclusion of law that the power of attorney was not the act of both defendants because it was executed in the firm name: 4th, that, although the judgment would have been more technical if it had affirmed that the power of attorney was duly proved, yet it might be intended that its execution was satisfactorily shown. The legal intendment of which the court speaks in that case is clearly predicated upon the fact that the record shows an appearance of the defendants. The power in this case is no part of the record in strictness, yet, inasmuch as it is referred to in the judgment, it would perhaps have been sufficient to sustain it in case the necessary proof had been made to establish it as the genuine act and deed of the plaintiffs. The reason why proof of authority under which the attorney in fact assumes to act is necessary, must be obvious at the first blush. The paper purporting to be a power, and by which a party is authorized to confess a judgment for another, is introduced to the notice of the court, and that too without any notice to the party to be bound by it either actual or constructive. It cannot be said, in such a case, that the power imports verity upon its face, and that the presumption of its genuineness will prevail unless rebutted by the plea of the party by whom it purports to have been executed, supported by his affidavit.

We are, therefore, clearly of the opinion that the court did not acquire jurisdiction of the plaintiffs in error, since the record

utterly fails to show that the power was duly proven. An attorney at law is fully authorized, in virtue of his oath as an officer of the court, to confess a judgment for his client without an express warrant: but not so with a mere attorney in fact who assumes to act under a specially delegated authority, for in such cases it is absolutely necessary that the record should show, and that affirmatively, that the power under which he acted was duly established before the court. It is, therefore, clear that such proof is essential to a legitimate exercise of the power, and, as a matter of course, no valid judgment could be rendered against the plaintiffs, as a full and complete power was essential to confer jurisdiction over them. The judgment is therefore reversed.

DENNING VS. KELLY.

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By filing a motion to rule the plaintiff to give security for costs, and taking the judgment of the court thereon, defendant concedes the jurisdiction of the court, and waives objections thereto, the matter of the motion being subsequent, in the order of pleading, to objections to the jurisdiction.

The motion being signed by attorney, presupposes leave of court, and by that also the jurisdiction is conceded.

Appeal from the Carroll Circuit Court.

Bowels Denning brought an action of assumpsit against Hardy Kelly, to the April term of the Carroll Circuit Court, 1846. There were two counts in the declaration: the 1st, alleging that the defendant was indebted to plaintiff in the sum of $150 for money lent, &c.: the 2d, alleging a like indebtedness for money had and received, &c. At the return term, the defendant, having been duly summoned, appeared, by attorney, and filed the following motion:

"And on this day comes the said defendant, by his attorney, and moves the court here to rule the said plaintiff to give bond and good security for the costs of suit in this case, for the reason that the said plaintiff is insolvent, and unable to pay the costs of suit." *Reagan & Costa.*

Which motion was overruled by the court. Defendant then filed the following plea:

"And the said defendant, Hardy Kelly, in his own proper person, comes and says the court ought not to take cognizance of this case, because he says that the sum in controversy between him, the said defendant, and the said plaintiff, does not amount to the sum of one hundred dollars, but to the sum of five dollars and forty cents; and the said defendant further avers, that, by the constitution and laws of the State of Arkansas, the courts of justices of the peace, within and for the county of Carroll, in said State, have original and exclusive jurisdiction of the subject matter of this suit, and this he, the said defendant, is ready to verify; wherefore, he prays judgment if the court here will or ought to take cognizance of the subject matter of this case, and that the writ in this behalf may be quashed."

After the plea was filed, plaintiff moved for judgment "for want of a sufficient and issuable plea," which the court overruled, and he excepted. Plaintiff declining to answer the plea, the court rendered judgment that the writ be quashed, the suit dismissed, defendant discharged, and that plaintiff pay the costs.

The cause was tried before the Hon. WM. W. FLOYD, judge. Plaintiff appealed.

D. WALKER, for the appellant, contended that the defendant admitted the jurisdiction of the court by filing a motion to rule the plaintiff to give security for costs.

WALKER, J., not sitting.

SCOTT, J. The defendant's motion by attorney for a rule upon the plaintiff for security for costs under the provisions of the

statute, (*Digest*, 280, *sec.* 3,) which was adjudged against him, clearly precludes the plea to the jurisdiction of the court which he afterwards filed.

The matter presented to the court by motion, although authorized to be presented in that manner, and allowed to be presented at any time during the pendency of the suit, was nevertheless in its nature matter in abatement. Had the insolvency alleged in the motion been properly presented and satisfactorily shown to the court, the plaintiff would have been ruled to give security for costs, and on his failure to do so, his suit, on motion, would have been dismissed. Neither the manner of interposing this dilatory defence, or the time allowed for its interposition changes its nature, as has been in effect repeatedly held by this court of prerequisite bonds for costs. *Clark vs. Gibson*, 2 *Ark.* 113. *Webb vs. Jones & Prescott*, *ib.* 332. *Didier et al. vs. Galloway*, 3 *Ark.* 503. *Hardwick et al. vs. Campbell & Co.*, 2 *Eng.* 120.

The law has prescribed and settled the order of pleading, that the defendant is to pursue when brought into court by the plaintiff. That order is, 1st, To the jurisdiction of the court. 2d. To the disability of the plaintiff. 3d. In abatement. He cannot plead successively two pleas of the same kind or grade. And if he pleads a plea belonging to a subsequent order or division, he thereby loses the privilege of all pleas comprehended in any prior order or division; in other words, such subsequent plea is an admission that none of the previous objections exist. *Gould's Pleading*, *chap.* 5, *sec.* 10. *Story's Pleading*, 73. 1 *Chitty's Pleading*, 440. Whenever a defendant would except to the jurisdiction of the court in a case like this, where the exception must be taken by plea, if taken at all, he must do so before he offers any other plea, "for in such a case, if he refers to the court any other question than that of its own jurisdiction, it is a tacit admission that the court has a right to judge in the cause: or in other words, it has jurisdiction. And thus, all exceptions to the jurisdiction are waived." *Gould's Pl. chap.* 5, *sec.* 13.

In the case before us, the defendant by his motion referred to

the court the question of the insolvency of the plaintiff, which went, not to his disability to sue in the first instance, but to his disability further to maintain his suit, and thus presented matter comprehended in the second series in the fixed order of pleading, and thereby precluded himself from afterwards interposing, by plea, any matter comprehended in the first of the series and admitted the jurisdiction. And not only did he waive *all* exceptions that he could have taken to the jurisdiction by plea, and thus admit the jurisdiction by the matter to the disability of the plaintiff which he had thus presented to the court for adjudication, but he did so by the manner in which he presented that matter; for having presented it by attorney, through the instrumentality of a written motion, signed by him as such, the rule of pleading applied, that in such case, "the attorney is supposed to have signed it by leave of the court, and asking of leave, is considered a tacit admission of the jurisdiction." *Gould's Pleading, chap.* 5, *sec.* 27. True it is, that such implied admission, proceeding as it does upon the ground that the attorney is an officer of court, obviously cannot aid the jurisdiction except in cases in which the objection to the jurisdiction must be taken, if taken at all, by plea, and can be taken in no other way. But this is a case of that very character. And, besides all this, the defendant's motion presupposes jurisdiction in its very object—the security of costs to be adjudged—which can only be adjudged by a court having jurisdiction of the subject matter. Then the defendant's supposed plea to the jurisdiction of the court, was no plea at all—a mere nullity—and interposed no obstacle whatever to the plaintiff's motion for judgment, which was erroneously overruled. And the subsequent judgment in favor of the defendant being also erroneous, it must be reversed and the cause remanded, with leave to the defendant to plead to the merits at least, and also, first plead any other matter from which he may not have been by his acts or omissions by law precluded, if there be any such matter.

PARKS ET AL. VS. WEEMS.

Where a summons is served by leaving a copy at defendant's residence, the sheriff's return must show a strict compliance with the statute.

Judgment by default reversed because the return of the sheriff in such case does not show that the person with whom the copy was left was "of the family" of defendant.

The rule in *Gilbreath vs. Kuykendall*, 1 *Ark. Rep.* 50, enforced.

Writ of Error to Washington Circuit Court.

DEBT, on a writing obligatory, brought by James Weems, against Aaron Parks and Joel D. Parks, partners under the style of A. & J. D. Parks, and Robert Parks, determined in the Washing Circuit Court, in November, 1848, before SNEED, judge.

The sheriff returned upon the summons personal service as to Aaron and Robert Parks, and, as to the other defendant, "I also executed the said writ on the within named Joel D. Parks, on the 20th day of October, 1847, at the county of Washington and State aforesaid, by then and there leaving a true copy thereof, at his usual place of abode, with Aaron Parks, a white person over fifteen years." At the return term, judgment was taken against defendants by default, and they brought error.

D. WALKER, for the plaintiff, referred to 4 *Ark. R.* 428. 2 *Eng. R.* 44.

WALKER, J. Not sitting.

SCOTT, J. As to Joel D. Parks, the sheriff's return failing to show that the white person over fifteen years of age, with whom the copy of summons was left, at his usual place of abode, was "of the family" of this defendant, the judgment by default, in this case, cannot be supported. The provisions of the statute, for this constructive service of process, must be strictly pursued, as has been repeatedly held by this court. 3 *Ark.* 505. 4 *Ark.*

428. 5 *Ark.* 154. *Ib.* 664. 1 *Eng.* 380, 552. 2 *Eng.* 44. The judgment must be reversed, and the cause remanded to be proceeded in as if all the defendants had been regularly served with process, as held in *Gilbreath vs. Kuykendall*, 1 *Ark.* 50, and numerous other cases in this court.

GOODRICH AS ADR. VS. FRITZ.

Where judgment is obtained against a party, he appeals to this court, the judgment is affirmed, but, pending the appeal, he dies, and afterwards the judgment is revived against his administrator, and certified to the Probate Court for classification and allowance, the affidavit prescribed by *sec.* 88, *chap.* 4, *Digest*, is not a prerequisite to the allowance in the Probate Court.

It is a case of action pending at the death of the party, within the meaning of *sec.* 86, *chap.* 4, *Digest*, and the revivor against the administrator was an allowance of the claim.

Appeal from the Johnson Circuit Court.

The facts are stated in the opinion of this court.

BATSON, for the appellant. The appellee failed to make an affidavit as required by *sec.* 88, *chap.* 4, *Digest*, wherefore the motion for judgment of non-suit against him ought to have been sustained. *Ib. sec.* 93. *Ryan et al. use, &c. vs. Lemon as ad.* 2 *Eng.* 78.

WATKINS & CURRAN, contra. There was no necessity for an affidavit. The action was pending in this court against the intestate at the time of his death, and subsequently revived in the circuit court against the administrator, and ordered to be paid. *Digest, chap.* 4, *sec.* 86, 87. If the administrator had any defence, he should have made it in the circuit court; when that court ren-

dered judgment against him, his rights were precluded, and the probate court was bound to class the claim.

SCOTT, J. The only question presented in this case relates to the affidavit prescribed by the 88*th sec.* (*Digest, p.* 126,) of the administration statute. During the lifetime of the intestate a judgment was recovered against him, in the circuit court of Johnson county, which, on appeal to this court, was affirmed. Pending this appeal, the intestate departed this life. After this affirmance, but before a revivor, this judgment was allowed and classed in the probate court, and, on appeal to the circuit court, that allowance and classification was reversed. Afterwards the judgment was revived, in the Johnson circuit court, against the administrator, and, being certified down to the probate court, was classed in that court against the objection of the administrator, who moved for non-suit, urging the want of the affidavit prescribed by the statute. That classification, on appeal to the circuit court, was affirmed, and must be affirmed here. There was no necessity for an affidavit. The action was pending against the intestate on his appeal at the time of his death. The revivor against the administrator, in the circuit court, allowed the claim, and the overruling of the appellant's motion for non-suit, and subsequent classification in the probate court, were proper. *Digest*, 126, *sec.* 86.

Finding no error in the judgment of the circuit court, it must be affirmed with costs.

SUMNER VS. SPENCER.

In an action of forcible entry and detainer, a variance between the affidavit filed by plaintiff, and the writ, may be pleaded in abatement.

If the action is for a forcible entry and detainer, the affidavit must correspond with that form of action: if for unlawful detainer, it must be framed accordingly.

Where the writ is abated on a plea for variance between it and the affidavit, the defendant is entitled to judgment for restitution.

Appeal from the Madison Circuit Court.

On the 12th of April, 1848, John C. Sumner filed a declaration in the Madison Circuit Court, complaining of James Spencer, "wherefore, he forcibly and unlawfully holds possession of the real estate of said plaintiff"; and alleging that, on the 12th day of November, 1845, he was seized and possessed of a certain tract of land, and that defendant, on said day, forcibly entered upon said real estate, and unlawfully withheld the same from said plaintiff, after demand, &c. Appended to the declaration, was the following affidavit:

"STATE OF ARKANSAS,
COUNTY OF MADISON.

Be it known that John C. Sumner, on this the 12th of April, A. D. 1848, appeared before me, John Berry, an acting justice of the peace, for said county, and, upon his oath, says that he is lawfully entitled to the possession of the real estate described in the foregoing declaration, and that said James Spencer unlawfully detains the same, after lawful demand therefor made. J. C. SUMNER.

Sworn to and subscribed before me, this day and date aforesaid. JOHN BERRY, J. P."

The writ followed the form of the declaration for forcible entry and detainer, and by virtue thereof the sheriff put the plaintiff in possession of the premises.

At the return term, (May, 1848,) the defendont filed the following plea in abatement:

"The defendant, by attorney, comes and defends, &c., and prays judgment of the writ in this case, because he says that there is a variance between the same and the affidavit made and filed by the said plaintiff, in this, that is to say, the affidavit

alleges that the defendant unlawfully detains certain lands therein mentioned from the said plaintiff, and the writ issued thereon is for the forcible entry and detainer of the same land by the said defendant: and this he, the defendant, is ready to verify; wherefore, because of the variance aforesaid, the said defendant prays judgment of said writ, and that the same may be quashed." *Murphey & Costa.*

The plea was verified by defendant's affidavit. Plaintiff demurred to the plea, on the grounds: 1st, that the variance alleged in the plea was immaterial and frivolous: 2d, that it was not necessary, in law, that the affidavit and writ should correspond in the matter therein set forth. The court overruled the demurrer, plaintiff declined answering the plea, judgment was rendered in favor of defendant for costs, and writ of restitution awarded, and plaintiff appealed.

D. WALKER, for the appellant, admitted that a variance between the writ and declaration might be pleaded in abatement; but denied that a variance between the affidavit and writ is matter of abatement: and contended that the court erred in rendering final judgment for the defendant—that the same principles govern in this case as in the action of replevin, when the writ is abated. 1 *Eng. R.* 506.

WALKER, J. Did not sit.

SCOTT, J. The demurrer to the defendant's plea in abatement was correctly overruled. The affidavit was clearly insufficient, and its variance from the writ, set up by the plea, was but a substantial assertion of this insufficiency. The statute provides for an affidavit that is in perfect harmony and accordance with the writ and declaration in each given case, and no affidavit, other than one in strict conformity to the statute, can be recognized as sufficient. In most cases this want of sufficiency may be as well presented and exemplified by an allegation of substantive variance from the writ, or writ and declaration, as by

an allegation of specific insufficiency: indeed, such substantial variance and specific insufficiency will, in many cases, as in the present, be, in effect, but reciprocal or convertible terms.

This remedy, like all of the class which changes possession of property before the defendant has had an opportunity to be heard in a court of justice, is strongly in derogation of common right, and, although its operation will be often beneficent, it will be perhaps as often found an instrument of injustice and oppression, and possibly sometimes a means of irreparable mischief, and, according to well settled rules, it must, so far as the plaintiff is concerned, be kept strictly within the provisions of the statute, which creates and qualifies it. More latitude, however, is allowed the defendant, springing from the reason of the same rule, which inculcates strictness as to the plaintiff, and so also as to the proceedings authorized by the twentieth section, (*Digest, p.* 538,) as these contemplate no change of possession until after the defendant has been allowed an opportunity to be heard, and has had his rights passed upon "by the judgment of his peers or the laws of the land." And the provisions of this section manifest still more plainly the intention of the Legislature that the prescribed affidavit and bond required by the sixth and and seventh sections shall be indispensable prerequisites to a proceeding contemplating a change of the possession of the property in the commencement of the suit.

When the declaration is for "forcible entry and detainer," and the plaintiff elects to adopt that mode of proceeding which will dispossess the defendant at the commencement of the action, as in the case before us, the affidavit must not only state that "the plaintiff is lawfully entitled to the possession of the lands, tenements, or other possession, mentioned in the complaint, but also that the defendant forcibly entered upon and detains the same after lawful demand made therefor." In this case the affidavit is fatally variant from the writ in not stating that the defendant "forcibly entered" upon, as well as unlawfully detains the premises in question. Had the action been for "unlawful detainer," the affidavit would have been sufficient, and would not

have been variant from a proper declaration and writ in such case.

Nor did the court below err in the judgment for costs and restitution upon the overruling of the demurrer and the plaintiff saying nothing further. Restitution was properly awarded, that the parties might be placed in *statu quo*, leaving their rights to be settled by law in future proceedings at the election of the parties. (See *Fleman et al. vs. Horen et al.*, 3 *Eng.* 355, and the cases there cited.) Had this not been done, the plaintiff would have profited by his own omissions and wrong, and the process of the court would have been abused and perverted to purposes of injustice.

Finding no error in the record, the judgment of the court below must be affirmed with costs.

BRINKLEY VS. MOONEY.

Unlawful detainer for a lot of ground, tan-yard, situated thereon, together with tanning implements, hides, &c.: demurrer to declaration for misjoinder of causes of action, grounds of demurrer conceded, and leave granted to plaintiff to amend, on condition that he would restore to defendant the chattels taken by virtue of the writ; plaintiff prepared, and offered to file an amended declaration, but refused to comply with the terms imposed, whereupon the court refused to permit him to file the amended declaration, and gave judgment against him on the demurrer. HELD, that the court had no power to make the restoration of the personal property, a condition of the leave to amend.

The power of the court to impose terms on leave to amend discussed.

A sheriff may at any time (before suit against him for false return) be permitted to amend his return according to the facts.

Writ of Error to Clark Circuit Court.

Action of unlawful detainer brought by John S. Brinkley, against Lazarus Mooney, in the Clark circuit court, determined

at the September term, 1847, before the Hon. C. C. SCOTT, then judge of the 8th circuit.

Plaintiff alleged in his declaration, that defendant unlawfully detained from him a certain lot of ground, a tan-yard, situated thereon, tanning implements attached and belonging thereto, and a specified number of hides, skins, &c. The writ commanded the sheriff to put plaintiff in possession of the property, real and personal, named in the declaration, &c.

The sheriff returned upon the writ, that he had delivered the premises therein named to plaintiff, &c.

At the return term, on motion of defendant, the court permitted the sheriff to amend his return by specifying the personal property delivered to plaintiff, by virtue of the writ, to which defendant excepted.

Defendant demurred to the declaration, because of a misjoinder of causes of action; plaintiff conceded the grounds of demurrer, and asked leave to amend, which was granted by the court, on condition that he would restore to the defendant, the personal property taken and delivered to him under the writ. Plaintiff's counsel prepared, and asked leave to file an amended declaration, but stated to the court, that the plaintiff declined and refused to comply with the condition upon which leave had been granted him to amend. Whereupon the court refused to permit the amended declaration to be filed, and gave judgment for defendant on the demurrer, to which plaintiff excepted. Defendant moved for judgment of restitution, which the court refused, and he excepted. Both parties brought error.

WATKINS & CURRAN, for the plaintiff. The sheriff has a right to amend his return, so as to show the truth in regard to acts done by him in his official character, by virtue of the mandant of the writ under which he acted; but not to introduce other acts, done in his individual character: by the writ, he was commanded to put the plaintiff in possession of "the premises"—a term confined to real estate, and not embracing the personal property mentioned in the recital of the writ.

The court erred in refusing to permit the plaintiff to file his amended declaration, without a compliance with the terms imposed. The allowance of such amendments in this State, is not within the discretion of the court, but a matter of right: and if refused, the party is entitled to a revision in the appellate court of the order refusing it. The only terms that can be imposed, must be in relation to that suit, such as, the payment of costs, granting an imparlance or continuance, (1 *Tidd's Pr.* 561 *et seq.*) and not the settlement of other matters in dispute between the parties.

JORDAN and CUMMINS, contra. Amendments at common law are within the discretion of the court for the furtherance of justice, (1 *Bou. L. D.* 105. 2 *Burr.* 756. *Stev. Pl.* 106. 3 *Salk.* 31;) and will not be allowed to the prejudice of the other party. (1 *Bou. L. D.* 105.) The allowance of amendments, and the terms upon which they will be allowed are governed by no general rule, but left to the sound discretion of the court. (2 *Mass.* 83. 16 *Mass.* 373. 7 *J. R.* 468. 16 *J. R.* 145. 5 *Cranch* 15. 1 *Caines Rep.* 9. 2 *Yates* 536. 6 *J. R.* 8,) and terms may be imposed even after the demurrer. (5 *Mass.* 99. 3 *Mass.* 208.) The court may impose any terms that are just and equitable, and a refusal to permit an amendment, without a compliance with the terms, cannot be assigned for error in this court. (2 *Cond. Rep.* 347. 3 *Gilman Rep.* 449. 18 *Maine Rep.* 249.) But if the discretion of the circuit court can be revised, it was surely just to refuse the amendment, unless the plaintiff would restore the property illegally taken under his own writ.

That the court had the power to permit the sheriff to amend his return according to the facts, *vide* 5 *Ark.* 78. 1 *Eng.* 474. 2 *Eng.* 341. 1 *Cow.* 430.

SCOTT, J. Did not sit.

WALKER, J. An action of forcible entry and detainer was instituted by Brinkley against Mooney, in the Clark circuit court,

for the possession of a lot of land. It appears, from the record, that the sheriff, in executing the writ, also took into his possession certain goods and chattels of the defendant, and, when he delivered to the plaintiff possession of the land, delivered to him the goods so taken. At the return term of the writ, the defendant demurred to the declaration; the plaintiff conceded the demurrer, and asked leave to amend: the court granted him such leave upon condition that he would restore to the defendant the goods so placed in his possession: the plaintiff prepared and tendered an amended declaration in apt time, but declined to comply with the terms imposed by the court: whereupon, the court refused to permit him to file his amended declaration, and gave judgment against him upon the demurrer to the original declaration, and dismissed his suit with costs.

The third assignment of errors presents the only material question to be determined, which is, "that said circuit court erred in refusing to permit said plaintiff to file an amended declaration."

Our statute of amendments is designed to afford to litigants an opportunity to correct any errors or imperfections which may arise in the pleadings from the commencement of the suit to final judgment, for the furtherance of justice, on such terms as may be just. (*Digest, sec.* 113, *p.* 814.) This right to amend is to be exercised under the sound discretion of the court: 1st, as to the nature of the amendment to be made, as that it shall conform to the nature of the action brought: 2d, that it shall be made in apt time, so as not to surprise the adverse party, or delay the suit, or multiply costs; in such cases the court should grant the amendment upon terms of time to respond or payment of costs: 3d, amendments are sometimes refused where, after repeated amendments allowed, the party still presents an insufficient pleading; here, terms of costs may be imposed; or, where it is persisted in until it amounts to an abuse of the privilege, may be absolutely refused: 4th, amendments are also sometimes refused where, after issue joined and a continuance had, the party seeks to interpose a defence not favored in law, such as limitation, usury, &c., which do not tend to the furtherance of justice.

But, where an amendment is offered in due time, it should be allowed as of course, and without terms. The imposing of terms presupposes the party to rest under neglect, or inattention to his rights.

In the case before us, the plaintiff had a right to his amendment without terms. The circuit court had nothing whatever to do with the personal property. The sheriff had no power to take it under his writ, and was responsible over to the party injured. It was not a case, as counsel seem to suppose, where, by mistake, property, not the defendant's, had been taken. But, even if the doctrine could be made to extend that far, which is by no means admitted, the condition here imposed was, that the plaintiff should deliver over property which he held as was alleged, and not the sheriff. We are clearly of opinion that the terms were such as the plaintiff was not bound to submit to, and that he should have been allowed to file his amended declaration.

As regards the leave given the sheriff to amend his return, there was no error. The sheriff will always be allowed to amend his return (before suit brought for a false return) so as to make it conform to the truth of the case, for the correctness of which he is responsible.

The judgment of the circuit court must, for the error aforesaid, be reversed, and the cause remanded, with directions that the plaintiff have leave to file his amended declaration, that the case may progress to final hearing.

MOONEY VS. BRINKLEY.

WALKER, J. Upon examination of the record, in this case, it appears that the same case, which is brought here by the plaintiff in error, who was the defendant in the court below, has been brought into this court by the defendant here, the plaintiff in the

court below; and upon which an opinion has been delivered reversing the judgment of the circuit court upon grounds which would, in any event, have been fatal to the successful prosecution of this writ, and supersedes the necessity of further action in this case. The case must, therefore, be dismissed with costs.

REARDON EX PARTE.

The *46th sec. of chap. 67, Digest,* giving forfeited delivery bonds the force and effect of judgments, upon which execution may issue, held constitutional.

By the stipulations of the bond, the obligors waive the right of trial by jury.

SCOTT, J., remarks upon the power of the courts to set aside such judgments, and the mode of defending against them.

Application for Supersedeas.

At the January term of this court, 1849, Lambert J. Reardon, by S. H. Hempstead, his attorney, presented to this court a petition for *supersedeas*, accompanied by a transcript showing the proceedings upon which the application was based.

The petitioner states, and the transcript shows, that, on the 8th December, 1846, R. C. Byrd, for the use of Taylor, recovered a judgment, in the Pulaski Circuit Court, against Crutchfield and Hempstead. On the 31st July, 1848, a *fi. fa.* issued thereon to the sheriff of Pulaski county, returnable to the October term of the same year; that the sheriff levied the *fi. fa.* upon a slave belonging to Crutchfield; and Crutchfield and Hempstead, as principals, and petitioner, as security, executed to the sheriff a delivery bond, conditioned, as prescribed by law, for the delivery of the slave to the sheriff, at the court house, on the first day of the return term of the *fi. fa.*, the day of sale: and conditioned further, according to *sec.* 46, *chap.* 67, *Digest,* that, in case the property specified in the bond should not be delivered, as provided therein,

the said bond should have the force and effect of a judgment, on which an execution might be issued against all the obligors thereof. That Crutchfield failed to deliver the slave, according to the condition of the bond, and the sheriff returned the bond forfeited, and the *fi. fa.* unsatisfied. Whereupon, the clerk entered an abstract thereof in his judgment docket, and issued a *fi. fa.* thereon, as directed by *sec.* 47, *chap.* 67, *Digest*, which petitioner prayed the court to supersede. Petitioner admitted that the proceedings were regular, but based his application for supersedeas upon the position that the act giving forfeited delivery bonds the effect of judgments is unconstitutional.

S. H. HEMPSTEAD, for the petitioner.

WALKER, J. Absent.

SCOTT, J. The constitutionality of the Delivery Bond Act, approved the 16th December, 1846, is the only question presented. Numerous decisions in the courts of Virginia, Kentucky, Tennessee, Alabama, and several decisions in the federal courts, have settled the principles upon which the act seems clearly constitutional. Many of these are upon statutes identical with ours, except that the express agreement, contained in the bond provided by our statute, "that, in case the property specified in said bond shall not be delivered as provided therein, the said bond shall have the force and effect of a judgment, on which an execution may be issued against all the obligors," is not incorporated, whereby these authorities the more emphatically sustain the constitutionality of the act in question—this stipulation being a still more explicit waiver of the right of trial by jury than is contained in the statutes upon which these decisions have been made. And that a party has a clear right in any case to waive the right of trial by jury, seems unquestionable, both upon principle and authority. It is not the trial by jury, but the right of trial by jury, that is to remain inviolate. If a party cannot waive this right, it is a restraint, and not a privilege. The ob-

ject of this provision was not to protect the citizen from his own acts, but to protect him from the acts of others: and so of that other provision in the bill of rights from *magna charta*, "that no free man," &c., (*sec.* 10, *Bill of Rights, Ark.*,) which was but "to secure the citizen from arbitrary exercise of the powers of government unrestrained by the established principle of private rights and distributive justice." *Bank of Columbia vs. Oakly*, 4 *Wheaton*, 235. *Lawson et al. vs. Garrett ad.*, 5 *How. Miss. R.* 457.

Of what a party voluntarily relinquishes, and dispoils himself, he cannot rightfully complain, especially against an innocent party. As well might he complain of not having been allowed a trial by jury, in the case of an ordinary judgment by default, after notice, or of a judgment against him on demurrer, when, in the one case, he waives this right by his omissions, and in the other, by his act: as in the case of a delivery bond statutory judgment against him, where he, voluntarily, with a full knowledge of the consequences that are to follow, makes himself, without the solicitation or consent of the plaintiff, a party to procedings already in court, and which have then, in the regular course of the law, progressed beyond the point of a trial by jury, thereby admitting the jurisdiction and virtually relinquishing all claim to rights or remedies inconsistent with the continued progress of the proceedings in their ordinary course, undertaking, not only that the defendant shall discharge duties then incumbent on him, but that he himself will be responsible for his delinquency in a particular mode fixed by law, which law thereby becomes a part of the contract: whereby he not only fixes his own liability, but the method by which it is to be enforced, and subjects himself as much to the summary remedy as to the liability. On the same identical principle is sustained the constitutionality of laws authorizing judgments on appeal bonds, writ of error bonds, jail bound bonds, attachment, replevin, and all other bonds given in a cause already in court. And it is on the same general principle that an award of arbitrators is binding when voluntarily sought: that a sale of property under mortgage, with power of sale, is valid: that the confession of a judgment by an attorney

in fact is allowed; and many summary proceedings against sheriffs and other officers, and their securities, are held to be constitutional. The constitution of particular tribunals of the parties' own creation or selection, for the adjustment of controversies among themselves, touching many of their private rights, the temporary privation or surrender of these rights in the submission voluntarily to summary remedies, being among the most common incidents of life. True it is that the public policy of a country may, and does, set bounds to the relinquishment of private rights; but, until such surrender actually conflicts with public policy, the law indulges in no animadversion, nor holds the surrender for nought. And it is sufficient to say that the surrender of such of these rights, touching the trial by jury, and touching the guarantee of having justice distributed to him through the ordinary channels of the law of the land, in the sense of the bill of rights, and the substitution of another and summary channel therefor at the period of the original suit in its progress through the court at which these surrenders were made by the defendant in the execution of the forthcoming bond, contravenes no public policy set on foot by our institutions or preserved by our constitution and laws. And this is all that the application before us requires to be adjudicated, and we will therefore determine no other point.

But, inasmuch, as in the examination of the question decided, other questions, touching the remedy when the bond is insufficient for defects apparent upon its face, or upon the face of the bond and execution, or where it is insufficient for a reason that would sustain a plea of *non est factum*, have, to some extent, come under our observation, we will remark, that all the authorities seem to concur that, after the term has elapsed to which the bond is returned, relief for either cause is beyond the power of that court unless in cases where the bond is an absolute nullity. The position seeming to be based upon the idea that the court of law would no more set aside, at a subsequent term, that which, by operation of law, has the force and effect of a judgment, than it would an actual judgment formally entered up

at a preceding term: and that after the lapse of that term relief is alone to be sought in a court of chancery, seeming to base this position upon the ground that that court, when the parties' claim for relief grows out of circumstances that would have sustained a plea of *non est factum* at law, could fully relieve on a substantive ground of equitable interposition by assimilating this statutory judgment thus obtained to a judgment obtained by fraud without any fault on the part of the defendant. *Brooks et al. vs. Harrison*, 2 *Ala. R.* 211. 3 *John. C. C.* 375. 6 *ib.* 90. *Dev. E. R.* 289. 2 *J. J. Marshall R.* 405. *Ib.* 513. And especially would the chancellor grant relief in such case if the complainant had in no way been guilty of neglect. 2 *Porter*, 262. 6 *Porter*, 24. 7 *Porter*, 549.

But, as to the kind of defence that may be allowed to be made in the court of law, at the return term of the bond, and the manner of its interposition, and by what form of trial it is to be decided upon, the authorities do not altogether agree. In Kentucky, at such time not only may the bond be quashed for such irregularities on its face, but also by means of the writ of error *coram nobis*, there regulated and perhaps extended by statute, the party may have an issue founded on a plea of *non est factum*, and have it tried by a jury. *Logan vs. Donaphan*, 2 *J. J. Marsh.* 251. In Virginia, although the trial on that issue may be demanded, the court tries that issue itself, and refuses a jury trial, holding the party bound by his waiver of that mode of trial implied (and seeming to be held as *prima facie* against him) from the stipulation of the bond to submit to the decision of the court. While, in Alabama and in Mississippi, no other defence will be heard than such as may be predicated upon defects apparent upon the bond, or bond and execution, and are prsentable by motion: all other remedies, these courts seem to hold, are to be sought in chancery. *Taylor et al. vs. Powers, use, &c.*, 3 *Ala.* 285, and *Patterson vs. Denton*, *S. & M. Chan. R.* 593.

The constitutional question having been the only one before us, and holding the act of our Legislature in question to be constitutional, the application for supersedeas must be refused.

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ALSTON VS. STATE BANK.

It is erroneous to proceed to judgment against a defendant served with process, without a discontinuance as to one not served.

An endorsement upon a note of part payment, made by plaintiff, or in his behalf, is inadmissible, on his part, as evidence to take the case out of the statute of limitations, unless it be first proven by evidence *aliunde* to have been actually made before the cause of action was barred, and consequently against the interest of the party making it.

The authorities on this subject reviewed.

Appeal from the Washington Circuit Court.

On the first day of October, 1846, the Bank of the State of Arkansas, brought an action of debt, in the Washington circuit court, against Elijah B. Alston, John J. Horton, and James Alston, on a promisory note executed by them to the bank, on the 12th day of November, 1842, negotiable and payable six months after date, at the branch of said bank, at Fayetteville. A writ was issued to the sheriff of Johnson county, against all of the defendants, returnable to the November term, 1846, and was returned served upon Elijah B. Alston, and "not found," as to the other two defendants. At the return term, no entry appears. At the May term, 1847, defendant, Elijah B. Alston, filed a plea of the statute of limitation—that the cause of action did not accrue to plaintiff within three years, &c. No further entry at that term. On the 25th August, 1847, an alias writ was issued to the sheriff of Pope county against defendants, James Alston, and John J. Horton, returnable to the November term, 1847, which was returned with an informal service upon Horton, by leaving a copy at his residence, and *non est* as to James Alston. At the return term of this writ, Horton moved to set aside the return as to him, which motion the court sustained, and adjudged that he recover his costs of plaintiff. At the same term, plaintiff filed a replication to Elijah B. Alston's plea of the statute of limitation, alleging that within three years next before

the commencement of the suit, said Elijah paid to said plaintiff, in part payment and discharge of the note mentioned in the declaration, the sum of ninety-five dollars; to which defendant took issue. The cause was discontinued as to James Alston. No further entry at that term. At the May term, 1848, plaintiff moved the court for leave to amend the sheriff's return upon the alias writ as to Horton, which had been set aside at the previous term, which motion the court overruled. The issue made up as aforesaid, between plaintiff and Elijah B. Alston, was submitted to the court sitting as a jury. Plaintiff read to the jury the note sued on, and an endorsement thereon in these words: "See entry, January 30th, 1845: Cr. by $95." Plaintiff then introduced R. P. Pulliam, Financial Receiver of the branch of the bank at Fayetteville, who testified that, when he went into office, the note sued on was delivered over to him among the rest of the effects, and that the endorsement of the credit of of $95, which was in the hand-writing of Col. McKissick, the former Financial Receiver, was on the note at the time of its coming into his possession. That he knew nothing about the makers paying said sum of $95, nor on what account it was made. This was all the evidence introduced. Whereupon the court found the issue for plaintiff, and rendered judgment for the balance due on the note. Defendant, Elijah B. Alston, moved for a new trial, which was refused, and he excepted, and put the evidence on record. No judgment of discontinuance as to Horton. Appeal by said Elijah.

D. WALKER, for the appellant, contended that the circuit court erred in proceeding to judgment against him, while the action remained pending against his co-defendant, who was not served with process; that the proof was insufficient to sustain the replication to the plea—it not appearing that there was actually any payment, though the credit was endorsed, or that the payment, if made, was made by the defendant and within three years next before the institution of the suit; that the onus of the proof rested upon the plaintiff below.

LINCOLN, contra, contended that the endorsement of the credit on the note, by the Financial Receiver, under the law (*Pamp. Acts*, 1843. *p.* 80, *sec.* 11) authorizing the renewal of notes by payment, is sufficient to take the case out of the statute of limitations.

SCOTT, J. The main question we are to examine in this case relates to the sufficiency of the evidence adduced to show such part payment within the period of limitation of the debt sued as to take the case without the operation of the statute.

It has been often much regretted, by learned jurists, especially within the last twenty years, that the plain letter of the statute of limitations was ever departed from. For some time after the passage of the statute of 21st James, the courts seem to have had an improper conception of its true character, and, during this period, the tendency of judicial decisions touching its provisions (many of which were rife with subtle distinctions and prolific of law suits) was rapidly to its virtual repeal. But experience has tested its efficiency for the suppression of fraud in quarters where no other instrumentality had ever reached it, and shown its decided general tendency to discountenance and diminish litigation, and to achieve the substantial ends of justice. When administered in its true spirit, more liberal views began to prevail, and although the courts now made manifest efforts to recover the lost ground, the rule "*stare decisis*" rendered it utterly impossible to do more than modify doctrines that had been too hastily established and promulged under mistaken views of the true character and value of the statute. This state of things produced the statute of 9th George 4th, chap. 14, generally known as "Lord Tenterdon's Act," nearly all the provisions of which are found in our own. This act, among its numerous other valuable provisions, by requiring a different mode of proof to establish some of the numerous implied promises which these doctrines had recognized as sufficient to take a case without the influence of the statute, suppressed much of the mischief that had sprung from the doctrines that those adjudications had established, and

it is to be regretted that any substantial portion of the third section of that act was omitted in ours, which seems the more remarkable from the numerous provisions, throughout the whole body of our statutory laws, placing, for many purposes, sealed and unsealed instruments of writing on a footing of entire equality. Previous to the passage of this act, the English courts had ultimately arrived at the conclusion, under the more liberal views that they had gradually been induced to adopt, that, "in addition to the admission of a present subsisting debt, there must be either an express promise to pay, or circumstances from which an implied promise might be fairly presumed." *Moore vs. The Bank of Columbia*, 6 *Peters*, 8. And it was soon after settled that the office of this act upon this point was not to alter the legal construction to be put upon acknowledgments or promises made by the defendant, but merely to require a different mode of proof, substituting the certain evidence of a writing signed by the party chargeable instead of the uncertain and precarious testimony to be derived from the memory of witnesses, (*Chitty on Contracts*, 818, 819,) and in this respect, to the extent that that, as well as our own statute, goes, it cuts off peremptorily parol evidence in rendering it totally incompetent.

The American courts, for the most part, regarding these statutes emphatically as statutes of peace and repose, and discarding, in a great degree, the mere prejudices of the earlier years of their existence, which the English courts had seemed to entertain, and acting more upon the motto, "that the law was created for the watchful, and not the negligent," and considering it as the part of sound public policy to discountenance those who permit the remedies for their rights to be postponed by their unreasonable forbearance, have in general administered these laws in a spirit of fairness and liberality, and in many instances discountenanced technical and narrow views which had, in earlier times, found favor in the English courts. They have not, however, refused to administer substantially the law as it was transmitted to them, although, as has been already remarked, they have not been insensible that much of it has been derived

from departures from the letter of the statute, which the most enlightened jurists of the present day, with more liberal views of just public policy and enlarged experience, have not altogether approved.

