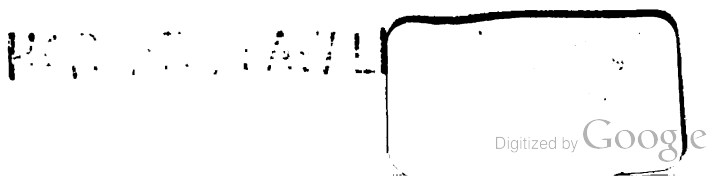

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REPORTS

OF

CASES AT LAW AND IN EQUITY

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF THE

STATE OF ARKANSAS,

CONTAINING THE CASES DECIDED AT THE MAY TERM, 1884, AND NOT REPORTED IN VOLUME 42, AND PART OF THE CASES DECIDED AT THE NOVEMBER TERM, 1884.

BY B. D. TURNER, REPORTER.

VOLUME XLIII.

LITTLE ROCK:
A. M. WOODRUFF, STATE PRINTER.
1885.

Rec. May 11, 1885

OFFICERS

OF THE

SUPREME COURT OF THE STATE OF ARKANSAS,

DURING THE PERIOD COMPRISED IN THIS VOLUME

Hon. E. H. ENGLISH*.....CHIEF JUSTICE.

Hon. STERLING R. COCKRILL†..... " "

Hon. JOHN R. EAKIN,
Hon. WILLIAM W. SMITH, } .....ASSOCIATE JUSTICES.

C. B. MOORE‡ .....ATTORNEY GENERAL.

DAN. W. JONES§..... " "

LUKE E. BARBER.....CLERK.

B. D. TURNER.....REPORTER.

*Died Sept. 1st., 1884.

†Elected Nov. 4th, 1884, to fill the vacancy occasioned by the death of Chief Justice English.

‡Term expired January 12, 1885.

§Elected September 1st, 1884.

CHANCELLOR,

Hon. DAVID W. CARROLL.

JUDGES OF THE CIRCUIT COURTS:

DURING THE PERIOD COMPRISED IN THIS VOLUME.

1st Circuit..... .....Hon. M. T. SANDERS.

2d Circuit..... .....Hon. W. H. CATE.

3d Circuit.....Hon. R. H. POWELL.

4th Circuit.....Hon. J. M. PITTMAN.

5th Circuit.....Hon. GEO. L. CUNNINGHAM.

6th Circuit.....Hon. FRANK T. VAUGHAN.

7th Circuit.....Hon. J. B. WOOD.

8th Circuit.....Hon. H. B. STUART.

9th Circuit..... .....Hon. C. E. MITCHELL.*

9th Circuit.....Hon. L. A. BYRNE.†

10th Circuit..... .....Hon. J. M. BRADLEY.

11th Circuit.....Hon. JNO. A. WILLIAMS.

12th Circuit.....Hon. R. B. RUTHERFORD.

13th Circuit.....Hon. B. F. ASKEW.

*Resigned September 10th, 1884.

†Elected November 4, 1884, to fill vacancy occasioned by the resignation of Hon. C. E. Mitchel.

PROSECUTING ATTORNEYS

OF THE SEVERAL

JUDICIAL CIRCUITS,

DURING THE PERIOD COMPRISED IN THIS VOLUME

1st Circuit.....GREENFIELD QUARLES.

2d Circuit.....W. B. EDRINGTON

3d Circuit.....M. N. DYER.

4th Circuit.....J. F. WILSON

5th Circuit.....J. G. WALLACE.

6th Circuit .....ROBT. J. LEA.

7th Circuit.....J. P. HENDERSON.

8th Circuit .....H. M. GREEN.

9th Circuit.....T. E. WEBBER.

10th Circuit..... .....C. D. WOOD.

11th Circuit.....JNO. M. ELLIOTT.

12th Circuit.....C. A. LEWERS.

13th Circuit..... H. P. SMEAD.

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RULES OF THE SUPREME COURT

OF THE

STATE OF ARKANSAS.

ADOPTED ON THE 7TH DAY OF MARCH, 1885.

RULE I.

MOTIONS MUST BE WRITTEN.

All motions shall be submitted in writing, and such as are not of course shall be supported by affidavit, unless the facts are of record.

RULE II.