The doctrine that part payment of a debt revives the claim as to the residue, is a part of the law so derived, and has been expressly recognized by this court in the case of *The Trustees of R. E. Bank vs. Hartford et al.*, 5 *Ark.* 551. This doctrine proceeds upon the ground that part payment is precisely equivalent to an admission that, at the time of payment, the debt is due, and upon that admission the law implies a promise to pay, which it regards as equivalent to an express promise, on the supposition that money is not usually paid and appropriated without deliberation. All these implications and presumptions arise from the fact of actual part payment, and until there be actual part payment of the particular debt to be revived, none of these implications and presumptions can arise. So, if a debt is sought to be revived, not by part payment, but by a written acknowledgment of that debt, that must be "an express acknowledgment of the debt as a debt due at that time," or it must be an "express written promise to pay it," which latter necessarily presupposes such an acknowledgment. *Davidson vs. Morris*, 5 *Smedes & Marshall*, 571:—the revival both in the one and the other mode standing in principle upon the same foundation, that is to say, upon an acknowledgment of a subsisting debt under circumstances from which an implied promise may be fairly presumed. The proof of such acknowledgment, under such circumstances, is a different question, and the made of proof or grade of evidence in the one case is not the same as in the other. In the one case, written evidence is indispensable: in the other, parol evidence is allowed; in the one case, an actual acknowledgment, under circumstances from which a promise may be fairly implied, is to be proven by written testimony: in the other, an actual payment is to be proven, from which fact the law presumes an acknowledgment and promise, as to the residue, from the circumstance that a part of a particular entire debt has been paid. In the one case, the ex-

press acknowledgment, so proven, is the foundation of the legal implication: in the other, the actual part payment. By each the same result is achieved from like foundations. In either case, the main fact to be proven is the "continued existence of the debt, notwithstanding the lapse of time since its creation was such as either to raise a presumption of payment, or to bring the case within the operation of the statute of limitations." 1 *Greenleaf's Ev. s.* 121. "This fact is sought to be proven by the acknowledgment of the debtor himself, and this acknowledgment to be proved by his having actually paid part of the money." *Ib.*

When such part payment is sought to be proven by a credit endorsed on the back of a security, (and in cases where such endorsement is admissible at all as evidence,) it is the actual part payment so sought to be proven that has the effect to revive the debt, not the endorsement: that has no such effect, it being but evidence to be considered by the jury among the circumstances showing an actual part payment. 2 *Greenl. Ev., s.* 444. But such endorsement, when made by the plaintiff, or in his behalf, can never be admissible on his part unless it be first proven, by evidence *aliunde*, to have been actually made before the cause of action was barred by the statute, and consequently against the interest of the party making it, and to this effect are all the American authorities and most of the English. It is true that some of the English cases, of a date not long after the statute 21st Jac., when the strongest prejudices against this statute seem to have obtained, are to the express, but most of this class only to the seeming, purport that the date of the making of the endorsement will be inferred from its face in the absence of opposing circumstances, and that, "if there is no evidence to the contrary, the presumption is that the endorsement was made at the time it purports to bear date, and the burthen of proving the date to be false lies on the other party." (See *Greenl. Ev., s.* 121, and the cases there cited.) But all such decisions, except perhaps one or two, will be found, on examination, to be reconcilable with the law, in this, that such endorsements were gene-

rally in these cases offered in evidence not by the plaintiff, but by the party defendant, or by third persons, and, therefore, in some of these cases, were admissible evidence, not only because against the interest of the party making them, but because they were original evidence of a verbal contemporaneous act linked in a chain of events, and they were thus a part of the *res gestæ*. And of such of the English cases as cannot be so reconciled with the law, Lord ELLENBOROUGH, in the case of *Rose ad. vs. Bryant*, 3 *Campbell R.* 321, makes the following remarks: "I have been at a loss to see the principle on which these receipts in the handwriting of the creditor have sometimes been admitted as evidence against the debtor, and I am of the opinion they cannot be properly admitted unless they are first proved to have been written at a time when the effect of them was clearly in contradiction to the writer's interest." And these views of Lord Ellenborough are fully sustained by the subsequent cases of *Sinclair vs. Baggarly*, decided in the Exchequer in 1838, 4 *Meeson & Welby's R.* 318, afterwards approved in *Anderson vs. Weston*, 6 *Bingham's New Cases*, 296; in *Caldwell vs. Gamble*, 4 *Watts*, 292, and in *Cremer's Cases*, 5 *W. & S.* 331: and, of American authorities, in *Roseboon vs. Biblington*, 17 *Johnson R.* 182, it was held that "an endorsement on a bond or note, made by the obligee or promisee, without the privity of the debtor, cannot be admitted as evidence of payment in favor of the party making such endorsement, unless it be first shown that it was made at a timé when its operation would be against the interest of the party making it." And to the same express purport are the cases, decided by the supreme court of Alabama, of *McGeehee vs. Green*, 6 *Porter*, 537; *Watson vs. Dale*, 1 *Porter*, 250, and *Skelton vs. Skelton*, previously decided by that court: and the cases of South Carolina, of *Gibson vs. Peebles*, 2 *McCord*, 418, and *Concklin vs. Pearson*, 1 *Richardson R.* 392: and in Georgia, of *West vs. Johnson*, *Georgia Decisions*, *part* 1, *p.* 72, and various other American authorities.

To establish such part payment as will defeat the operation of the statute of limitations, it is indispensable that it be shown that the payment "was expressly made and appropriated by the

debtor on account of the debt which would be otherwise barred by the statute, and, therefore, if the creditor has two separate demands against his debtor, one barred by the statute and the other not, and the debtor make a payment without specially appropriating it to either demand, though the creditor may, in the exercise of his ordinary right of appropriation, apply it in part liquidation of the older demand, he cannot make it operate as a part payment under the statute so as to revive a remedy for the remainder of such old demand." *Chitty on Contracts*, 831, 832. This principle of appropriation necessarily results from the foundation upon which the doctrine of part payment rests, for unless there be not only a part payment, but an actual part payment, of the particular debt sought to be revived by the appropriation of the payment of that specific debt, not by the creditor, but by the debtor, no presumption of recognition and acknowledgment of the stale debt can by possibility arise. And of course the fact of appropriation by the creditor has to be proven like any other fact, and the burthen of doing so lies upon the party setting up the part payment.

In the case before us, the evidence adduced on the trial below, as the bill of exceptions presents it, (and that professes to set out all the evidence adduced,) was clearly inadmissible; but, as the question of competency was not raised and saved in that court, it cannot be considered by us, as has been frequently ruled here, and we have but to look at its weight and sufficiency to support the verdict and judgment, and, regarding it in this aspect alone, we are entirely satisfied that it was altogether insufficient, and had no weight at all, as it laid the foundation for no inference whatever against the defendant, on the issue joined, unaccompanied, as it was, with the proof of facts and circumstances which, if proven, would have given it weight: and therefore, in overruling the motion for a new trial, the court below erred; but as this case has again to go before a jury, we designedly abstain from any further remark upon the testimony.

There was also manifest error in the court's proceeding to judgment without first discontinuing the action as to the de-

fendants who had not been served with process. *Davis vs. Tierson*, 2 *How. Miss. Rep.* 786. *Dennison vs. Lewis*, 6 *How. Miss. Rep.* 517.

For these errors, the judgment below must be reversed, and the cause remanded to be proceeded in.

COLLINS ET AL. VS. WOODRUFF.

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Where a justice of the peace has no jurisdiction of the subject matter of a suit, the circuit court has none on appeal.

It follows as a consequence of the decision in *Berry vs. Linton*, 1 *Ark. R.* 252, that one suit may be brought before a justice of the peace on several notes, where neither of the notes is for a greater sum than $100, though the aggregate sum of all the notes may exceed that amount.

It is not the aggregate amount of the several demands, but the sum due upon each, that constitutes the true sum in controversy.

A. hired a negro to B. for one year, and took his obligation for the price of the hire: before the expiration of the year, the negro was drowned without fault of the hirer. HELD, that the owner could recover the hire of the negro to the time of his death only.

Writ of Error to Pulaski Circuit Court.

On the 19th of May, 1847, William E. Woodruff, assignee of E. Claud, sued A. W. Collins and John H. Woodruff, before a justice of the peace of Pulaski county, on two writings obligatory: the 1st, for $70, dated 1st January, 1846, and due at twelve months after date, upon which were endorsed credits of $13 50, March 24th, 1846; $10, April 20th, and $10, May 14th, of the same year; also an assignment to plaintiff, dated May 5th, 1847. The other writing obligatory, for $60, dated 28th February, 1846, due 1st January, 1847, without credits, and endorsed to plaintiff May 6th, 1847. The justice's transcript states that "defendants pleaded partial failure of consideration on oath," and, on hear-

ing the evidence, he rendered judgment in their favor. Plaintiff appealed to the Circuit Court, where the cause was submitted to a jury, in April, 1848, (SUTTON, J., presiding,) and verdict and judgment in favor of plaintiff for $128 80, balance due on the obligations. Defendants moved for a new trial, which was refused, and they excepted. Their bill of exceptions shows, that, on the trial of the cause, plaintiff read to the jury the obligations sued on, with the endorsements thereon. Defendants then read to the jury an agreed statement of facts, signed by the counsel of both parties, as follows:

"The notes (sued on) were given for the hire of a negro, by Woodruff and Collins, from Claud, from 4th February, 1846, to 25th December, of the same year. On the 2d day of May, whilst the negro was in the possession of Woodruff and Collins, said negro was drowned. On the day before he was drowned, Collins and Woodruff visited Little Rock, and did not return home until the day after the negro was drowned. Collins and Woodruff were engaged in running a saw mill, (by water power,) and said boy was hired to them to assist them in that business. The negro, on the day on which he was drowned, was not engaged in any business about the mill, but was left to employ his time as he pleased for the day. Collins and Woodruff, before the assignment to plaintiff by Claud, tendered to Claud, $2 and a few cents, the balance of hire of said negro, from 4th February, 1846, up to the time of said negroe's death, in specie. Tender was made on the 6th March, 1847, and tendered and deposited in court," &c. The instructions given by the court to the jury, as contained in the bill of exceptions, are set out in the opinion of this court. Defendants brought error.

FOWLER, for the plaintiffs. The justice of the peace, nor the circuit court on appeal, possessed jurisdiction over the sum for which judgment was rendered. *Fitzgerald et al. vs. Beebe*, 2 *Eng.* 309.

An entire or partial failure of consideration is a good defence under our statutes. *Digest, p.* 654–5, *sec.* 96, 97.

An entire contract is one, the consideration for which is entire on both sides: and in which the entire fulfilment of the promise by either is a condition precedent to the fulfilment of any part of the promise by the other. (*Story on Con., sec.* 16, *p.* 8.) The contract in this case being entire, the hirer was not entitled to recover until the slave had worked the full term for which he was hired. (*Story on Con., p.* 9, *sec.* 16. *Cutter vs. Powell*, 6 *Term Rep.* 324. 1 *Salk.* 65,) whether the non-performance of the whole contract be rendered impossible by necessity or negligence, (*Story on Con., ub. sup.* 1 *Salk.* 65,) without a special contract to the contrary, (2 *Hen. & Munf.* 6,) or proof of general usage, which was not made in this case. 6 *T. R.* 326.

RINGO & TRAPNALL, contra. By the contract the hirers became owners of the slave for the term; if he became sick and was unable to render any service, or ran off and remained away, the loss would fall on them; so if he dies. *Hicks vs. Parham*, 3 *Hay.* 224. 4 *id.* 10. 5 *Mon.* 360. 1 *Littell*, 15. 1 *Bibb*, 540. 2 *Const. R. S. C.* 157. 5 *Littell*, 324. 1 *Rices Dig. No.* 12, *p.* 18. The only exception is the case in 2 *Hen. & Munf.* 5, in which the argument of the court and the authorities cited are at war with the judgment.

A tenant is not excused from rent on account of the burning or destruction of the premises, (1 *Chan. Cases*, 83. 2 *Vern.* 280. 1 *Fondbl.* 378. 2 *Saund.* 422, *note* 2. 4 *Coke*, 81 *b.*,) not even if they be destroyed by an invading enemy. *Pollard vs. Schaffer*, 1 *Dallas*, 210.

JOHNSON, C. J. The plaintiffs in error urge two several objections to the judgment and proceedings in the court below. The first denies the jurisdiction of the court, and the second questions the propriety of the instructions.

It is contended that the circuit court, upon an appeal from a justice of the peace, cannot lawfully take cognizance of a subject matter that is not embraced within the constitutional jurisdiction of the justice. This proposition we consider clear and

unquestionable, and consequently the only inquiry that remains is as to the jurisdiction of the justice. The suit is based upon two separate instruments, each of which is under one hundred dollars, though the sum found due exceeds that limit; and it is upon this ground that it is insisted there is an end of the jurisdiction. The question here presented cannot now be regarded as open to controversy. The case of *Berry vs. Linton*, (1 *Ark. R.* 252,) is conclusive of the question. It was there expressly decided that it is not the aggregate amount of the several demands, but the sum due upon each, that constitutes the true sum in controversy. The necessary consequence of this doctrine is, that, although the judgment of the justice shall exceed one hundred dollars, yet the jurisdiction is not ousted in case that no one of the demands shall exceed that sum.

In respect to the other point raised in the case, it was admitted by the defendant in error that the instruments sued upon were given for the hire of a negro, by the plaintiffs, from Claud, the assignor, from the 4th of February, 1846, to the 25th of December, of the same year; that, on the 2d day of May, whilst the negro was in the possession of the plaintiffs, said negro was drowned. It was further admitted, that, on the day the negro was drowned, he was not engaged in any business for the plaintiffs, but that he was left to employ his time as he pleased for the day. The court, upon this branch of the case, instructed the jury that the evidence adduced was not sufficient to authorize a deduction from the notes sued on, on the ground of a partial failure of the consideration for which they were given, and that the death of the negro, after he was hired and before the expiration of the time for which he was hired, did not in law authorize the jury to deduct, in behalf of the appellees in that court, any part of the consideration or amount of the notes in controversy, the appellant being in law entitled to the whole amount which was still unpaid, notwithstanding the death of the negro. This instruction was excepted to at the time it was given, and is now assigned for error in this court.

The supreme court of Virginia, in the case of *George vs. Elliot*,

2 *Hen. & Munf. R.* 6, held the following language, to wit: "The only question in this case is, whether the plaintiff should be allowed a credit on his bond from the time of the negro's death to the end of the year, for so much as the hire for that time would amount to. The court understands the rule to be, where one hires a slave for a year, that if the slave be sick, or run away, the tenant must pay the hire: but, if the slave die, without any fault in the tenant, the owner, and not the tenant, should lose the hire from the death of the slave, unless otherwise agreed upon. By pursuing this rule, the act of God falls upon the owner, on whom it must have fallen if the slave had not been hired; from which time it would be unreasonable to allow the owner hire. Hire! for what? For a dead negro? It would be rigid enough in the case of a special agreement: but, where there is no such special agreement, to insist upon the hire appears to this court unjust in the extreme. See 1 *Ruth. Inst.* 250, 251. 1 *Fondbl. Eq.* 376. *Powell on Contracts*, 446." The same doctrine was recognized in North Carolina, in the case of *Williams vs. Holcomb*, (1 *N. C. L. R.* 365,) and also in South Carolina, in the case of *Bacot vs. Parnell*, (2 *Bailey's R.* 424.) The case decided in South Carolina was an action brought upon a promissory note for the hire of a slave for one year. The slave died within the year, and the defendant claimed an apportionment by way of discount, which was allowed by the court below. The court, after referring to *Byrd vs. Boyd*, 4 *McCord's R.* 246. *George vs. Elliot*, 2 *Hen. & Munf.* 5. *Riply vs. Wightman*, 4 *McCord's R.* 447, observed that a contract of hiring was generally an entire contract, but in certain cases an apportionment is allowed, and that that was one of those cases. In this case the act of God (the death of the slave) has ended the contract of hiring. The owner is entitled to receive, and the hirer is bound to pay, only so much as the hire was worth from the commencement of the hiring until the slave's death. The court of appeals of Kentucky ruled otherwise in the cases of *Harrison vs. Murrell*, 5 *Monroe's R.* 359,) and *S. P. Redding vs. Hall*, (1 *Bibb's R.* 536.) In the case of *Harrison vs. Murrell*, Harrison hired of Murrell two

slaves, for one year, for $160, and covenanted to pay the amount at a specified time. The negroes had been in his possession but a short time when one of them died. After the time of payment Murrell sued on the covenant, and recovered the full amount of the hire. Harrison filed a bill, and obtained an injunction against the judgment; but the circuit court was of opinion that no deduction ought to be made, and dissolved the injunction and dismissed the bill. The court, by OUSLEY, J., said: "The principle is not perceived upon which Harrison can be relieved from any part of the hire which he covenanted to pay for the negroes. Though it may, at first blush, seem hard that Harrison should be compelled to pay hire for the negro that died before the expiration of the term for which he was hired, it will, upon mature reflection, be found not to be unjust in Murrell to exact the full hire of the negro. The uncertainty of the negro's life was equally known to both Harrison and Murrell when the contract for hire was entered into between them. With that knowledge, it was competent for them to contract in the way most acceptable to themselves, and, when fairly made, the court possesses no power to alter or change the import of the contract." This case is predicated upon the idea that the contract of hiring is entire, and that, inasmuch as the uncertainty of the negro's life was equally known to both parties, therefore the hirer took that risk upon himself in the absence of an express contract to the contrary. The doctrine of entire contracts, as it formerly prevailed, has been much softened and relaxed in modern times, and we are clearly of opinion that the principles of equity have been greatly advanced by such relaxation. It is not only unjust that the hirer should be held bound for the hire accruing after the death of the negro, but it is not in accordance with the understanding of the parties to the contract. Suppose, for example, that a party should hire a negro, for a year, for the sum of one hundred and fifty dollars, and that he should die the next day after the contract was made: would it not be flatly absurd, as well as shocking to our sense of justice and propriety, to hold that he would be liable for the full amount stipulated for the

year? We have no hesitation in saying that such would be the conclusion of the mind of every one, and that so monstrous a notion could rest alone upon the sheerest technicality. We are, therefore, clearly of opinion that the circuit court erred in the instruction to the jury. There is not a scintilla of evidence going to show that the negro came to his death either by the fault or negligence of the hirer; and in such case we think it clear that he is entitled to a deduction for the residue of the term after his death.

The judgment of the circuit court, for this error, is, therefore, reversed, and the cause remanded to be proceeded in according to law, and not inconsistent with this opinion.

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STONE VS. ROBINSON.

It is no ground of error that a judge, who was incompetent to sit in a cause, took jurisdiction of it so far as to grant a continuance, for it would have been continued by operation of law, without action of the judge, he being incompetent to try it.

On change of venue, the clerk should send a transcript of the record, proceedings, and original papers in the cause, authenticated by his official seal, to the court to which the venue is removed, and without such authentication of the transcript, the court, to which it is sent, can take no jurisdiction of the cause.

Where such authenticated transcript is sent, so as to give the court jurisdiction, but there is an omission or irregularity in it, the court may compel the clerk, by mandamus or certiorari, to perfect it.

But if no such authenticated transcript is sent, the party aggrieved may apply to the court, or judge in vacation, for mandamus to compel the clerk to perform his duty.

Defendant filed two pleas: demurrer to one, and issue to the other; in determining the demurrer, the court looked back to the declaration, and decided it bad, and plaintiff amended. HELD, that the plea to which issue was taken, was an answer to the amended declaration, inasmuch as the cause of action was not changed, but merely stated differently: if new facts are introduced into the amended declaration, defendant may replead.

HELD, further, that when a plea is demurred to, and thereupon the court decides the

declaration bad, no judgment is given upon the sufficiency of the plea, and after the declaration is amended, it is erroneous to proceed to judgment on other issues, without disposing of such plea.

Writ of Error to Lawrence Circuit Court.

COVENANT, by Robinson, against Stone, on a writing obligatory, payable in Arkansas bank paper. The facts are stated by the court.

FOWLER, for the plaintiff. The transcript sent from Jackson county, not being under the seal of the court, could not give the court of Lawrence county any jurisdiction, and it ought to have been dismissed on Stone's motion. The circuit court of Lawrence county might, perhaps, have caused the transcript to be perfected: (*Frazier & Tunstall vs. Fortenbury*, 4 *Ark. R.* 163,) but, having failed to do this, it clearly erred in adjudicating a cause of which it had not the legitimate possession. Even a writ without a seal is void. (*The People vs. McKay*, 18 *John. R.* 216. *Stayton vs. Newcomer*, 1 *Eng.* 453. 2 *Ark. R.* 131.) A transcript sent to this court without the seal of the court below is a mere nullity. *Wells vs. Long*, 1 *Eng.* 252.

None of the original papers were transmitted; and the statute (*Digest, chap.* 167, *sec.* 7,) ought to be substantially complied with before the court, to which the cause is sent, could take jurisdiction and render a final judgment.

S. H. HEMPSTEAD, contra. The motion to dismiss was unwarranted, and the exceptions founded on it cannot be regarded in this court. If the party could avail himself at all of the matters contained in the motion, it should have been done by plea. *Didier vs. Galloway*, 3 *Ark.* 503.

A change of venue is a privilege allowed to suitors under speciul circumstances, and it seems to me that the spirit of the act imposes the duty of perfecting the papers on him who obtains it; and at least it may be safely declared that it would outrage

the principles of justice to suffer him to dismiss the case from the court to which it is removed on account of some formal defect in the transcript or mode of classification. It would, in effect, allow him to take advantage of his own wrong. In criminal cases the law requires the transcript to be certified under the seal of the court, but in civil cases there is no such requisition. (*Digest, sec.* 130, 131, *p.* 407; *sec.* 140, *p.* 409; *sec.* 7, 8, *p.* 983.) Unless there is a statute requiring process, papers, or proceedings, to be sealed, it is unnecessary. (*State vs. Vaughn, Harper's R.* 226.) And it is on this principle that a return to a certiorari need not be sealed. *Scott vs. Rushman*, 1 *Cowan*, 212, *and note* (*b.*)

It is not necessary that a seal should be affixed to the transcript, because it was certified and signed officially by the clerk of Jackson county. This was a sufficient authentication of it in any of the courts of this State, for the plain reason that they are bound to take official notice of the public acts of the clerks of the circuit courts. (*Bennet vs. The State, Mart. & Yerg.* 133. *Stinson's lessee vs. Russell*, 2 *Tenn.* 40.) Our courts take judicial notice of the acts of justices of the peace. In Tennessee, the courts ex-officio notice the laws of sister States. (*Foster vs. Taylor*, 2 *Tenn.* 191.) In Louisiana, the courts recognize the signatures of all judicial officers without proof. (*Despaw vs. Swindler*, 3 *Martin*, 705. *Wood vs. Fitz*, 10 *Martin*, 635.) Indeed, it would produce incalculable mischief if our tribunals were not obliged to take judicial notice of the respective clerks of the circuit courts. It is a practice which is common—it could be justified on the ground of necessity alone; and in fact it is constantly done by this court. (*The State vs. Simmons*, 1 *Ark.* 266.) The law authorizing a change of venue is directory not mandatory, and hence it is not the seal of the court to the transcript which can give, nor its omission which can destroy, jurisdiction. The jurisdiction of the court, to which the case is removed, arises *solely out of the order of removal*, or change of venue. (*Frazier vs. Fortenbury*, 4 *Ark.* 163.) The later case of *The State vs. Hicklin*, 5 *Ark.* 192, is decisive of this question. In that case, the petition on which the change of

venue was granted was not copied into the transcript at all, although the statute requires it, and yet this defect in a criminal case too, was not deemed worthy of consideration.

The party cannot avail himself of this defect after *verdict*, because it is cured by our comprehensive statute of jeofails. (*Digest*, 814, 815.) It is an objection utterly destitute of merit, and to sustain it would be a positive outrage on right and justice—especially as the party has not shown the existence of any error which is to his prejudice. *Shropshire vs. McLain*, 1 *Eng*. 441. If the transcript was not sufficiently accurate or authentic for his purpose, or if original papers were wanted, he ought to have applied to the proper tribunal in apt time, and, having failed to do so, his complaints cannot now be heard.

JOHNSON, C. J. Did not sit.

WALKER, J. This is an action of covenant commenced in the Jackson circuit court. The defendant appeared and filed three pleas: the first, on motion, was stricken out: the second, demurred to: and issue to the third, which was a plea of payment. The court decided that the plea demurred to was defective, but that the declaration was also defective, and gave judgment on the demurrer for the defendant. The plaintiff, on leave, filed an amended declaration. On petition of the defendant the venue was ordered to be changed to the county of Lawrence. At the next term of the Lawrence circuit court, there was found on file in said court a transcript certified by the clerk of the Jackson circuit court, to be a full transcript of the record in the case; there was, however, no seal to the transcript. The original papers were not transmitted. The case having been docketed the defendant moved to dismiss the suit, because the court had no sufficient record of the case before it to authorize said court to take jurisdiction of and try the case. The motion was overruled by the court, and exceptions filed preserving the whole of the transcript transmitted from the Jackson to the Lawrence circuit court. The defendant made no further appearance; a jury

was sworn to try the issue joined, and found a verdict for plaintiff:—judgment thereon for plaintiff.

The case comes up on writ of error, and the first question assigned for error is, that, during the pendency of this cause in the Jackson circuit court, the Hon. Joseph M. Hoge, who, it is assumed, was incompetent to preside in said court, did preside therein, and take jurisdiction of this case. This objection we think entitled to but little consideration. Nothing more was done with the case in the court below than to continue it at the instance of the defendant, whose rights are presumed to have been protected rather than impaired by the action of the court. Suppose, however, that there was, in fact, no competent court sitting, the case would have continued by operation of law. The result then, in either event, would have been the same.

The circuit court erred in overruling the motion of the defendant to dismiss the case. Before the circuit court of Lawrence county could exercise the jurisdiction acquired by the order changing the venue to that county, it was necessary that a record should have been filed in that court, verified by the seal of office of the Jackson circuit court. The certificate of the clerk, without the seal of office, is not sufficient. The statute required that a transcript of the record and proceedings, with all the original papers in the case, should be sealed up and transmitted to the clerk of the court to which the venue is changed. (*Digest, p.* 984, *sec.* 14.) It is true the statute does not say, in express terms, that the transcript shall be certified under the seal of court, but the general direction to the clerk necessarily implies that it shall be done as records are usually authenticated. This question has been settled by this court in several cases under a statute strikingly similar to the one referred to in this case. It is the act in regard to appeals from the circuit to the supreme court, (*Digest, p.* 825, *sec.* 24,) which provides that "a transcript of the record and proceedings shall be filed in the supreme court." Nothing is said as to the manner of certifying. So far as this question is concerned, these statutes are identically the same: each requiring the act to be done, both silent as to the

manner of doing it. In the case of *Wells vs. Long*, 1 *Eng. Rep.* 252, and *Heard et al. vs. Lowry*, 5 *Ark. Rep.* 474, to each of which the clerk had made, and attested by his signature, full and perfect certificates, but to neither of which the seal of office was affixed, this court decided that the records were not so authenticated as to give the court jurisdiction of the cases. The case of *The State vs. Hicklin*, is relied on by counsel in defence, but upon examination of that case it will be found in no respect to conflict with the decisions made in the cases of *Wells vs. Long*, and *Heard et al. vs. Lowry*. In the case of *The State vs. Hicklin*, the record was well authenticated; the objection to that record was, not that it was not fully attested under the seal of office, but that the petition for a change of venue had not been transmitted with the record. There the court had a well authenticated record, over which, by virtue of the order for the change of venue, it had acquired jurisdiction and authority to try and determine it; whilst, in this case, there was no part of the record so authenticated as to bring to the knowledge of the court even the fact that a change of venue had been made, much less that the transcript filed was truly the records and files in the case. In cases where there is an authenticated transcript over which the court can exercise its jurisdiction, but in which there is an omission or irregularity, the court assumes its jurisdiction, and, by certiorari or mandamus, may compel the clerk to perfect the record. (*Frazier & Tunstall vs. Fortenbury*, 4 *Ark.* 162. 5 *ib.* 202.) If, however, (as in this case,) no such record is filed as would give the court power to exercise its jurisdiction, the party aggrieved may, by petition to the court or to the judge thereof in vacation, procure an order for mandamus to compel the clerk to certify the record and proceedings, and transmit the same, with the original papers, to the clerk of the court to which the change of venue has been ordered.

It is true that the circuit court, so soon as it makes the order for a change of venue, loses all further jurisdiction or control over the case, and the circuit court, to which the change is ordered, instantly acquires jurisdiction over the case, to be called

into action so soon as competent authenticated evidence is furnished that the order has been made and a transcript of the record filed. When an appeal is taken from the judgment of the circuit court, that court no longer retains jurisdiction of it, and a jurisdiction at once attaches to this court, which, however, is not called into action until competent evidence is furnished, and that by the transcript of the record under the seal of office, not only that it is the record in the case, but that an appeal has been allowed: both are requisite to confer jurisdiction, which, when once gained, if the record be incomplete, it may be corrected and made perfect, and for which the court has ample power; and we of opinion that the same power exists in the circuit courts and judges.

The next question for our consideration is, whether a plea, filed before the declaration is amended, is an answer to the declaration as amended. In order to determine this question, it becomes necessary to ascertain the extent and effect of an amendment. Our statute of amendments requires the courts to amend every defect or other imperfection in the pleading other than such as the party demurring shall express in his demurrer. (*Digest, sec.* 6, *p.* 806.) Under this statute, then, all defects not specially assigned as cause of demurrer are cured by legal intendment, unless the facts disclosed by the pleading, if set forth in the most apt form, would not sustain an action. Therefore, it is only such defects as are presented to the court by demurrer, and adjudged insufficient, that become the subject of amendment, and the leave given to amend extends no further; and the amendment, whether by interlineation, (a loose practice which should be discontinued,) or by filing an addition to the former pleading, so identified as to be connected with it, or by re-stating the first declaration correcting the defect pointed out in the demurrer, has the same legal effect, and it amounts to nothing more than an amendment of that part of the pleading adjudged insufficient. It is for this reason that a second demurrer to the same pleading only extends to the part amended. A different rule would present the absurdity of a party calling on the court to hear and

determine what has already been decided, or to reconsider its decision on all that portion of the pleading which stood amended by operation of law, (and which is, therefore, as perfect as the law can make it,) as well as such defects as may have been presented in the first demurrer and overruled by the court. It is, therefore, evident that upon demurrer an amended declaration is not properly a new cause of action, but the same cause differently stated. There are cases, however, where, upon special leave, additional counts are allowed to be filed, but that special leave takes the case out of the rule in regard to amendments upon demurrer.

From this view of the effect of amendments, we are of opinion that the filing of the amended declaration in this case did not necessarily affect the issue formed on the plea of payment, so as to require a new plea to be filed to the declaration as amended. Upon comparing the original and amended declarations, it will be perceived that the same cause of action and no other is disclosed in each; and so identical is the legal effect of the statement that the amendment may be considered rather verbal than affecting the merits of the case. It is true that cases may arise where the amendment might present such new facts as to require that the issue be changed. In such cases the defendant would be permitted to withdraw his pleading, and amend it: and the practice seems to be in several of the States to allow amendment after plea filed only upon condition that the defendant, if he choose to do so, have leave to withdraw his plea and plead over. (1 *John. Cases*, 248. 1 *Hill R.* 165. 4 *Porter R.* 425.) In most cases, however, (as in this,) the amendment does not, in the slightest degree, affect the issue, and, unless withdrawn by the defendant, it will be taken as responsive to the whole declaration. We are, therefore, of opinion that there was an issue formed on the plea of payment which the jury was sworn to try.

It next becomes necessary to inquire what effect the decision of the court, upon the plaintiff's demurrer to the defendant's plea, had upon that plea. The decision of the court was made under the well established rule that on demurrer the court will examine

the whole record and render judgment against the party who committed the first error, which rule has been recognized by this court in *Davis vs. Gibson*, 2 *Ark. Rep.* 115. *Byers & Minikin vs. Aikin*, 5 *Ark. R.* 422. *McLaughlin vs. Hutchings*, 3 *Ark. Rep.* 213. In which cases the court proceeded at once to render judgment against the party committing the first error, without pronouncing any judgment on the pleading demurred to; and this, we apprehend, is the correct practice, because if the declaration be insufficient, there is nothing which the plea could answer. In this case, although the court intimated an opinion that the plea was defective, yet it did not, and, we apprehend, could not have passed judgment on the plea. The judgment rendered by the court was for the defendant, with leave to the plaintiff to amend his declaration under the practice and decisions of this court in the cases above referred to. The special plea demurred to, we are of opinion, now remains of record unanswered, and the circuit court erred in proceeding to judgment without having first disposed of it.

The judgment of the circuit court is reversed and set aside with costs.

STONE VS. ROBINSON ET AL.

WALKER, J. This record presents the same state of case, in regard to the change of venue, that the case of *Rufus Stone vs. John Robinson* did. Every order, in regard to the change of venue, as well as the motion to dismiss, and judgment thereon, was taken at the same time and before the same courts in both cases. There are no other points raised by the assignment of errors or the record in this case which we deem it important to notice. The decision upon this point, in that case, is, in all re-

spects, applicable to this, and decides the question presented by the record.

The judgment of the circuit court of Lawrence county is reversed, and the cause remanded to that court, with directions to dismiss this suit.

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EVERETT VS. CLEMENTS & THOMPSON.

A bill of exceptions may, by equivalent expressions, as fully exclude the idea that other testimony might have been produced on the trial, as if it positively averred that it contained all the testimony.

The cause of action must be filed with the justice before the issuance of the writ to give him jurisdiction of the case, as well where the defendant appears and pleads, as where he makes default.

Where the defendant moves for the consolidation of three suits, in two of which the cause of action was not filed, and pleads to and defends the consolidated suit, still the jurisdiction of the justice is restricted to the cause of action filed: and so is the circuit court on appeal taken from the judgment of the justice.

The employment of a person to measure and pile plank, is not a delivery of it, unless it be actually measured and piled.

A delivery to a general agent, is a delivery to the principal, without special authority to the general agent.

Appeal from the Marion Circuit Court.

Clements & Thompson instituted three suits, before a justice of the peace, against Everett, on three several promissory notes, one of which only appears, from the transcript, to have been filed before the issuance of the writ. Everett appeared before the justice, and moved that the three suits be consolidated, which was done. He then pleaded a set-off, and payment in plank: and, upon a trial, the justice gave judgment against him for the amount of the three notes, deducting the payment allowed. The defendant appealed to the circuit court, and, on a trial therein,

upon the plea of payment, the verdict and judgment being against him, he moved for a new trial, which was refused; he excepted, and set out the testimony and instructions given and refused; from which it appears that, to sustain the plea of payment, he gave in evidence an order from Clements & Thompson for the plank, and proved that he had purchased goods of them to be paid for in plank: that they engaged him to saw the plank for them, and that they had engaged the witness, McKnight, to stack the plank for them when sawed, and agreed to pay him for it: that he did stack the plank, and marked it in their name, and that they hauled a part of it away.

The appellee moved the court to instruct the jnry "that a delivery must be proved to entitle the (appellant) to recover." The appellant asked the following instruction: "That if they believe, from the testimony, that Clements & Thompson employed any person to measure, pile, and mark the plank, it amounts to a delivery:" which the court refused to give, but instructed the jury, "that, if they believed, from the testimony, that McKnight was the general agent of Thompson & Clements, and had authority to receive the plank for Thompson & Clements, a delivery to him was a delivery to Thompson & Clements." And the verdict and judgment being against the appellant, he appealed to this court.

CUMMINS, for the appellant, relied upon the cases of *Anthony Ex parte*, 5 *Ark. R.* 358. *Reeves vs. Clark, ib.* 27. *Fowler vs. Pendleton*, 1 *Eng.* 41. *Levy vs. Shurman, ib.* 182, to show that the justice of the peace, nor the circuit court, had jurisdiction of two of the demands for which judgment was rendered, and contended that the circuit court erred in refusing the instruction asked by the appellant, and in giving the last instruction.

ENGLISH, contra, contended that the motion of the appellant to consolidate the separate suits upon the three notes which are copied into the transcript, and his pleading to the causes of action thus consolidated, take the case out of the principle decided

in the cases cited by the appellant to show a want of jurisdiction: that the court will presume in favor of the judgment below, because the bill of exceptions does not state that it contained all the evidence: and that the circuit court did not err in the instructions given and refused.

SCOTT, J. The court below overruled the appellant's motion for a new trial, which on exceptions is assigned for error.

It is contended, by the appellees, that the presumption must be in favor of the judgment below, because, as it is urged, the bill of exceptions is not so explicit in its terms as to exclude the idea that more testimony than appears by it might not have been actually produced on the trial below. It first shows "that the appellees, to support the issues on their part, read to the jury the three notes sued on:" then, "that the defendant, to establish payment of said notes, introduced," &c., naming several witnesses, and detailing the testimony of each: then, "no further testimony being offered, plaintiff asked the following instructions," &c., and concludes by praying "that this bill of exceptions containing all the facts of the case be signed," &c. Taking it altogether, we are of the opinion that it as fully excludes the idea that any testimony was produced on the trial that does not appear in the bill of exceptions, as if the words had been used in its conclusion "that the foregoing was all the testimony that was produced on the trial of this case." *Jordan vs. Adams*, 2 *Eng. R.* 348.

Upon looking into the record, it appears that the court below had jurisdiction of but one of the three demands sought to be recovered by the appellant, and that this amounted to the sum of $8 85 only, besides interest that had accrued on it;—it not appearing that either of the other two demands had been filed with the justice of the peace before whom the proceedings had been commenced. It is urged, however, that, inasmuch as the appellant had himself moved before the justice for the consolidation, and had both in that, and also in the circuit court pleaded to and defended this consolidated suit, it would be abhorrent to justice

and common sense to permit him now, in this court, to set up, as cause for reversal, the fact that these two demands had not been filed before the justice. However specious this may appear, the law seems clearly otherwise, as has been frequently declared by this court in the cases of *Reeves vs. Clark*, 5 *Ark.* 27. *Anthony Ex parte, ib.* 358. *Fowler vs. Pendleton*, 1 *Eng.* 41. *Levy vs. Shurman, ib.* 182. *Wilson vs. Mason et al.*, 3 *Ark.* 494; whereby it appears that, on the trial of appeals, the circuit court can claim no more enlarged jurisdiction than the justice had from whose court the case came up, and that universally the proceedings before the justice "must show and set forth such facts as constitute a case within its jurisdiction, otherwise the law regards the whole proceeding as *coram non judice*, and absolutely void:" and that the previous filing of the demand, which is the foundation of the action, must not only appear in the proceedings of the justice as indispensable in cases where the defendant makes default, but also where he appears and defends.

In this case, although the appellees lawfully demanded only the sum of $8 85, with the interest that accrued on that sum, the verdict and judgment are for the sum of $23 16, which should have been sufficient of itself to have induced the court below to have granted the motion for a new trial, and, to have refused, under such circumstances, was manifestly error.

The first instruction given to the jury was not erroneous; nor was the refusal to give that, that was asked and refused, in the terms in which it was asked, inasmuch as the mere employment of any person to measure and pile the plank was not a delivery unless that person so employed had actually measured and piled the plank. But the other instruction given was manifestly much more calculated to mislead and bewilder the jury than enlighten them: because the doctrine of *general agency*, as presented in this instruction, had no sort of application to the case made by the testimony, and was, in this respect, so far as it was concerned, abstract and mischievous. True it is that, if McKnight was the general agent of Thompson & Clements, and had also, by a work of supererogation, been clothed with special authority

to receive the plank, a delivery to him would have been a delivery to them; but the terms of this instruction strongly implied that nothing short of a general agency, and also an additional special authority to receive the plank, would make a delivery to him a delivery to them; and such being its character it is difficult to conceive that it did not mislead the jury, especially when it is remembered that no instruction was given them as to what would, under the circumstances of this case as proven, amount to a delivery in point of law.

For these errors, the judgment of the court below must be reversed, and the cause remanded to be proceeded in.

DARDENNE VS. HARDWICK.

Fraud will never be presumed in a court of law: nor in a court of equity, where the act does not necessarily import fraud, and may have as well occurred from a good as bad motive.

A purchase and sale of property, for a valuable consideration, accompanied by a bona fide change of property and possession, without proof of fraud in which both parties participated, the law will not presume as being made with intent to hinder, delay or defraud creditors.

A purchase of property from a debtor, for the purpose of defrauding his creditors, is void: but a man, no matter how much indebted, may sell his property, and the mere circumstance of indebtedness is no evidence of fraud.

Appeal from Jefferson Circuit Court.

The plaintiff instituted suit, by attachment, against James Moseley, in the Circuit Court of Jefferson county, before the Hon. WM. H. SUTTON, judge. The writ was levied upon five negroes in the possession of Garland Hardwick, as the property

of the defendant, Moseley. Hardwick appeared and filed his interplea claiming the negroes so attached; the plaintiff replied that the negroes were not the property of the interpleader, but of the defendant: the case was submitted to a jury, who rendered a verdict for the interpleader. The plaintiff moved for a new trial, which was refused; he excepted, and appealed to this court.

The bill of exceptions states that Hardwick read, in evidence, a duly executed bill of sale from Moseley, to him, for the negroes attached, and some twelve others, bearing date before the issuance of the writ: he proved the execution of the bill of sale by the subscribing witness, the payment of $3000, part of the consideration, and a note for the balance, and the delivery of the negroes: he also proved that Moseley still had some other property, and also the lands purchased by him of the plaintiff; the purchase money for which, in part, constituted the indebtedness sought to be made in this suit. He also proved that the consideration agreed to be paid for said negroes, $5,000, was their full value; that the whole consideration, except $1,635 75, was paid in cash, and the remainder was secured by note and security: that the interpleader, at the time of the purchase, was aware of the indebtedness of the defendant to the plaintiff; and that the plaintiff knew, at the time and before the purchase of the negroes, that the interpleader intended to purchase them, and applied to the agent of the interpleader to pay his debt in the event of the purchase, which the agent agreed to do, if the defendant would consent to it.

The plaintiff asked the court to instruct the jury "that fraud may be presumed when a party sells all of his property being largely indebted at the time, when the purchaser had full knowledge at the time of said sale, and when the party selling does not apply the said money to the payment of any of his debts;" but the court refused to give this instruction, and gave the following: "1st. That if they believe, from all the circumstances of the case, that the purchase of Hardwick, from Moseley, of the negroes in question, was done for the purpose of defrauding

Moseley's creditors, the purchase is void, and the negroes are subject to the plaintiff's demand: 2d. That the issue to be tried is the right of property, and the jury must find to whom the negroes belong, from all the evidence in the cause: 3d. That a man may sell his property, real and personal, no matter how much he is indebted, and that the mere circumstance of indebtedness is no evidence of fraud." The defendant also asked the following instruction, which was overlooked by the court: "If the jury believe, from the circumstances, that the sale was made to defraud one creditor, it is void against all the other creditors."