MOTION TO ADVANCE CAUSES.

Every motion to advance a cause shall contain a brief statement of the matter involved, with the reason of the application.

RULE III.

PETITIONS FOR RE-HEARING.

All petitions for a re-hearing must be presented within fifteen judicial days from the time the decision was rendered, and must briefly

and distinctly state the grounds, and be supported by certificate of counsel; and in no case will such petition be granted when based on any fact thought to be overlooked by the court, unless reference has been clearly made to the same in the abstract of the transcript prescribed in rule 16.

RULE IV.

WRITS OF ERROR AND APPEALS BY THE CLERK.

When a writ of error is issued, or an appeal is granted by the clerk of this court a summons shall be issued, commanding the defendant or appellee to appear at the trial term and defend. If the summons be returned not executed an alias may issue, at any time, or when it shall appear that the defendant or appellee is a non-resident, notice shall be given by a warning order, that he appear by a day to be fixed: which order shall be published weekly for at least four weeks, in some authorized newspaper published at the seat of government, the first of which publications shall be at least thirty days before the appearance day fixed as aforesaid, and an affidavit of such publications shall be filed with the Clerk. The cause shall stand for hearing in the same manner as if a notice against such defendant had been returned executed.

RULE V.

MANDATES, CERTIFIED COPIES OF DECISIONS, &c.

No transcript of any judgment, decision or opinion of this court shall be certified by the Clerk, or mandate issued, within fifteen judicial days after the judgment is rendered without the special leave of the court; and no leave will be given therefor before the expiration of fifteen judicial days from the date of the judgment or decision, unless by consent of both parties.

RULE VI.

ORAL ARGUMENTS.

Only two counsel shall be heard for each party on the argument of a cause.

Two hours on each side shall be allowed to the argument, and no more, without special leave of the court, granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side, at their discretion: provided always, that fair opening of the case shall be made by the party having the opening and closing arguments.

The plaintiff or appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross-appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

RULE VII.

APPELLEE MAY FILE TRANSCRIPT AND MOVE TO AFFIRM OR DISMISS, WHEN.

In all cases when the appeal has been taken more than ninety days before the first day of a term of this court, and a supersedeas bond filed, and the appellant does not file in the office of the Clerk an authenticated copy of the record, the appellee may, at any time after the third day of the term, file in this court a certified transcript of the judgment, order or decree appealed from, the order granting the appeal and the supersedeas bond, with his motion to dismiss the appeal, or affirm the judgment; and the appeal shall be dismissed or the judgment affirmed at the cost of the apellant unless for good cause; *provided*, a notice of ten days of such intended motion be given the appellant or his attorney of record.

RULE VIII.

BRIEFS.

Each party shall prepare for the use of the court three copies of argument or brief of the points and authorities relied on.

RULE IX.

ABSTRACTS OF THE TRANSCRIPT AND BRIEFS TO BE FILED.

In all cases except felonies, the appellant or plaintiff in error shall file with the Clerk of this court when his case is called for submission,

an abstract or abridgement of the transcript setting forth the material parts of the pleadings, proceedings, facts and documents upon which he relies, together with such other statements from the record as are necessary to a full understanding of all questions presented to this court for decision. The abstract, if in writing, shall be in a legible hand, on one side only of legal cap paper, and shall contain full references to the pages of the transcript. He shall also deliver a copy of said abstract and of his brief to the attorney for the opposite party, or deposit it with the Clerk of this court for his use, at least thirty days before his case is subject to be called for submission; and the attorney for the appellee or defendant in error shall, at least one week before the case is subject to call for submission, deliver to the attorney for the appellant or plaintiff in error, or deposit with the Clerk of this court for his use, a copy of his brief and such further abstract as he may deem necessary to a fair determination of the case, and shall on or before the calling of the case for submission file with the Clerk of this court a copy of the same; and the evidence of the service of the abstracts and briefs as above required, shall be filed by each party at the time of filing said copies with the Clerk.

RULE X.

FAILURE TO COMPLY WITH RULE IX, BY APPELLANT.

Where no counsel appears and no abstracts and briefs have been filed by the plaintiff in error or appellant, in accordance with rule ix, when the case is called for trial, the defendant in error or appellee may have the writ of error or appeal dismissed, or the judgment affirmed as of course.