YELL, for the appellant, contended that it appeared, from the evidence, that the sale was made to the appellee for the express purpose of defrauding the appellant of his debt; and that the fact was known to the agent and attorney of the appellee; and to show that knowledge of such intent by the agent was equivalent to knowledge by the principal, cited 9 *J. R.* 163. *Com. on Con.* 763. *Chit. on Con.* 210, 211, 72, 215; that fraud may be proven by direct or circumstantial testimony, 8 *Yerg.* 484; that the actings, doings, and declarations of the party are all evidence to establish fraud, *Crary vs. Sprague*, 12 *Wend.* 41; that if the purchaser do any act to defeat the creditors of the vendor, it makes the sale void even if he pays full price for the property, 8 *J. R.* 446. *Hickman vs. Miller*, 12 *J. R.* 320. 9 *Cow.* 73. 7 *Peters*, 348. *Pet. C. C. R.* 460; that the onus of proof is on the purchaser to show that the sale is fair, and for a *bona fide* consideration, 3 *Yerg.* 502; that the court was bound to give or refuse to give all the instructions asked, and the omission to do so is cause for reversal.

S. H. HEMPSTEAD, contra. The sale of the slaves was public and notorious, and the full value of them was paid to the vendor, in consideration of which they were actually delivered to the purchaser, accompanied by a regular bill of sale acknowledged and recorded. There is not even the shadow of proof of any design to hinder, delay, injure, or defraud, any creditor.

Apply to the transaction the rigid doctrine of *Twyne's case*, 3 *Co.* 80, and it will stand the test. *Long on Sales*, 104, 105. It is true that the vendor was indebted to the plaintiff, and which fact was also known to the vendee: but do these circumstances invalidate the sale? If so, simple indebtedness would constitute in reality a greater impediment to the alienation of property than any which existed under the feudal system.

The true rule upon this subject is, that a sale, upon a valuable and adequate consideration, accompanied by a *bona fide* change of possession, is valid, and cannot be impeached by creditors. *Wheaton vs. Sexton*, 4 *Wheat.* 503. 4 *Cond. Rep.* 521. *Holbird vs. Anderson*, 5 *Term Rep.* 235. *Beals vs. Guernsey*, 8 *J. R.* 452. *Chit. on Con*, 412.

It is a familiar principle that fraud cannot be presumed, but must be expressly proved and found. *Conrad vs. Nicol*, 4 *Peters*, 297. *United States vs. Arredondo*, 6 *Peters*, 716. *Gregg vs. The lessee of Sayre*, 8 *Peters*, 244. *Clarke vs. White*, 12 *Peters*, 196. This whole question was fairly submitted to the jury, and their verdict negatives the idea of any fraud in the case, which is conclusive upon all parties. *Prentiss vs. Slack*, 1 *Hill*, 467.

SCOTT, J. We find no error in this record relating to the instructions given by the court below, to that refused, or to that asked and omitted to be given from having been overlooked, as shown in the bill of exceptions. The instructions given were proper under the evidence: that asked and refused was properly refused. Fraud will never be presumed in a court of law, although a somewhat different rule prevails in a court of equity; but even there, where an act does not necessarily import fraud, and may have as well occurred from good as bad motives, fraud will not be inferred. 8 *Peters*, 253.

The instruction asked to be given, but omitted by oversight, was embraced in those that were given to the jury. The verdict and judgment seem clearly warranted by the law and the testimony. A purchase and sale, upon an adequate and valuable consideration, accompanied by a *bona fide* change of property

and possession, are clearly established by the testimony. Of such a contract, without proof of fraud in which both parties participated, it cannot be predicated that it was made with intent to hinder, delay, or defraud creditors, within the meaning of the statute, which has been universally considered as but an exposition of the common law. *Wheaton vs. Sexton*, 4 *Wheat. R.* 503. *Sands vs. Hilbreath*, 14 *John.* 498.

All the circumstances of this case, insisted on as tending to show such fraudulent intent, have been passed upon by a jury properly instructed, who have determined by their verdict against the supposed fraud; and, after looking closely at the evidence, we see no reason to disturb the verdict and judgment. The plaintiff had full knowledge of a desired purchase,—was advised of the progress of the negotiation to effect it. The evidence shows a *bona fide* desire to purchase the property, an actual purchase for an adequate price, on which a large portion of the purchase money was paid down, and a note given for $1,635 75, the residue, due some months after date. The note, (leaving out of view the consideration that the money paid was a substitute for the property,) added to the land and the other property shown by the testimony not to have been sold by Moseley, seeming amply sufficient to satisfy the debt of Dardenne, fully rebuts any circumstances in proof going to show, on the part of the purchaser, any participancy in any fraud that might have been intended by Moseley.

In our opinion, therefore, the motion for a new trial was properly overruled, and the judgment of the court below must be affirmed with costs.

BENTLEY ET AL. VS. CUMMINS AS ADR.

Writ of Error to Pulaski Circuit Court.

Bentley obtained a judgment against William Cummins, in his life time, and, after his death, without reviving the judgment against his administrator, issued execution, which was levied upon certain slaves of the deceased. The administrator, upon notice given to the plaintiff, purchasers, and sheriff, moved to quash the writ and return, and set aside the sales. The circuit court sustained the motion.

HELD, that, "independent of other reasons, the judgment of the court below must be affirmed for the reason that the execution in this case was issued after the death of the party defendant, and before the administrator had been made a party."

BLAKENEY VS. FERGUSON ET AL.

Upon petition for an injunction to restrain proceedings at law, affecting real estate, until a decision upon a bill in equity for title to such real estate, if the bill, upon demurrer, be insufficient to sustain a decree, it is error to perpetuate the injunction. The decision of this court in the case of *Blakeney vs. Ferguson et al.*, 3 *Eng.* 273, concurred in.

Appeal from Pulaski Circuit Court in Chancery.

S. H. HEMPSTEAD, for the appellant.

L. R. LINCOLN and P. JORDAN, contra.

SCOTT, J. The object of this proceeding by petition was to

enjoin Blakeney—pending a bill in equity filed by Mary Ferguson et al., against the heirs of Gray, (in which Ben Blakeney was also a defendant,)—from proceeding with a writ of possession, in his favor, issued from the circuit court of Pulaski county, designed to place Blakeney in possession of the land, the legal title to which was sought through the bill in equity. That bill in equity is set out *in hæc verba* in this petition, and forms its *gravamen.* The injunction was granted according to the prayer of the petition. To the petition, Blakeney demurred; the demurrer being overruled by the court below, and he declining to plead or answer, but electing to stand on his demurrer, the court perpetuated the injunction with costs: from which action of the court below Blakeney appealed to this court.

That the circuit court erred in overruling the demurrer, we have no doubt. The bill in equity, set out *in hæc verba* in this proceeding, and which forms its *gravamen*, was before this court in the case of *Blakeney vs. Ferguson et al.*, 3 *Eng.* 273, and was adjudged insufficient to resist a demurrer that was interposed to its action. With that decision we are not dissatisfied, and, as a necessary result, the doings of the court below in this case must be overturned. Decree reversed.

MILLER VS. HEMPHILL.

An order re-instating a cause on the docket which had been dismissed at the preceding term for want of prosecution, is *coram non judice.*

When a cause has been called and submitted to the court, no act remains to be done by the party, no duty is incumbent on him but to hear and perform the decree; and the court cannot dismiss the cause for want of prosecution.

Though an injunction be granted under the territorial laws, the court has no power to assess greater damages than are authorized by the laws in force at the time of the dissolution of the injunction and assessment of damages.

As an interlocutory decree by default, under the territorial law, did not become

final until "made absolute," the court could, at any time, until made absolute, set it aside upon sufficient showing.

A verbal agreement, made contemporaneously with the execution of a deed, may control or defeat it, by showing that it was intended as a mortgage, or that it was delivered as an escrow: but no subsequent parol contract can be admitted to control or defeat a deed, or attach a condition or defeasance to it.

After breach of a sealed contract a right of action under it may be waived or released by a new parol contract; but a sealed executory contract cannot be released or rescinded by a parol executory contract.

Appeal from Lafayette Circuit Court in Chancery.

The appellant, William L. Miller, presented his bill in chancery at the April term, 1836, of the Lafayette Circuit Court, setting forth that, on the 6th December, 1833, he purchased of Andrew Hemphill, the appellee, a certain improvement, or parcel of land, for $500, to be paid on 1st January, 1835, and for which he executed his writing obligatory to Hemphill, who executed and delivered to him a deed for the land, being a portion of the unsurveyed public lands, and gave him possession thereof: that the possession was then given to the appellee under a special verbal contract, to continue until November, 1834: that he was prevented, by accident, from fulfilling this verbal contract and receiving possession again of the land at the time stipulated: that, subsequently, Hemphill sold the land, at an advanced price, to Sam'l P. Carson, with knowledge on the part of Carson of the previous sale to the complainant. He prayed for a *ne exeat* as to Hemphill, and an injunction to restrain Carson from paying the purchase money to Hemphill, and for a decree that possession of the land be given to him under his deed, or that he may have the benefit of the sale to Carson. Both writs were granted.

On the 6th April, 1837, an interlocutory decree by default was entered, but set aside on the 26th March, 1838, for cause shown, and the answer of Hemphill permitted to be filed; to which the complainant excepted.

The answer of Hemphill admits the contract as set forth in the bill, and the deed to Miller: but sets up a subsequent verbal

agreement varying the written contract, and averring that it was then agreed that the deed should be delivered to a third person, and if the terms of the verbal agreement were not complied with, by Miller, the contract was to become void, and the deed returned to him. The complainant excepted to so much of the answer as set up the subsequent verbal agreement, but his exceptions were overruled, and the injunction was dissolved.

On the 30th March, 1842, the cause was heard and submitted to the court, and again submitted at the April and October terms, 1843.

On the 10th October, 1845, the complainant was called and the cause dismissed, by the Hon. JOHN O. HIGHTOWER, special judge, for want of prosecution, and a decree against the complainant for $1,125, as damages sustained by the defendant on the injunction of a debt of $3,750.

On the 10th April, 1846, the cause was re-instated on the docket on motion and affidavit; and on the 3d September, 1846, an appeal was granted to the complainant, on petition, by one of the judges of the supreme court.

RINGO & TRAPNALL, for the appellant. Upon the submission of the cause to the court, the complainant had no day in court, and could do no other act than abide and perform the decree; and, upon the case as then presented, the court should have rendered a final decree. *Rev. Stat.*, *chap.* 23, *sec.* 60, 115.

The court, having adjudicated upon the subject of damages at the time of dissolving the injunction, and the decree in relation thereto remaining in full force, had no power to award the defendant damages upon dismissing the bill. The amount of damages was excessive, being more than ten per cent. upon the amount released by the dissolution of the injunction. *Rev. Stat.*, *chap.* 77, *sec.* 19.

The defendant having failed to appear on or before the third day of the term succeeding that at which the interlocutory decree was pronounced, the decree became final, and the order of court setting aside the decree and permitting the answer to be

filed, and all subsequent proceedings, were void. *Trapnall & Cocke vs. Hammett et al.*, 2 *Eng.* —. *Smith & wife et al. vs. Yell*, 4 *Ark.* 293.

The exceptions to the answer ought to have been sustained. The answer sets up a subsequent parol agreement, without consideration, to defeat the absolute conveyance by deed executed. *Littler vs. Holland*, 3 *T. R.* 590. *Souverbye vs. Arden*, 1 *John. Chy. R.* 250. *Stevens vs. Cooper*, *ib.* 428. *Sugden's Vendors and Purchasers*, 120 *et seq.* *Allen vs. Jaquish*, 21 *Wend.* 628. *Pattison vs. Hull*, 9 *Cow.* 747. As to defeasance, see 2 *Black. Com.* 327, 342.

S. H. HEMPSTEAD, contra, contended: 1st. That it is competent for a court of chancery to dismiss a bill, for want of prosecution, at any time while the cause and parties are in court. (*Lyon vs. Dumbell*, 11 *Vesey*, 608.) Until a final decree is actually pronounced, and the term expired, the cause and the parties have day in court whether the cause has been submitted or not. A submission to one judge amounts to nothing unless he actually decides the case, and an omission to do so casts the duty on his successor, who must, of course, re-hear it to enable himself to pronounce a proper decree. The merits of the case are not involved on this appeal, and need not be discussed: 2d. That a fair construction of the law under which the proceeding was had authorizes the court, in its discretion, to decree such damages upon the dissolution of the injunction, as may have been sustained, without any maximum or minimum—depending entirely upon the circumstances of each particular case. (*Territorial Digest*, 302.) And that there is no proof showing the decree to be excessive, and consequently that this court will presume in favor of its correctness. A motion overruled may be renewed at a subsequent time. (*Robins vs. Fowler*, 2 *Ark.* 144): 3d. That the decree of the 4th of April, 1837, was interlocutory merely, and, on a sufficient showing, was set aside, and rightfully too, in March, 1838. Interlocutory decrees and orders may be set aside at the instance of the party, or by the court on its own motion, when justice requires it, at any time before a final decree is actu-

ally pronounced, enrolled, and the term at which such final decree was given has passed. (*Hays' vs. Mays' heirs*, 1 *J. J. Marsh.* 497. *Templeman vs. Steptoe*, 1 *Munf.* 366 *to* 369. *President, &c. vs. Lee's ex'rs*, 2 *Hen. & Munf.* 565. *McCall vs. Peachy*, 1 *Call.* 58. *Grymes vs. Pendleton*, *id* 54. *Young vs. Skipworth*, 2 *Wash.* 300.) According to the law then in force, an interlocutory decree could only become final, or absolute, by the action of the court. (*Ter. Dig.*, *sec.* 17, *p.* 115.) Setting aside an interlocutory decree, is, in fact, no more than a re-hearing, and may be done no matter how many terms have passed: nothing is more common in English practice. (*The Attorney General vs. Brooke*, 18 *Vesey*, 320. *East India Co. vs. Boddam*, 13 *Vesey*, 422.) On strict technical principles judgments at law are final when the term at which they were pronounced has passed. (*Real Estate Bank vs. Rawdon*, 5 *Ark.* 573. *Walker vs. Jefferson*, *id.* 25.) This doctrine, however, cannot possibly have any application to interlocutory decrees or orders in a court of chancery.

SCOTT, J. The last order, which appears by the transcript to have been made in this case, by the court below, directing it to be re-instated on the docket, was clearly *coram non judice*, inasmuch as, at the term next preceding, the cause had been dismissed for alleged want of prosecution.

And this decree dismissing the cause on that alleged ground was manifestly erroneous. It is difficult to conceive in what the complainant had failed. Three years before this decree of dismissal, the cause had been regularly heard on the bill, answer, depositions, and exhibits, and submitted to the court and taken under advisement. One year after that, the cause still remaining under advisement, the record shows that, by consent, it was again submitted to the court, which was but a work of supererogation. At the next succeeding term it was a third time submitted to the court. One year after this, the cause remaining under advisement, the presiding judge certified to the governor that he was disqualified to decide it; and, twelve months after that, a special judge, commissioned to decide this cause, without

having even made a previous order for its re-argument, dismissed it for an alleged want of prosecution. This being the state of the case at that time the complainant was certainly in no default. His case was not in his own, but the hands of the court, and had been prosecuted as far as was in his power; and no further duty was incumbent on him except to hear and perform such decree as the court might pronounce. His case had been already called for hearing, and to that call he had responded; the next duty was to be performed by the court, and until that duty was performed nothing was incumbent upon the complainant.

Nor was this the only error in this final decree. The amount of damages assessed was clearly unauthorized by law. The injunction had been sued out under the territorial laws, and, as a pre-requisite, the territorial judge had required bond and security, conditioned that the complainant should pay all such costs and damages as should be awarded against him in case the injunction should be dissolved. Had the injunction been dissolved during the existence of the territorial laws, the defendant could have claimed, at the hands of the territorial court, such remedy in that case as those courts could have afforded him. But since the erection of our State government, and especially since the 20th of March, 1839, when the Revised Statutes took effect, although none of the rights of the parties were affected by these changes, the defendant could not claim any remedy at the hands of the court below that these laws did not enable the court to afford. When, therefore, in 1845, the defendant elected, as a means of making this injunction bond available to him, to move the court below for an assessment of damages based upon the dissolution of the injunction that had been ordered by that court the 28th of March, 1839, that court had no power to make this assessment at more than ten per cent. on the amount of money, the collection of which had been enjoined. *Digest, p.* 594, *sec.* 21.

But there was no error in the order of the court, made at the March term, 1838, setting aside the interlocutory decree upon the merits on the default of the defendant at the April term, 1837, when the bill was taken for confessed. That decree had never

been made final. An interlocutory decree upon the merits did not become final, under the territorial law, until "made absolute" (*Steele & McCampbell's Digest, p.* 115, *sec.* 17) by subsequent action of the court. No such action had been taken, and it was competent for the court to set it aside, and permit the defendant to answer—the showing having been amply sufficient.

The remaining question before us relates to the complainant's exceptions to the defendant's answer, which the court overruled. It is admitted, by the answer, that, on the 6th December, 1833, the complainant purchased from the defendant, Hemphill, an improvement and claim on the public lands, and for the purchase money executed his note payable the 1st of January, 1835, and that at that time the defendant sealed and delivered to the complainant a deed for the improvement and claim. But it is not pretended that at that time there was any parol agreement between the parties other than that the defendant might remain on the improvement and claim, and use and cultivate the same until the 1st November, 1834, and that the defendant should crib for the complainant, that year, 1000 bushels of corn, and that, on the 1st of November, 1834, the complainant should receive this corn, and pay for it at the rate of fifty cents per bushel. No parol agreement was made at that time for any future rescision of the sale and conveyance, nor any agreement that the deed should not instantly operate as a deed, but be merely an escrow. But the defendant alleges that afterwards, to wit: on or about the 7th of December, a verbal agreement was made between him and the complainant which provided for additional improvements on the claim sold and conveyed, to be paid for by the delivery of a slave (in time to make a crop in the year 1834) of the value of six hundred dollars, five hundred of which value to pay for the thousand bushels of corn; and that at that time it was further stipulated, verbally, that the deed, that had been before executed under the circumstances mentioned, should be left with Maj. Pryor, and, in case the defendant failed to come into the county on or before the 1st November, 1834, and receive possession of the improvement, and receive and pay for the corn, and

for the additional improvements in the meantime made, that, in such case, the deed was to be delivered up to the defendant, and the defendant was to deliver up the complainant's note, and that all contracts between the parties, either verbal or written, were then to be considered dissolved and discharged. The complainant excepts to so much of the answer as sets up this second verbal agreement, and insists that it cannot have any legal effect to defeat the original contract executed by the deed of conveyance by the one party, and the execution of the promissory note for five hundred dollars, payable the 1st January, 1835, by the other party. It is true that a verbal agreement, to that purport, made contemporaneously with the execution of the deed, might control or defeat it by showing it to have been in truth only a mortgage, although on its face absolute, or by showing that it was agreed, or declared, or delivered, as an escrow merely, to become a deed on the happening of a future contingency. But although the law allows evidence of this sort to be introduced, yet all the authorities agree that any declaration of the grantor, or agreement, or understanding, different from the face of the deed, to control, alter, or defeat it, on either of these grounds, must be made at the time of executing it, and not afterwards: and therefore, any verbal agreement made on the 7th December, cannot, in this case, show that the alleged deed was a mere escrow, or that it is to be taken as having only this effect. If this subsequent parol agreement can, in any way, affect this supposed deed, then it must be done by some other operation. Can it have this effect by way of condition? Unquestionably not; for, to have that legal effect, it must have been part and parcel of the deed itself which is to be defeated, which is not pretended. Nor can it defeat it by way of defeasance, for every defeasance must not only contain proper words, as that *the thing* shall be void, as this parol agreement does, (2 *Salk.* 575. *Willes*, 108,) but it "must be made *in eodem modo*, and by matter as high as the thing to be defeated;" (*Touch.* 397,) and as the thing here to be defeated is an absolute deed, nothing short of a defeasance sealed and delivered can defeat it. But, even if this were not the true

ground upon which to place this case, and it were to be placed on the ground of a sealed executory contract, which is the most favorable position that any plausible construction can place it in to be most for the advantage of the defendant, Hemphill, it could not avail as a defence to the complainant's case. For "the law is understood to be well settled that a covenant under seal not broken, cannot be discharged by a parol agreement." (1 *Taunton*, 430. 10 *Wend.* 1848. 11 *ib.* 30. *Delacroi vs. Bulky*, 13 *Wend.* 73.) The extent that the authorities seem to go, when clearly examined, is, that after breach of a sealed contract, the parties to it may discharge any liability upon it by entering into a new agreement in relation to the same subject matter, which new agreement is a valid contract founded upon sufficient consideration, and "that the law remains as it always existed, that a sealed executory contract cannot be released or rescinded by a parol executory contract. But after breach of a sealed contract a right of action may be waived or released by a new parol contract in relation to the same subject matter, or by any valid parol executed contract." Now it cannot, in any sense, be pretended, that, on the 7th of December, when the parol contract sought to be set up by the answer was made, that there was then any breach of the contract of sale and purchase of the improvement and land claim. Nor could it be possible that any proper breach could accrue until long afterwards, the note for the purshase money falling due not until 1st January, 1835. If, on the 1st of November, 1834, the complainant should have failed to take possession of the improvement sold, as the answer alleged he verbally stipulated to do, this failure would be to the advantage and not the prejudice of the defendant. And if, for the purpose of the question we are considering, that part of the first verbal agreement, as alleged in the answer, which relates to the thousand bushels of corn, is considered a part of the contract of sale and purchase of the land and improvement, which is all that the defendant can possibly claim, even this could not be broken until November, 1834, long after the date of the second parol agreement, which the answer attempts to set up as working

a discharge of the sealed contract. Then, viewed in this, the most favorable attitude for the defendant, it could not have been sooner than November, 1834, that any parol contract could have had the effect to discharge the sealed contract, and even then it could have been discharged only by an executed and not by an executory parol contract, such as is by the answer sought to be set up. In any legal view, then, of the case, it is clear that the court below erred in overruling the complainant's exception to the defendant Hemphill's answer.

And for the various errors we have pointed out, the decree, and the several orders of the court below touching the various errors, must be reversed, and the cause remanded to be proceeded in not inconsistently with this opinion.

STRINGER VS. JACOBS ET AL.

An order for a change of venue divests the court, in which the suit is instituted, of jurisdiction over the cause, and invests it in the court to which the transfer is ordered.

But the latter court cannot adjudicate upon the rights of the parties until a transcript of the record and proceedings, duly authenticated under the hand and seal of the clerk, and all the original papers composing a part of the record, are filed therein: or such of them as to enable the court to see what is in controversy between the parties, and bring its dormant powers into active exercise.

A copy of the petition, notice, and order, for a change of venue, and the original declaration and writ, not duly authenticated, without a transcript of the record and proceedings, held insufficient to authorize the court to adjudicate the cause.

Writ of Error to Sevier Circuit Court.

This was an action of detinue for a slave, brought by Wingfield and John Jacobs, minors, by William H. Wingfield, their guardian, against Rice Stringer, and determined in the Hempstead Circuit Court, before the Hon. GEORGE CONWAY, then one of the circuit judges.

The suit was instituted in the Pike circuit court, on the 25th Aug., 1845: the process was served on the same day, and before the return term, on petition of the Jacobs', the judge of that circuit made an order, in vacation, changing the venue from Pike to Hempstead county. Under this order, the clerk of Pike transmitted to the clerk of Hempstead a duly certified copy of the petition, affidavit, notice, and order, for the change of venue, and at the same time transmitted and filed, in the office of the clerk of the Hempstead Circuit Court, the original declaration and summons in the cause; no term of the Pike Circuit Court having intervened between the commencement of the suit and the change of venue, there were no record entries or other proceedings or papers. The declaration transmitted is endorsed filed, by the clerk of Pike, on the 25th August, 1845, and by the clerk of Hempstead, October 21, 1845, but not otherwise authenticated or identified.

At the first term of the Hempstead Circuit Court, after the papers above mentioned were filed therein, Stringer moved to strike the case from the docket of that court, upon the ground that the clerk of Pike had not conformed to the statute in transmitting the papers pursuant to the order changing the venue; but this motion being overruled, he pleaded the general issue, upon which there was a trial by jury, and a verdict and judgment rendered against him.

The defendant objected to certain testimony on the part of the plaintiffs below, and filed a bill of exceptions, but it is omitted here, as the points made in relation thereto are not embraced in the decision of this court.

RINGO & TRAPNALL, for the plaintiff.

WATKINS & CURRAN, contra.

JOHNSON, C. J. The court below clearly erred in overruling the defendant's motion to strike the case, as certified, from the docket. The statute declares that when an order for a change of venue shall be made by the court, or judge thereof, in vacation, the

clerk of such court shall immediately make out, and transmit to the proper court, a copy of the order, petition, and affidavit, and a full transcript of the record and proceedings in such cause, with all the original papers filed therein and composing a part of the record: and further, that the clerk of the court, to which such cause may have been certified, shall file in his office all the papers in the cause transmitted to him, and the cause shall be docketed, proceeded in, and determined as if it had originated in such court. This court, in the case of *Frazier & Tunstall vs. Fortenbury*, 4 *Ark. R.* 163, said, that "after a change of venue granted, the case is no longer within the jurisdiction of the court awarding the change. It appertains and belongs exclusively to the court to which the order is directed. That court, by virtue of the change of venue, is invested with complete control and authority over the subject matter in dispute, and its jurisdiction and power cannot be ousted or destroyed by the improper interference of any other tribunal. It is its right and duty to have the transcript and papers properly made out and authenticated." The statute, it is conceded, does not, in express terms, require the clerk to transmit the transcript over his official certificate and seal, yet it is so strongly implied, in several sections of the law, as to leave no room to doubt the necessity of such authentication. The order for the change of venue divests the court, in which the suit is instituted, of its jurisdiction over the cause, and, in contemplation of law, operates to transfer the same to the court to which the change is taken. The latter court, though vested with the jurisdiction, cannot exercise it so as to adjudicate upon the rights of the parties litigant until such a transcript of the record and proceedings is filed, as is required by the statute. The statute requires a full transcript of the record and proceedings in the cause, with all the original papers filed therein and composing a part of the record. We do not conceive it absolutely essential that a copy of the entire record and proceedings, or that every original paper filed in the cause should be transmitted in order to enable the court, to which the venue is changed, to exercise jurisdiction over the subject matter in dispute.

There can be no doubt that, where a sufficiency is transmitted to enable the court to see what is in controversy between the parties, and to bring its dormant powers into active exercise, numerous irregularities might be waived without impairing or in any manner affecting the validity of the judgment. The true question, in all such cases, is, whether the transcript is such as to give life and action to the previously dormant jurisdiction of the court. In this case, the clerk of the Pike Circuit Court transmitted only a copy of the petition, notice, and order, for the change of venue, and totally failed to send up any part of the record and proceedings in the cause. It is true that a declaration and writ in a case between the parties described in the order has, by some means, found its way into the Hempstead Circuit Court, but being without the authentication required by the statute, they are not entitled to the notice of this court. The least that would satisfy the law in order to call forth the dormant jurisdiction of the court to which the venue is changed is a full transcript of the foundation of the action, whatever that may be. There was nothing legitimately before the Hempstead Circuit Court showing the pendency of a suit between the parties to this record, and consequently there was nothing upon which the jurisdiction of the court could be made to operate.

Under this view of the statute, it is clear that the Hempstead Circuit Court erred in overruling the motion to strike out the transcript, and in going on to exercise jurisdiction over the cause; and for this error the judgment ought to be reversed. The judgment of the Hempstead Circuit Court is therefore reversed.

NOTE.—A petition for re-consideration was filed in this case by the defendants, and overruled by the court.

BLACK VS. BOWMAN & TRAMMELL.

A bond for the conveyance of land, and a note executed at the same time for the purchase money, are taken as one contract: therefore, if the bond covenants to make title or deliver up the notes, title must be made by the time limited for payment of the notes.

If the remedy at law is effectual and complete, the party cannot resort to a court of equity: otherwise, if the remedy be not adequate and complete and adapted to the particular exigency.

Two notes given for the purchase of a tract of land, to which the vendor cannot make title; one of the notes is assigned, and suit instituted upon it: the defendant can obtain only partial redress at law, and must go into equity for complete relief.

In such case, the vendee is entitled to the same relief against the assignee, as against the vendor; and a court of equity will decree a perpetual injunction against the judgment, and compel the vendor to deliver up the other note to be canceled.

A contract cannot rest partly in parol and partly in writing; nor can verbal conditions be annexed to a written contract.

Testimony taken under a special agreement as to objections to be made to it, ought not to be suppressed unless the particular terms of the agreement be violated, or it be wholly immaterial.

Appeal from Sevier Circuit Court in Chancery.

The facts in this case sufficiently appear in the opinion of the court.

RINGO & TRAPNALL, for the appellant. It is apparent that the contract was dependant, and the purchase money not payable until the delivery of a title to the land, as the notes were to be given up on failure to make title. 20 *John.* 15. *Id.* 130. *Smith vs. Henry*, 2 *Eng.* 208.

The additional agreement, set up in the answer, if in writing, should have been exhibited: if in parol, it was void. (14 *Wend.* 6. 15 *id.* 561. 2 *Eng.* 208.) Parol evidence inadmissible to contradict or vary the import of a written agreement. 1 *Cow.* 250. 9 *id.* 39. 1 *Har. & John.* 252. *Bertrand vs. Byrd*, 5 *Ark.* 637. 4 *Stark.* 1001, 1043.

Neither the vendor nor his assignee could coerce the payment of the purchase money until title made to the vendee.

PIKE & BALDWIN, contra. Between the original parties, the consideration could be inquired into; and the contract shows that the bonds were not payable until the title to the land was made; but in this case, Trammell is the *bona fide* holder of negotiable paper without knowledge of the private contract.

Endorsees of negotiable instruments, assigned after due, take them subject to every defence that existed before endorsement: (1 *John. Cas.* 51. *Id.* 331. 3 *id.* 29. 1 *J. R.* 319. 8 *id.* 454:) otherwise, where the endorsement is before due, and for a valuable consideration and *bona fide*. (6 *Wend.* 615. 1 *Hall*, 70. 13 *J. R.* 52. *Story on Prom. Notes*, 210.) These rules were not intended to be changed by our statute of assignments. *Rev. Stat.*, *chap.* 11, *sec.* 3, 7.

A negotiable bill or note is conclusive evidence of consideration in the hands of a *bona fide* purchaser before it is due. *Story on Prom. Notes*, 11. *Story on Bills*, 16, 17.

WALKER, J. Defendant, Bowman, professing to own 1,476 acres of land in the then republic of Texas, by virtue of a land certificate, on the 30th March, 1838, sold the same to the complainant, for $700, for the payment of which he executed to Bowman two notes of $350 each, payable on the 1st January, 1839. Whereupon, Bowman executed to complainant a bond, in the penal sum of $2,000, to make to complainant a good and lawful title to said land, or give up to complainant said notes. Before the notes became due, Bowman assigned one of them to defendant, Trammell, who instituted suit on it, and recovered judgment for the sum of $350, debt and interest. Bowman never conveyed the land to complainant, and the bill charges that he is wholly unable to make title to the land, and prays that the judgment at law be enjoined, that if defendant has title he set it forth, that the contract be set aside, and the note taken in and canceled.

The note and bond, having been executed at the same time, and relating to the same contract, are taken and considered as being but one contract, as decided in the case of *Nicks' heirs et al. vs. Rector*, 4 *Ark. R.* 278. It will be seen that the bond specifies no time at which the title it is to be made, but provides that if it be not made the notes shall be given up. The notes are made payable on the 1st January, 1839. Taking these two instruments together as constituting but one, we are supplied by the notes with a date which it is to be presumed the parties intended as a limit to the time given in which to make a title to the land; for it never could have been intended that the notes should be paid on the 1st January, 1839, unless, at or before that time, the title to the land was made, because it is expressly provided, in the covenant, that if the land be not conveyed the notes should be given up.

Placing this construction upon the contract, we will proceed to examine the case as it is presented upon the record: and 1st, is this a case of equitable jurisdiction, or should the complainant have made his defence at law?

It is a general rule, says Judge STORY, subject to few exceptions, that where the plaintiff can have as effectual and complete a remedy in a court of law as in a court of equity, and that remedy is direct, certain, and adequate, he must resort to a court of law for redress. But where there is a clear right, and yet there is no remedy in a court of law, or the remedy is not plain, adequate, and complete, and adapted to the particular exigency, then, and in such cases, courts of equity will maintain jurisdiction. (*Equity Pleading*, 313.) By reference to the facts disclosed by the record, it will be readily perceived that a full and complete remedy cannot be afforded the complainant in a court of law. "The first consideration," says Judge Story, "is whether there is an adequate remedy at law, not merely whether there is some remedy at law." (1 *Story's Eq.* 96.) Had the bill been filed to avoid the payment of a single note—had that been the extent and scope of the contract, there might be some force in the argument that the complainant should have interposed his

defence at law. Such, however, is not the nature of this case. A court of law, bound by strict legal rules, and limited to an issue upon the particular case before it, never could have afforded relief upon this entire contract.

"The remedy and the relief administered in courts of equity, are, in general, more complete, adequate, and perfect, than they can be at common law. It is more complete, because it adapts itself to the circumstances of each particular case, adjusting all cross equities, and bringing all the parties in interest before the court so as to prevent multiplicity of suits and interminable litigation." (*Eq. Jurisprudence*, 436.) "It varies its adjustments and proportions so as to meet the very form and pressure of each particular case, in all its complex habitudes. Thus, if conveyances are fraudulently or improperly obtained, they are decreed to be given up and canceled: if money securities, on which the money has been paid, the money is decreed to be paid back: if deeds, &c., detained from the rightful party, they are declared to be delivered up." *Id.* 438.

The bill now before us brings the contract, and all of the parties, before a tribunal competent to do full and complete justice to each. To the allegation that defendant has no title to the land, or is unwilling to convey, he may exhibit his title to the court, tender a conveyance for the land, and insist upon his pay. The defendant, Trammell, might have so shaped his defence as that, in the event the judgment is enjoined, he may take a decree against his co-defendant for the consideration money paid for the note: whilst the complainant, if he fails to get title to the land, is released from paying for it, takes in his note, and has the contract rescinded. Although the bill is not so full and explicit as is usual, yet we think it substantially good, and that relief to this extent might have been afforded under it. The power to enforce the specific execution of a contract (particularly in respect to real estate); to rescind a contract; to decree that outstanding deeds, and other contracts, be called in and canceled; to enjoin the collection of the purchase money until title is made, has been so long recognized as within the appropriate jurisdiction

of courts of equity as to render it unnecessary to refer to authorities, particularly as the learned counsel, who has investigated this case for the appellees, has not made the question of jurisdiction, nor is it raised upon the record by demurrer to the bill.

It does not appear, either from the bill or answers, whether the complainant did, or did not, interpose a defence at law to the judgment which is sought to be injoined. The complainant's right to equitable relief did not originally depend upon the fact whether there was a defence at law or not. Having his election to defend at law, or make his defence before the chancellor, when he comes into a court of chancery he is only required to make out a clear case of equitable jurisdiction, and present such facts as show that he could not have had adequate relief at law. This, we think, he has sufficiently done, particularly as the defendant is silent on the subject of defence at law. As this case does not turn upon the principle of concurrent jurisdiction where adequate relief might have been afforded by either court, it is deemed unnecessary to refer to the authorities relating to such cases. The question has been recently settled by this court in the case of *Conway & Hempstead vs. Watkins ad.*, 1 *Eng.* 317, after an able and full examination of authorities by counsel on both sides of the question, and which, if a doubt could arise as to the correctness of the position we have assumed, would upon principle determine this case.

It is contended that as defendant, Trammell, was an innocent purchaser of the note, for a valuable consideration, without notice of the terms upon which the note was executed, he should be protected in his purchase. This ground we think untenable. The statute (*page* 162, *sec.* 3) declares that all discounts and offsets, either in law or equity, which the defendant may have against the original assignor previous to the assignment, or against the plaintiff or assignee after the assignment, shall be allowed; and it was intended, as it expresses, to protect the maker of the note, or other writing, and afford him the full benefit of his defence either in law or equity: and although the

note on its face may give no indication of the defence to be offered, the assignee is understood to take it subject to all and every defence which the maker could offer at the time of the assignment.

So far as relates to defendant Bowman's answer, the material facts in regard to the written contract are admitted, but he sets up a verbal agreement, which he insists is part of the contract. This statement is not sustained by proof, and, if it was, it is not permissible. A contract cannot rest partly in writing and partly in parol; consequently, conditions cannot be annexed by extrinsic parol evidence. 1 *Powell on Contracts*, 259. 3 *Starkie*, 1008.

It seems that the deposition of a witness was taken under the written agreement of the parties, waiving all formality, but reserving the right to object to the credibility of the witness, to his competency, or to the relevancy of the testimony. The deposition appears to have been taken in strict accordance with the agreement, and we think that the objections to the depositions should be limited to the reservations contained in the agreement. Neither his credibility nor competency seems to have been questioned, nor is there any thing in the record to affect either. The testimony conduced to prove the allegation in the bill that defendant could not make, to complainant, title, and should not have been suppressed. The witness states that, after the covenant to convey to complainant, defendant sold his land claim to other persons, and that for half of it at least the title had been made and entered of record. Testimony should not be suppressed unless it is wholly irrelevant; it should be permitted to go to the court or jury to be considered and weighed in connexion with other evidence under the issue.

The decree of the court below is reversed and set aside, and the case remanded to the Circuit Court, with instructions to enter a final decree perpetually injoining the collection of said judgment at law, setting aside and rescinding the contract between the complainant and defendant Bowman, and in regard

to the outstanding note of complainant, such decree as may be necessary to compel defendant Bowman to surrender the note, and deliver it up to be canceled.

ROSE VS. ROSE.

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This court, when hearing appeals from the chancery side of the circuit court, will determine the cases upon the same evidence that was produced on the hearing in the court below—the depositions filed in the cause and read in evidence constituting a part of the record in a chancery cause without being made so by bill of exceptions.

At common law a marriage was absolutely void, and so pronounced both by the courts of chancery and of common law in a collateral proceeding, where either of the parties had not the legal capacity to contract marriage, or did not give a legal consent, or acquiesce in the marriage.

But both courts yielded the exclusive jurisdiction to the ecclesiastical courts to declare marriage a nullity in a direct proceeding between the parties.

The chancery courts of this State possess all the powers, in relation to divorces and alimony, as well of the English ecclesiastical courts, as those conferred by our statute.

The civil and ecclesiastical courts granted divorces for no austerity of temper, petulance of manner, rudeness of language, or other indignities, unaccompanied with bodily injury either actual or menaced, and which did not render the party incapable of performing the marital duties.

The 5th cause of divorce set forth in the statute gives to our courts a broader jurisdiction than that exercised by the civil and ecclesiastical courts for legal cruelty; for indignities to the person may render the condition of the party intolerable without "reasonable apprehension of bodily hurt."

Must not the drunkenness specified, in the 1st section of our statute as one of the causes of divorce, be not only habitual for the space of one year, but also, in each particular case, render the marital state intolerable?

Personal indignities, such as rudeness, unmerited reproach, contempt, studied neglect, open insult, &c., and other plain manifestations of settled hate, alienation, and estrangement, must be habitual, continuous, and permanent, to create that intolerable condition contemplated by the statute.

But such indignities, when habitual and continuous, causing extreme and unmeri-

ted suffering, are sufficient to warrant a decree for divorce and alimony, without being attended with bodily harm, and need not be so extreme as to render the party incapable of discharging the marital duties.

The husband may defend a bill for a divorce on the ground of alleged ill conduct, by showing a just provocation in the ill conduct of the wife; but it is not necessary that the wife be entirely without blame.

Exhibitions of justly aroused passion on her part cannot defeat her of alimony, when it appears that she generally submitted in meekness to an almost continued flow, for years, of insult and unmerited contumely.

Appeal from the Chicot Circuit Court in Chancery.

This was a bill filed in the Chicot Circuit Court on the chancery side, by Nancy M. Rose, for a divorce from her husband, William W. Rose, and for alimony; and decided by the Hon. WILLIAM H. FEILD, judge.

The bill states that the complainant and defendant were married in October, 1841, and lived together until June, 1845: that the complainant, during the time of co-habitation, conducted herself with propriety, and discharged her duty as a wife; but that the defendant, within a few weeks after the marriage, commenced a course of unkind, harsh, and tyrannical treatment towards her, which continued with little intermission until the separation: that he treated her with great harshness and almost uniform unkindness, and proceeded to strike her: that he frequently used opprobious epithets towards her, and was, for years, in the almost constant practice of offering such personal indignities as rendered her condition intolerable, evincing discontent by sullen silence for days and weeks towards her, and encouraging disobedience in his slaves: that, in consequence of his unfeeling and insulting conduct, and the miserable life she led, she left his house.

The answer denies that she conducted herself with propriety and discharged her duties as a wife; but that her conduct was highly improper: denies that he was unkind, harsh and tyrannical, but alleges that his treatment was kind, indulgent and affectionate: that when he kindly remonstrated with her, she used violent, abusive, and insulting language to him: that when he

tried, by persuasion and conciliation, to restore peace and harmony to their home, she was perverse, outrageous and wilfully annoying to him: denies that he struck or attempted to strike her, but she was anxious to induce him to do so to give her cause of complaint: denies that he was in the practice of offering to her personal indignities, but she was unkind and disrespectful to him.

The defendant filed a cross bill for a divorce, to which the complainant answered. The averments and allegations in the cross bill and answer were materially the same as in the original bill and answer.

The testimony taken in the cause is voluminous on both sides, and the general effect of it only will be stated without any attempt to set out the substance of each deposition.

The witnesses for the complainant (some of them visiters, others resident in the family) testified that she was industrious, managing, and attentive to her domestic duties: that he frequently got angry with her, without any cause, and would not speak to her, sometimes for a week, even in answer to her persuasions that he would tell her what she had done, and when he did speak, he was snappish and quarrelsome: that he was silent and morose towards her, treating her with silent contempt and manifesting freaks of ill nature: that he refused her permission to visit her sister; and when she was sick, was indifferent and careless, and noisy: that, in his morose and sullen moods, he said she was the meanest rascal he had ever seen, that he would not talk to such a fool, and this in response to her persuasions that he would tell her what she had done, that she might know what to do: called her a lazy rascal, a lazy white woman, and, upon her complaint of disobedience and insolence on the part of the servants, said she was a liar, and he would not believe any thing she said: that his conduct towards her was that of silence, moroseness, contempt, neglect, and indifference to her convenience and happiness: and he slept a portion of the time in an out-house, and apart from her for the last five months they

lived together: that she appeared unhappy from his ill treatment, whilst her own conduct was patient and conciliatory.

The witnesses for the defendant (also visiters and residents in the family) testified that Mrs. Rose was not always kind and pleasant to her husband, nor acted always as became an affectionate and dutiful wife: that she visited once contrary to his desire, and in a quarrel commenced by him she dared him to strike her: that she was often unkind to him, and once called him, during a quarrel, a fool and liar, he calling her a liar: she was sometimes kind, sometimes unkind: did not live happily: both were quick tempered.

The circuit court, being of opinion that the conduct of William W. Rose, towards his wife, was unkind, harsh, and tyrannical, that he offered such indignities to her person as rendered her condition intolerable, and that he was seized of property to the value of $15,000, decreed, on her complaint, a divorce from the bonds of matrimony, and that he pay her, as alimony, the sum of $250, annually, during her single life, commencing on the 23d June, 1845, from which decree the defendant appealed to this court.

RINGO & TRAPNALL, for the appellant, contended that the testimony did not show that the appellant had offered such personal indignities to his wife as to render her condition intolerable and entitle her to a divorce (2 *Kent*, 126): that her own conduct had provoked the treatment she received, that the indignities were mutual, and in such case she is not entitled to a divorce (*Bedell vs. Bedell*, 1 *J. C. R.* 604. *French vs. French*, 4 *Mass. R.* 587. 2 *Kent*, 128. 2 *Haggard's Con. R.* 154): certainly not to alimony. *Anon.*, 4 *Desau*, 94. *Cooper et ux. vs. Clason at ux.*, 5 *J. C. R.* 421. 1 *J. C. R.* 604.

MEANY, contra. That the depositions, though filed in the court below and copied into the transcript, were not brought upon the transcript by bill of exceptions or otherwise, and will not be taken

notice of by this court. 2 *Litt. R.* 371. *Lenox vs. Pike*, 2 *Ark.* 14. *Fort vs. Hundley*, 5 *Ark.* 179.

The testimony warranted the court in granting the divorce, and the chancellor has full power to make an allowance for the support of the wife in such cases of divorce. *Rev. St.* 334, 335. 6 *John. Ch. Rep.* 91. *Reeves on Baron & Femme*, 204, 209, 210. 2 *Kent's Com.* 98, 99, 100.

SCOTT, J. In England the ancient common law rendered a marriage absolutely void when either of the parties had not the legal capacity to contract marriage, or when there was in fact no legal consent by one of the parties, the same having been obtained by force or fraud, and never afterwards voluntarily acquiesced in; and in such cases the courts of chancery and the courts of common law always exercised the power to declare the marriage absolutely void, whenever the question came before them in a collateral proceeding. (*Betsworth vs. Betsworth, Styles R.* 10. *Ruggles vs. Wogan, Cro. Eliz.* 858.) But these courts yielded to the ecclesiastical courts the exclusive jurisdiction to declare the nullity of such marriages by a direct proceeding between the parties, not for want of power in the chancery courts to grant similar relief to the parties as to those marriages void by the common law, but more upon the ground of convenience. But beyond this the jurisdiction over divorces and alimony (which is not necessarily an integral part of a decree for a divorce even when granted *a mensa et thoro*, and had no place in the English divorce *a vinculo matrimonii*) belonged exclusively to the ecclesiastical courts, and was never exercised in England by any other courts except only during the usurpation of Cromwell while the spiritual courts were closed, (1 *Mad. Ch.* 305, citing 2 *Showers*, 283. 1 *Fon.*, *b.* 1, *ch.* 2, *sec.* 6, *note a*), which jurisdiction the chancery courts renounced upon the restoration and resumption of authority by the ecclesiastical courts. And upon the same ground of necessity and convenience the chancery courts of Virginia, previous to the act of the legislature of that State of 1826, which conferred upon them a more extensive

jurisdiction over these subjects than had ever been exercised in England by the ecclesiastical courts, had already assumed and exercised jurisdiction of alimony in the case of *Percel vs. Percel*, 4 *H. & M. Rep.* 507, and other cases to the same extent as the ecclesiastical courts had exercised it—it seeming to have been the unanimous opinion of the five judges of the Virginia court of appeals, who refused to allow an appeal in the case of *Percel vs. Percel*, that it would be a solecism in the jurisprudence of any enlightened nation to admit the existence of a right without a corresponding remedy, likening our system of jurisprudence to the human body, in which, when one artery is cut off, its functions are to be performed by collateral branches according to the bountiful provisions of nature. So, in our body politic, if by any means the ordinary tribunals for affording relief be destroyed, some other tribunal must be found to supply its place, which is generally the courts of equity, it being the boast of those tribunals to give relief where others are incompetent. Upon this general foundation, then, in reference to which our constitutional and statutory provisions as to these subjects are to be interpreted, it is altogether safe to assume that the chancery courts of this State have rightfully, as to divorce and alimony, all the powers of the English ecclesiastical courts as well as additional powers conferred by our statutes.

And, as a general doctrine, it may be also safely assumed that this court, when hearing appeals from the chancery side of the circuit courts, bears the same general relation to these courts that the House of Lords in England bore to the equity side of the chancery courts of that kingdom, and when such appeals are heard here, they will be heard as they were there, only on the same evidence that was produced on the hearing in the court below. And in order to dispose more distinctly of a preliminary question raised by the appellee, we will remark that, although as a rule of practice adopted by this court, soon after its organization, in the case of *Pope, Gov., use, &c. vs. Latham et al.*, 1 *Ark.* 66, and ever since adhered to, no difference is observed as to the mode of proceedings between cases brought here by appeal and

by writs of error, yet this identity relates more particularly to the mode of proceeding in this court and more exclusively confined to cases from the law side of the circuit courts, (in the examination of which this court sits more strictly as a court of errors,) and is not in any sense to be understood of cases brought here from the chancery side of those courts (wherein this court sits more strictly as a court of appeals) so as to make the doctrines of the cases of *Lenox vs. Pike* (2 *Ark. R.* 14,) and *Fort vs. Hundley* (5 *Ark. R.* 179) have any effect to exclude, from the consideration of this court, any of the depositions that have been read on the trial of any such case from the chancery side of these courts merely on the ground that any such depositions had not been, by bill of exceptions or otherwise, brought on the record: those cases having no such application to chancery cases, as seems to be supposed by the counsel for the appellee.

And having premised thus much in reference to preliminary and incidental questions, it is now devolved upon us to examine into the correctness of the decree of the court below. And it being manifest, from a mere glance at the testimony, that the decree cannot be sustained on the ground that facts have been proven which show the husband to have been guilty of such "cruel and barbarous treatment" to the wife as to "endanger her life," it can only be sustained, if at all, upon the other ground that the proof shows such "indignities to her person as rendered her condition intolerable;" and thus it becomes indispensable to ascertain, if we can, the true meaning of the legislature in the fifth cause for divorce contained in our statute. (*Digest, ch.* 58, *sec.* 1.) The act provides that "the circuit court of the proper county shall have power to dissolve and set aside such marriage contract, not only from bed and board, but from the bonds of matrimony for the following causes: first, second, &c., fifth, where either party shall be addicted to drunkenness for the space of one year, or shall be guilty of such cruel and barbarous treatment as to endanger the life of the other, or shall offer such indignities to the person of the other as shall render his or her condition intolerable." Taking the whole of this specification

together, as one general ground of divorce, it not only is fully commensurate to the legal idea of "*sævitia*" of the civil law and of "legal cruelty" as defined by the ecclesiastical courts, but it seems incontestibly to go beyond both, and place the jurisdiction on broader grounds. Legal cruelty, as these courts defined it, was never recognized as having existence under any state of facts short of "reasonable apprehension of danger of life, of limb, or of health," or, as it was sometimes more generally expressed, "reasonable apprehension of bodily hurt:" and these courts adjudged such a state of things a sufficient cause for a decree of separation upon the ground that in a state of personal danger no duties to others can be perfectly performed, for the reason that, under such circumstances, the duty of self-preservation, which is primary, in commencement, and paramount in obligation, is superior to the duties imposed by the marital connexion, and when called into action is inconsistent with those duties, and render their discharge impossible.

Occupying this ground, so supported by reason, drawn from the laws of nature, the ecclesiastical courts rarely, if ever, suffered themselves to be drawn from it, seeming always to apprehend that any departure into a more enlarged field of jurisdiction would result disastrously to the morals and well being of society. Accordingly, in the language of Sir WILLIAM SCOTT, whose name is so conspicuously connected with this branch of jurisprudence, "it was the duty and was consequently always the inclination of the courts to keep the rule extremely strict," and hence, "mere austerity of temper, petulance of manner, rudeness of language, a want of civil attentions even approaching sallies of passion, if they did not threaten bodily harm, were held not to amount to legal cruelty, and that which merely wounded the mental feelings was, in few cases, admitted, when it was not accompanied with bodily injury either actual or menaced." "Still less was it legal cruelty when it wounded not the natural feelings, but those acquired feelings arising from rank; these, however, were not excluded when they were presented as matter of aggravation merely—nor were even words of menace, when they were the

mere language of passion, and not the expression of settled malignity. For none of these called into action the paramount duty of self-preservation to paralyse and overshadow the marital duties." But, on the other hand, mere "words of menace, importing the actual danger of bodily harm, would justify the interposition of the court, as the law ought not to wait until the mischief is actually done." "It will not pause till a tragical event has taken place; words of menace, if accompanied with probability of bodily violence, will be sufficient. It may be enough it they are such as inflict indignity and threaten pain." Then it would be the duty of the court to say that the suffering party is not obliged to continue in co-habitation under such treatment. (*Kirkham vs. Kirkham*, 1 *Hagg. R.* 409.) Such being legal cruelty, as expounded and administered in those tribunals as a cause supervenient for which separation *a mensa et thoro* was decreed, it is manifest, as we have remarked, that that provision of our statute, which we are considering, confers a broader jurisdiction, whether for weal or woe time and experience alone can prove, and as it is not our office either to vindicate or condemn the policy of any law, but simply to listen to its mandates, we shall endeavor to tread only the path which is marked out by duty: and with this view, when we look at these doctrines of the ecclesiastical courts, as we have shown they were expounded and administered, we find they fell confessedly far short of the great object designed, and left, for the "succour of religion and the consolation of friends," many cases without the sphere of their action of great individual hardship and severity. To provide a remedy for some of these was doubtless the object of our legislature in making the provision of law which we are now considering. But although this seems clear, it is difficult to determine the true limits of this additional jurisdiction: and feeling the force of the considerations which induced the ecclesiastical courts to hold the rule of "legal cruelty extremely strict," we shall preserve the same strictness applicable to this enlargement of that jurisdiction.

The description of drunkenness specified is not without its

significancy. It is not alone drunkenneess, nor habitual drunkenness, but it must be an habitual drunkenness extending through a period of time not less than one year, and it may be even doubted whether this would be necessarily within the true meaning of the legislature; for it would be difficult to conceive that it was designed to add to the deplorable consequence of intemperance by making it the sole cause for severing the conjugal tie. A more rational construction would seem to be that it was designed to operate only when it would thereby render the marital state intolerable, as in most cases it does, though not certainly in every case. And so it may be safely assumed of those personal indignities mentioned by the statute, which necessarily include rudeness, vulgarity, unmerited reproach, haughtiness, contempt, contumely, studied neglect, intentional incivility, injury, manifest disdain, abusive language, malignant ridicule, and every other plain manifestation of settled hate, alienation and estrangement, both of word and action, that they must be no less habitual, continuous, and permanent, to create that intolerable condition contemplated by the statute, and for which it provides relief. The spiritual courts, we have seen, granted relief only in those cases where they adjudged that it was impossible that the duties of the conjugal life could be discharged, and they regarded abiding reasonable apprehension of bodily harm to create such impossibility; and this condition of abiding reasonable apprehension would seem necessarily to include the intolerable condition contemplated by our statute, which would seem to be such a condition as human nature, under its influence, could not endure through a long period of time, or, at least, could not endure it without extreme suffering, and which the statute contemplates as the fruit, not only of the description of intemperance specified and of such cruel and barbarous treatment as will endanger life, but also of repeated, numerous, and continued personal indignities. Such intolerable condition not going to the extent of rendering it impossible to discharge the duties of married life as did legal cruelty in contemplation of law, but merely to the extent of rendering it impossible, for reasons which the public

wisdom approves, to require or compel the performance of those duties under such continuous extreme and unmerited suffering.

True it is that a husband may successfully defend a bill for a divorce on the ground of alleged ill conduct, by showing a just provocation in the ill behavior of the wife: but it does not follow from this that the wife cannot succeed unless she be entirely without blame; for the reason which would justify the imputation of blame to the wife, would not justify the ferocity of the husband. (*Holden vs. Holden*, 1 *Hagg. R.* 458.) And while it is likewise true that the wife cannot establish any claim against her husband, founded on her own violation of conjugal duty, (*Coper and wife vs. Clason, &c.*, 3 *John. C. C.* 521,) she cannot be defeated of alimony by one or two exhibitions of justly aroused passion during a space of four or five years, during all of which period, with these one or two exceptions when she was but true to the instincts of her nature, she submitted in meekness, smiling through her tears, to an almost continued flow of insult and unmerited contumely.

So holding the law, we have examined minutely all the testimony in this case, and being altogether satisfied that the facts established bring the complainant's case within the provision of the statute, as we have herein construed it, and that she was therefore entitled to all the relief sought, the decree of the court below dismissing the cross bill and granting the complainant's prayer for a divorce from the bonds of matrimony is, in all things, affirmed. And although in so much of the decree as relates to *alimony*, there is manifest error in its want of conformity to the principles of equity—being incommensurate as to amount with the estate and pecuniary condition of the husband as shown by the testimony, without suitable provision to secure its payment, and in being limited in its duration to the single state of the complainant below, and would have therefore been reformed had she complained; but, as all these errors are in favor of the appellant, the entire decree of the court below must be therefore affirmed.

CASES

DETERMINED AT THE JULY TERM, 1849.

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McGuire et al. vs. Ramsey.

To create a resulting trust, there must be an original agreement creating the trust at the time of the purchase, or when the contract for the purchase takes effect: and no resulting trust can arise in contradiction to the terms of the deed.

Resulting trusts, or trusts created by operation of law, are expressly excluded from the operation of our statute of frauds, and it is manifest that parol evidence is admissible to establish them: such evidence is not to establish a fact inconsistent with the deed, but to engraft a trust upon the legal estate.

Where real estate is purchased and paid for with partnership funds, but conveyed to one of the partners alone, a trust results in favor of the other partner.

Lapse of time is allowed to prevail sometimes in equity, but only in analogy to the plea of the statute of limitations at law: and cannot be allowed in favor of one partner in possession of real estate against the other, for the possession of one is the possession of both.

Where the proof shows that a part of real estate held in partnership had been divided, and the division evidenced by deed between the parties, and no evidence, written or

parol, is offered to show a division of the residue, the presumption is that no division was made of the residue.

A part of partnership property being sold by the guardian of the heir of the partner in possession, the administrator of such heir, after his death, is a proper party—the estate being liable to the co-partner, and the administrator of the heir receiving the money, liable to pay the co-partner his portion of the receipts.

This was a bill filed in the Independence Circuit Court in Chancery, by Allen D. Ramsey, against the administrator *de bonis non* of Charles Kelly, and the administrator and heirs of James DeWitt Clinton Kelly, and determined by the Hon. WM. C. SCOTT, judge.

The bill states that, on the 24th February, 1821, Charles Kelly and William Ramsey were partners in the purchase and sale of goods and real estate, and, with others, purchased a part of the lands upon which the town of Batesville is located: that the interest of said Kelly and Ramsey in such purchase was one-fourth part; that the same was purchased on partnership account and paid for with the funds of the partnership, but that the deed was executed to said Charles Kelly, and the other purchasers, without including his said partner therein: that afterwards a portion of said land was laid off into town lots and a division thereof between Kelly and the other purchasers, and afterwards a division between Kelly and Ramsey of the lots so awarded to Kelly, and deeds of release as to the lots so divided: that Charles Kelly departed this life, leaving James DeWitt Clinton Kelly his only heir at law, and that William Ramsey hath departed this life, leaving the complainant his only heir at law: that, after the death of said Kelly and Ramsey, a division of the residue of the land so purchased, and remaining undivided, was made between the heir of Charles Kelly and the other owners, and a part of the land awarded to James DeWitt Clinton Kelly had been sold by his guardian, and the money paid over to him. The bill makes exhibits of the various deeds of purchase and division alleged, and prays for a decree in favor of complainant against the administrator and heirs of said James DeWitt Clinton Kelly, who hath also departed this life, for one-half of the rents and profits

of the undivided part of said land, for one-half of the purchase money so received by the guardian on said sale of lots, and for a division of the residue of the lots remaining unsold.

The answer admits a partnership between Charles Kelly and William Ramsey, and the purchase of the land, by Kelly, on which the town of Batesville is located; but the defendants allege that they are ignorant that it was paid for in partnership funds, and aver that it was purchased by Kelly in his individual right: they aver that a full and complete settlement was made by Kelly and Ramsey, in their lifetime, of their partnership affairs, and a full division of the partnership property, and that mutual deeds were passed: they do not know that Kelly held the residue of the land, as charged, for himself and Ramsey, and aver that Ramsey had no interest whatever in said residue: admit that the complainant is the heir of Ramsey.

The deposition of John Simpson, a witness on the part of the complainant, stated that he was personally acquainted with Charles Kelly and William Ramsey in their lifetime, and intimately acquainted with their business; that they were in partnership in merchandizing, buying, and selling lands, negroes, and keeping tavern: that purchases and sales of lands, negroes, &c., were generally made in the name of Kelly: that Kelly and Ramsey both told him that they had purchased the undivided fourth part of the tract of land upon which the town of Batesville is now situated: that the purchase was made by Kelly, for himself and Ramsey, and the deed made to Kelly: that the payment was made by Kelly with the funds that belonged to the firm. A short time after the purchase, a part of the tract was laid off into lots, and one-fourth allotted to Kelly. He understood that Kelly and Ramsey divided the lots, but did not divide the residue; both told him they were equally interested in the town lot, share and share alike. A short time before Ramsey's death, Kelly said he wished that Ramsey would come on so that they could finish dividing their property: that Ramsey, soon after, died, and the division was never made.

John Ruddell testified that he was present when Kelly, Hall,

Searcy and Hardin made the purchase of the tract of land: that, shortly after the purchase, a part of it was laid off into town lots: that both Kelly and Ramsey told him they were equally interested in the purchase made by Kelly: that they commenced dividing their property in 1824: he understood that a part of said tract, which had been laid off into town lots, had been divided, and he understood and believes that the residue of said tract had not been divided: they had not completed the division of their partnership property at the death of Ramsey.

Robert Bates testified that he understood, from both Kelly and Ramsey, that they were equally interested in a tract of land on which the town of Batesville was laid off, or the interest that Kelly had purchased.

Joseph H. Egner, a witness on the part of the defendants, testified that he lived at the house of Kelly and Ramsey, and understood, from both of them, that they were in partnership in the purchase of the town tract: in the latter part of 1824, they dissolved and commenced dividing their property; they divided that part of the town tract that had been laid off into lots, and said that they had divided all their town property: they drew writings passing the title to the town lots: after the division heard Ramsey say that they had divided all their property.

The circuit court rendered a decree in favor of the complainant, in accordance with the prayer of the bill; and the defendants appealed to this court.

BEVENS & FAIRCHILD, for the appellants. Parol testimony is not admissible to establish the trust charged in the bill. *Askew vs. Poyas*, 2 *Dessau.* 145. *Henderson vs. Hudson*, 1 *Munf.* 510. *Forster vs. Hale*, 3 *Ves. Jr.* 707. 3 *Dessau.* 152. 1 *Ves. Jr.* 241. 1 *Dessau.* 333. *Id.* 345. 2 *id.* 190. *Brodie vs. St. Paul*, 1 *Ves. Jr.* 234. *Movan vs. Hays*, 1 *John. C. R.* 339.

The purchase of the land by Kelly did not raise a resulting trust for the firm. The bill would not lie against an agent unless supported by written acknowledgments or manifestations of trust. (*Story's Eq. Juris.*, *sec.* 1201, *a.* *Bartlett vs. Bickersgill*, *cited*

in 4 *Burr.* 2255.) A partner, in his partnership dealings, holds only the relation of agent to his co-partners. *Story on Part., sec.* 1, 94, 104.

The evidence is not sufficient to establish a trust—consisting of parol testimony, repetitions of conversations that happened twenty years ago, and being confused, inconsistent and contradictory. How courts regard such testimony, and receive parol testimony to raise a trust, *vide Bollsford vs. Burr*, 2 *John. Ch. R.* 405, 409, 411, 414. 3 *Phil. Ev.* (*Cowen & Hill*) 1489. *Boyd vs. McLean*, 1 *John. Ch.* 586. *Dupree vs. McDonald*, 4 *Dessau.* 209. 4 *ib.* 432. 10 *Ves.* 517. *Foote vs. Calvin*, 3 *John.* 222. *Sugden on Ven. and Pur.* (1 *Amer. Ed. from* 7 *Lond. Ed.*) 616.

It does not appear that payment was made by Ramsey when the trust commenced: and payment after the purchase is completed will not raise a trust. *Bollsford vs. Burr*, 2 *John. Ch. R.* 413. *Sheer vs. Shenk*, 5 *John. Ch. R.* 1.

Fowler, also for the appellants. Parol evidence is not admissible to establish the trust. (*Movan and wife vs. Hays*, 1 *John. Ch. R.* 341. *Sug. on Ven.* 444,) (and the authorities cited by Bevens & Fairchild to this point.) Such evidence is admitted with great caution, (*Boyd vs. McLean and wife*, 1 *John. Ch. R.* 586,) and must be very clear where the trust does not arise on the face of the deed. (*Sug. on Ven.* 444, 446.) If parol evidence is admissible, the testimony in this case is too indefinite and uncertain. The affirmative testimony of Egner cannot be overturned by the negative testimony of the other witnesses. (1 *Stark. Ev.* 516.) A witness, testifying according to his knowledge or belief, must show whence his knowledge was derived or belief induced. *Clason vs. Morris*, 10 *John. Rep.* 531. *Smith's heirs vs. Frost*, 2 *J. J. Marsh.* 426.

The complainant's claim is barred by *lapse of time.* Lapse of time is often applied and operates in equity by analogy to the statute of limitations. (*Baker vs. Biddle*, 1 *Baldw. C. C. R.* 419. *Sug. on Ven.* 271. *Moore vs. Cable*, 1 *John. Ch. R.* 387. *Peyton et al. vs. Stith*, 5 *Pet. R.* 494. *Story on Eq. Pl. sec.* 503. *Lewis et al.*

vs. Marshall et al., 1 *McLean's R.* 17. 6 *Pet. R.* 66 *et seq.*) And equitable rights affected and barred by time in the same manner as legal estates are barred by the statute of limitations. *Sug. on Ven.* 271. *Miller's heirs vs. The McIntires*, 1 *McLean's R.* 87. 2 *Marsh. R.* 145. 1 *John. Ch. R.* 316. 1 *McLean's R.* 160. *Story's Eq. Pl. sec.* 751, 756. *Reeves vs. Dougherty*, 7 *Yerg.* 233. *Coulson vs. Walton et al.*, 9 *Pet. R.* 82. *Cooper's Eq.* 251. *Elemendorff vs. Taylor*, 6 *Cond. R.* 56. 6 *Pet. R.* 66.

Statutes of limitation, or length of time, may be pleaded in bar between parties or their representatives. (*Waggoner vs. Gray's ad.*, 2 *Hen. & Munf. Rep.* 609. *Atwater vs. Fowler*, 1 *Edw. C. R.* 422. *Coretant vs. Feaks*, 2 *id.* 333. 3 *Pet. R.* 52.

Independent of statutes of limitation, and in cases where those will not apply by analogy or otherwise, as in cases of trust, &c., the principle of the lapse of time is applied by a court of equity, *under its own rules*, where a party has slept upon his own rights. (*Ware's heirs vs. Brush*, 1 *McLean's R.* 538. *Thomas vs. Harbie's heirs*, 6 *Cond. R.* 416. *S. C.* 1 *McLean's R.* 164. *Story's Eq. Pl. sec.* 756, 757, 813. 6 *Pet. R.* 66.) Even in cases of express trust if the parties have long ceased to act upon or recognize them, equity will not interfere to enforce them, (*Story's Eq. Pl. sec.* 756, 813. *Prevost vs. Gratz*, 5 *Cond. R.* 154. *Cooper's Eq.* 254. 3 *John. Ch. Rep.* 135. *Beckford, &c. vs. Wade*, 17 *Ves. Jr.* 95, 99,) and after a long possession of lands in severalty, will presume a deed of partition. 1 *McLean's Rep.* 489.

There is no resulting trust in this case: it therefore comes within the statute of frauds, and the whole of the parol testimony is inadmissible. "An express trust, although by parol only, will prevent the resulting trust, and require other than parol evidence to establish it." *Sug. on Ven.* 446. *Lady Bellasis vs. Compton et al.*, 2 *Vern. R.* 294.

The decree against McGuire, as administrator, for one half of the money received for the lands sold by the guardian of his intestate, and for one-half of the rents, &c., without any allegation in the bill, admission in the answer or any evidence that either the administrator or his intestate received the money, is

clearly erroneous. The money may still remain in the hands of the guardian. The *allegata* and *probata* must correspond; and no decree can stand unless based upon an allegation and sustained by proof. *Barraque et al. vs. Manuel*, 7 *Ark. R.* 519. *Boone vs. Chiles*, 10 *Pet. R.* 208. *Piatt vs. Vattier et al.*, 9 *Pet. Rep.* 415. *Scott vs. Evans*, 1 *McLean's R.* 489. *Cowan vs. Price*, 1 *Bibb's R.* 175. *Bibb vs. Prather et al.*, *ib.* 316.

BYERS & PATTERSON, contra. The deed to Kelly created a resulting trust,—the property having been purchased with partnership funds for the joint benefit of Kelly and Ramsey, and the deed made to Kelly alone.

A trust resulting by operation of law is not within the statute of frauds, and may be established by parol evidence. 2 *Story's Eq. secs.* 1206, 1207, *and authorities there cited.*

A purchase made for partnership purposes and on partnership account, is deemed partnership property, no matter to whom the deed is made. (2 *Story's Eq. sec.* 1207. *Sug. on Ven.* 434, 435, 438, 440, 441, 442. 4 *Kent's Com.* (5 *Ed.*) 305, 306, *and note.*) Such a resulting trust is not within the statute of frauds, and may be establishsd by parol proof. (*Boyd vs. McLean*, 1 *John. Ch. R.* 582. *Snelling vs. Utterback*, 1 *Bibb*, 609. *Bollsford vs. Burr*, 2 *John. Ch. R.* 409. *Foot vs. Calvin*, 3 *John. R.* 222. *Jackson vs. Sternbergh*, 1 *John. Cas.* 153. *Jackson vs. Matsdorf*, 11 *John. R.* 91. *Jackson vs. Mills*, 13 *John. R.* 463. *Jackson vs. Morse*, 16 *John. Rep.* 197. *McGuire vs. McGowan*, 4 *Dessau. Eq. R.* 486.

If one partner purchase lands with partnership funds a resulting trust will arise which may be established by parol proof. 2 *Wash. Cir. Ct. Rep.* 441. See, also, 4 *Kent's Com.* 305, 307. 2 *John. Ch. R.* 252. 1 *Lomax Dig.* 200. 2 *Fairf.* 1. 1 *Wash. Rep.* 14. 6 *Har. & John.* 435. 4 *John. Ch. R.* 167. 1 *Porter's Ala. R.* 318.

The land in controversy not having been divided, there was no adverse possession. Kelly's possession was the possession of both, and the statute of limitations cannot begin to run. (1 *Atk.* 494.) When the nature of property does not admit of ad-

verse possession, the statute does not run. (*Ib.*) The defendant, therefore, cannot take advantage of the lapse of time.

If the guardian of Kelly sold a part of the lots, the receipt of the purchase money, by his guardian, was, so far as Ramsey is concerned, a receipt by Kelly, and his estate in the hands of his administrator is liable for it.

JOHNSON, C. J. The object of this bill was to establish a resulting trust in one-half of certain lands therein described.

It is contended, on the part of the appellants, that the right of the appellee, in case it ever existed, is now barred by lapse of time, and that, if not so barred, it cannot be established by parol evidence. The 12th and 13th sections of the statute of frauds declare that "all declarations, or creations, of trust, or confidences, of any lands or tenements, shall be manifested and proven by some writing signed by the party, who is or shall be by law enabled to declare such trusts, or by his last will in writing, or else they shall be void; and all grants and assignments of any trust or confidences shall be in writing, signed by the party granting or assigning the same, or by his or her last will in writing, or else they shall be void;" and that "where any conveyance shall be made, of any lands or tenements, by which a trust or confidence may arise or result by implication of law, such trust or confidence shall not be affected by any thing contained in this act." (*Digest, chap.* 73.) In the case of *Hoxie vs. Carr et al.*, 1 *Sumner*, Judge STORY, when commenting upon the statute of frauds of Rhode Island, said: "Then again it is said, that the statute of conveyances and the statute of frauds of Rhode Island contain no exception in favor of resulting trusts, (as the statute of frauds in England and the corresponding statute of Massachusetts do,) and therefore such a trust cannot be varied by operation of law in favor of the partnership. But it does not appear to me that the statutes of Rhode Island vary the common rule, for they respect trusts created by the acts of the parties, and not trusts created by operation of law. My impression is that the exception in the statute of frauds in England and Mas-

sachusetts, as to resulting trusts, has been deemed merely affirmative of the general law, and not as creating a saving of resulting trusts, which would otherwise have been cut off unless in writing. But it is the less necessary to decide this point absolutely on this naked ground: for if the property were purchased with partnership funds, and for partnership purposes, and thus it became an executed contract between the parties, it would be a fraud upon the partnership afterwards to appropriate it to the private use of either of the parties, without the assent of the others. And purchasers claiming under him with notice would be in the same predicament as the partners so misapplying the funds. No one will doubt that a partner cannot shelter himself in a court of equity from responsibility for a fraud under cover of a statute to prevent fraud. That would be (as has been often said) to convert the very statute into an instrument of fraud." It is laid down, as a general doctrine, in the books, that, to create a resulting trust, there must be an original agreement creating the trust at the time of the purchase, or at least at the time when the contract for the purchase takes effect, and is executed by an appropriation of it as partnership property. And it is also recognized as a general rule that a resulting trust cannot arise in contradiction to the terms of the deed. The question to be settled here is, whether the trust asserted in the present case is liable to any exception on either of these grounds. It most unquestionably does not contradict any of the terms used in the deed, nor has it a commencement posterior to the partnership purchase and appropriation.

The next question is, whether there is sufficient evidence to establish the fact that the property in controversy is property belonging to the partnership and purchased with partnership funds. The remark of Judge Story, in regard to the saving clause contained in the statute of Rhode Island, is equally applicable to our own. If any doubt could exist upon the question whether resulting trusts were embraced within the scope and operation of our statute in case there were no express exception, that matter is placed in a clear light by the words of the act

itself. Resulting trusts, or trusts created by operation of law, being expressly excluded from the operation of the statute, it is manifest that parol evidence is admissible to establish them. The evidence, in such cases, is not introduced to establish any fact inconsistent with the legal operation of the words of the deed, but merely to engraft a trust upon the legal estate. The entire testimony taken in the cause concurs to establish the fact that one undivided fourth-part of the town tract, though nominally conveyed to Kelly alone, was in reality purchased with the joint funds of Kelly and Ramsey. It is apparent, therefore, that a trust resulted originally in favor of Ramsey for one-half of that portion conveyed to Kelly, and the only question now remaining is, whether Ramsey has been shown to have done any act which could legally deprive him or his heir of the benefit of it.

The first position is, that, even admitting that the trust once existed, it is now barred by the lapse of time. It is conceded that lapse of time is sometimes allowed to prevail in equity, but whenever such plea is allowed it is only in analogy to the plea of the statute of limitations at law. It being considered in the nature of the plea of the statute of limitations, can only be adopted to bar a right where there has been an adverse possession, and consequently where the party asserting his right is guilty of negligence. The charge of laches or neglect cannot be properly made against the complainant, nor his deceased ancestor, as neither Charles nor James DeWitt Clinton Kelly can be said to have held the land in dispute adversely to either. The purchase being in partnership and with joint funds, share and share alike, the possession of one was the possession of the other, and consequently neither could set up the lapse of time in prejudice of the other's rights.

The next ground taken by the appellants is, that, previous to the death of Ramsey, he and Kelly dissolved partnership, and actually made partition of all their partnership effects. If this proposition be true, and sustained by the evidence, it must be conceded that the appellee had no right, and is, consequently,

entitled to no relief. To determine this question correctly, recourse must necessarily be had to the testimony. The appellees introduced three witnesses, each of whom testified as to the existence originally of the trust estate. They derived their knowledge of the fact from both parties to the transaction, and their testimony is conclusive upon that point. Their testimony, in regard to the continuance of the estate down to the period of the death of the original parties, is as strong as it could possibly be under all the circumstances of the case. To show that the estate still continued necessarily involved a negative, it depending upon the question whether a division had been effected or not, and it would be difficult to conceive of a case where a nearer approach could be made to the entire establishment of a negative. Indeed we think that the testimony of the appellee's witnesses, when taken in connection with the strong extrinsic evidence which pervades the whole, leaves no doubt that the property now in controversy remained *in statu quo* and undivided at the period of Kelly's death. The fact that the property was purchased originally with partnership funds, is denied, it is true, by the answer, but this answer is completely overturned, not only by the appellee's witnesses, but by the united testimony of both parties. Egner, the witness introduced by the appellants, is equally clear upon this point. There is no difference of opinion amongst them in regard to the division of that portion of the tract which had been laid off into town lots by the original proprietors, and the appellants' own witness testifies that, as to that part, they executed deeds to each other. He stated that, after they had divided the one-fourth of the lots so laid off, Ramsey told him that they had divided all their town property, and that subsequently he also told him that they had effected a division of all their property. The whole current of the testimony offered by the appellee is of an opposite character and tendency upon the subject of a full and final division. This case presents one very remarkable feature upon the supposition that an entire division had actually been made previous to the death of Ramsey. It has not been made to appear by any exhibit in writing, nor

has it been testified by any witness, what disposition was ever made of the residue of the land after the division of the town lots which were laid off by the original proprietors. That residue is the subject matter of this suit. The utter absence of proof upon this point raises a most violent presumption against the idea that any division was ever made between the parties. The circumstance that in the division of their other real estate they were careful to preserve written evidence of their respective rights is strong, if not conclusive, in connection with other pregnant circumstances that the residue of the town tract remained undivided at the period of their deaths.

The answer indirectly admits that a partnership once existed between the parties, but insists that all the partnership property was divided before the death of Ramsey. This answer is clearly overturned by the testimony. It is not only contradicted by one witness and strong corroborating circumstances, but it stands opposed by the concurring testimony of three witnesses, and that testimony corroborated and supported by the strongest possible circumstantial evidence. We are clear, therefore, that the trust asserted in the bill not only once had an existence, but that it still exists, and that the complainant is entitled to the full benefit of it.

It is also objected, against the decree, that it is rendered against the administrator of James DeWitt Clinton Kelly for one-half of the purchase money for which the lots had been sold by his guardian. We cannot perceive any error in this respect. The estate is liable to the complainant for the amount, and the administrator, having the custody of it, is the proper party to pay it.

We are, therefore, of opinion that the decree of the circuit court of Independence county herein rendered ought to be, in all things, affirmed. The decree is, in all things, affirmed with costs.

PELHAM AS AD. VS. FLOYD AS AD. ET AL.

If there be an irregularity in the taking of testimony, the party must except to it at the time it is offered to be read, or he will be considered as having waived the objection, and cannot make it in this court.

Where facts are charged in the bill, and admitted, or, charged, and not denied, but other facts set up to avoid the consequences of them, it is not necessary that the facts charged be proven.

An objection to the bill, founded upon a want of equity and jurisdiction in the court, will not be considered, when the case is brought into this court a second time for revision—the first adjudication having admitted the equity and jurisdiction of the court.

Where the testimony shows clearly that one party sold, and the other understood that he was purchasing, a pre-emption right, the court will decree a perpetual injunction against a judgment obtained for the purchase money if the party selling was not entitled to a pre-emption.

Appeal from Johnson Circuit Court in Chancery.

This case was before this court at the January term, 1842. (See 4 *Ark. Rep.* 292.) Upon its return to the circuit court, it was suggested that Cravens and Wilson had resigned the administration of the estate of Joseph Cravens, and that Wm. W. Floyd had been appointed administrator *de bonis non* of said estate; thereupon, Floyd, as administrator, &c., appeared, and the cause progressed.

The testimony of Alpheus Erwin, James McGee, William McGee, and James A. Erwin, was taken and read at the hearing without objection. They all concurred in proving that they were present at the sale: that the administrator first offered the improvement for sale, and there were no bidders: that, after a private conversation between the administrator and the crier at the sale, he offered to sell a pre-emption, affirming that he was entitled to a pre-emption, and would prove it up and assign it, or make it good.

The court decreed a perpetual injunction, and the defendant

applied to one of the judges of this court, and obtained an order granting him an appeal from the decree of the circuit court.

CUMMINS argued the case in this court for the appellant, but his brief is not now on file.

RINGO & TRAPNALL, for the appellees, contended that, as no objection was taken to the reading of the testimony in the court below, none could be taken on the appeal. *Edwards vs. Morris et al.*, 2 *Marsh.* 66. *Brand vs. Webb's heirs, ib.* 576. *Field vs. Simco*, 2 *Eng.* 269. *Johnson vs. Ashley, ib.* 470. *Peel & Pelham vs. Ringgold & Williams*, 2 *Eng.* 546.

As to the equity of the bill, the jurisdiction of the court, and the regularity of the proceedings prior to the former decree, the court and parties are concluded by the previous adjudication. *Rutherford, use, &c. vs. Lafferty*, 2 *Eng. R.* 402. *Walker et al. vs. Walker, ib.* 544. *Ex parte Sibbald*, 12 *Pet.* 488, 495. *Skiller's ex. vs. Mays' exrs.* 2 *Cond. R.* 366.

The fact that neither Ryan nor his administrator, had a pre-emption right, is not denied by the answer; and the only question put in issue is, whether the administrator offered a pre-emption for sale, and this is clearly proved by the testimony.

JOHNSON, C. J. The main question involved in this case was decided by this court when it was here before. (See 4 *Ark. Rep.* 292.) It was then held that if the administrator of Ryan sold, and Cravens understood that he was purchasing, a pre-emption right, and that fact had been substantiated by the testimony, Cravens would have been entitled to relief. But if, on the contrary, the improvement alone was sold, he purchased at his peril, and must comply with his contract. The legal question having been settled, it only remains to be determined whether the fact, upon which it is made to depend, has been established by the proof in the case.

The objection to the testimony for irregularity comes too late,

as, if such irregularity in fact existed, it was virtually waived in the court below by the failure of the appellant to take his exception at the time it was offered. It is contended, by the appellant's counsel, that there is no proof which shows that the note sought to be canceled was executed in consideration of the improvement, or that no right of pre-emption in fact existed. These facts were expressly charged in the bill. The defendant below admitted the first and did not deny the last, but endeavored to escape the consequences by setting up and alleging that he did not pretend to sell any thing more than the improvement, and denied that he gave any assurances whatever of a pre-emption right. It was wholly unnecessary, therefore, that the testimony should have established that fact, as it was fully admitted by the answer. The objection to the bill, founded upon a want of equity and jurisdiction in the court, also came too late, as all such questions are thrown out of this case by the former adjudication of this court.

The only question, therefore, that remains for our determination is, whether the administrator of Ryan sold, and Cravens understood that he was purchasing, a pre-emption right. Upon this point the proof is full and conclusive. The testimony adduced upon the first trial, in the circuit court, we consider greatly in favor of the complainant; but when that which was introduced upon the last is taken in connection with it, it is utterly impossible to doubt but that the administrator of Ryan sold, and that Cravens understood that he was purchasing, a pre-emption right. We are, therefore, of opinion that the decree of the Johnson circuit court ought, in all things, to be affirmed. The decree is affirmed.

GARVIN ET AL. VS. SQUIRES.

A defendant at law, entitled to a set-off, has no right to go into a court of equity for relief after he has made his defence at law and failed: otherwise, if he is precluded from making his defence at law.

The doctrine of the case of *Hempstead & Conway vs. Watkins ad.*, 1 *Eng.* 317, on this point, approved: and the opinion in *Menifee's exr. vs. Ball et al.*, 2 *Eng.* 520, recognized as applicable to cases where the party has waived or lost his right to go to the chancellor for relief.

Appearance by the garnishee, and filing answers to the plaintiff's interrogatories, is clearly an election to defend at law, and he is thereby precluded from a hearing in equity, unless he has been prevented from a fair defence at law by fraud, accident, or the act of the opposite party, unmixed with negligence on his part.

The fact that the justice of the peace, before whom the suit was brought and tried, refused to grant the defendant a new trial or allow him an appeal, is not sufficient to authorize a court of equity to grant him relief, as a court of law, in which he had elected to make his defence, could have afforded him ample remedy.

Appeal from Benton Circuit Court in Chancery.

This was a bill for injunction filed in the circuit court of Benton county, and determined at the May term, 1848. The facts of the case sufficiently appear in the opinion of the court.

W. WALKER, for the appellants, contended that the complainant, having a defence at law, was not entitled to relief in equity; (*Bentley's ex. vs. Dillard*, 1 *Eng.*—;) that the refusal of the justice to grant him an appeal, did not entitle him to relief in equity, as he might have procured a mandamus, or rule and attachment, to compel the justice to allow the appeal.

SCOTT, J. Squires, the complainant below, filed his bill in equity for relief against a judgment rendered against him by a justice of the peace, for $61 31, at the suit of Spring, assignee of Smith, vs. Garvin, defendant, and complainant as garnishee, and prayed that, forasmuch as Garvin was wholly insolvent, and that

the justice had first refused to set aside the verdict and judgment, and then refused to grant him an appeal, though he had regularly applied in apt time for each, that the chancellor would interpose and set off against this judgment against him an unsatisfied judgment for $150, which he (the complainant below) had, in his own name and right, against the said Garvin, before and at the time of the rendition of the judgment against him, as garnishee, for the supposed debt of $61 31, due from complainant below to Garvin, and to grant him further relief by injunction. To this bill a demurrer was interposed, upon the overruling of which, and default of further answer, all the relief sought was decreed.

As the relief sought, so far as the set-off was concerned, might have been afforded by the court of law, and, unless precluded by making defence to the action at law, ought not to be denied in chancery under the doctrine, which we approve, of the case of *Hempstead & Conway vs. Watkins, ad.*, 1 *Eng.* 317, notwithstanding what is said to the contrary in the latter part of the opinion of the court in the case of *Menifee's exrs. vs. Ball et al.*, 2 *Eng.* 520, which we recognize as applicable mainly, if not alone, to cases where a party may have, in the manner here indicated, received or lost his right to go to the chancellor for relief, the main question presented in the case at bar is, whether or not, under the state of facts presented by the record, the complainant below was precluded from a hearing in equity.

It is distinctly shown, by the record, that, upon being summoned as a garnishee, he "appeared and filed his answer to the interrogatories filed by the plaintiff, (in the suit before the justice,) denying, under oath, that he had any effects in his hands or possession that belonged to the defendant, Garvin, or that he was, in any manner, indebted to him." To this answer the plaintiff, in that suit, filed of record his denial of the truth of the answer:—that process was then issued to bring in a jury to try the issue of fact thus formed, on a future day, to which the case was adjourned: that, on that day, the justice adjourned the case to a future day, and a second time issued process for a jury. On

this last named day a jury came and so did the plaintiff in that suit, but the defendant made default. The jury were regularly sworn, evidence was produced before them, and they found their verdict on which the judgment was rendered, against which relief is sought in equity.

These facts clearly showing, as they do, a plain election by the complainant below to defend himself at law upon the merits of his case, the law holds him to that election, and forever precludes him from a hearing of that case in equity, unless he can show that he was prevented from bringing his defence fairly before that court by fraud, or accident, or the act of the opposite party, unmixed with negligence on his part. (9 *Wheaton*, 534. 1 *Ark.* 192. 1 *Eng.* 85. 6 *John. C. Rep.* 90. 2 *John.* 228, 553. 1 *John.* 49, 91, 320, 432, 465. 6 *Rand.* 1, 125, 580. 2 *Tucker's Lec.* 468.) Nor can it avail him any thing that the justice of the peace refused him both a new trial and an appeal. The law courts, in which he had elected to present his defence, afforded the most full, ample, and complete remedy for any failure on the part of the justice properly to administer the law.

The decree on the chancery side of the circuit court of Benton county must, therefore, be reversed, and the cause remanded, with directions to that court to dissolve the injunction and dismiss the bill for want of equity.

SNEED ET AL. VS. TOWN.

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Where no replication has been filed to the answer, the cause will be heard on the bill, answer, and exhibits, exclusive of depositions; and the answer will be taken as true, whether the matter contained in it be responsive to the bill or not; or whether negative or affirmative.

But where a cause is set down for hearing, at the next term, "on the issues formed," and at that term "submitted on bill, answer, replication, exhibits and depositions,"

this court will presume that a replication was filed, though the record shows none, and that its failure to appear was a clerical omission.

Where the parties submit the matter in dispute to arbitration, after suit instituted, and the award is that the defendant shall pay a certain sum and the costs of suit, and he performs the award by giving his note, for the debt, with security, but fails to pay the costs, and the plaintiff proceeds to judgment for the whole debt, this is such a surprise as equity will relieve against.

In such case, the defendant is not guilty of negligence in failing to appear and plead to the action, because he had no reason to suppose that the plaintiff would take judgment against him for more than the costs.

Where the record states that the defendant appeared, by attorney, and pleaded, without naming the attorney; the plainsiff takes judgment by default regardless of the plea; the defendant charges in his bill, on oath, that he authorized no attorney to appear; the answer does not affirm that one did appear, and it was against the interest of the defendant to appear, the court will presume that there was no appearance, or if so, by an unauthorized attorney.

The complainant in equity must pay or bring into court all that he is in equity bound to pay, before he can obtain the relief sought, or the costs of the proceedings in equity to the time of such payment will be decreed against him.

Appeal from Washington Circuit Court in Chancery.

This was a bill for injunction, brought by Charles F. Town, against Sebron G. Sneed and Haddock & Hazeltine, and determined before the Hon. WILLIAM W. FLOYD, judge.

Upon the hearing of the cause, the facts of which sufficiently appear in the opinion of this court, the circuit court rendered a decree perpetuating the injunction, from which the defendants appealed.

RINGO & TRAPNALL, for the appellants. As no replication had been filed to the answer, the depositions were not before the court, and the answer should have been taken as true. *Digest, chap.* 28, *secs.* 46, 58. *Pierce vs. West's ex., Pet. C. C. Rep.* 351. *Duponti vs. Mussey*, 4 *Wash. C. C. R.* 128. *Piatt vs. Vattier et al.*, 9 *Pet.* 405. *Mills vs. Pittman*, 1 *Paige*, 490. *Pickett vs. Chilton*, 5 *Munf.* 467.

As the defendant did not appear and plead the alleged award in bar of the further maintainance of the suit at law, nor show sufficient cause for his failure, the judgment at law is conclusive

against him. 1 *Story's Eq.* 684, *a*, *b*, *c*. *Graves et al. vs. The Boston Marine Ins. Co.*, 2 *Cranch*, 419. 1 *Cond. Rep.* 443. *Stark vs. Thompson*, 3 *Monroe*, 299.

Chancery had no jurisdiction of the defence arising from the arbitration without proof of fraud or mistake on the part of Haddock & Hazeltine. *Bentley's ex. vs. Dillard*, 1 *Eng. Rep.* 79. *Menefee's ad. vs. Ball et al.*, 2 *Eng.* 520. *Cummins vs. Bentley*, 5 *Ark. Rep.* 9. *Watson vs. Palmer*, *ib.* 501. *Dugan vs. Cureton*, 1 *Ark. R.* 31.

As the complainant had never paid either the amount of the award or judgment, the injunction at all events ought not to have been for more than the excess.

FOWLER, contra, contended that, as the entire equity of the bill was admitted, and the complainant had paid the costs of the suit at law, the decree for perpetual injunction was clearly right.

SCOTT, J. The question of jurisdiction will be first considered, and as this must be based upon surprise or fraud, if sustainable at all in this case, we must necessarily look throughout the whole record to ascertain if such facts and circumstances exist as to constitute a foundation for the interposition of the chancellor, with authority derived from either of these sources. But, even at the threshold of this inquiry, we are met with a technical objection, which, if well taken, must not only limit its range to the bill and answer, but will also circumscribe within that scope the appellee's claim for relief, in case the question of jurisdiction shall be found in his favor. That objection is, that, inasmuch as the record presents, upon its face, no replication to the answers, the law confines the hearing to the bill, answers, and exhibits, and thus the depositions will be excluded. And such is undoubtedly the law, of which our statute, referred to by the appellants, is but a declaration or affirmance: and in such case the answer must be taken as true in all things, whether the matter contained in it be responsive or not, or whether it be negative or affirmative, for the reason, not only that the complainant in

the bill thereby intimates his admission of all these facts, but also that by this omission he prevents the respondents from proving such of them as he would otherwise have to establish by evidence, by paralysing his authority to sue out a commission to examine witnesses, which neither party can do until after an issue shall have been formed by the pleadings, unless for aged and infirm witnesses, and in other cases, which are within the range of the exception to this rule. But can this objection, at this late hour, and in this court, be urged successfully? The record shows that, at the June term, 1847, both parties being then present in the court below the case was set down for hearing at the succeeding term upon the issues thereto formed, and that leave was given to both sides to sue out commissions and take depositions, and that, at the May term, 1848, the cause was heard upon the bill, answers, replications, exhibits, and depositions. These entries seem to repel the supposition that no replications had ever been filed, and places the case fully within the range of those presumptions of the regularity in the proceedings of the court below which the law authorizes this court to indulge, and seems fully sufficient to authorize us in this case to indulge this presumption to the extent of supplying by intendment the record entry of the filing of the replications upon the hypothesis that its failure to appear there was in consequence of a mere clerical omission.

Then, looking at the whole record, it appears that the next day after the issuance and service of the summons, both of which were on the same day, the parties referred to arbitration the subject matter of the suit; that the payment of $70 was awarded, but the exact performance of the award was not insisted upon: on the contrary, a substantial, but different, performance was that day accepted in a note for that sum, at six months, secured by a lien on property, and, both parties seeming to be satisfied, it was agreed that the suit should be dimissed at the cost of the defendant in that suit, but this was not to be done "until all the costs that had accrued therein, up to the date of the settlement, should be by the defendant paid;" but no time for the payment of the

cost was agreed upon, nor in any way indicated, further than that the suit should not be dismissed until this was first done: that the note, thus given and secured, was delivered to Sneed, the acknowledged authorized agent of Haddock and Hazeltine in the premises, and remained in his hands at the filing of the bill in equity, it having not then matured, nor does it appear that it was ever offered to be surrendered up to Town, or to the court to be canceled; and that, shortly after this settlement, Town left the State for the east, and did not return until after the judgment at law had been rendered against him.

Under this state of facts, it would seem that nothing was obligatory upon Town, connected with the suit at law, so far as equity and good conscience were concerned, other than the payment of the costs as agreed upon, and no circumstance whatever appears from which he could have ever suspected that the plaintiff in that suit would ever progress with it for any other purpose than to coerce the payment of these costs. True, as no time for this payment was specified in the agreement, it might perhaps have been presumed that this should be done at or before the calling of the cause for trial at the succeeding term of the court; but, upon his failure to do so, there was no ground for him to suspect that the plaintiffs would do more than to take a judgment against him by default, and immediately remit all but the costs, for beyond this they could not go in good conscience, and he was not authorized to presume that they would do an iniquitous act, and, as he could not have had the slightest use for an attorney at the succeeding term of the court, it is inconceivable that he should have employed one, and inevitable that he must have been most completely surprised on his return home, a few months afterwards, to find his appearance of record, by a nameless attorney, and a judgment against him, for a hundred dollars, on account of a demand for which full satisfaction had been long before accepted in a note for $70, at six months, secured by a lien on property, which had not been returned or offered to be surrendered, to the court, for cancellation. We are aware that that surprise at law, against the consequences of

which equity will relieve, must arise from facts and circumstances which must not only be true, but must have been beyond the control of the complainant. But this rule does not extend to a case of mere possibility of control in a very remote contingency altogether improbable, as that would exclude numerous cases where relief had been granted by the most respectable courts in the Union, adhering to the rule but evidently relaxing it in its application to particular cases of hardship, but in truth not departing from the principle upon which the rule is founded. And we cite some of these cases, not to give them our special approval, for some of them seem to have gone beyond prudent bounds, but to indicate, in some sort, the character of that surprise at law against the consequences of which equity will relieve. The cases in 3 *Call.* 536, 1 *Mad.* 64, 4 *Mun.* 69, 2 *P. Williams*, 426, are cases where, after a trial at law, a receipt, or other evidence, has been found. The case in 2 *Hen. & Mun.* 10, is where the party defendant was absent from the State, and his counsel was sick, at the time of the trial at law: 4 *Hen. & Mun.* 427, where the defendant mistook the court to which he was sued: 4 *Mun.* 110, where he mistook the time of trial, with other circumstances of hardship: 4 *Mun.* 58, where an executor was mislead by his counsel in the management of his cause: 4 *Hen. & Mun.* 453, 6 *Mun.* 418, where the plaintiff at law assured the plaintiff in equity, who was one of the defendants at law, that he would not look to him for his money. And there are in the Virginia reports a number of other cases of like character, some of which go beyond any that we have cited; but in all of them it was required of the complainant to present himself under circumstances showing clearly that the circumstances which were the foundation of the surprise of which he complained, were unmixed with negligence on his part. But, in all cases of this character, the general rule seems to be that the relief granted must be at the cost of the party who seeks it; and this rule seems reasonable, not as being founded in any fault in the party seeking the relief, but as contemplating no particular fault in the other side. Hence, where there might be circumstances to throw

a strong presumption of fraud on the plaintiff at law, this rule as to costs would not seem to apply.

In the case before us, when we leave out of view Town's supposed appearance, and plea of *nil debet* in short upon the record by consent, by and of a nameless attorney, whose personal identity seems equally unknown to either side, he seems to present himself in equity, so far at least as the judgment at law exceeds the costs of that suit, in an attitude of surprise at law, unmixed with negligence on his part. But, if that entry records the truth, and he did indeed appear in court, and, in the first place after seeing the fraudulent designs of the other side, fail to plead his defence *puis darrien continuance;* and in case he had not discovered these fraudulent designs until too late for this, then failed to move for a new trial, he would be justly chargeable with negligence, and the chancellor's ears would be closed to his wrongs, unless, moved by an unmitigated abhorrence of fraud, as much to seek out and punish this in the perpetrator, as to aid one who has slept on his rights, he might for this end entertain the cause to examine any allegation of fraud in obtaining the judgment, even one that might question the verity of a part of the record itself, if founded upon other inconsistent entries and strong corroborating facts and circumstances, and, if found to be sustained, grant relief against the judgment. In this case, the allegation of fraud, in obtaining the judgment, rests mainly upon the appearing in court of an unknown attorney; the inconsistency of the action of the court with his recorded doings; the absence of the party he professed to represent, and the iniquitous end achieved by the plantiff in that suit, not only directly, by obtaining a judgment for a demand that he had previously received a satisfaction for, but also in closing the door to a hearing in equity by means of the recorded doings of an unknown attorney, whose name has not been ascertained.

To the direct assertion and charge of falsehood against the record entry of the appellee's appearance and plea of *nil debet*, and to the interrogatory to Sneed to state particularly who put in this plea for him, and who on his part consented that it should

be entered in short on the record, Sneed cautiously answers that he "admits this plea was put in by some attorney professing to act for (the appellee) Town, but that he knows not who, nor whether Town employed him to do so or not," but fails to deny positively the charge of falsehood made against this record entry. And Sneed, it appears from the record, was the leading counsel in fact, but whether he was present in court when the judgment at law was obtained does not appear. The inconsistency of the record with itself appears in the judgment entry which recites: "And now on this day the parties came by their respective attorneys, and the said defendant plead his plea of *nil debet*, to which plea the plaintiff by attorney joined issue, all of which, by consent of parties, is taken in short upon the record: thereupon came a jury, to wit: &c., who, being duly sworn to enquire and assess the damages, &c., returned into court their verdict, to wit: we, the jury, do assess the plaintiff's damages at $100." And thus it appears that the issue formed upon the plea of *nil debet*, was left untouched, and precisely that proceeding occurred as would have occurred had the defendant made default instead of appearing by this unnamed attorney and pleading the plea of *nil debet*. Now, if we were looking at this record upon a writ of error, the judgment could only be sustained, if at all, upon the presumption that the plea of *nil debet* had been withdrawn by the leave of the court and a default suffered, but that the entry of the withdrawal and default had been omitted by the clerk, and so, in an appeal in chancery, upon a question of jurisdiction, if his defence was one that courts of law and equity could concurrently entertain, such presumed withdrawal and default might place him in an attitude to be relieved in equity, as he would not thus be shown to have made his election to defend himself in the court at law: in other words, his appearance and plea to the merits and subsequent withdrawal before trial, and default by leave of the court, might perhaps be held for nought.

And, in the case before us, to sustain the verity of the record, and to harmonize it with itself, this presumption of withdrawal by leave and default must necessarily be indulged, but then the

result would not be the same upon the question of jurisdiction, as the defence which might have been made here by the plea of *puis darrien continuance* was not concurrently cognizable in law and equity, but exclusively in a court of law, and to have failed to offer it, if the party was really in court, was the height of negligence: then here is another circumstance elicited bearing upon the question of fraud, if the origin of it can be laid at the door of the appellants; and upon the question of surprise, if at the door of the appellee.

Now, taking it for granted that the record entry, the truth of which has been questioned, has not been successfully assailed on the hypothesis assumed for its harmony with the balance of the entry, we have still to determine whether, although it may have been in form and appearance true insomuch as to vindicate the record from having been fraudulently practiced upon and the appellants from fraud in its production, it may not still have been false to the appellee, so as to save him from the imputation of that negligence which would close the door of equity upon him when he would seek relief there upon the ground of surprise at law. Against him, on this point, is the naked record entry, asseverated and charged by him to be false, and this not positively denied by the answer; in his favor, that the appearance, pleading, and withdrawal from the court of law were altogether against his own interest and in favor alone of the other party, who thereby was not only facilitated in obtaining an iniquitous judgment, but enabled to obtain evidence of negligence to be urged against him when he might go to the chancellor for relief against this iniquitous judgment. The utter improbability that he would employ a lawyer, when he had no use for one, unless to confess a judgment for cost and save the plaintiff from the trouble of taking a judgment by default and then enter a remittiter for all but the costs; the fact that this attorney is not named upon the record, and could not be pointed out by the leading counsel for the plaintiffs, so as to give Town a remedy over against him, and thus place him within the reason of the law for holding a party bound for the acts of an attorney, for if

he cannot be relieved in equity against this judgment, so manifestly iniquitous, because an incognito attorney has assumed to represent him, he is to be sacrificed for being within the terms of the rule but without the reason. Then, looking at the point we are now considering in the light of these considerations, and of all the other facts developed by the bill, answer, replication, exhibits and depositions, we cannot believe that the unnamed attorney, whom the record represents as having appeared and filed the plea of *nil debet* for Town, ever did so by his procurement or within his knowledge, and we think he cannot therefore be justly chargeable with that negligence which would exclude him from relief in equity, when basing his claim for relief upon surprise at law, under the circumstances he has shown. The true solution of the appearance of the attorney in the court of law (as this solution, as the name of that attorney cannot be discovered, alike acquits the rcord from foul practice, the appellants from fraud in this particular, and appellee from negligence so far as the main question is concerned that we have been considering) may possibly be found in what has been sometimes known to have occurred in the courts (though very rarely to the honor of the profession) that of attorneys meddling in causes in which they have not been employed or invited, without the knowledge of the party whom they assume to represent, either direct or indirect, and without any foundation for believing that their professional services would be acceptable.

As to the equities between the parties, the case is clear. So much of the judgment at law as was beyond the cost, was, beyond all question, against equity and good conscience, and as the plaintiff at law held on to the note, at six months, and made no offer to surrender it, for cancellation, to the court of law, and gave the defendant no intimation of dissatisfaction, or of any wish to rescind, and proceeded against him in his absence, so much of the judgment, coupled with the avowed intention to enforce it, was so iniquitous as to rise to the grade of fraud upon his rights. So far as the judgment was for costs it was equitable and just, and had the original subject matter of the suit, though settled,

been in such a condition that any adjustment, though merely formal, was needful for the convenience or greater safety of the plaintiff, and the judgment had been taken for the entire debt, as in this case, it would be relieved against in equity, if the party could properly present himself, only at his own costs; but when, as in this case, there is no excuse for not entering a remittiter at law for all beyond the costs, and so many circumstances from which inferences may be drawn that the appellants desired and sought to deal unjustly with the appellee, we do not think the rule of granting relief at the costs of the party seeking it applies. But, inasmuch as the appellee was in default, so far as the payment of the costs in the suit at law was concerned, up to the time when, in progress of the suit in equity, he paid those costs into the court, as he should have carried into court these costs with his bill, it is but justice and equity that he should pay the costs of the proceeding in equity up to that time. So much of the decree, therefore, as adjudges all the costs of the proceeding in chancery in favor of the appellee, must be reversed, and the cause remanded, with instructions to that court to enter up a decree in favor of the appellants for all the costs of the chancery proceeding up to the time inclusive when the costs of the suit at law was paid into the chancery court, and a decree for all the balance of the costs in that court in favor of the appellee. All the residue of the decree of the court below must be affirmed, there being no error in its decree for relief against the judgment at law.

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BARRAQUE AND WIFE VS. SITER, PRICE & CO.

The answer of one defendant in chancery, cannot, in general, be read in evidence against his co-defendant, unless where he claims under the co-defendant whose

answer is offered in evidence, or where they have a joint interest in the matter in controversy.

But this court will not reverse the decree of the circuit court for error in refusing to exclude the answers as evidence, when the other testimony in the cause is sufficient to sustain the decree.

When the facts charged in the bill are proven by a single witness, and positively denied by the answer, the court will not decree against the answer without corroborating circumstances to sustain the single witness: but the answer must be positively, clearly and precisely responsive to the bill, and of a fact which, from the nature of the transaction, is within the knowledge of the defendant.

When the answer positively denies a fact charged in the bill, but proceeds to give a circumstantial account of the transaction inconsistent with the truth of the denial, a single witness without corroborating circumstances is sufficient to prove the fact charged.

A vendor points out, to the agent of the vendee, two fractions, when showing him a tract of land offered for sale—represents them as valuable—gives a written description of the improvements on the fractions to be submitted to the vendee—the agent understands the whole tract is offered—possession of the fractions with the tract is delivered to the vendee, but they are omitted in the deed. HELD, that the fractions were included in the sale.

Appeal from the Jefferson Circuit Court in Chancery.

This was a bill filed in the circuit court of Jefferson county by Siter, Price & Co., against Antoine Barraque and wife, and others, for title to two fractions of land, alleged to have been purchased by them of said Barraque, with other lands, but omitted in the deed by mistake, and determined by the Hon. WILLIAM H. SUTTON, judge. The circuit court decreed in favor of the complainants, and the defendants, Barraque and wife, appealed to this court.

The facts, upon which the adjudication in this court rests, sufficiently appear in the opinion of the court.

YELL, for the appellants, contended that the circuit court erred in permitting the answers of the other defendants to be read in evidence against the appellants, and referred to *Harrison vs. Edwards*, 3 *Litt.* 340. *Leeds vs. Movine*, 2 *Wheat.* 380. 2 *Cond. R.* 293, *and notes*, and authorities there cited.

RINGO & TRAPNALL, also for the appellants. The equity of the bill being expressly contradicted by the answer of Barraque and wife, the facts cannot be established by one witness without corroborative testimony. 3 *Mon.* 225. 6 *id.* 22. 4 *id.* 174.

The answer of one party cannot be evidence against another, therefore the answers of the co-defendants cannot strengthen or corroborate the testimony of the witness. *Ward vs. Davidson*, 2 *J. J. Marsh.* 445. 5 *Mon.* 411. 6 *id.* 80.

PIKE & BALDWIN, contra, contended that the question in this court is not whether the answers of the co-defendants should have been rejected as evidence in the court below, but whether the decree is right upon the whole case: if the decree is right, independent of the answers, it must stand. The testimony fully sustains the decree: and this court will not reverse it unless it be clearly shown that the judge below erred. *Lloyd vs. Lord Trimleston*, 2 *Molloy*, 81.

WALKER, J. There is no rule of evidence better settled than that, in general, the answer of one defendant in chancery cannot be given in evidence against his co-defendants; the reason being that, as there is no issue between them, there can be no opportunity for cross-examination. (1 *Greenl. Ev.* 178. *Singleton vs. Gayle*, 8 *Porter*, 271. *Clark vs. Van Reimsdyke*, 9 *Cranch*, 152. *Judd vs. Seever*, 8 *Paige*, 548. *Field vs. Holland*, 6 *Cranch*, 8. 3 *Phillips Ev.* (*Cowen & Hill's Ed.*) 931. 2 *Daniel Ch. Pl. & Pr.* 981.) This general rule, however, does not apply to cases where the defendant claims through him whose answer is offered in evidence; nor to cases of joint interest, either as partners or otherwise in the transaction. (1 *Greenl. Ev.* 178. *Williams vs. Hogsden*, 2 *Har. & John.* 474. *Van Reimsdyke vs. Kail*, 1 *Gall.* 630. *Clark vs. Van Reimsdyke*, 9 *Cranch*, 153. *Danl. Ch. Pl. & Pr.* 982.) And this exception to the general rule is, in many instances, qualified and dependent upon the peculiar circumstances of each particular case, which it is unnecessary here to notice, as the answers of Notribe, Wait, and Hall, do not come within the

exception to the general rule, and were clearly incompetent as evidence.

It was objected, at the trial, on the part of defendant Barraque, that these answers were incompetent as evidence, and should be excluded. There is a marked difference between an offer to exclude illegal evidence from a court and a jury. The reasons for excluding evidence from a jury, do not hold good to the same extent with courts. Juries do not determine the admissibility of evidence; it passes to them under the discretion of the court; their province is to determine its sufficiency. (1 *Ph. Ev.* 18.) Therefore, to permit legal and illegal evidence indiscriminately to go before them would pervert the ends of justice by making their verdict the result alike of competent and incompetent evidence. Not so with the court, when questions of fact are presented to it. It is at all times competent and prepared, whether when the evidence is offered, or at the time of making up its verdict, to discriminate between that which is legal evidence and that which is not. The error, therefore, in such cases, consists not in the court's refusing to exclude the evidence from itself, (although it might be best in some instances to save time,) but in taking it into consideration in making up a verdict.

There are instances, however, where secondary evidence, if permitted to pass without objection to the court sitting as a jury, would become legal evidence upon the same principle and to the same extent that it would if allowed to go to a jury, because, by permitting it to pass without objection, the adverse party is lulled into repose and deprived of an opportunity to offer better evidence or to amend that already offered.

In this case the answers were a part of the pleading, and were necessarily before the court: the motion to exclude them as evidence amounted but to a proposition that the court should not weigh them in making up its decision. They were not secondary evidence, and the court was under the same obligation to exclude them in weighing the evidence without as with the motion. The case having been submitted to the court, the correctness of its decision must depend upon the fact whether the evi-

dence, independent of the answers, is sufficient to uphold the decree. If such be the case, this court will not reverse the decree of the circuit court. There is a difference in the practice in appeals from common law and chancery decisions. The 138*th sec. Digest*, 244, requires "the supreme court to hear and determine the appeal in chancery, and if said court shall reverse the decision, order, or decree of the circuit court, the supreme court shall make such order, decision, or decree as the circuit court should have made." So that, although the circuit court erred in its opinion as to whether the answers should be received in evidence in the case, it remains to be seen whether the facts, independent of the answers, were sufficient to sustain the decree, or if not, what decree this court should render in the premises.

There seems to have been but one question seriously contested between the parties, which was, whether two fractions of land, part of a tract conveyed, by defendants Barraque and wife, to defendants Notribe and Wait, in trust for Siter, Price & Co., were contracted and intended to be conveyed and embraced in said deed, but which were, as is alleged, inadvertently omitted. The bill sets up positively that such was the case: that, before the purchase, Barraque went upon the land conveyed, including these fractions, and showed it to the agent, who purchased it for Siter, Price & Co., as being part of the tract of land offered for sale: that part of the improvements were upon them, and that the deed was made with a full and confident belief that these fractions constituted part of the tract conveyed: that Barraque made out, and delivered to the agent, at the time the deed was made, a statement of the different improvements on the entire tract conveyed, and in which is the improvement on these fractions: that possession was subsequently given of the whole tract, including the fractions, without reservation. To these allegations, the defendants, Barraque and wife, responded, admitting all the facts in the bill except those relating to the fractions not embraced in the deed. They positively deny that they ever did sell, or intend to sell, or convey, any other lands than those described in the deed, and that, if there was any misap-

prehension, it arose from no misrepresentation or fault of theirs. The defendant Barraque admits that he did go with the agent upon the land described in the deed as well as the fractions in dispute, and showed him the land, part of which was the fractions so omitted to be inserted in the deed, and represented them as being valuable; but denies that he told the agent that these fractions were part of the lands which he offered to sell. The answer also admits that possession was given of the premises, including the improvements on these fractions, which were held by the trustees for the plaintiffs without defendant's having asserted his claim to them, but states that there were no houses on the fractions, and that he never intended to abandon his rightful claim to them, although he had not asserted it before. He admits that he may have given the statements of improvements on the land referred to, but insists that, if done, it was through inadvertency, and that he never intended to include them as part of the improved lands sold.

In order to determine what amount of evidence is necessary to sustain the allegations in the bill, it becomes important to ascertain whether this answer is to be considered as a positive denial of the material allegations of the bill. For, whilst the general rule is that where the bill is sustained by a single witness, and the facts are clearly and positively denied by the answer, the court will not render a decree against the defendant without the evidence of an additional witness, or corroborating circumstances. (*Dunham vs. Gates*, 1 *Hoff. Ch. R.* 188. *Hart vs. Ten Eyck*, 2 *John. Ch.* 92. *Hughes vs. Blake*, 6 *Wheat.* 468. *Pierson vs. Catlin*, 5 *Vermont Rep.* 272. *Clark vs. Van Deimsdyke*, 9 *Cranch*, 160. 1 *Greenl. Ev.* 260.) Yet, in order to put the complainant to this strictness of proof, the answer, in the language of Greenleaf, "must be positively, clearly, and precisely responsive to the matter stated in the bill." (1 *Greenl. Ev.* 260. *Danl. Ch. Pl. & Pr.* 984.) It must not only be positive, but it must be in answer to a fact which, from the nature of the transaction, is within the knowledge of the defendant. (*Combs vs. Boswell*, 2 *Dana*, 474. *Lawrence vs. Lawrence*, 4 *Bibb*, 385. *Watson et al. vs.*

Palmer et al., 5 *Ark. Rep.* 501. *Mitchell vs. Maupin*, 3 *Mon.* 187. *Whittington vs. Roberts*, 4 *Mon.* 179.) And the same rule applies when the answer is evasive, or so expressed as not to amount to a positive denial. (*Watkins vs. Woodfin*, 5 *Munf.* 183. 7 *Mon.* 293. *Id.* 383.) And it may tender circumstances to corroborate the plaintiff's proof so as to overcome its own denials. *Pierson vs. Catlin*, 3 *Ver. R.* 272. *Maury vs. Lewis*, 10 *Yerg.* 115.

When these rules are applied to the answer of Barraque, it will be seen that it is directly responsive as to the point relative to the sale or intention to sell the two fractions in dispute, but, in giving a circumstantial account of the transaction, to a very considerable extent, negatives the positive denial. The defendant admits that he did go with the agent upon the land conveyed by the deed, and also the fractions which constituted a part of the tract and on which were part of the improvements, for the purpose of showing it to him, that he might correspond with the complainants and induce them to purchase it. He admits that, in connexion with the other lands, he showed these fractions to the agent, and represented them as being of great value; but positively denies that he pointed them out to the agent as part of the tract which he wished to sell. Now, when we take into consideration the object and purpose of the parties in going upon the land, and their examination, and the general and unqualified declaration of the defendant in regard to the value of this land,—it being part and parcel of one farm, it is evident that the fact of his also going upon these fractions and representing them as being of great value, without expressly declaring that they were not embraced in the contemplated sale, amounted to an affirmative declaration that they were intended and designed to be conveyed with the other lands. They were part of the same tract, fractions upon which part of the improvements were situated, without buildings for a separate residence, not of sufficient quantity for a separate farm—could any reasonable man have supposed that they were designed to be reserved, or severed from the common tract? The object of the visit was to show the agent the farm and lands to be conveyed; there-

fore the agent might well consider all the lands shown him in that connexion as part of the land offered. If not, why show these fractions to him? Why represent them to him as being of great value? These facts, when fairly considered, must be taken as strongly affirmative of the fact that they were represented as part of the lands offered to the agent. Indeed, unqualified by other circumstances, or an express reservation at the time, they were equivalent to an affirmative declaration that they were such: therefore, the defendant's denial that he told the agent that they were part of the lands which he proposed selling, amounts to nothing, and we are not prepared to say that this answer is of that class which requires the evidence of two witnesses, or one with concurrent circumstances, in order to warrant a decree.

We will next briefly review the evidence. The material allegation, upon which relief is sought, is positively, in every respect, proven by one witness, who made the examination, and who took the deed. He exhibits, with his answer, the description of the several improvements on the lands sold, made out, by the defendant, Barraque, at the time the deed was made, and in which are the improvements on the fractions in dispute. It is proven, by another witness, that he was present when the deed was executed, and understood that the sale embraced the entire tract on that side of the river: that it was notorious that Barraque had sold all his lands on the north side of the river: that he afterwards heard Barraque say that the Mason place was the only place he owned, and that he had to take his family to it. The defendant, to rebut this evidence, proved that, the next morning, after the deed was made, witness heard agent and Barraque speaking of a reserve, but what it was he did not recollect: that Barraque, at the time the mortgage was executed, owned several tracts not embraced in it: that Barraque paid taxes on the fractions after the execution of the deed.

This evidence, in our opinion, would be amply sufficient to justify a decree in favor of the complainants even upon the positive and unequivocal denial of the answer; but, when ap-

plied to the case as it is presented before us, there can be no question but that the circuit court should have rendered a decree on it independent of the answers of defendants Notribe, Hall, and Wait: and although that court did, in our opinion, err in declaring that the answers were competent evidence against defendant Barraque, in view of the circumstances and relative positions and interests which existed between them in this case, yet, inasmuch as that court had sufficient evidence upon which to found its decree, independent of the answers of the defendants, defendants Barraque and wife have no cause to complain: and were we to open the cause here, under the statute, our decree would be but an affirmance of the decree of the circuit court.

Therefore, let the decree be, in all things, affirmed, with costs.

McMEEKIN ET AL. VS. THE STATE.

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A demurrer to a writ of garnishment goes to so much of it as answers the purpose of a declaration, and extends to the allegations and interrogatories which are an amplification of that part of the writ.

The State cannot be garnisheed for the salary of a public officer.

Writ of Error to Pulaski Circuit Court.

On the 24th of December, 1847, the plaintiffs in error sued out of the Pulaski Circuit Court a writ of garnishment against the State of Arkansas, in substance as follows:

"The State of Arkansas, &c.: [usual caption and address.] Whereas, John McMeekin, D. S. Slaughter, and Thomas W. Hynes, as administrators, with the will annexed, of William R. Hynes, deceased, obtained a judgment in the Pulaski Circuit Court, on the 30th day of November, A. D. 1842, in an action of

debt against William Conway B., for the sum of three hundred and twenty-four dollars and fifty-four cents, with interest thereon at six per cent. per annum from the 25th of November, A. D. 1842, until paid, together with costs, &c., which judgment still remains unsatisfied; and whereas, it is alleged by the plaintiffs that they have reason to believe that the State of Arkansas has in her hands and possession goods and chattels, moneys and effects belonging to the said defendant: Now, therefore, you are hereby commanded to summon the said State of Arkansas, *if she be found within your bailiwick*, to appear before the judge of our Circuit Court," &c., "to answer what goods, chattels, moneys, credits and effects she may have in her hands or possession belonging to said defendant, to satisfy the judgment aforesaid, and also to answer such further interrogatories as may be exhibited against her, and that," &c., &c.

The sheriff served said writ upon E. N. Conway, Auditor of Public Accounts, on the 24th December, 1847.

At the return term (April, 1848) the plaintiffs filed allegations and interrogatories in accordance with the statute.

They alleged that the State was, on the 24th of December, 1847, justly indebted to the said William Conway B. in the sum of $375; and at other times, between then and the time of filing the interrogatories, other sums, making an aggregate indebtedness of $1,125, alleging specific times and amounts, and required the State to answer if she was not so indebted to said Conway B., and if not, how otherwise. Plaintiffs also propounded the following specific interrogatories to the State:

"1st. Has the said William Conway B. served as judge of the supreme court, from the 1st of October, 1847, until the 17th of April, 1848? And was he not, for his said services, entitled to have and receive of, and from, said State, a hire, compensation or salary, at the rate of $1,500 per year, payable to him by said State quarterly?

"2d. Is the State of Arkansas debited or chargeable with any sum of money for, and in favor of, said William Conway B., as due or payable to him, or otherwise, for his services or salary as

one of the judges of the supreme court, or on any other account whatsoever; or has she, at any time between the said 24th day of December, 1847, and the 17th day of April, 1848, been debited or chargeable to said Conway in any sum of money whatsoever, and if yea, when and in what sum or sums, and the value thereof?"

The Attorney General filed a demurrer to the writ of garnishment, and assigned as causes of demurrer:

"1st. That the State cannot be sued except in the manner prescribed by law.

"2d. That the State, nor any officer of hers, can answer said writ or allegations.

"3d. That the salary of a public officer cannot be garnisheed, especially of a judicial officer, under the constitution, and upon grounds of public policy."

The court (the Hon. WILLIAM H. SUTTON presiding) sustained the demurrer, and plaintiffs brought error.

RINGO & TRAPNALL, for the plaintiffs. The demurrer in this case is to the writ, by which the defendant was summoned to answer what goods, &c., belonging to the judgment debtor, she had in her possession, without charging an indebtedness to him as judge: and the only question is, whether the property or money of a judgment debtor, held by the State, or debts due to him from the State, can be subjected to the payment of his debts. See *State, use Reider vs. Lawson et al.*, 2 *Eng.* 394. *Digest, chap.* 17, *secs.* 6, 8, 9; *chap.* 78, *secs.* 1–9.

It is not alleged in the writ or allegations that the indebtedness of the State to Conway B. was for a debt due to him as judge, the court then must adjudicate this cause as if the debt was due to him as a private citizen.

But, if the judgment debtor was a judge of the supreme court, there is no exemption in favor of such officer in the statute, which is in the most general terms and embraces all cases. Public policy, so far from protecting a judge in the refusal to pay his debts, ought to require of him, as an exemplar to the private

citizen, the most rigid observance of the obligations of morality and common honesty, as well as the general laws of the land.

WATKINS, Att. Gen. Though the language of the statute is broad, this court has found it necessary in construing it to restrict its general language, upon grounds of public policy, and because it would interfere with other statutes equally imperative and defeat their operation. So this court has held that executors and administrators are not liable to be garnisheed, (*Thorn & Robins vs. Woodruff*, 5 *Ark.* 55. *Fowler vs. McClelland*, 5 *Ark.* 188;) nor a judgment debtor, (*Trowbridge vs. Means*, 5 *Ark.* 135. *Tunstall vs. Means*, 5 *Ark.* 700;) and that the writ must be confined to the county in which the judgment was rendered. *Pike vs. Lytle*, 1 *Eng.* 212. *Allen vs. State Bank*, 103.

So it is held that a sheriff, or other public officer, cannot be garnisheed. *Conant vs. Bicknell*, 1 *Chip.* 50. *Duboise vs. Duboise*, 6 *Cowen*, 494. *Chealy vs. Brewer*, 7 *Mass.* 259. *Brooks vs. Cook*, 8 *Mass.* 246. *Barnes vs. Treat*, 7 *Mass.* 271. *Pickquet vs. Swan*, 4 *Mason*, 443.

The State is not a "person" within the meaning of the statute; and the writ ought not to be allowed against her on the grounds of public policy.

SCOTT, J. It is insisted that, inasmuch as the demurrer, interposed by the State in this case, in its terms, is to the writ, so much of the record as presents the allegations and interrogatories is excluded from the view of the court. We entertain a different opinion. The demurrer looks through the entire record, and presents it all for examination and judgment. In this proceeding, as in the proceeding by scire facias, the writ of garnishment having the double nature of a writ and of a declaration, (it being the office of the allegations and interrogatories to amplify and complete it in its latter nature,) the demurrer when, as in this case, interposed in terms to the writ, will be intended as interposed to so much of the writ only as is in the nature of a declaration. Any other intendment would be absurd, as it is

as incompetent for a demurrer to reach a writ in its purely technical sense as for a plea in abatement to perform the office of a demurrer in reaching the insufficiency of the pleadings in the statement of the cause of action.

Looking, then, to the whole record, the question is distinctly presented whether or not the salary due from the State to one of her public officers, can, by garnishment, be seized before being paid to him, and appropriated to the payment of his judgment debts. And this seems to be absolutely forbidden by considerations of public policy. In every enlightened community public policy must ever be paramount to individual convenience and private interest. And it cannot be doubted that the most efficient administration of the government in general, and the free course of the stream of justice in the tribunals, are the very highest of these considerations. To interpret the will of the legislature as in conflict, in any degree, with these great public objects, could rarely, if ever, be done; as to do so would be abhorrent to every legal idea of civil liberty. And that the proper and efficient administration of the State government, in all its departments, would be endangered by the establishment of the doctrine contended for by the plaintiffs in error, cannot, for a moment, be doubted, as it would, at all times, in its practical operation, be embarrassing, would frequently be mischievous, and, under some circumstances, might prove fatal to the public service.

If the statute of garnishments, and that providing for the conduct of suits against the State, were to be construed in a condition of isolation, without any regard to the body of the law, and with reference alone to their apparent provisions, there would be much plausibility in the position of the plaintiffs in error; but as they are but an inconsiderate part of an harmonious body of laws, all looking to one great paramount object, this mode of interpretation cannot for a moment be tolerated. Nor are we without the most persuasive authority for the ground we occupy. The unbroken current of decisions in England, and in the State and federal courts of the United States, as to the doctrines of the law analogous, and, for the most part, identical in principle, and

even so to the very letter in many instances, have uniformly excluded money, and other effects, in the hands of executors and administrators, and in the hands of all officers of the law, from the operation of such enactments, although in their general terms these would seem to have been included. (*Conant vs. Bicknell*, 1 *Chip.* 50. *Duboise vs. Duboise*, 6 *Cowen*, 494. *Chealy vs. Brewer*, 7 *Mass.* 259. *Barnes vs. Treat, ib.* 271. *Brooks vs. Cook*, 8 *Mass.* 246. *Pickquett vs. Sloan*, 4 *Mason*, 443. 1 *Root*, 451. 4 *Day*, 87, 96. 1 *Conn.* 385. 4 *Greenl.* 533.) And to the same purport has this court gone in several adjudications, as cases have arisen. 5 *Ark.* 55. *Ib.* 188. *Ib.* 135. *Ib.* 700. 1 *Eng.* 212. 2 *Eng.* 103.

In the supreme court of the United States, at the January term, 1846, in a case where a purser of the navy had been garnisheed, and seamen's wages, for debts due by them, had been attempted to be attached in his hands for their satisfaction, Mr. Justice McLEAN, in delivering the opinion of that court, says: "The important question is, whether the money in the hands of the purser, though due to the seamen for wages, was attachable. A purser, it would seem, cannot, in this respect, be distinguished from any other disbursing agent of the government. If the creditors of these seamen may, by process of attachment, divert the public money from its legitimate and appropriate object, the same thing may be done as regards the pay of our officers and men of the army, and of the navy, and also in every other case where the public funds may be placed in the hands of an agent for disbursement. To state such a principle is to refute it; no government can sanction it. At all times it would be found embarrassing, and, under some circumstances, it might be fatal to the public service. The funds of the government are specifically appropriated to certain national objects, and if such appropriation may be diverted and defeated by State process, or otherwise, the functions of the government may be suspended. So long as money remains in the hands of a disbursing officer, it is as much the money of the United States as if it had not been drawn from the treasury. Until paid over by the agent of the government to the person entitled to it, the

fund cannot, in any legal sense, be considered a part of his effects. The purser is not the debtor of the seamen. It is not doubted that cases may have arisen in which the government, as a matter of policy or accommodation, may have aided a creditor of one who received money for public services; but this cannot have been under any supposed legal liability, as no such liability attaches to the government or to its disbursing officers." And accordingly the cause was remanded to the State of Virginia, where it originated, with instructions for its dismissal.

This case, although different in its facts from that at bar, and the remarks of Judge McLean, which we have quoted, so firmly present the general considerations which prevent the establishment of the doctrine contended for by the plaintiffs in error, that we deem it unnecessary to examine and array the other considerations of minor import appropriately suggested by the Attorney General, some of which have been in principle sustained by the decisions of the State courts. 1 *Ala. Rep.* 398. *Ib.* 754.

Therefore, finding no error in the proceedings of the court below, its judgment must be affirmed with costs.

FEARS VS. MERRILL.

A vendor, who executes a bond for title to his vendee, upon the payment of the purchase money at a future day, and puts him into possession, may, if the money is not paid when due, by first giving to the vendee reasonable notice to quit, avoid his contract, and maintain an action of ejectment for the land.

Or, if the vendee has, by his own act, placed himself, in legal contemplation, in the attitude of a trespasser, the vendor may treat him as such, and sue without giving notice.

The notice, in such case, should be reasonable, to be determined by the circumstances of each case. The English rule is six months; but the better rule is that the time

of notice should vary with the nature of the contract, and the character of the estate. Notice on the day suit is brought is insufficient.

One entering under the vendee, by consent of the vendor, is entitled to notice.

In ejectment by the vendor, in such case, the true criterion of damages is the value of the land from the date of the demand and refusal.

Writ of Error to Pulaski Circuit Court.

Ejectment, by Joseph Merrill, against James A. Fears, determined in the Pulaski Circuit Court, in November, 1846, before the Hon. WILLIAM H. FEILD, judge.

The facts are stated in the opinion of this court.

RINGO & TRAPNALL, for the plaintiff. A vendor of land, who sells *bona fide*, receives a portion of the purchase money, gives his obligation to the vendee to convey in fee simple upon payment of the residue, gives him seizen of the land, and retains the legal title as a security for the payment of the residue of the purchase money, cannot maintain an action of ejectment against his vendee on his failure to pay the purchase money: for the vendor having, by his own act, separated the equitable estate and right of possession, which are transferred to the vendee, from the legal estate, which remains in himself as a security for the purchase money, can subject the land to sale, on default of payment, only by bill in equity.

But if the vendor can maintain ejectment in such case, then, as the possession of the vendee is lawful, there must first be a demand of possession, and a refusal by the vendee, or some wrongful act by him done, to determine his lawful possession. 13 *East*, 210. 3 *Mon.* 275.

A person lawfully in possession for an indefinite period, is regarded as holding from year to year, or at will: in the former case, the tenancy can only be determined at the end of the year, and upon six months notice to quit; in the latter case, upon a reasonable notice to quit, allowing sufficient time for the tenant to take the emblements. 4 *Kent's Com.* 110 *to* 116.

The legal title to land may be in one person, the right of pos-

session in another, and the actual possession in a third. (2 *Black. Com.* 199.) The vendee having the right of possession as well as the actual possession, does not forfeit the right of possession by failing to pay the purchase money, so long as the contract of purchase continues; and, unless the contract under which the vendee holds be determined, so as to make him a trespasser, the action of ejectment, which is a possessory action, cannot be maintained by the vendor. *Runnington on Ejectment*, 21, 22. *City of Cincinnati vs. White*, 6 *Pet.* 431.

The demise laid in the declaration must be of a day subsequent to that on which the writ of action accrued. The demand of possession and notice to quit being on the same day that the writ issued, and the law not recognizing fractions of a day, the notice or demand cannot be regarded as having been given before the suit commenced. *Dickinson vs. Jackson, Ex dem. Caldwell*, 6 *Cow.* 147. *Van Alen vs. Rogers*, 1 *John. Cases*, 283. *Harle vs. McCoy*, 7 *J. J. Marsh.* 320. 1 *Chitty Pl.* 258.

The damages were excessive: they were given for a period of three or four years, when only a few months had elapsed since the demand of possession and notice to quit.

CUMMINS, contra. Where a party contracts to purchase land —he enters upon it, and agrees to pay the purchase money by a stated time, and he fails to pay as stipulated, he becomes a trespasser *ab initio*, is entitled to no notice to quit—may be ejected and compelled to pay the mesne profits, and the relation of landlord and tenant does not subsist between the vendor and vendee, and the contract becomes immediately void. *Whiteside & McGee vs. Jackson ex dem.*, 1 *Wend.* 418. *Smith vs. Stuart*, 6 *John. R.* 46. *Jackson ex dem. Church*, 7 *Cow.* 747. *Brown vs. Morrison & Sullivan*, 5 *Ark.* 222.

The plaintiff was entitled to rent from the time when the purchase money was due, or at least the time of the demise laid in the declaration; and the damages allowed were less than he was entitled to.

WALKER, J. On the 28th day of November, 1840, Merrill, the defendant, executed to Nelson W. Hill his covenant, by which he became bound to convey to Hill, or his assigns, eighty acres of land, provided the said Hill should, when due, pay to Merrill $100, for the payment of which he had executed his writing obligatory, to Merrill, due twelve months after date. On the 30th of April, 1841, Hill bargained said land to the plaintiff Fears, and thereupon, at the instance of Fears, executed his covenant to Edmund Fears, an infant son of the plaintiff, binding himself to convey to Edmund by deed. The contract made by the plaintiff with Hill was made with a full knowledge that Merrill held a lien on the land for $100, it being the residue of the price agreed upon for the land, and that about the time of his purchase he entered upon the land with the knowledge and consent of both Hill and Merrill. At the time Fears entered on the land it would not have rented for any price: he so improved it that after the first year it would have rented for $25 or $30 per annum. On the 16th of March, 1846, Merrill demanded of Fears possession, and on the same day filed his declaration and sued out his writ of ejectment.

These facts being presented to the circuit court, sitting as a jury, upon the plea of not guilty, the court found the issue for the plaintiff, Merrill, and assessed damages to $100, upon which judgment was rendered for possession of the land and the damages so assessed. Fears filed his motion for a new trial upon the ground that the court decided contrary to law, and without sufficient evidence; that the damages assessed were excessive, and contrary to law and evidence: which motion the court overruled.

The case presents a question of some importance when we consider the vast amount of real estate conveyed under contracts of like legal effect in this State. The several assignments of errors may be considered as substantially embraced in two propositions: 1st. Can the vendor of land, who sells and gives to his vendee an obligation to convey to him in fee simple, upon the payment of the purchase money, and gives immediate pos-

session of the land, after the payment becomes due, maintain an action of ejectment against the vendee for the possession of the land, and if so, under what circumstances? 2d. If the action be maintainable, when does the right of action commence, and what should be the measure of damages?

Ejectment is a possessory action, and, in cases like this, in order to maintain it, the plaintiff must, at the commencement of his suit, have both the legal and the possessory right in himself. (1 *Chitty Pl.* 87.) In this case the vendor had parted with his equitable title and right of possession, and consequently, until, by operation of law, or the acts of the parties, these essential requisites were re-united, no action could be maintained. This must depend upon the validity and existence of the contract by which the vendee acquired his right of possession. So long as that contract remains in force the vendor holding the naked legal title can maintain no action, for it would be the heighth of absurdity to allow one to maintain an action for that to which he was not entitled. It, therefore, becomes important to ascertain how and under what circumstances the contract may be considered as rescinded, whereby the vendor re-acquires his right to possession and with it his right of action.

Ejectment was originally a mere action of trespass to recover damages sustained by a lessee for years, when ousted of his possession. In time it became a favorite possessory remedy for the the recovery of real property, and particularly as between landlord and tenant, where the tenant held over after his term had expired. But, in all actions in ejectment, whether to regain possession after the term of lease has expired, or where possession is given under an executory contract for the purchase, and in all other cases where the entry is peaceable, the action cannot be maintained until the tenant in possession is placed, either by his own wrongful act, or by notice to quit, and refusal, in the attitude of a trespasser. Hence, in the case of *Rightonthe demise of Lewis vs. Beard*, 13 *East*, 210, Lord ELLENBOROUGH, in delivering his opinion, says: "That, after the lessor had put the defendant into possession, he could not, without a demand of the possession

again, and a refusal by the defendant, or some wrongful act by him to determine his lawful possession, treat the defendant as a wrong doer and trespasser, as he assumes to do by his declaration in ejectment." So in 3 *Starkie, p.* 1612, it is laid down that "a vendor, who has let his intended vendee into possession, cannot recover the premises by ejectment without proof of demand of possession, for until then the possession is lawful." In *Tillinghast's Adams on Ejectment, p.* 107, it is said that the party in treaty for purchase being lawfully in possession, cannot be ejected until such lawful possession is determined, either by demand or possession." So that it is essential to the maintainance of the action, not only that the plaintiff should hold the legal right and the right of possession, but that the defendant should stand, in contemplation of law, at least, a wrong doer or trespasser. Notice is indispensably necessary in order to place him in that attitude towards the vendor, and to enable the vendor to avoid the contract and reclaim his possession, unless the vendee, by his own wrongful act, has placed himself in the attitude of a wrong doer, as by denying the title of him who holds the fee, or claiming under adverse title; but a mere neglect to pay the purchase money when due is not sufficient for that purpose.

In the case of *Haile vs. McCoy*, 7 *J. J. Marshall*, 318, McCoy sold to Haile and gave his bond for title to the land; Haile bound himself to pay for it at a future day, and entered upon the land; after the money became due, McCoy sued Haile in ejectment to regain possession; Chief Justice ROBERTSON, in delivering the opinion of the court, said: "The law will not presume his possession unlawful, and hence reason and analogy seem to forbid that he should be subject to a suit for a wrong of which he had not been guilty in fact, or by construction of law, unless he had refused to surrender on a sufficient demand or notice to quit, or had been guilty of some positive act which rendered his detention of possession wrongful in fact or in contemplation of law: —such, for example, as a denial of the appellee's title, or a disavowal, or a renunciation, of the contract; a mere failure to pay would not, of itself, be sufficient."

An occupant under an executory contract is a *quasi* tenant at will, and though he could not be evicted without a previous demand of possession, he is not entitled to six months notice to quit. (4 *Dana R.* 337. 10 *Yerg. R.* 513. 1 *Greenl. R.* 95.) So in the case of *Dennis vs. Harder*, 3 *B. Mon.* 175, it is said possession given under a contract purchase is a *quasi* tenancy, and, without previous notice, express or implied, of the vendor's intention to avoid the contract and reclaim possession, he cannot take or reclaim possession in ejectment. (9 *John. R.* 330.) If a vendee, who purchases land on a credit and receives a bond for title when he has paid the purchase money, fails to pay according to the terms stipulated, the vendor may consider the contract at an end, and lawfully sell to a third person. (4 *Smedes & Marsh. R.* 594. 5 *Peter's Rep.* 452.) These authorities we consider directly in point, and they fully sustain us in the opinion to which we have arrived;—that a vendor, who executes a bond for title to his vendee upon the payment of the purchase money at a future day, and puts him into possession, may, if the money is not paid when due, by first giving to the vendee reasonable notice to quit, avoid his contract and maintain an action of ejectment for the land: or, if the vendee has, by his own act, placed himself, in legal contemplation, in the attitude of a trespasser, the vendor may treat him as such, and sue without giving notice.

The case in 13 *Peters*, relied upon by the plaintiff's counsel, and which is the strongest case we have seen, although it decides that ejectment cannot be maintained where the right of possession has been parted with under an executory contract, we think, when carefully examined, will be found to have been decided on principles not inconsistent with the general current of authorities. In that case, the proprietors of the city of Cincinnati, before a patent had issued for the land, laid off the city and designated on the plat of said city a certain square, and set it apart as a common, and donated it as such to said city. Subsequently the patent issued, and suit was brought in ejectment for the square so donated; the court held that the right of possession

having been conveyed and delivered, not for a limited period but perpetually, and the public having acquired an interest in said square as a public highway or thoroughfare, the right of possession claimed was incompatible with the public right, and to dispossess the public would, in effect, be to hinder their quiet enjoyment of it, and create a nuisance. Therefore, so far from sustaining the ground assumed by the plaintiff's counsel, the fact that the court in that case rested their opinion upon the peculiar circumstances of the case, and not upon general principles, strongly implies that but for those circumstances the decision would have been different.

In the case under consideration, the defendant in the court below, having entered peaceably under the purchase made for his infant son, and, as appears from the evidence, having done no act which amounted to a forfeiture of his contract or made his possession tortious, was therefore entitled to reasonable notice before the right of action accrued to the plaintiff; and this notice must affirmatively appear to have been given before the commencement of the suit. This, we think, the plaintiff has failed to do. The notice was given on the same day the suit was brought. It is impossible for us to determine in point of fact which was first; in computation of time the law knows no fractions of days. We are of opinion that the evidence is insufficient to establish a cause of action prior to the commencement of the suit. If, however, in point of fact, it was made to appear that the notice was served before the suit was commenced, still we are of opinion it is insufficient. The notice should be reasonable notice, to be determined by the circumstances of each case. The English rule is six months, which has been adopted by several of the States. The rule laid down in 4 *Kent's Com.* 113, is that, in our opinion, best calculated to subserve the the ends of justice. He says: "Justice and good sense require that the time of notice should vary with the nature of the contract and the character of the estate." PUTNAM, Justice, in delivering his opinion, (2 *Pick.* 71,) said that "the doctrine of notice was grounded on the immutable principles of justice and the common

law, and was introduced for the advancement of agriculture and the maintainance of justice, and to prevent the mischievious effects of a capricious and unreasonable determination of the estate."

The argument of the defendant in error, that there is no privity of contract between the plaintiff and himself, cannot, in our opinion, affect the question under consideration. The plaintiff in error entered with his son, an infant, in whom the possessory title existed, but whether with or under him or not, he entered with the consent of the vendor, and is as much entitled to notice as a tenant under lease, or one who enters under an executory contract. If his entry is peaceable and lawful, he is never to be regarded as a trespasser, unless he holds over after notice or does some tortious act. The doctrine laid down by Justice LIVINGSTON, and concurred in by KENT and SPENCER, (2 *John. Rep.* 75,) is full and to the point. In the opinion delivered in that case, it is said: "Without any nice disquisitions of the rights and duties of particular tenants, which may perplex but cannot elucidate the question, I am ready to say, that no person, who holds lands by another's consent for an indefinite period, ought ever to be evicted by ejectment at the suit of such party without a previous notice to quit."

There is error in the assessment of damages. Until the demand was made, the plaintiff had no cause of action. Prior to that time, the vendor, under the contract which he had made and had not elected to abandon, had the use of the money paid him and interest on the amount unpaid; the assignees of the vendee, the use of the land. The true criterion of damages, in our opinion, is the value of the land from the date of the demand and refusal.

Wherefore, we are of opinion that there is error in the record and proceedings in this case, and that the judgment ought to be reversed.

INDEX.

ABATEMENT.

1. Declaration in Pulaski circuit court, and writ to Johnson county. Plea in abatement, that the writ improperly issued to Johnson, and judgment on the plea for defendants. HELD, that such judgment was merely in abatement of the writ, and no bar to the issuance of a new writ properly directed. *Adams et al. vs. State, use State Bank*, 33.
2. In a suit by attachment, the defendant, by executing bond as required by statute in order to retain possession of the property attached, does not preclude himself from interposing pleas in abatement. *Childress vs. Fowler*, 159.
3. Executing such bond is analogous to giving bail in an ordinary suit, after which the defendant may plead matter in abatement. *Ib.*
4. A plea in abatement must exclude every conclusion against the pleader: therefore a plea that plaintiff's name was signed to an attachment bond by one without authority, must negative the ratification of the act by the plaintiff before the writ issued. *Taylor vs. Ricards & Hoffman*, 378.
5. In an action of forcible entry and detainer, a variance between the affidavit filed by the plaintiff, and the writ, may be pleaded in abatement. *Sumner vs. Spencer*, 441.

ACKNOWLEDGMENT.

1. Where a mortgage is recorded without being acknowledged, it constitutes no lien upon the mortgaged premises as against strangers. *Main et al. vs. Alexander*, 112.

ACTION.

1. Where a party covenants to do an act, for which he receives a consideration, and fails to perform the act, the other party may bring covenant for the breach, or assumpsit to reclaim the consideration. *Murray vs. Clay*, 39.
2. As to proof necessary in such action. *Ib.*
3. Trover is a concurrent remedy with trespass. *Gaines as ad. vs. Briggs et al.*, 46.
4. Case and assumpsit are concurrent remedies against a bailee for negligence. *Ferrier vs. Wood*, 85.
5. A count in trover may be joined with case. *Ib.*
6. Where plaintiff bargained for a horse, but was to perform a condition precedent to the vesting of his title and right of possession, and failed to perform such condition, he cannot maintain case or trover for the value of the horse against a bailee who was to deliver him on the performance of such precedent condition. *Ib.*
7. Where a party is sued for an act done under color of process, if the process be void,

ACTION—CONTINUED.

the action should be trespass *vi et armis*; if voidable, trespass on the case. *Dixon vs. Watkins et al.*, 139.

ADMINISTRATION.

1. Where judgment is obtained against a party, he appeals to this court, the judgment is affirmed, but, pending the appeal, he dies, and afterwards the judgment is revived against his administrator, and certified to the probate court for classification and allowance, the affidavit prescribed by *sec.* 88, *chap.* 4, *Digest*, is not a prerequisite to the allowance in the probate court. *Goodrich as ad. vs. Fritz*, 440.
2. It is a case of action pending at the death of the party, within the meaning of *sec.* 86, *chap.* 4, *Digest*, and the revivor against the administrator was an allowance of the claim. *Ib.*
3. The statute of non-claim, (*Digest*, *chap.* 4, *sec.* 85,) like other statutes of limitation, runs against a claim from the accrual of the cause of action, and not from the grant of letters. *Burton's ad. vs. Lockert's ex'rs*, 411.

ADMINISTRATORS.

See *Executors and Administrators.*

AFFIDAVIT.

1. The truth of the affidavit, which the statute requires the plaintiff to file before obtaining a writ of attachment, cannot be disputed by plea in abatement. *Taylor vs. Ricards & Hoffman*, 378.
2. If the action is forcible entry and detainer, the affidavit, required of plaintiff before the issuance of the writ, must correspond with that form of action: if unlawful detainer, it must be framed accordingly. *Sumner vs. Spencer*, 442.

See *Attachment*, 4, 5, 6.

Also, *Appeal.*

AMENDMENTS.

1. A *scire facias* was issued and attested by the clerk of the *circuit* court, and recited a judgment in the *circuit* court, but commanded the sheriff to summon the defendant to appear before the *probate* court and show cause, &c. HELD, that the error was clerical, and that the writ was not void, but amendable. *Anthony vs. Humphries, ad., use, &c.*, 176.
2. The circuit court may, at any time, in furtherance of justice, order its record amended in whatever is necessary to make it speak the truth: this the court does in the exercise of its high equity powers, and not by virtue of the statute of jeofails. *King & Houston vs. State Bank*, 185.
3. The practice of correcting errors in the record by writ of error *coram nobis* has measurably fallen into disuse in this country; and the practice of amending on motion, supported by affidavit, has been substituted. *Ib.*
4. Amendments may be made by interlineation, where the order of court particularly

AMENDMENTS—CONTINUED.

specifies the amendments to be made, but the more regular mode of amending, after the judgment term, is by an order of court reversing the defective entry, followed by a new order *nunc pro tunc*, such as should have been made. *Ib.*

5. Unlawful detainer for a lot of ground, tan-yard situated thereon, together with tanning implements, hides, &c.: demurrer to declaration for misjoinder of causes of action, grounds of demurrer conceded, and leave granted to plaintiff to amend, on condition that he would restore to defendant the chattels taken by virtue of the writ; plaintiff prepared, and offered to file, an amended declaration, but refused to comply with the terms imposed, whereupon the court refused to permit him to file the amended declaration, and gave judgment against him on the demurrer. HELD, that the court had no power to make the restoration of the personal property a condition of the leave to amend. *Brinkley vs. Mooney*, 445.
6. The power of the court to impose terms on leave to amend discussed. *Ib.*
7. A sheriff may, at any time, (before suit against him for false return,) be permitted to amend his return according to the facts. *Ib.*

APPEAL.

1. Where the record entry states that a party prayed an appeal, filed his affidavit therefor, and the appeal was granted on the 15th day of the month, but the clerk certifies at the bottom of the affidavit that it was sworn to and subscribed on the 16th of the month, the record entry must prevail over such certificate, and the affidavit will be regarded as having been filed before the granting of the appeal. *Ferrier vs. Wood*, 85.
2. Though a party appealing from a judgment of the circuit court to this court, may comply with all the prerequisites required by statute to entitle him to an appeal, yet if no order of court granting the appeal appear of record, this court will dismiss for want of jurisdiction. *Berry vs. Singer*, 128.
3. Where the defendant is convicted in a criminal case, appeals to this court, and the court below orders the appeal to operate as a stay of execution, and he fails to prosecute his appeal as prescribed by law, on application of the State to this court to affirm the judgment, the appellant cannot resist the application on the ground that it is made the duty of the clerk to send up the transcript: he is required to see that the transcript is here in due time. *Chaney vs. The State*, 129.
4. But the State must make the application for an affirmance of the judgment at the first term of this court, held more than thirty days after the granting of the appeal, and the judgment will not be affirmed on application to a subsequent term. *Ib.*
5. In such case, it is the order of the court that the appeal shall operate as a stay of execution, and not the recognizance of the appellant, that stays proceedings upon the judgment. *Ib.*
6. Where a party makes and files the proper appeal affidavit, and the clerk notices the filing of it of record, an omission to endorse it filed will not prejudice appellant. *State, use Wallace vs. Ritter ad.*, 244.

ASSIGNMENTS.

1. C. & C. brought assumpsit for the use of O., against S., upon an open account; S.

ASSIGNMENTS—CONTINUED.

pleaded that, after the service of the summons upon him in said action, he was garnisheed by creditors of plaintiffs, and answering that he was indebted, they took judgment against him for the amount of his indebtedness. HELD, on demurrer, that the plea was bad; that the service of the writ upon him in the suit of C. & C., for the use of O., was notice to him of the transfer of the claim to O., and he should have pleaded that in bar of the garnishment. *Campbell & Cureton vs. Sneed*, 118.

2. HELD, further, that courts of law will regard the assignment of choses in action, and protect the interest of the assignee against persons having actual or constructive notice of the transfer. *Ib.*
3. A promissory note, payable to bearer, may be assigned by delivery so as to vest the legal title in the assignee. *Edison et al. vs. Frazier*, 219.
4. The term "assignment" is frequently used in the law books to express the transfer by delivery, though assignments are generally made by endorsement. *Ib.*
5. Where a party declares upon a note payable to bearer as assignee by endorsement, he must make profert of the indorsement; but where he declares as assignee by delivery, of course no profert can be made. *Ib.*
6. The words, in a declaration, "assigned over and delivered," held to import an assignment by delivery. *Ib.*
7. By statute, (*Digest, chap.* 15, *sec.* 7,) where plaintiff sues as assignee by blank indorsement, defendant is entitled to fix the assignment on such day as will be most to his advantage. *Weaver vs Caldwell's ex.*, 339.

ATTACHMENT.

1. In a suit by attachment, the defendant, by executing bond as required by statute in order to retain possession of the property attached, does not preclude himself from interposing pleas in abatement. *Childress vs. Fowler*, 159.
2. Executing such bond is analogous to giving bail in an ordinary suit, after which the defendant may plead matter in abatement. *Ib.*
3. SCOTT, J., reviews the attachment statutes of this State, and comments upon the genius, scope, and design of them. *Ib.*
4. Plaintiff applied to the clerk for a writ of attachment, and made the affidavit required by statute previous to issuing the writ; the clerk, instead of filing the affidavit, wrote out the writ on the reverse side of the half-sheet on which the affidavit was written, and handed it to the sheriff, who kept it until he executed the writ, and made his return. HELD, that the validity of the affidavit was not thereby impaired, and that the failure of the clerk to retain it in his office and mark it filed, furnished no ground for dissolving the attachment. *Hughes vs. Stinnett's ad.*, 211.
5. HELD, further, that on motion of the plaintiff, at the trial, the court properly ordered it filed *nunc pro tunc*. *Ib.*
6. In such affidavit it is not necessary for the affiant to swear, in terms, that his demand exceeds one hundred dollars: it is sufficient if the sum sworn to exceeds that amount. *Ib.*
7. The truth of the affidavit, which the statute requires the plaintiff to file before ob-

ATTACHMENT—CONTINUED.

taining a writ of attachment, cannot be disputed by plea in abatement. *Taylor vs. Ricards & Hoffman*, 378.

8. An attachment bond signed by securities alone, is good without the signature of the plaintiff in the action. *Ib.*
9. Where plaintiff's name is signed to an attachment bond by one without authority, it is nevertheless binding upon the securities, and therefore a good bond. *Ib.*
10. A plea in abatement must exclude every conclusion against the pleader: therefore, a plea that plaintiff's name was signed to an attachment bond by one without authority, must negative the ratification of the act by the plaintiff before the writ issued. *Ib.*
11. So far as *Kellogg et al. vs. Miller*, 1 *Eng. R.* 468, may conflict with the above principles, it is overruled. *Ib.*

AUTHENTICATION.

1. The fact that a court has a clerk and seal, raises the presumption, and is *prima facie* evidence that it is a court of record. *Adamson vs. Adamson*, 26.
2. Where a transcript presented to this court, on application for supersedeas, shows a regular decree, but the clerk, in authenticating the transcript, after making the usual certificate, adds a statement of matters dehors the record, showing irregularities in entering the decree, such statement will not be regarded. *Slocomb, Richards & Co. Ex parte*, 375.

BAIL.

1. By the 16th section of the Declaration of Rights all prisoners are entitled to bail, except in capital offences where the proof is evident or the presumption great. *White Ex parte*, 222.
2. An indictment in a capital case does not raise such presumption of defendant's guilt as absolutely to preclude the power of this court to go behind the indictment, and investigate the merits of the charge with the view of ascertaining whether the party is entitled to bail; but it raises such presumption against defendant as to deprive him of the privilege of habeas corpus as a matter of right; and to entitle him to the writ, he must state such facts in his petition, under oath, as will rebut the presumption raised against him by the indictment. *Ib.*
3. In such case a general allegation of his innocence is not sufficient to entitle him to the writ. *Ib.*

BAILMENT.

1. Goods were shipped on board of a steamboat, at New Orleans, to plaintiff, at Norristown, Ark.; by mistake, they were delivered to T. & H., at Little Rock, who sold a portion of the goods before they discovered the mistake; afterwards, they paid the master of the boat for them, and sold the remainder of the goods. HELD, that payment to the master of the boat was no defence, by T. & H., to an action brought by

BAILMENT—CONTINUED.

the plaintiff against them for the price of the goods. *Crumbacker vs. Tucker & Hamilton*, 365.

2. A common carrier cannot sell goods so as to divest the title of the consignee, and he may follow up the goods and recover them, or recover the price thereof of one who has purchased of the carrier, and sold them. *Ib.*

BANK NOTES.

1. A bond "for one hundred and fifty dollars, to be *paid in any current notes of the Bank of the State of Arkansas*," is payable in the notes of said bank, at their nominal value, regardless of their depreciation. *Bizzell & Owens vs. Brewer as ad.*, 58.
2. This construction accords with common sense, and the popular meaning of the terms used in the obligation. *Ib.*
3. In covenant on such obligation, the plaintiff must prove the value of such bank paper, otherwise he is not entitled to judgment for any sum. *Ib.*
4. If the judgment is for the full amount of the obligation, and the evidence is not put upon the record, this court will presume that the bank notes were at par. *Ib.*
5. But if the evidence is put upon the record, and it appears that the plaintiff offered no proof as to the value of the notes, and yet took judgment for the full amount of the obligation, the judgment will be reversed. *Ib.*
6. The 28th section of the charter of the State Bank, which provided that the notes of the bank should be received in payment of all debts due the State, having been repealed by act of 10th January, 1845, since the repeal, notes of the bank are not a legal tender in payment of a bond executed to the governor for a part of the seminary lands, even if the debt be regarded as due to the State in her own right. *Paup et al. vs. Drew, as Gov.*, 205.
7. The General Assembly had full power to pass the repealing act, as it is not a law impairing the obligation of contracts, as held in *Woodruff vs. Attorney General*, 3 *Eng. R.* 236, which case is approved. *Ib.*

BANKRUPTCY.

1. L. performed labor for B., for which he was to be paid, by B., a stipulated price on the happening of a contingency: after the labor was performed, but before the happening of such contingency, L. became a bankrupt. HELD, that the claim passed to his assignee; and this, though he omitted to include it in his schedule. *Burton's ad. vs. Lockert's ex'rs*, 411.

BILLS OF EXCEPTIONS.

1. Where a judge refuses to sign a bill of exceptions, and it is signed by by-standers, and there is an endorsement upon it by the judge that he refused to permit it to be filed, but the record entry states that the court ordered it to be filed and made part of the record, the record entry must prevail over such indorsement upon the bill of exceptions, and no affidavits of the truth of such bill of exceptions are necessary. *Dixon vs. Weaver as ad., use, &c.*, 133.

BILLS OF EXCEPTIONS—CONTINUED.

2. This court will presume that by-standers signing a bill of exceptions are reputable persons, unless the opposite party objected to them, and made a showing to the contrary. *Ib.*
3. A bill of exceptions may, by equivalent expressions, as fully exclude the idea that other testimony might have been produced on the trial, as if it positively averred that it contained all the testimony. *Everett vs. Clements & Thompson*, 478.

BILLS OF EXCHANGE.

1. Protest of an inland bill for non-acceptance or non-payment, is not necessary. *S. & G. Turner vs. Greenwood*, 44.
2. Where acceptance is refused, the bill need not be presented for payment, *Ib.*
3. Plaintiff declared against defendant as drawer of an inland bill of exchange, made in New York, and added the common counts. On the trial it was proven that plaintiff sold defendant goods, and received, in part payment thereof, the bill sued on, which was drawn, by defendant, in favor of plaintiff, upon M. & Co., and accepted by them; but there was no proof that plaintiff demanded payment of the bill, at maturity, of the acceptors, and that payment was refused by them. On this evidence, the plaintiff obtained judgment on the common counts for the price of the goods. HELD, that it is well settled in New York, where the contract was made, that a plaintiff is not allowed to resort to the common counts, and base his recovery upon the original consideration after he has lost, by his own laches, his action against defendant upon the bill or note which has been passed to him either as absolute or conditional payment. *Gracie vs. Sandford*, 233.
4. On the contrary, the rule seems to be that a plaintiff can never recover on the original consideration for which the note or bill was given, until he shows such a state of facts as will authorize him to recover on the note or bill itself. *Ib.*
5. In this case, the plaintiff, having failed to fix the liability of defendant as drawer of the bill, by proving demand and refusal of the acceptors, could not resort to the common counts, and recover the original consideration for which the bill was drawn. *Ib.*
6. The execution of a note raises no presumption that a bill of exchange of prior date has been paid. *Weaver vs. Caldwell's ex'r*, 339.

See, also, *Bonds, Bills*, and *Notes*.

See, also, *Assignments*.

BLANK DATE.

See *Bonds, Bills*, and *Notes*, 4 *to* 10.

BONDS, BILLS, AND NOTES.

1. A plea that a bond was delivered to the obligee on conditions not performed, is not a good plea that it was delivered as an escrow. The principle is also applicable to notes. *Scott vs. State Bank*, 36.

BONDS, BILLS, AND NOTES—CONTINUED.

2. If delivered to a third person, it is not binding until the conditions are performed, but otherwise if delivered to the payee: a delivery to an agent is a delivery to the principal. *Ib.*
3. A bond for "one hundred and fifty dollars, to be paid in any current notes of the Bank of the State of Arkansas," is payable in the notes of said bank, at their nominal value, regardless of their depreciation. *Bizzell & Owen vs. Brewer as ad.*, 58.
4. Where a note is delivered in blank as to the date, no authority for the payee to fill up the blank is implied by law, but express authority is necessary; but this authority may be directly proven, or inferred from circumstances. *English & Johnson vs. Breneman*, 122.
5. A subsequent ratification of the filling of the blank by the makers, is equivalent to an original authority, but a ratification by the principal is only good as to him, and not as to the security. *Ib.*
6. Where the payee fills the blank without authority with a date prior to the delivery, it avoids the note. *Ib.*
7. Where the maker proves that the note was delivered in blank as to the date, the payee must prove authority to fill up the blank: none is implied by law. *Ib.*
8. Where the blank exists when the note is delivered, the presumption is that it was filled by the person having the legal custody of the note. *Ib.*
9. The payee cannot insert a date different from the true one without authority from the makers. *Ib.*
10. As to evidence of authority to fill up the blank, or of subsequent ratification. *Ib.*
11. The execution of a note raises a strong presumption that pre-existing accounts between the parties have been settled. *Weaver vs. Caldwell's ex'rs*, 339.
12. But the execution of a note raises no presumption that a bill of exchange of a prior date has been paid. *Ib.*
13. The presumption of payment does not attach where the opposing evidences of debt are of equal dignity. *Ib.*
14 Where plaintiff's name is signed to an attachment bond by one without authority, it is nevertheless binding upon the securities, and therefore a good bond. *Taylor vs. Ricards & Hoffman*, 378.

See, also, *Bills of Exchange.*

See, also, *Assignments.*

See, also, *Penal Bonds.*

CARRIERS.

1. Goods were shipped on board of a steamboat, at New Orleans, to plaintiff, at Norristown, Ark.: by mistake, they were delivered to T. & H., at Little Rock, who sold a portion of the goods before they discovered the mistake; afterwards, they paid the master of the boat for them, and sold the remainder of the goods. HELD, that payment to the master of the boat was no defence, by T. & H., to an action brought by the plaintiff against them for the price of the goods. *Crumbacker vs. Tucker & Hamilton*, 365.

CARRIERS—CONTINUED.

2. A common carrier cannot sell goods so as to divest the title of the consignee, and he may follow up the goods and recover them, or recover the price thereof of one who has purchased of the carrier, and sold them. *Ib.*

CASES.

1. *Kellogg et al. vs. Miller*, 1 *Eng. R.* 468, qualified. *Taylor vs. Ricards & Hoffman*, 378.
2. *Hempstead & Conway vs. Watkins as ad.*, 1 *Eng. R.* 317, approved, and *Menifee's ex. vs. Ball et al.*, 2 *Eng. R.* 520, qualified. *Garvin et al. vs. Squires*, 533.

CERTIORARI.

1. In the absence of an act authorizing it, a judgment of a justice of the peace cannot be removed to the circuit court by *certiorari* for re-adjudication, as held in *Levy vs. Lychinski*, 3 *Eng. R.* *Sawyer vs. Crawford*, 32.
2. Where a county court exceeds its jurisdiction, its acts are void, and this court has power, on the proper showing, to remove its proceedings by *certiorari*, and quash them. *Buckner et al. Ex parte*, 73.

CHANCERY.
See *Equity. Injunction.*

CHANGE OF VENUE.
See *Venue.*

CHARGE TO JURY.
See *Instructions.*

CIRCUITS.
See *Constitutional Law. Circuit Judges.*

CIRCUIT JUDGES.

1. The defendant (Scott) was elected, by the General Assembly, judge of the third judicial circuit on the 9th day of December, 1846, and commissioned on the 11th of the same month, for the term of four years: the amendment to the State constitution, ratified by the General Assembly, at the November session of 1848, declaring that the qualified voters of each judicial circuit shall elect their judge, did not vacate his office. *State vs. Scott*, 270.
2. In November, 1846, defendant was elected judge of the seventh circuit, composed of the counties of Crawford, Franklin, Johnson, Pope, Scott, Yell, and Conway, for the term of four years. By an act of December 29th, 1848, the judicial circuits were re-arranged, reduced from eight to six; the counties of Scott, Crawford, Franklin, Johnson, Carroll, Newton, Madison, Washington, and Benton, declared to constitute the *fourth* circuit, and defendant assigned to that circuit. HELD, that though

CIRCUIT JUDGES—CONTINUED.

the number of defendant's circuit was changed from *seventh* to *fourth*, yet its identity was preserved, as it embraced a majority of the counties of his original circuit, including the county of his residence, and that he was rightfully judge of the fourth circuit under the new arrangement. *State vs. Floyd*, 302.

3. That such a change in his circuit did not abolish his office. *Ib.*

4. The statute does not require the circuit judge to sign the record of the preceding day every morning, but only at the close of the term, and the omission of the judge to sign the record, at the close of the term, will not invalidate judgments or decrees of the term. *Slocomb, Richards & Co. Ex parte*, 375.

5. Though such omission would be gross negligence, and subject the judge to animadversion. *Ib.*

CLERICAL ERRORS.

See *Attachment*, 4, 5, 6.
Also *Appeal.*

CONCURRENT ACTIONS.

See *Action*, 4.

CONSTABLES.

1. To an action on a constable's bond, assigning as a breach that he failed to return an execution issued to him on a justice's judgment, a plea that there is no record of such judgment and execution, is bad, because a justice's court is not a court of record. *Faulkner et al. vs. State, use Eller's ad'x.*, 14.

2. Where an execution is delivered to a constable before he executes his bond, it is his duty to levy and return it according to law, after his bond is executed, and, on failure to do so, his securities are liable. *Ib.*

3. If he receive money on such execution after the making of his bond, and fail to pay it over, his securities are liable. *Ib.*

4. Where the securities confess, in their pleadings, that the money was received by the constable on the execution, but aver that he received it before the date of the bond, the *onus* is on them to prove that fact. *Ib.*

CONSTITUTIONAL LAW.

1. The 28th section of the charter of the State Bank, which provided that the notes of the bank should be received in payment of debts due the State, having been repealed by act of 10th January, 1845, since the repeal, notes of the bank are not a legal tender in payment of a bond executed to the governor for a part of the seminary lands, even if the debt be regarded as due to the State in her own right. *Paup et al. vs. Drew, as Gov.*, 205.

2. The General Assembly had full power to pass the repealing act, as it is not a law

CONSTITUTIONAL LAW—CONTINUED.

impairing the obligation of contracts, as held in *Woodruff vs. Attorney General*, 3 *Eng. R.* 236, which case is approved. *Ib.*

3. BY JOHNSON, C. J. The constitution of the State, like all other deeds or charters, is to be construed according to the sense of the terms used, and the intention of its authors. *State vs. Scott*, 270.

4. It is to be construed (says Story) as a frame of laws established by the people according to their own free pleasure and sovereign will. *Ib.*

5. It should receive a fair and liberal interpretation, so that the true objects of the grant may be promoted, and the government left in the full and free exercise and enjoyment of all its rights, privileges, and immunities, which are not expressed out of its ordinary and general powers, and declared by the sovereign will to be inviolate and supreme. *Ib.*

6. Every word (says Story) employed in the constitution, is to be expounded in its plain, obvious and common sense, unless the context furnishes some grounds to control, qualify, or enlarge it. *Ib.*

7. The amendment to the constitution, ratified by the General Assembly of 1848, declaring that "the qualified voters of each judicial circuit shall elect their circuit judge," must be construed in harmony with other provisions of the constitution, if it will admit of such construction. *Ib.*

8. When this amendment is construed in connection with the provision of the constitution fixing the official term of the circuit judges, the conclusion is irresistible that the amendment was not intended to have immediate effect, but designed to go into operation as vacancies should occur in the office of circuit judge. *Ib.*

9. The amendment was not designed to act upon the office, or incumbents, but merely to change the mode of filling vacancies occurring in future. *Ib.*

10. It is not true, as argued, that, because the people, by said amendment, resumed into their own hands a portion of sovereign power previously delegated to the legislature—the power to elect the circuit judges—the offices filled by the exercise of that power whilst in the hands of the legislature, were thereby vacated. *Ib.*

11. The power to fill the office, whether exercised by the people, or their representatives, is equally sovereign, and the rights accruing to the officer are the same under either mode of election. *Ib.*

12. A statute goes into effect from its passage, if no other time be fixed, because it is perfect in itself: not so with said amendment to the constitution: it transferred the power of election to the people, but that power could not be exercised until the mode of its exercise was prescribed by legislation. *Ib.*

13. The conclusion that said amendment did not oust the judges in office at the time of its ratification, is not predicated upon the doctrine of vested right in the office, in its technical sense. *Ib.*

14. BY WALKER, J. Constitutions are interpreted by the following rules (laid down by Story, and sanctioned by this court):

1st. The first fundamental rule in the construction of all instruments is, to construe them according to the sense of the terms, and the intention of the parties:

CONSTITUTIONAL LAW—CONTINUED.

2d. Where its words are plain, clear, and determinate, they require no interpretation, and it should, therefore, be admitted, if at all, with great caution, and only from necessity, either to escape from absurd consequences, or to guard against some fatal error:

3d. It is to be construed as a frame of fundamental law of government, established by the people according to their own free pleasure and sovereign will. *Ib.*

15. The terms of the amendment to our State constitution, ratified by the General Assembly of November, 1848, declaring that "the qualified voters of each judicial circuit, in the State of Arkansas, shall elect their circuit judge," are too plain and unambiguous to admit of but one construction. *Ib.*

16. The framers of our constitution, anticipating change in the wants and necessities of an increasing population, have expressed its powers in general terms, vesting in the legislative department, as occasion might require, power to pass such laws as might be found necessary to give efficacy to the general grants. *Ib.*

17. Such is the case in regard to said amendment; it depends directly upon legislative enactment for its development—was designed to confer upon the qualified voters of each judicial circuit the power to elect their judge, and has reference to no other subject. *Ib.*

18. The amendment is clear, explicit, and therefore needs no interpretation; but, to determine that its effect was to oust the judges in office at the time of its ratification, would be to produce absurd consequences and fatal evils, which the above rules of interpretation forbid. *Ib.*

19. In determining the intention of the framers of the amendment, we must keep in view the constitution as it stood at the time the amendment was made. *Ib.*

20. No interpretation should be allowed which would conflict with any other provision of the constitution, or which is not absolutely necessary in order to give effect to the amendment. *Ib.*

21. On the contrary, such construction should be given as will, if possible, leave all the other provisions of the constitution unimpaired and in full force. *Ib.*

22. The withdrawal of the power from the legislature to elect judges, did not vacate the offices previously filled by an exercise of that power. *Ib.*

23. The amendment was only designed to prescribe a new mode of filling vacancies in the judgships occurring after its ratification. *Ib.*

24. The power to elect the judges was transferred from the legislature to the people, but, before the power could be exercised by them, legislative enactments were necessary, and occasions must occur making the exercise of the power necessary. *Ib.*

25. The constitution confers upon the voters of each township the right to elect a constable; but this power could not be exercised without legislation prescribing the mode of holding the election—nor could the people elect the judges under said amendment until the legislature made provision therefor. *Ib.*

26. The constitution provides for the creation of the office of circuit judge, but the legislature creates the office; and when the office is established by legislative enactment, and filled, the officer looks to the constitution for the tenure and powers of his office. *Ib.*

CONSTITUTIONAL LAW—CONTINUED.

27. In this country, there is no vested right in office as against the public: the legislature creates, and may abolish, a circuit judgship when the public good requires it. *Ib.*

28. The legislature may also change, at pleasure, the territorial limits of a circuit after it is established. *Ib.*

29. But though the legislature may change, or abolish, a circuit, and when the circuit is abolished the office is vacated, yet a mere alteration or change, or re-modeling of a circuit does not necessarily vacate the office whilst its identity exists. *Ib.*

30. BY SCOTT, J., *dissenting*. Where a new constitution is framed, the government built upon it necessarily ceases, and officers holding under the government instantly go out of office, unless provision is made in the new organic law for their continuation. *Ib.*

31. So where one of the departments of the government (or even a single office) is re-organized by a change of the constitution in the mode prescribed. *Ib.*

32. Therefore, the amendment to our State constitution, ratified by the General Assembly of 1848, declaring that the qualified voters of each judicial circuit shall elect their circuit judge, took effect immediately on its ratification, and the tenure of the circuit judges then in office ceased. *Ib.*

33. BY THE COURT. The defendant was elected, by the General Assembly, judge of the third judicial circuit on the 9th day of December, 1846, and commissioned on the 11th of the same month, for the term of four years—the amendment to the State constitution, ratified by the General Assembly at the November session of 1848, declaring that the qualified voters of each judicial circuit shall elect their judge, did not vacate his office. *Ib.*

34. In November, 1846, defendant (Floyd) was elected judge of the seventh circuit, composed of the counties of Crawford, Franklin, Johnson, Pope, Scott, Yell, and Conway, for the term of four years. By an act of December 29th, 1848, the judicial circuits were re-arranged, reduced from eight to six; the counties of Scott, Crawford, Franklin, Johnson, Carroll, Newton, Madison, Washington, and Benton, declared to constitute the *fourth* circuit, and defendant assigned to that circuit. HELD, that though the number of defendant's circuit was changed from *seventh* to *fourth*, yet its identity was preserved, as it embraced a majority of the counties of his original circuit, including the county of his residence, and that he was rightfully judge of the fourth circuit under the new arrangement. *State vs. Floyd*, 302.

35. That such a change in his circuit did not abolish his office. *Ib.*

36. The *46th sec. of chap.* 67, *Digest*, giving forfeited delivery bonds the force and effect of judgments, upon which execution may issue, held constitutional. By the stipulations of the bond, the obligors waive the right of trial by jury. *Reardon Ex parte*, 450.

CONTEMPT.

1. The power to punish for contempts, in a summary manner, is inherent in all courts of justice and legislative assemblies. *Neel vs. State*, 259.

CONTEMPT—CONTINUED.

2. By the common law a court may punish for contemptuous conduct toward the tribunal, its process, the presiding judge, or for indignities to the judge while engaged in the performance of judicial duties in vacation, or for insults offered him in consequence of judicial acts; but indignities offered to the person of the judge in vacation, when not engaged in judicial business, and without reference to his official conduct, are not punishable as contempts. *Ib.*
3. The question as to how far our constitution and statutes have modified the common law doctrine of contempts, is waived by the court in this case. *Ib.*
4. In a proceeding for contempt, the party is not entitled to trial by jury. *Ib.*

CONTINUANCE.

1. It is no ground for error that a judge, who was incompetent to sit in a cause, took jurisdiction of it so far as to grant a continuance, for it would have been continued by operation of law, without action of the judge, he being incompetent to try it. *Stone vs. Robinson*, 469.
2. The overruling of a motion for continuance cannot be made a ground for granting a new trial. *Magruder vs. Snapp*, 108.

CONTRACTS.

1. It is a general rule that when one contracts to employ another, for a certain time, at a specified price for the whole time, and discharges him, without cause, before the expiration of the time, he is bound to pay the whole amount of wages for the full time. *Walworth vs. Pool*, 394.
2. But this general rule has more special reference to the sustaining of the action, than to the admeasurement of damages to be thereby recovered. *Ib.*
3. In other words, although a tender and offer to perform, by the party not in fault, is equivalent to performance for the purpose of sustaining the action, the damages to be recovered are not universally and necessarily to be measured by the amount that was stipulated to be paid on actual performance. *Ib.*
4. But, for the most part, where these contracts concern personal property or personal service, the true rule of damages is the actual loss or injury sustained by the party ready and willing to perform. *Ib.*
5. Defendant may prove, in mitigation of damages, that, after plaintiff's discharge, he found other employment of a like character for the balance of the time. *Ib.*
6. Where the damages assessed are manifestly excessive, the court will grant a new trial. *Ib.*
7. Walker brough suit against Moody, in Saline chancery court, for a family of negroes: Moody ran the negroes off: in the year 1836, Burton purchased Walker's interest in the suit, and agreed to give Lockert $250, to assist him in getting the negroes, on condition the suit was successful: Lockert accordingly obtained the negroes, and delivered them to the sheriff: the chancery suit was determined in Feb-

CONTRACTS—CONTINUED.

ruary, 1844, and six out of eleven of the negroes decreed to Walker for the use of Burton's estate, who had, in the meantime, died: in July, 1844, Lockert presented his claim, for $250, to the probate court, for allowance, against the estate of Burton: Burton's administrator objected to the allowance of the claim, 1st, because only a part of the negroes were recovered in the chancery suit, and Lockert was only entitled to compensation for his services *pro tanto:* 2d, that the claim was not presented to Burton's administrator for allowance within two years after the grant of letters: 3d, that, in October, 1842, Lockert became a bankrupt, and the claim passed to his assignee. HELD, that, inasmuch as Burton purchased the interest of Walker in the slaves, and the only condition upon which Lockert's claim was made to depend being the recovery of such interest, his claim could not be reduced by the failure of Burton to recover the whole of the slaves. *Burton's ad. vs. Lockert's ex.*, 411.

8. HELD, further, that the statute of *non*-claim (*Digest, ch.* 4, *sec.* 85) run against the claim of Lockert not from the time of the grant of letters of administration on Burton's estate, but from the accrual of the cause of action on the determination of the chancery suit for the slaves: that this statute, like other strtutes of limitation, runs from the time the cause of action accrues. *Ib.*

9. HELD, further, that though the cause of action had not accrued when Lockert was declared a bankrupt, it was an inchoate demand, and passed to his assignee, and this though he omitted to include it in his schedule. *Ib.*

10. A verbal agreement, made contemporaneously with the execution of a deed, may control or defeat it, by showing that it was intended as a mortgage, or that it was delivered as an escrow: but no subsequent parol contract can be admitted to control or defeat a deed, or attach a condition or defeasance to it. *Miller & Hemphill*, 488.

11. After breach of a sealed contract a right of action under it may be waived or released by a new parol contract; but a sealed executory contract cannot be released or rescinded by a parol executory contract. *Ib.*

CONVEYANCE.

See *Gift. Vendor and Vendee.*

COUNTY BUILDINGS.

1. Where a county court exceeds its jurisdiction, its acts are void, and this court has power, on the proper showing, to remove its proceedings by *certiorari*, and quash them. *Buckner et al. Ex parte*, 73.

2. Under the 42*d chap. of the Digest*, the county court has power to make an order for the building of a court-house whenever there is sufficient funds in the county treasury, not otherwise appropriated, for that purpose, or may levy a tax therefor; but such tax cannot be laid without an order of the court made after a notification of all the justices of the county to attend for that purpose. *Ib.*

3. It is possible, however, that a county may have ample funds for the erection of a

COUNTY BUILDINGS—CONTINUED.

court-house, without a dollar in the treasury: an instance supposed by way of illustration. *Ib.*

4. In such case, the county court may order a court-house erected without a notification to all the justices to attend. *Ib.*
5. The statute requiring the commissioner of public buildings to take bond of the persons who undertake the erection of the court-house, is directory, and his failure to do so does not affect the jurisdiction of the county court over the subject matter. *Ib.*

COUNTY COURT.

1. The county court has the power to provide a house for the poor, and may appoint commissioners to select and contract for a site therefor, and when the acts of such commissioners are ratified by the court, they become as valid as if done directly by the court. *Pulaski County vs. Lincoln et al.*, 320.
2. Where such commissioners contracted with the presiding judge of the court for a site for a poor house, the presiding judge (being interested) and the two associate justices could not confirm the purchase. *Ib.*
3. It requires the presiding judge and the two associate justices to hold the court, and the presiding judge being incompetent, the act of the court so organized was void, though the presiding judge did not vote on the question. *Ib.*
4. Nor could the contract of such commissioners be confirmed at a special term of the court, held on the second Monday in November, to act on the delinquent list of the collector: such court being held for a special purpose, other business could not legally be done. *Ib.*
5. Where three commissioners are appointed to contract for a site for a poor house, two of them cannot make a valid purchase. *Ib.*
6. A county warrant issued by order of the court, for such purchase, so illegally confirmed, may be cancelled by bill in chancery at the suit of the county. *Ib.*

CRIMINAL LAW.

1. A crime or misdemeanor consists in a violation of public law, in the commission of which there must be a union or joint operation of act and intention or criminal negligence. *Digest, p.* 319. *Yoes vs. State*, 42.
2. The mere fact of a person going to a place with the intention to assault another, will not subject him to the penalty of such an offence, unless he carry his intention into effect. *Ib.*
3. If the assault be made, the preconceived intention may be proven in aggravation. *Ib.*

See, also, *Gaming. Marriage. Indictment.*

DATE.

See *Bonds, Bills, and Notes, 4 to* 10.

DEED.

See *Gift. Vendor and Vendee.*

DEFAULT—JUDGMENT BY.

1. The general rule requiring merits to be shown in order to relieve a party against a judgment by default, is well settled, (*Wilson vs. Phillips*, 5 *Ark. Rep.* 183,) but to this rule the courts have admitted exceptions. *Browning et al. vs. Roane et al.*, 354.
2. For example, where a default is taken against a defendant before the expiration of the time allowed him to plead: *Ib.*
3. Or, where the defendant filed a plea, but the clerk omitted to notice the filing of record: *Ib.*
4. Or, where the plaintiff had filed a bill in chancery concerning the matter in litigation, and obtained defendant's consent for the cause to stand continued until the bill was heard, and afterwards took judgment by default whilst the bill was pending. *Ib.*

DELIVERY.

1. The employment of a person to measure and pile plank, is not a delivery of it, unless it be actually measured and piled. *Everett vs. Clements & Thompson*, 478.
2. A delivery to a general agent, is a delivery to the principal, without special authority to the general agent. *Ib.*

DELIVERY BONDS.

1. A judgment upon a forfeited delivery bond, on motion, without notice to defendant, actual or constructive, is utterly void, as repeatedly held by this court. *Pile et al. Ex parte*, 336.
2. The revival of such void judgment on *scire facias*, imparts no validity to it, though the defendant appear and plead to the writ. *Ib.*
3. A judgment on a forfeited delivery bond, taken on motion, without notice to defendants, actual or constructive, is no bar to an action of debt on the same bond. *McLain vs. Taylor et al.*, 358.
4. The sheriff may justify under process issued on such judgment, the court having jurisdiction of the subject matter, but not so with the plaintiff therein. *Ib.*
5. A demurrer having been sustained to the plea of former recovery in such case, the record of the first judgment cannot be introduced as evidence under other issues to which it is not applicable. *Ib.*
6. In such action, under a plea of payment, the sheriff may prove that he collected money by virtue of an execution issued upon the first judgment, and paid it to plaintiff. *Ib.*
7. The *46th sec. of chap.* 67, *Digest*, giving forfeited delivery bonds the force and effect of judgments, upon which execution may issue, held constitutional. By the stipula-

DELIVERY BONDS—CONTINUED.

tions of the bond, the obligors waive the right of trial by jury. *Reardon Ex parte*, 450.

8. SCOTT, J., remarks upon the power of the court to set aside such judgments, and the mode of defending against them. *Ib.*

DEMURRER.

1. Defendant filed two pleas: demurrer to one, and issue to the other; in determining the demurrer, the court looked back to the declaration, and decided it bad, and plaintiff amended. HELD, that the plea to which issue was taken, was an answer to the amended declaration, inasmuch as the cause of action was not changed, but merely stated differently: if new facts are introduced into the amended declaration, defendant may replead. *Stone vs. Robinson*, 469.
2. HELD, further, that when a plea is demurred to, and thereupon the court decides the declaration bad, no judgment is given upon the sufficiency of the plea, and after the declaration is amended, it is erroneous to proceed to judgment on other issues without disposing of such plea. *Ib.*
3. A demurrer to a writ of garnishment goes to so much of it as answers the purpose of a declaration, and extends to the allegations and interrogatories which are an amplification of that part of the writ. *McMeekin et al. vs. The State*, 553.

DEPOSITIONS.

1. The certificate of an officer before whom a deposition is taken must show that it was reduced to writing in his presence, otherwise it cannot be read. *Digest, p.* 433, *sec.* 13. *Hammond vs. Freeman*, 62.
2. Where notice of the time and place of taking a deposition is served by a person other than an authorized officer, the affidavit to such return required by statute (*Digest, p.* 799, *sec.* 23) cannot be made before a justice of the peace who is the attorney of the party taking the deposition. *Ib.*
3. A notice that depositions will be taken on the 4th, 5th and 6th days of May, 1846, or any one or more of said days, is indefinite and insufficient. *Humphries vs. McCraw*, 91.
4. A notice to take depositions on "the 16th, 17, and 18th days of March next, or on *any or each* of said days," is not sufficiently certain as to time. *Reardon vs. Farrington*, 2 *Eng. R.* 304, cited. *Caldwell's ex. vs. McVicar*, 418.
5. Where a party appears, by himself or attorney, and makes his appearance, cross examines, objects to a question, to the competency of the witness, or does any substantive act connected with the taking of the deposition, and it so appears in the deposition, regularly certified, he will not, at the hearing of the cause, be permitted to object that no legal notice had been given. *Ib.*
6. HELD, that a statement at the foot of a deposition, thus: "To all of which testimony, the said James McVicar, by Ja's Yell, his attorney, objected as being illegal:

DEPOSITIONS—CONTINUED.

Attest, H. Scull, J. P." was an extra-official act of the justice, and furnished no evidence of such an appearance as constituted a waiver of notice. *Ib.*

DIVORCE.

1. This court, when hearing appeals from the chancery side of the circuit court, will determine the cases upon the same evidence that was produced on the hearing in the court below—the depositions filed in the cause and read in evidence constituting a part of the record in a chancery cause without being made so by bill of exceptions. *Rose vs. Rose*, 507.
2. At common law a marriage was absolutely void, and so pronounced both by the courts of chancery and of common law in a collateral proceeding, where either of the parties had not the legal capacity to contract marriage, or did not give a legal consent, or acquiesce in the marriage. *Ib.*
3. But both courts yielded the exclusive jurisdiction to the ecclesiastical courts to declare marriage a nullity in a direct proceeding between the parties. *Ib.*
4. The chancery courts of this State possess all the powers, in relation to divorces and alimony, as well of the English ecclesiastical courts, as those conferred by our statute. *Ib.*
5. The civil and ecclesiastical courts granted divorces for no austerity of temper, petulance of manner, rudeness of language, or other indignities, unaccompanied with bodily injury, either actual or menaced, and which did not render the party incapable of performing the marital duties. *Ib.*
6. The 5th cause of divorce set forth in the statute gives to our courts a broader jurisdiction than that exercised by the civil and ecclesiastical courts for legal cruelty; for indignities to the person may render the condition of the party intolerable without "reasonable apprehension of bodily hurt." *Ib.*
7. Must not the drunkenness specified in the 1st section of our statute as one of the causes of divorce, be not only habitual for the space of one year, but also, in each particular case, render the marital state intolerable? *Ib.*
8. Personal indignities, such as rudeness, unmerited reproach, contempt, studied neglect, open insult, &c., and other plain manifestations of settled hate, alienation, and estrangement, must be habitual, continuous, and permanent, to create that intolerable condition contemplated by the statute. *Ib.*
9. But such indignities, when habitual and continuous, causing extreme and unmerited suffering, are sufficient to warrant a decree for divorce and alimony, without being attended with bodily harm, and need not be so extreme as to render the party incapable of discharging the marital duties. *Ib.*
10. The husband may defend a bill for a divorce on the ground of alleged ill conduct, by showing a just provocation in the ill conduct of the wife; but it is not necessary that the wife be entirely without blame. *Ib.*
11. Exhibitions of justly aroused passion on her part cannot defeat her of alimony, when it appears that she generally submitted in meekness to an almost continued flow, for years, of insult and unmerited contumely. *Ib.*

EJECTMENT.

1. A vendor, who executes a bond for title to his vendee, upon the payment of the purchase money at a future day, and puts him into possession, may, if the money is not paid when due, by first giving to the vendee reasonable time to quit, avoid his contract, and maintain an action of ejectment for the land. *Fears vs. Merrill*, 559.
2. Or, if the vendee has, by his own act, placed himself, in legal contemplation, in the attitude of a trespasser, the vendor may treat him as such, and sue without giving notice. *Ib.*
3. The notice, in such case, should be reasonable, to be determined by the circumstances of each case. The English rule is six months; but the better rule is that the time of notice should vary with the nature of the contract, and the character of the estate. *Notice on the day the suit is brought is insufficient. Ib.*
4. One entering under the vendee, by consent of the vendor, is entitled to notice. *Ib.*
5. In ejectment by the vendor, in such case, the true criterion of damages is the value of the land from the date of the demand and refusal. *Ib.*

EQUITY.

1. An order re-instating a cause on the docket which had been dismissed at the preceding term for want of prosecution, is *coram non judice*. *Miller vs. Hemphill*, 488.
2. When a cause has been called and submitted to the court, no act remains to be done by the party, no duty is incumbent on him but to hear and perform the decree; and the court cannot dismiss the cause for want of prosecution. *Ib.*
3. Though an injunction be granted under the territorial laws, the court has no power to assess greater damages than are authorized by the laws in force at the time of the dissolution of the injunction and assessment of damages. *Ib.*
4. As an interlocutory decree by default, under the territorial law, did not become final until "made absolute," the court could, at any time, until made absolute, set it aside upon sufficient showing. *Ib.*
5. A verbal agreement, made contemporaneously with the execution of a deed, may control or defeat it, by showing that it was intended as a mortgage, or that it was delivered as an escrow: but no subsequent parol contract can be admitted to control or defeat a deed, or attach a condition or defeasance to it. *Ib.*
6. After breach of a sealed contract a right of action under it may be waived or released by a new parol contract; but a sealed executory contract cannot be released or rescinded by a parol executory contract. *Ib.*
7. A bond for the conveyance of land, and a note executed at the same time for the purchase money, are taken as one contract: therefore, if the bond covenants to make title or deliver up the notes, title must be made by the time limited for payment of the notes. *Black vs. Bowman & Trammell*, 501.
8. If the remedy at law is effectual and complete, the party cannot resort to a court of equity: otherwise, if the remedy be not adequate and complete and adapted to the particular exigency. *Ib.*
9. Two notes given for the purchase of a tract of land, to which the vendor cannot

EQUITY—CONTINUED.

make title; one of the notes is assigned, and suit instituted upon it: defendant can obtain only partial redress at law, and must go into equity for complete relief. *Ib.*

10. In such case, the vendee is entitled to the same relief against the assignee as against the vendor; and a court of equity will decree a perpetual injunction against the judgment, and compel the vendor to deliver up the other note to be cancelled. *Ib.*

11. A contract cannot rest partly in parol and partly in writing; nor can verbal conditions be annexed to a written contract. *Ib.*

12. Testimony taken under a special agreement as to objections to be made to it, ought not to be suppressed unless the particular terms of the agreement be violated, or it be wholly immaterial. *Ib.*

13. To create a resulting trust, there must be an original agreement creating the trust at the time of the purchase, or when the contract for the purchase takes effect: and no resulting trust can arise in contradiction to the terms of the deed. *McGuire et al. vs. Ramsey*, 518.

14. Resulting trusts, or trusts created by operation of law, are expressly excluded from the operation of our statute of frauds, and it is manifest that parol evidence is admissible to establish them: such evidence is not to establish a fact inconsistent with the deed, but to engraft a trust upon the legal estate. *Ib.*

15. Where real estate is purchased and paid for with partnership funds, but conveyed to one of the partners alone, a trust results in favor of the other partner. *Ib.*

16. Lapse of time is allowed to prevail sometimes in equity, but only in analogy to the plea of the statute of limitations at law: and cannot be allowed in favor of one partner in possession of real estate against the other, for the possession of one is the possession of both. *Ib.*

17. Where the proof shows that a part of real estate held in partnership had been divided, and the division evidenced by deed between the parties, and no evidence, written or parol, is offered to show a division of the residue, the presumption is that no division was made of the residue. *Ib.*

18. A part of partnership property being sold by the guardian of the heir of the partner in possession, the administrator of such heir, after his death, is a proper party —the estate being liable to the co-partner, and the administrator of the heir receiving the money liable to pay the co-partner his portion of the receipts. *Ib.*

19. If there be an irregularity in the taking of testimony, the party must except to it at the time it is offered to be read, or he will be considered as having waived the objection, and cannot make it in this court. *Pelham as ad'r vs. Floyd as ad'r et al.*, 530.

20. Where facts are charged in the bill, and admitted, or, charged, and not denied, but other facts set up to avoid the consequences of them, it is not necessary that the facts charged be proven. *Ib.*

21. An objection to the bill, founded upon a want of equity and jurisdiction in the court, will not be considered when the case is brought into this court a second time

EQUITY—CONTINUED.

for revision—the first adjudication having admitted the equity and jurisdiction of the court. *Ib.*

22. Where the testimony shows clearly that one party sold, and the other understood that he was purchasing, a pre-emption right, the court will decree a perpetual injunction against a judgment obtained for the purchase money if the party selling was not entitled to a pre-emption. *Ib.*

23. A defendant at law, entitled to a set-off, has no right to go into a court of equity for relief after he has made his defence at law and failed: otherwise, if he is precluded from making his defence at law. *Garvin et al. vs. Squires*, 533.

24. The doctrine in the case of *Hempstead & Conway vs. Watkins ad.*, 1 *Eng.* 317, on this point, approved: and the opinion in *Menifee's ex. vs. Ball et al.*, 2 *Eng. R.* 520, recognized as applicable to cases where the party has waived or lost his right to go to the chancellor for relief. *Ib.*

25. Appearance by the garnishee, and filing answers to the plaintiff's interrogatories, is clearly an election to defend at law, and he is thereby precluded from a hearing in equity, unless he has been prevented from a fair defence at law by fraud, accident, or the act of the opposite party, unmixed with negligence on his part. *Ib.*

26. The fact that the justice of the peace, before whom the suit was brought and tried, refused to grant the defendant a new trial or allow him an appeal, is not sufficient to authorize a court of equity to grant him relief, as a court of law, in which he had elected to make his defence, could have afforded him ample remedy. *Ib.*

27. Where no replication has been filed to the answer, the cause will be heard on the bill, answer, and exhibits, exclusive of depositions; and the answer will be taken as true, whether the matter contained in it be responsive to the bill or not, or whether negative or affirmative. *Sneed et al. vs. Town*, 535.

28. But where a cause is set down for hearing, at the next term, "on the issues formed," and at that term "submitted on bill, answer, replication, exhibits and depositions," this court will presume that a replication was filed, though the record shows none, and that its failure to appear was a clerical omission. *Ib.*

29. Where the parties submit the matter in dispute to arbitration, after suit instituted, and the award is that the defendant shall pay a certain sum and the costs of suit, and he performs the award by giving his note, for the debt, with security, but fails to pay the costs, and the plaintiff proceeds to judgment for the whole debt, this is such a surprise as equity will relieve against. *Ib.*

30. In such case, the defendant is not guilty of negligence in failing to appear and plead to the action, because he had no reason to suppose that the plaintiff would take judgment against him for more than the costs. *Ib.*

31. Where the record states that the defendant appeared, by attorney, and pleaded, without naming the attorney; the plaintiff takes judgment by default regardless of the plea; the defendant charges in his bill, on oath, that he authorized no attorney to appear; the answer does not affirm that one did appear, and it was against the interest of the defendant to appear, the court will presume that there was no appearance, or, if so, by an unauthorized attorney. *Ib.*

EQUITY—CONTINUED.

32. The complainant in equity must pay or bring into court all that he is in equity bound to pay, before he can obtain the relief sought, or the costs of the proceedings in equity to the time of such payment will be decreed against him. *Ib.*

33. The answer of one defendant in chancery cannot, in general, be read in evidence against his co-defendant, unless where he claims under the co-defendant whose answer is offered in evidence, or where they have a joint interest in the matter in controversy. *Barraque and wife vs. Siter, Price & Co.*, 545.

34. But this court will not reverse the decree of the circuit court for error in refusing to exclude the answers as evidence, when the other testimony in the cause is sufficient to sustain the decree. *Ib.*

35. When the facts charged in the bill are proven by a single witness, and positively denied by the answer, the court will not decree against the answer without corroborating circumstances to sustain the single witness: but the answer must be positively, clearly, and precisely responsive to the bill, and of a fact which, from the nature of the transaction, is within the knowledge of the defendant. *Ib.*

36. When the answer positively denies a fact charged in the bill, but proceeds to give a circumstantial account of the transaction inconsistent with the truth of the denial, a single witness without corroborating circumstances is sufficient to prove the fact charged. *Ib.*

37. A vendor points out, to the agent of the vendee, two fractions, when showing him a tract of land offered for sale—represents them as valuable—gives a written description of the improvements on the fractions to be submitted to the vendee—the agent understands the whole tract is offered—possession of the fractions with the tract is delivered to the vendee, but they are omitted in the deed. HELD, that the fractions were included in the sale. *Ib.*

ESCROW.

1. A plea that a bond was delivered to the obligee on conditions not performed, is not a good plea that it was delivered as an escrow. The principle is also applicable to notes. *Scott vs. State Bank*, 36.

2. If delivered to a third person, it is not binding until the conditions are performed, but otherwise if delivered to the payee: a delivery to an agent is a delivery to the principal. *Ib.*

ESTRAY.

1. The owner of a posted animal cannot maintain replevin therefor until he has proven his property before a justice, and paid (or tendered) the costs to the taker-up, as required by *secs.* 25, 26, 27, 28, 29, *chap.* 65, *Digest. Phelan vs. Bonham*, 389.

EXECUTION.

1. An execution issued upon a judgment of the circuit court, from which an appeal

EXECUTION—CONTINUED.

has been taken to this court, and recognizance entered into to stay execution, is *voidable*, and may be superseded, but is not absolutely void. *Dixon vs. Watkins et al.*, 139.

2. The levy of an execution upon sufficient real estate to satisfy a judgment, undisposed of, is a satisfaction, as held in *Anderson vs. Fowler*, 3 *Eng. R.*, which case is approved. *Anthony vs. Humphries ad., use, &c.*, 176.
3. An execution may issue on a judgment rendered at the suit of the governor, where the State is the beneficiary, after he goes out of office, without a revival in the name of his successor. *Pryor & Paup Ex parte*, 257.
4. An execution cannot issue against a dead man. *Bentley et al. vs. Cummins as ad.*, 487.

EXECUTORS AND ADMINISTRATORS.

1. In a declaration upon an administrator's bond, it is assigned, as a breach thereof, that plaintiff had obtained judgment in the circuit court against the administrator; that he had assets in his hands, and, though requested, neglected and refused to pay plaintiff's judgment. Breach held insufficient. *Porter vs. State, use Brown*, 226.
2. To charge the administrator, or his securities, upon his bond in such case, it should have been further alleged that the plaintiff's judgment was filed, allowed and classed in the probate court against the estate; that the court had ordered the payment thereof on settlement with the administrator and ascertaining assets in his hands, and that he had neglected or refused to do so in obedience to the order of the probate court, as held in *Outlaw et al. vs. Yell, Gov.*, 5 *Ark. R.* 468. *Ib.*
3. In an action upon the bond of an administrator by a creditor (under *sec.* 170, *ch.* 4, *Digest*) to subject the administrator, and his securities, to damages for his failure to account and settle according to the conditions of his bond, a general breach, alleging a non-performance in the language used in the condition of the bond, is sufficient. *Ib.*
4. In such an action it is proper that the character in which the plaintiff sues should appear in the commencement of the declaration, though it is sufficient if it appear in the conclusion. *Ib.*
5. As to the evidence necessary to sustain such action. *Ib.*
6. Where a creditor of an estate brings an action upon the bond of an administrator to recover the amount of his own claim, he must aver, in assigning the breach of the condition of the bond, that his claim has been allowed, classed and ordered to be paid, by the probate court, and that he has demanded payment of the administrator, and payment has been refused. *Outlaw et al. vs. Yell, Gov.*, 5 *Ark. Rep.* 468, and *Porter vs. State, use Brown, ante*, cited. *State, use Wallace vs. Ritter ad.*, 244.
7. The proper form of a declaration by a creditor upon the bond of an administrator, for the benefit of creditors generally, under *sec.* 170, *chap.* 4, *Digest*, declared. *Porter vs. State, use Brown*, cited. *Ib.*

EVIDENCE.

1. Where a party covenants to do an act, for which he receives a consideration, and fails to perform the act, the other party may bring covenant for the breach, or assumpsit to reclaim the consideration; and, in assumpsit for the consideration, plaintiff must prove that the contract under which he paid the money, and the failure, refusal, or inability of defendant to perform it on his part. *Murray vs. Clay*, 39.

2. Where a witness has made a different statement from the one made by him on trial, he is not thereby discredited, unless the discrepancy is wilful. *Yoes vs. The State*, 42.

3. In covenant on a bond payable in Arkansas bank notes, plaintiff must prove the value of the notes; otherwise he is entitled to judgment for nothing. *Bizzell & Owens vs. Brewer as ad.*, 58.

4. A. made a note payable to the order of B., who endorsed it to C., and C. endorsed it to a bank; the bank obtained judgment against A. and C. on the note, and C. paid it: in a suit by C., against A., for the money so paid by him, proof of the payment is sufficient, without producing a transcript of the judgment. *Hammond vs. Freeman*, 62.

5. But as the liability of A. to C. depends upon the endorsement of B. to him, the note and endorsement must be produced in evidence, and a copy will not suffice, unless the loss of the original be shown. *Ib.*

6. The acts and declarations of the vendor, after the sale, in the absence of the vendee, are not competent evidence to impeach the title of the latter; but, if done, or made, in his presence, and not disaffirmed by him, they become legal evidence, not as the mere acts or declarations of the vendor, but as indirect admissions of the vendee inconsistent with his title. *Humphries vs. McCraw*, 9.

7. The acts and declarations of a party are competent evidence when they afford any presumption against them. *Phelan vs. Bonham*, 389.

8. A fact may be proven by secondary evidence if not objected to. *Wallace vs. Collins*, 5 *Ark. R.* 4, cited. *Ib.*

9. Where competent and incompetent evidence are introduced together without objection, none of it should be excluded by the court in charging the jury; the motion to exclude should be made immediately on its being introduced, and comes too late after other witnesses have been examined. *Johnson vs. Ashley*, 2 *Eng. R.* 473, cited. *Ib.*

10. To maintain replevin in the detinet, plaintiff need not prove a bailment. *Beebe vs. De Baun*, 3 *Eng. R.* 563, cited, and approved. *Ib.*

11. The owner of a posted animal cannot maintain replevin therefor until he has proven his property before a justice, and paid (or tendered) the costs to the taker-up as required by *secs.* 25, 26, 27, 28, 29, *chap.* 65, *Digest.* *Ib.*

12. An endorsement upon a note of part payment, made by plaintiff, or in his behalf, is inadmissible, on his part, as evidence to take the case out of the statute of limitations, unless it be first proven by evidence *aliunde* to have been actually made before the cause of action was barred, and consequently against the interest of the party making it. *Alston vs. State Bank*, 155.

13. The authorities on this subject reviewed. *Ib.*

FORCIBLE ENTRY AND DETAINER.

1. A tenant cannot dispute the title of his landlord. *Burke vs. Hale*, 328.
2. The limitation section of the forcible entry and detainer law (*Digest, chap.* 71, *sec.* 18) must be construed in connection with the third section, giving the remedy to landlords against tenants, so as to give effect to both sections. *Ib.*
3. Under such construction, the limitation section does not commence running in favor of one in possession under a lease, until the expiration of the lease. *Ib.*
4. The lessor has no cause of action against the lessee, or an under-tenant, until the expiration of the lease, and a construction of the 18th section that would make it bar the action of the lessor before it accrues, would be absurd. *Ib.*
5. In an action of forcible entry and detainer, a variance between the affidavit filed by plaintiff, and the writ, may be pleaded in abatement. *Sumner vs. Spencer*, 441.
6. If the action is for a forcible entry and detainer, the affidavit must correspond with that form of action: if for unlawful detainer, it must be framed accordingly. *Ib.*
7. Where the writ is abated on a plea for variance between it and the affidavit, the defendant is entitled to judgment for restitution. *Ib.*

FRAUD.

1. Fraud will never be presumed in a court of law, nor in a court of equity, where the act does not necessarily import fraud, and may have as well occurred from a good as bad motive. *Dardenne vs. Hardwick*, 482.
2. A purchase and sale of property, for a valuable consideration, accompanied by a bona fide change of property and possession, without proof of fraud in which both parties participated, the law will not presume as being made with intent to hinder, delay, or defraud creditors. *Ib.*
3. A purchase of property from a debtor, for the purpose of defrauding his creditors, is void: but a man, no matter how much indebted, may sell his property, and the mere circumstance of indebtedness is no evidence of fraud. *Ib.*
See, also, *Possession*, 1.

GAMING.

1. In an indictment for gaming, it was charged, in two of the counts, that the defendant and four other persons did *bet together and against each other* at a game of cards, &c.; and, in the other count, that the said defendant and the said other persons *did bet together* at a game of cards, &c. HELD, that proof that the four persons named in the indictment played the game of cards, and defendant stood by and bet with one of them; that three of the players bet with each other, but the fourth player did not bet at all, was not sufficient evidence to sustain a verdict of guilty against dedefendant: that the charge in the indictment, though made with unnecessary complication, should have been proven as alleged. *Hany vs. State*, 193.

GARNISHMENT.

1. A demurrer to a writ of garnishment goes to so much of it as answers the purpose

GARNISHMENT—CONTINUED.

of a declaration, and extends to the allegations and interrogatories which are an amplification of that part of the writ. *McMeekin vs. State*, 553.

2. The State cannot be garnisheed for the salary of a public officer. *Ib.*

GIFT.

1. A father, by deed of gift, gave to each of his sons and daughters, and to their heirs forever, a slave, with a proviso that if either of them died without heirs, his or her slave should be equally divided among the survivors: one of the daughters married, and her husband died possessed of her slave and increase. HELD, that the deed of gift vested the slave absolutely in the daughter; on her marriage, the property vested in the husband; and, on his death, the title passed to the administrator, subject to the dower of the widow. *Moody vs. Walker*, 3 *Ark. Rep.* 147, cited. *Gaines as ad. vs. Briggs et al.*, 46.

HIRING.

1. In an action for the hire of slaves for one year, it is erroneous to instruct the jury that what defendant paid for the same slaves the year previous, is the correct criterion of their value, as the value of slave hire fluctuates. *Adamson vs. Adamson*, 26.
2. What such slaves hired for during the year in controversy, would be the correct criterion. *Ib.*
3. A. hired a negro of B. for one year, and took his obligation for the price of the hire: before the expiration of the year the negro was drowned without fault of the hirer. HELD, that the owner could recover the hire of the negro to the time of his death only. *Collins et al. vs. Woodruff*, 463.

HUSBAND AND WIFE.

1. Marriage suspends the legal existence of the wife during coverture, and vests her personal estate in her husband. *Sadler vs. Bean and wife*, 202.
2. Her future acquisitions of personalty vest in him also, unless settled upon her to her sole and separate use by apt words excluding the marital rights of the husband: and this, whether the property be conveyed directly to her, or to a trustee for her use. *Ib.*
3. If such apt words are used in the conveyance to the wife, the husband becomes her trustee. *Ib.*

INDICTMENT.

1. In an indictment against a minister for solemnizing the marriage of minors without the consent of the parent, it is sufficient to allege that he is authorized by law to solemnize the rites of matrimony in this State, without alleging in terms that his

INDICTMENT—CONTINUED.

license or credentials of clerical character have been previously recorded. *State vs. Wills*, 196.

2. And it is sufficient to allege that the marriage was solemnized without the consent of the parent, and that the parent resided in the State, without setting out the name of the parent. *Ib.*

INFORMAL SUITS.

See *Practice in the Circuit Courts*, 3 *to* 9.

INJUNCTION.

1. Complainant's bill being verified by affidavit, the facts therein stated are taken as true for the purpose of granting an injunction, and the circuit judge having refused an injunction, where the complainant made a sufficient showing therefor upon the face of his bill, this court awarded a mandamus to compel him to grant the injunction. *Pile et al. Ex parte*, 336.
2. Where a garnishee obtains an injunction as to proceedings against him, it is no release of errors as to the defendant in the attachment: an injunction operates as a release of errors in the proceedings at law only as to the party obtaining it. *Taylor vs. Ricards & Hoffman*, 378.
3. Upon petition for an injunction to restrain proceedings at law, affecting real estate, until a decision upon a bill in equity for title to such real estate, if the bill, upon demurrer, be insufficient to sustain a decree, it is error to perpetuate the injunction. *Ib.*
4. The decision of this court in the case of *Blakeney vs. Ferguson*, 3 *Eng.* 273, concurred in. *Blakeney vs. Ferguson et al.*, 487.
5. Though an injunction be granted under the territorial laws, the court has no power to assess greater damages than are authorized by the laws in force at the time of the dissolution of the injunction and assessment of damages. *Miller vs. Hemphill*, 483.

INSTRUCTIONS.

1. Abstract instructions to the jury are improper. *Zachary vs. Pace*, 212.
2. Where the court erroneously instructed the jury as to the law, but the instructions could not have influenced the verdict, a new trial will not be granted on that account. *Ib.*

JOINDER OF ACTIONS.

See *Action*, 5.

JUDGMENTS.

1. A judgment upon a forfeited delivery bond, on motion, without notice to defen-

JUDGMENTS—CONTINUED.

dant, actual or constructive, is utterly void, as repeatedly held by this court. *Pile et al. Ex parte*, 336.

2. The revival of such void judgment on *scire facias* imparts no validity to it, though the defendant appear and plead to the writ. *Ib.*
3. A judgment on a forfeited delivery bond, taken on motion, without notice to defendants, actual or constructive, is no bar to an action of debt on the same bond. *McLain vs. Taylor et al.*, 358.
4. The sheriff may justify under process issued on such judgment, the court having jurisdiction of the subject matter, but not so with the plaintiff therein. *Ib.*
5. A demurrer having been sustained to the plea of former recovery in such case, the record of the first judgment cannot be introduced as evidence under other issues to which it is not applicable. *Ib.*
6. In such action, under a plea of payment, the sheriff may prove that he collected money by virtue of an execution issued upon the first judgment, and paid it to plaintiff. *Ib.*
7. On the 17th March, 1847, R. & Co. executed a power of attorney to C., authorizing him to confess judgment on a note in favor of P. N. & Co., with a proviso that if they paid $560 on the note on or before the — day of —, 1847, the power was thereby to be revoked; C. confessed judgment on the note 22d June, 1847. HELD, on error, that the blank date in the power of attorney might be supplied by parol evidence, and that this court would presume in favor of the judgment below, that it was done, the contrary not affirmatively appearing. *Rapley & Co. vs. Price, Newlin & Co*, 428.
8. HELD, further, that the attorney was not bound to prove that the payment mentioned in the power was not made. *Ib.*
9. HELD, moreover, that, inasmuch as it did not affirmatively appear of record that the execution of the power was proven before the judgment was confessed, the court had no jurisdiction of the persons of the makers thereof, and the judgment was invalid. *Ib.*

JUDICIAL CIRCUITS.

See *Constitutional Law. Circuit Judges.*

JURISDICTION.

1. By filing a motion to rule the plaintiff to give security for costs, and taking the judgment of the circuit court thereon, defendant concedes the jurisdiction of the court, and waives objections thereto, the matter of the motion being subsequent, in the order of pleading, to objections to the jurisdiction. *Denning vs. Kelly*, 435.
2. The motion being signed by attorney presupposes leave of court, and by that also the jurisdiction is conceded. *Ib.*
3. Where a justice of the peace has no jurisdiction of the subject matter of a suit, the circuit court has none on appeal. *Collins et al. vs. Woodruff*, 463.

JURISDICTION—CONTINUED.

4. It follows, as a consequence of the decision in *Berry vs. Linton*, 1 *Ark. R.* 252, that one suit may be brought before a justice of the peace on several notes, where neither of the notes is for a greater sum than $100, though the aggregate sum of all the notes may exceed that amount. *Ib.*
5. It is not the aggregate amount of the several demands, but the sum due upon each, that constitutes the true sum in controversy. *Ib.*

JURY TRIAL.
See *Trial by Jury.*

JUSTICES OF THE PEACE.

1. Where a justice of the peace has no jurisdiction of the subject matter of a suit, the circuit court has none on appeal. *Collins et al. vs. Woodruff*, 463.
2. It follows, as a consequence of the decision in *Berry vs. Linton*, 1 *Ark. R.* 252, that one suit may be brought before a justice of the peace on several notes, where neither of the notes is for a greater sum than $100, though the aggregate sum of all the notes may exceed that amount *Ib.*
3. It is not the aggregate amount of the several demands, but the sum due upon each, that constitutes the true sum in controversy. *Ib.*
4. The cause of action must be filed with the justice before the issuance of the writ to give him jurisdicttion of the case, as well where the defendant appears and pleads, as where he makes default. *Everett vs. Clements & Thompson*, 478.
5. Where the defendant moves for the consolidation of three suits, in two of which the cause of action was not filed, and pleads to and defends the consolidated suit, still the jurisdiction of the justice is restricted to the cause of action filed: and so is the circuit court on appeal taken from the judgment of the justice. *Ib.*

JUSTIFICATION.

1. An officer may justify under final process, regular upon its face, issued from a court having jurisdiction of the subject matter, without showing the judgment on which it is founded; but the plaintiff in the process, or a stranger, must show a regular judgment. *Dixon vs. Watkins et al.*, 139.
2. A sheriff may justify under process issued upon a judgment obtained upon a delivery bond without notice to defendant, the court having jurisdiction of the subject matter, but not so with the plaintiff therein. *McLain vs. Taylor et al.*, 358.

LANDLORD AND TENANT.
1. A tenant cannot dispute the title of his landlord. *Burke vs. Hale*, 328.

LEVY.

1. The levy of an execution upon sufficient real estate to satisfy a judgment, undis-

LANDLORD AND TENANT—CONTINUED.

posed of, is a satisfaction, as held in *Anderson vs. Fowler*, 3 *Eng. R*, which case is approved. *Anthony vs. Humphries ad., use, &c.*, 176.

LIMITATION.

1. The exception in the 13th section of the limitation act of the Revised Statutes, in favor of non-residents, being repealed by act of 14th of January, 1843, the statute commenced running from that date against the causes of action of non-residents then existing; but, by act of 14th of December, 1844, (*Digest*, 698,) non-residents were allowed two years, from that date, to sue upon causes of action barred by that or previous acts. *Carneal vs. Thompson & Hanly*, 55.
2. On a promissory note due a non-resident 15th of May, 1838, the statute commenced running 14th January, 1843, and three years being the bar, it was not barred on the 14th December, 1844, when the time was extended two years, and plaintiff having brought his suit on the 18th September, 1846, the cause of action was not barred. *Wilson vs. Higgins*, 2 *Eng.* 475, cited. *Ib.*
3. The limitation section of the forcible entry and detainer law (*Digest, chap.* 71, *sec.* 18) must be construed in connection with the third section, giving the remedy to landlords against tenants, so as to give effect to both sections. *Burke vs. Hale*, 328.
4. Under such construction, the limitation section does not commence running in favor of one in possession under a lease until the expiration of the lease. *Ib.*
5. The lessor has no cause of action against the lessee, or an under-tenant, until the expiration of the lease, and a construction of the 18th section that would make it bar the action of the lessor before it accrues, would be absurd. *Ib.*
6. The statute of non-claim, (*Digest, chap.* 4, *sec.* 85,) like other statutes of limitation, runs against a claim from the accrual of the cause of action, and not from the grant of letters of administration. *Burton's ad'r vs. Lockert's ex'r*, 411.
7. An endorsement upon a note of part payment, made by plaintiff, or in his behalf, is inadmissible, on his part, as evidence to take the case out of the statute of limitations, unless it be first proven by evidence *aliunde* to have been actually made before the cause of action was barred, and consequently against the interest of the party making it. *Alston vs. State Bank*, 455.
8. The authorities on this subject reviewed. *Ib.*
9. Lapse of time is allowed to prevail sometimes in equity, but only in analogy to the plea of the statute of limitations at law: and cannot be allowed in favor of one partner in possession of real estate against the other, for the possession of one is the possession of both. *McGuire et al. vs. Ramsey*, 518.

MANDAMUS.

1. Where an inferior tribunal has a discretion, and proceeds to exercise it, this court

MANDAMUS—CONTINUED.

has no jurisdiction to control that discretion by mandamus; but if the inferior court refuses to act, or to entertain the question for its discretion, where it is enjoined by law, this court will enforce obedience to the law by mandamus. *Brem vs. Arkansas County Court*, 240.

2. The statute in reference to paupers construed, and the county court of Arkansas county compelled by mandamus to take jurisdiction of, and determine, a claim for medical attendance, &c., in the illness of a person who died in that county destitute of means. *Ib.*

3. Complainant's bill being verified by affidavit, the facts therein stated are taken as true for the purpose of granting an injunction, and the circuit judge having refused an injunction, where the complainant made a sufficient showing therefor upon the face of his bill, this court awarded a mandamus to compel him to grant the injunction. *Pile et al. Ex parte*, 336.

MARRIAGE.

1. In an indictment against a minister for solemnizing the marriage of minors without the consent of the parent, it is sufficient to allege that he is authorized by law to solemnize the rites of matrimony in this State, without alleging in terms that his license or credentials of clerical character have been previously recorded. *State vs. Wills*, 196.

2. And it is sufficient to allege that the marriage was solemnized without the consent of the parent, and that the parent resided in the State, without setting out the name of the parent. *Ib.*

MORTGAGE.

1. A mortgage is good between the parties, though not acknowledged and recorded; but, under our registry act, it constitutes no lien upon the mortgaged property as against strangers, unless it is acknowledged and recorded as required by the act, even though they may have actual notice of its existence. *Main et al. vs. Alexander*, 112.

2. The registry of a mortgage without acknowledgment does not constitute such constructive notice to the world as contemplated by the act. *Ib.*

3. A mortgage was executed upon a slave, and recorded without acknowledgment: afterwards the slave was attached by creditors of the mortgagor. On a bill to foreclose against the mortgagor and attaching creditors, HELD, that the lien of the attachments was paramount to the mortgage. *Ib.*

NATURALIZATION.

1. An alien who has emigrated to the United States since the 18th of June, 1812, and

NATURALIZATION—CONTINUED.

who was not a minor on his arrival, is not entitled to take the oath of naturalization on five years residence, without having made the declaration of his intention to become a citizen as required by the act of 26th May, 1824, two years before his application to take the oath of naturalization. (See *Digest Stat. Ark.* 90.) *Brownlee Ex parte*, 191.

NEW TRIALS.

1. By moving for a new trial a party abandons previous exceptions, unless he incorporates them in the motion, and reserves them by bill of exceptions to the decision of the court overruling the motion. *Sawyers vs. Lathrap*, 67.
2. The decision of the court below overruling a motion for a new trial will not be reviewed by this court unless the evidence is put upon record: the presumption is in favor of the correctness of the decision. *Ib.*
3. A memorandum, signed by the judge, stating that certain facts were proven, is not part of the record. *Ib.*
4. The overruling of a motion for continuance cannot be made a ground for granting a new trial. *Magruder vs. Snapp*, 108.
5. By moving for a new trial, a party abandons previous exceptions, unless they are made the grounds of the motion, and reserved in the bill of exceptions to the decision of the court overruling the motion, as held in *Danley vs. Robin's heirs*, 3 *Ark. R.*, and *Ashley vs. Hyde & Goodrich*, 2 *Eng. R.* *Anthony vs. Humphries as ad., use, &c.*, 176.
6. Where the court erroneously instructed the jury as to the law, but the instructions could not have influenced the verdict, a new trial will not be granted on that account. *Zachary vs. Pace*, 212.
7. The admission, by the court, of irrelevant evidence, is no cause for a new trial where it could not have influenced the verdict. *Weaver vs. Caldwell's ex.*, 33.

NON-CLAIM.

6. The statute of non-claim, (*Digest, chap. 4, sec.* 85,) like other statutes of limitation, runs against a claim from the accrual of the cause of action, and not from the grant of letters of administration. *Burton's ad'r vs. Lockert's ex'rs*, 411.

NOTICE.

See *Depositions*. *Ejectment*.

OATH OF PETIT JURY.

1. In an action on a penal bond, where the breaches assigned are answered by pleas, and issues taken thereto, swearing the jruy to *try the issues joined*, is equiva-

OATH OF PETIT JURY—CONTINUED.

lent to swearing them to try the *truth of the breaches:* they must also be sworn, however, to assess the damages. (*Digest, chap.* 120, *secs.* 5, 6.) *McLain vs. Taylor et al.*, 358.

2. But, in such action, where judgment is taken on demurrer, by confession or default, it is indispensible to swear them to inquire into the truth of the breaches, and assess the damages. *Ib.*

PARTNERSHIP.

1. Where real estate is purchased and paid for with partnership funds, but conveyed to one of the partners alone, a trust results in favor of the other partner. *McGuire et al. vs. Ramsey*, 518.
2. Lapse of time is allowed to prevail sometimes in equity, but only in analogy to the plea of the statute of limitations at law: and cannot be allowed in favor of one partner in possession of real estate against the other, for the possession of one is the possession of both. *Ib.*
3. A part of partnership property being sold by the guardian of the heir of the partner in possession, the administrator of such heir, after his death, is a proper party —the estate being liable to the co-partner, and the administrator of the heir receiving the money liable to pay the co-partner his portion of the receipts. *Ib.*

PAUPERS.

1. The statute in reference to paupers construed, and the county court of Arkansas county compelled by mandamus to take jurisdiction of, and determine, a claim for medical attendance, &c., in the last illness of a person who died in that county destitute of means. *Brem vs. Arkansas County Court*, 240.

PAYMENT.

1. The execution of a note raises a strong presumption that pre-existing accounts between the parties have been settled. *Weaver vs. Caldwell's ex.*, 339.
2. But the execution of a note raises no presumption that a bill of exchange of a prior date has been paid. *Ib.*
3. The presumption of payment does not attach where the opposing evidences of debt are of equal dignity. *Ib.*
4. Under a plea of payment to an action upon a forfeited delivery bond, it may be proven that, under an execution issued upon a void judgment obtained upon the same bond, the sheriff collected money and paid it to plaintiff. *McLain vs. Taylor et al.*, 358.

PENAL BONDS.

1. In an action on a penal bond, where the breaches assigned are answered by pleas,

PENAL BONDS—CONTINUED.

and issues taken thereto, swearing the jury to *try the issues joined*, is equivalent to swearing them to try the *truth of the breaches:* they must also be sworn, however, to assess the damages. (*Digest, chap.* 120, *secs.* 5, 6.) *McLain surv. vs. Taylor et al.*, 358.

2. But, in such action, where judgment is taken on demurrer, by confession or default, it is indispensible to swear them to inquire into the truth of the breaches, and assess the damages. *Ib.*

3. Previous to March 20, 1839, (the time *chap.* 91, *Revised Statutes*, took effect,) there was no act of limitation in this State as to writings obligatory, and causes of action then existing on such instruments were not barred until after the expiration of five years from the time the act went into operation. *Lee vs. Leech*, 423.

4. Debt on a penal bond, conditioned that defendant would convey to plaintiff a lot of ground, by a particular day, which he had sold to him for a specified price, and received the purchase money: breach, failure to convey. HELD, that on default of defendant, the court could not render final judgment for the purchase money specified in the bond with interest thereon, but should order a writ of inquiry as to the truth of the breach, and damages sustained, under *Digest, chap.* 120, *sec.* 7. *Ib.*

PLEAS AND PLEADING.

1. Every plea must answer the whole count, and every replication the whole plea; but to do this, it is not necessary that every material allegation in the opponents pleading should be traversed. *Lawson & Thorn vs. State, use Bettison*, 9.

2. A party may traverse any material allegation; for if such allegation be necessary to support the action, or defence, the plea or replication denying it, is an answer to the whole count or plea. *Ib*

3. To an action on a constable's bond, assigning as a breach that he failed to return an execution issued to him on a justice's judgment, a plea that there is no record of such judgment and execution, is bad, because a justice's court is not a court of record. *Faulkner et al. vs. State, use Eller's ad'x.*, 14.

4. A plea that a bond was delivered to the obligee on conditions not performed, is not a good plea that it was delivered as an escrow. The principle is also applicable to notes. *Scott vs. State Bank*, 36.

5. If delivered to a third person, it is not binding until the conditions are performed, but otherwise if delivered to the payee: a delivery to an agent is a delivery to the principal. *Ib.*

6. Therefore, a plea that defendant signed the note sued on and delivered it to an agent of the plaintiff (a bank) on the express agreement that it was not to be discounted until it was signed by a third person, as co-security, whose name was in the body of the note, and that the bank discounted the note without obtaining the signature of such third person, is bad on demurrer. *Ib.*

PLEAS AND PLEADING—CONTINUED.

7. *Nil debet,* not sworn to, under our state, (*Digest, p.* 812, *sec.* 103, 105,) does not put in issue the execution of the note. *State Bank vs. Kerby et al.*, 345.
8. Nor is the law different where a party executes a note by making his mark. *Ib.*
9. By filing a motion to rule the plaintiff to give security for costs, and taking the judgment of the court thereon, defendant concedes the jurisdiction of the court, and waives objections thereto, the matter of the motion being subsequent, in the order of pleading, to objections to the jurisdiction. *Denning vs. Kelly*, 435.
10. The motion being signed by attorney presupposes leave of court, and by that also the jurisdiction is conceded. *Ib.*
11. Defendant filed two pleas: demurrer to one, and issue to the other; in determining the demurrer, the court looked back to the declaration, and decided it bad, and plaintiff amended. HELD, that the plea to which issue was taken, was an answer to the amended declaration, inasmuch as the cause of action was not changed, but merely stated differently: if new facts are introduced into the amended declaration, defendant may replead. *Stone vs. Robinson*, 469.
12. HELD, further, that when a plea is demurred to, and thereupon the court decides the declaration bad, no judgment is given upon the sufficiency of the plea, and after the declaration is amended, it is erroneous to proceed to judgment on other issues without disposing of such plea. *Ib.*

POSSESSION.

1. Where a father sells a slave to a son, who is a member of his family, and so continues, and the slave remains in the family, in contemplation of law he is in the possession of the son, and if the father sometimes controls the slave, it raises no presumption of fraud. *Humphries vs. McCraw*, 91.

PRACTICE IN THE CIRCUIT COURTS.

1. Where there are issues to two pleas on record, and verdict upon one only, against defendant, final judgment cannot be given until the other issue is determined. *Hammond vs. Freeman*, 62.
2. By moving for a new trial, a party abandons previous exceptions, unless he incorporotes them in the motion, and reserves them by bill of exceptions to the decision of the court overruling the motion. *Sawyers vs. Lathrap*, 67.
3. By *sec.* 52, *chap.* 116, *Rev. Stat.*, the defendant has until the calling of a cause in its regular order on the docket to file his plea to the merits, and the court cannot abridge the time allowed him, by a rule of practice. *Hixon vs. Weaver as ad., use, &c.*, 133.
4. Rules of practice made by the court must accord with statutary provisions. *Ib.*
5. The effect of the act of 5th December, 1846, (*Digest, p.* 795,) authorizing the commencement of suits by filing the evidence of debt in the clerk's office, merely dispenses with the declaration, but has no further or other effect, either upon the form

PRACTICE IN THE CIRCUIT COURTS—CONTINUED.

or substance of the writ, or upon the pleadings subsequent to the declaration. *Gatton vs. Walker*, 199.

6. And when a defence is made to an action brought under said act, it must be presented by pleas appropriate to the form of action which the plaintiff may have adopted as indicated by his writ. *Ib.*

7. The summons in this case, showing that the plaintiff proceeded to recover a money demand, and distinctly indicating that he adopted the action of debt as the form of his remedy, declared good. *Ib.*

8. The return of the sheriff upon the writ shows a good service within the rule laid down in *Gilbreath vs. Kuykendall*, 1 *Ark. Rep.* 50, as it distinctly describes the time, place, and manner of the service, and the name of the party on whom it was made. *Ib.*

9. The service of the writ having been made more than fifteen days before the return term, plaintiff was entitled to judgment on failure of defendant to appear and plead, as held in *Tagert vs. Harkness*, 1 *Eng. R.* 528. *Ib.*

10. The general rule requiring merits to be shown in order to relieve a party against a judgment by default, is well settled, (*Wilson vs. Phillips*, 5 *Ark. Rep.* 183,) but to this rule the courts have admitted exceptions. *Browning et al. vs. Roane et al.*, 354.

11. For example, where a default is taken against a defendant before the expiration of the time allowed him to plead: *Ib.*

12. Or, where the defendant filed a plea, but the clerk omitted to notice the filing of record: *Ib.*

13. Or, where the plaintiff had filed a bill in chancery concerning the matter in litigation, and obtained defendant's consent for the cause to stand continued until the bill was heard, and afterwards took judgment by default whilst the bill was pending. *Ib.*

14. Where two replications are filed to a plea, and finding for plaintiff on one which is an answer to the plea, it is no objection that an issue to the other was not disposed of. *Taylor vs. Ricards & Hoffman*, 378.

15. Plaintiff filed a petition in debt on a note made to another, and writ issued: afterwards he filed another petition on the same note, against the same parties, setting out an assignment of the note to himself, which was not alleged in the first petition, and writ issued. HELD, that the suits were distinct; that the last petition was not an amendment of the first, and might be filed without leave of court. *Howell et al. vs. Mason as ad.*, 406.

16. The defendants appeared to the second petition, and moved to dismiss for want of bond for costs, which motion was sustained; the plaintiff moved for a reconsideration of the judgment of dismissal, which motion was granted, and defendants then interposed further defence. HELD, that the granting of the motion to reconsider was equivalent to setting aside the judgment of dismissal. *Ib.*

17. Afterwards the death of the plaintiff was suggested by one of the defendants, and thereupon judgment that the suit abate: several terms afterwards the suit was revived, on motion, in the name of plaintiff's administrator, and proceeded to judg-

PRACTICE IN THE CIRCUIT COURTS—CONTINUED.

ment on the merits. HELD, that the judgment of abatement, though contrary to the statute, (*Digest, chap.* 1, *sec.* 7,) was final and erroneous, but not void, and that the proceedings and judgment subsequent thereto were *coram non judice,* null and void. *Ib.*

18. It is erroneous to proceed to judgment against a defendant served with process without a discontinuance as to one not served. *Alston vs. State Bank,* 455.

PRACTICE IN THE STPREME COURT.

1. The decision of the court below overruling a motion for a new trial, will not be reviewed by this court unless the evidence is put upon record: the presumption is in favor of the correctness of the decision. *Sawyers vs. Lathrap,* 67.
2. A memorandum, signed by the judge, stating that certain facts were proven, is not part of the record. *Ib.*
3. Where defendant appeals to this court in a criminal case, but fails to prosecute his appeal, the State may have the judgment of the court below affirmed by applying to this court at the first term thereof held more than thirty days after the appeal is taken, but not at a subsequent term. *Chaney vs. The State,* 129.

PRSEUMPTOIN.

1. Suit on a bond before a justice: defendant interposed the statute of limitation as a defence: judgment for plaintiff, and defendant appealed: tried in the circuit court without formal pleadings, and judgment for plaintiff: defendant, without moving for a new trial, or putting the evidence on record, brought error. HELD, that though the bond appeared on its face to be barred by the statute of limitation, yet this court would presume in favor of the judgment below that plaintiff introduced proof to take the case out of the statute. *Hensley et al. vs. Moore,* 69.
2. The execution of a note raises a strong presumption that pre-existing accounts between the parties have been settled; but the execution of a note raises no presumption that a bill of exchange of prior date has been paid: the presumption of payment does not attach where the opposing evidences of debt are of equal dignity. *Weaver vs. Caldwell's ex.,* 339.
See, also, *Bank Notes,* 4, 5.

PRINCIPAL AND SURETY.

1. A plea by a surety that when the obligation fell due the principal was *solvent,* and the creditor neglected and forebore to sue him until he became insolvent, is bad: mere forbearance by the creditor is no discharge of the security. *King & Houston vs. State Bank,* 185.
2. But if the creditor give day of payment to the principal, upon a valid consideration, without the consent of the surety, the surety is discharged; but part payment of the debt is no such consideration. *Ib.*

PRINCIPAL AND SURETY—CONTINUED.

3. Where the holder of a bond gives day of payment to the principal, on a valuable consideration, without the consent of a security, the latter is thereby discharged both in law and in equity. *Caldwell's ex. vs. McVicar*, 418.

PROCESS.

1. A summons addressed to the sheriff of —— county, is void. *Vaughn* vs. *Brown*, 20.
2. As to the distinction between *void* and *voidable* process, and authorities on that subject reviewed. *Dixon vs. Watkins et al.*, 139.
3. An execution issued after appeal, and recognizance to stay execution, is not *void* but *voidable*. *Ib.*

PROFERT.

1. Where a party declares upon a note payable to bearer as assignee by endorsement, he must make profert of the endorsement; but where he declares as assignee by delivery, of course no profert can be made. *Edison et al. vs. Frazier*, 219.
2. The words, in a declaration, "assigned over and delivered," held to import an assignment by delivery. *Ib.*

PROTEST.

1. Protest of an inland bill for non-acceptance or non-payment, is not necessary. *S. & G. Turner vs. Greenwood*, 44.
2. Where acceptance is refused the bill need not be presented for payment. *Ib.*

RECORD.

1. Where a transcript presented to this court, on application for supersedeas, shows a regular decree, but the clerk in authenticating the transcript, after making the usual certificate, adds a statement of matters dehors the record, showing irregularities in entering the decree, such statement will not be regarded. *Slocomb, Richards & Co., Ex parte*, 375.
2. The statute does not require the circuit judge to sign the record of the preceding day every morning, but only at the close of the term, and the omission of the judge to sign the record, at the close of the term, will not invalidate judgments or decrees of the term. *Ib.*
3. Though such omission would be gross negligence, and subject the judge to animadversion. *Ib.*

RELEASE.

1. After breach of a sealed contract a right of action under it may be waived or relea-

RELEASE—CONTINUED.

sed by a new parol contract; but a sealed executory contract cannot be released or rescinded by a parol executory contract. *Miller vs. Hemphill*, 488.

REPLEVIN.

1. To maintain replevin in the detinet, plaintiff need not prove a bailment. *Beebe vs. De Baun*, 3 *Eng. R.* 563, cited, and approved. *Phelan vs. Bonham*, 389.
2. The owner of a posted animal cannot maintain replevin therefor until he has proven his property before a justice, and paid (or tendered) the costs to the taker-up, as required by *secs.* 25, 26, 27, 28, 29, *chap.* 65, *Digest. Ib.*

RETURN.

1. A return by a sheriff that he served a writ by leaving a copy with defendant's wife, a white member of his family, over the age of fifteen years, is not sufficient; the return must show, also, that the copy was left at defendant's usual place of abode. *Vaughn vs. Brown*, 20.
2. The return of the sheriff upon the writ shows a good service within the rule laid down in *Gilbreath vs. Kuykendall*, 1 *Ark. R.* 50, as it distinctly describes the time, place, and manner of the service, and the name of the party on whom it was made. *Gatton vs. Walker*, 198.
3. Where a summons is served by leaving a copy at defendant's residence, the sheriff's return must show a strict compliance with the statute. *Park et al. vs. Weems*, 439.
4. Judgment by default reversed because the return of the sheriff in such case does not show that the person with whom the copy was left was "of the family" of defendant. *Ib.*
5. The rule in *Gilbreath vs. Kuykendall*, 1 *Ark. R.* 50, enforced. *Ib.*

SCIRE FACIAS.

1. Where the sheriff serves a *sci. fa.* upon the defendant in the writ, and also upon persons not named therein as defendants, this does not impair the writ or return. *Anthony vs. Humphries ad., use, &c.*, 176.
2. The levy of an execution upon sufficient real estate to satisfy a judgment, undisposed of, is a satisfaction, as held in *Anderson vs. Fowler*, 3 *Eng. R.*, which case is approved. *Ib.*
3. A *sci. fa.* was issued and attested by the clerk of the *circuit court*, and recited a judgment in the *circuit court*, but commanded the sheriff to summon the defendant to appear before the *probate court* and show cause, &c. HELD, that the error was clerical, and that the writ was not void but amendable. *Ib.*
4. Where the original judgment was not void, the defendant cannot take advantage of mere errors and irregularities on *sci. fa.* to revive it. *Ib.*

SECURITY.

See *Principal and Surety*.

SEMINARY LAND.
See *Constitutional Law*, 1, 2.

SERVICE.
See *Return*.

SHERIFFS.

1. Where a sheriff collects money on an execution, and fails to pay it over, he is liable, under *sec.* 70, *chap.* 67, *Digest*, for the sum collected, with lawful interest thereon, and ten per cent. per month added, from the return day of the writ until he pays the money over: but, in an action on his bond therefor, it is erroneous to render judgment for the amount collected, interest and penalty, and for ten per cent. per month upon the amount of the judgment; this would be compounding the penalty, which the statute does not authorize. *Borden et al. vs. State, use Bowen & McNamee*, 253.

SHERIFF'S RETURN.
See *Return*. *Amendments*.

SLAVES.

1. In an action for the hire of slaves for one year, it is erroneous to instruct the jury that what defendant paid for the same slaves the year previous, is the correct criterion of their value, as the value of slave hire fluctuates. *Adamson vs. Adamson*, 26.
2. What such slaves hired for during the year in controversy, would be the correct criterion. *Ib.*
3. A. hired a negro of B. for one year, and took his obligation for the price of the hire: before the expiration of the year the negro was drowned without fault of the hirer. HELD, that the owner could recover the hire of the negro to the time of his death only. *Collins et al. vs. Woodruff*, 463.

STATUTES CONSTRUED.

1. Act in reference to the acknowledgment and registry of mortgages, *Digest, chap.* 110, *secs.* 1, 2. *Main et al. vs. Alexander*, 112.
2. *Chap.* 17, *sec.* 13, *Digest*. *Childress vs. Fowler*, 159.
3. *Chap.* 126, *sec.* 1, *Digest*, as to informal suits. *Gatton vs. Walker*, 199.
4. *Chap.* 118, *Digest*, as to paupers. *Brem vs. Arkansas County Court*, 240.
5. *Chap.* 71, *sec.* 18, *Digest*. *Burke vs. Hale*, 328.
6. *Chap.* 4, *sec.* 85, *Digest*. *Burton's ad. vs. Lockert's exs.*, 411.

SURETY.
See *Principal and Surety*.

TENDER.

See *Constitutional Law*, 1, 2.

TRESPASS.

1. It is well settled that where a party is sued for an act done under color of process, if the process be void, the action should be trespass *vi et armis;* if voidable, trespass on the case. *Dixon vs. Watkins et al.* 139.
2. An officer may justify under final process, regular upon its face, issued from a court having jurisdiction of the subject matter, without showing the judgment on which it is founded, but the plaintiff in the process, or a stranger, must show a regular judgment. *Ib.*
3. As to the distinction between *void* and *voidable* process, and authorities on that subject reviewed. *Ib.*
4. An execution issued upon a judgment of the circuit court, from which an appeal has been taken to this court, and recognizance entered into to stay execution, is *voidable*, and may be superseded, but is not absolutely *void*. *Ib.*

TRIAL BY JURY.

1. In a proceeding for contempt, the party is not entitled to trial by jury. *Neel vs. State*, 259.
2. The 46*th sec. of chap.* 67, *Digest*, giving forfeited delivery bonds the force and effect of judgments, upon which execution may issue, held constitutional: by the stipulations of the bond, the obligors waive the right of trial by jury. *Reardon Ex parte*, 450.

TROVER.

1. In trover by the administrator for slaves, the defendant cannot justify a taking and conversion, by showing that intestate had mortgaged the property to a third person. *Gaines as ad. vs. Briggs et al.*, 46.
2. Nor will it avail him that he discharged the mortgage, and took an assignment to himself subsequent to his trespass. *Ib.*
3. In trover it is no defence that defendant acted under the employment of another, who was himself a trespasser. *Ib.*
4. Trover is a concurrent remedy with trespass. *Ib.*
5. In trover proof of demand and non-compliance is *prima facie* evidence of conversion. *Zachary vs. Pace*, 212.
6. But where the plaintiff demanded the goods of defendant, and he answered that he had no claim to them himself, but would not give them up until he ascertained to whom they belonged, and the proof showed that the property was in dispute, and defendant had reasonable ground to doubt the title of the plaintiff. HELD, that the refusal to surrender the goods under such circumstances was not sufficient evidence of conversion. *Ib.*

TROVER—CONTINUED:

7. In trover it is not necessary for plaintiff to prove that the defendant was in possession of the goods at the commencement of the suit, for parting with possession is often evidence of conversion. *Ib.*

TRUSTS.

1. To create a resulting trust, there must be an original agreement creating the trust at the time of the purchase, or when the contract for the purchase takes effect: and no resulting trust can arise in contradiction to the terms of the deed. *McGuire et al. vs. Ramsey*, 518.
2. Resulting trusts, or trusts created by operation of law, are expressly excluded from the operation of our statute of frauds, and it is manfiest that parol evidence is admissible to establish them: such evidence is not to establish a fact inconsistent with the deed, but to engraft a trust upon the legal estate. *Ib.*
3. Where real estate is purchased and paid for with partnership funds, but conveyed to one of the partners alone, a trust results in favor of the other partner. *Ib.*
4. Lapse of time is allowed to prevail sometimes in equity, but only in analogy to the plea of the statute of limitations at law: and cannot be allowed in favor of one partner in possession of real estate against the other, for the possession of one is the possession of both. *Ib.*
5. Where the proof shows that a part of real estate held in partnership had been divided, and the division evidenced by deed between the parties, and no evidence, written or parol, is offered to show a division of the residue, the presumption is that no division was made of the residue. *Ib.*
6. A part of partnership property being sold by the guardian of the heir of the partner in possession, the administrator of such heir, after his death, is a proper party —the estate being liable to the co-partner, and the administrator of the heir receiving the money liable to pay the co-partner his portion of the receipts. *Ib.*

USURY.

1. To constitute usury there must be an intention knowingly to contract for, or to take usurious interest. *Gregory vs. Bewley et al.*, 22.
2. Where one loans another depreciated bank paper, and takes his bond therefor payable in dollars, with a provision that it may be discharged at maturity in such bank paper, the transaction is not usurious, unless that form is given to it as a device to cover usury. *Ib.*
3. The fact that the lender was in the habit at the time of paying and receiving such paper at par in business transactions, disproves a usurious intention on his part. *Ib.*

VENDOR AND VENDEE.

1. Where a father sells a slave to a son, who is a member of his family, and so con-

VENDOR AND VENDEE—CONTINUED.

tinues, and the slave remains in the family, in contemplation of law he is in the possession of the son, and if the father sometimes controls the slave, it raises no presumption of fraud. *Humphries vs. McCraw*, 91.

2. The acts and declarations of the vendor, after the sale, in the absence of the vendee, are not competent evidence to impeach the title of the latter; but, if done, or made, in his presence, and not disaffirmed by him, they become legal evidence, not as the mere acts or declarations of the vendor, but as indirect admissions of the vendee inconsistent with his title. *Ib.*
3. A vendor, who executes a bond for title to his vendee, upon the payment of the purchase money at a future day, and puts him into possession, may, if the money is not paid when due, by first giving to the vendee reasonable notice to quit, avoid his contract, and maintain an action of ejectment for the land. *Fears vs. Merrill*, 559.
4. Or, if the vendee has, by his own act, placed himself, in legal contemplation, in the attitude of a trespasser, the vendor may treat him as such, and sue without giving notice. *Ib.*
5. The notice, in such case, should be reasonable, to be determined by the circumstances of each case. The English rule is six months; but the better rule is that the time of notice should vary with the nature of the contract, and the character of the estate. Notice on the day the suit is brought is insufficient. *Ib.*
6. One entering under the vendee, by consent of the vendor, is entitled to notice. *Ib.*
7. In ejectment by the vendor, in such case, the true criterion of damages is the value of the land from the date of the demand and refusal. *Ib.*

VENUE—CHANGE OF.

1. On change of venue, the clerk should send a transcript of the record, proceedings, and original papers in the cause, authenticated by his official seal, to the court to which the venue is removed, and without such authentication of the transcript, the court, to which it is sent, can take no jurisdiction of the cause. *Stone vs. Robinson*, 469.
2. Where such authenticated transcript is sent, so as to give the court jurisdiction, but there is an omission or irregularity in it, the court may compel the clerk, by mandamus or certiorari, to perfect it. *Ib.*
3. But, if no such authenticated transcript is sent, the party aggrieved may apply to the court, or judge in vacation, for mandamus to compel the clerk to perform his duty. *Ib.*
4. An order for a change of venue divests the court, in which the suit is instituted, of jurisdiction over the cause, and invests it in the court to which the transfer is ordered. *Stringer vs. Jacobs et al.*, 497.
5. But the latter court cannot adjudicate upon the rights of the parties until a transcript of the record and proceedings, duly authenticated under the hand and seal of the clerk, and all the original papers composing a part of the record, are filed therein, or such of them as to enable the court to see what is in controversy between the parties, and bring its dormant powers into active exercise. *Ib.*

VENUE—CHANGE OF.—CONTINUED.

6. A copy of the petition, notice, and order, for a change of venue, and the original declaration and writ, not duly authenticated, without a transcript of the record and proceedings, held insufficient to authorize the court to adjudicate the cause. *Ib.*

VOID AND VOIDABLE.

1. A summons addressed to the sheriff of —— county, is void, and no officer is authorized to execute it. *Vaughn* vs. *Brown*, 20.
2. As to the distinction between *void* and *voidable* process, and authorities on that subject reviewed. *Dixon vs. Watkins et al.*, 139.
3. An execution issued after appeal, and recognizance to stay execution, is not *void* but *voidable*. *Ib.*

See, also, *Judgments.*

WITNESS.

1. Where a witness has made a different statement from the one made by him on trial, he is not thereby discredited, unless the discrepancy is wilful. *Yoes vs. State*, 42.

See, also, *Evidence.*

WRIT OF ERROR.

1. Debt against three on a joint and several promissory note; *nil debet* by one, issue, verdict and judgment in his favor: no judgment as to the other two. HELD, that, inasmuch as the plea of the one enured to the benefit of the others, the judgment was, in effect, in favor of all, and the writ of error was properly sued out against all. *State Bank vs. Kerby et al.*, 345.

WRITS.

1. A writ of summons addressed to the sheriff of —— county, is void, and no officer is authorized to execute it. *Vaughn vs. Brown*, 20.
1. A return by a sheriff that he served a writ by leaving a copy with defendant's wife, a white member of his family, over the age of fifteen years, is not sufficient; the return must show, also, that the copy was left at defendant's usual place of abode. *Vaughn vs. Brown*, 20.

See, also, *Return. Amendments. Execution.*

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