RULE XI.

FAILURE TO COMPLY WITH RULE IX, BY APPELLEE.

Where the appellee or defendant fails to appear and file his brief, when the case is called for trial, the court may proceed to hear argument on the part of the appellant or plaintiff, and give judgment according to the right of the case, or upon his motion, may continue the same.

RULE XII.

FAILURE TO COMPLY WITH RULE IX, BY BOTH PARTIES.

Where a case is reached in the regular call of the docket, and there is no appearance in compliance with rule 9, by either party, the case shall be dismissed at the cost of the plaintiff or appellant.

RULE XIII.

BILLS OF EXCEPTIONS.

Bills of exceptions, except in cases of felony, shall be so prepared as only to present to the Supreme Court the rulings of the court below upon some matter of law; and shall contain only such statement of facts as may be necessary to explain the bearing of the rulings upon the issues or questions involved; and if the facts are undisputed, they shall be stated as facts, and not the evidence from which they are deduced; and if disputed, it shall be sufficient to state that evidence was adduced tending to prove them, instead of setting out the evidence in detail; but if a defect of proof be the ground of ruling or exception, then the particulars in which the proof is supposed to be defective shall be briefly stated, and all the evidence offered in anywise connected with such supposed defect, shall be set out in the bill of exceptions

In no bill of exceptions shall any patent, deed, will, or other documentary evidence be inserted at length, but shall only be briefly stated, according to its import and effect, unless the nature of the question raised and decided renders necessary that it should be inserted *in extenso*: nor shall any document be more than once inserted at large in any transcript to be sent to the Supreme Court. And it shall be the duty of the judges of the courts below to require exceptions to be prepared in accordance with this rule. Either party, however, shall have the right to have any or all of the testimony in any case, or all of such documentary proof inserted at length; it being stated in the exception at whose instance the same is so inserted, that costs may be awarded as the matter so incorporated may be deemed proper, or not, to have been set out in full, by this court.

RULE XIV.

TRANSCRIPTS—HOW TO BE MADE OUT.

All transcripts shall commence with the style of the court in which the controversy was decided, and the name of the judge presiding when the decree, judgment or order in the cause was rendered, to reverse which the appeal is prayed, or writ of error intended to be prosecuted, and its date, as: "Pleas before A. B., judge [or special judge] of the —— Circuit Court, on the —— day of —— 18——," etc.; the names of all the parties litigant, as they stood when the controversy was decided, with the nature of the suit or motion, as

J. K., *Plaintiff*,
Against
L. M., *Defendant*.

When an order of court is mentioned, the date must be distinctly stated, and not by a reference to the day and year aforesaid.

Depositions offered as evidence and rejected by the court, shall not be inserted, unless by exceptions.

No paper shall be more than once copied; when it occurs a second time, let it be referred to by the page in the preceding part of the record.

When the depositions are taken on interrogatories, in making up the transcript, the answers must follow immediately after the questions to which they are responsive.

When a cause has once been before this court, and a transcript is again called for to have error, which occurred after its return, corrected, the second transcript shall begin where the former ended; that is, with the judgment of this court, which should be entered of record in the Circuit Court, omitting the opinion of the Appellate Court—the appeal or supersedeas bond to be the last paper copied, and at the end of the transcript there must be added an index or table of contents, referring to the pages of the record where the matter referred to is copied, as:

Complaint.....page 1
Exhibit A, &c..... " 3
Answer..... " 4
Exhibit B, &c..... " 5
Decree or Judgment..... " 6
Appeal..... " 7

and so, referring to the material points of the whole record. There should also be marginal notes indicating the subject matter of each page.

Clerks may add to their fee for the transcript, a reasonable charge for these items.

The fee for the transcript must in all cases be certified; also the cost in the Circuit Court, specifying by whom paid.

The transcript should be made out in plain handwriting, on legal cap paper, written on one side only, and fastened at the top of the page.

When surveys form a part of the record it is preferable to send up a copy without fastening it to the transcript.

RULE XV.

TRANSCRIPT, CONTINUED,

In civil cases at law the complaint, exhibit if any, answer, exhibit if any, referred to, in immediate succession up to and including the final judgment—omitting such matters as are proscribed by rule 13, then the record entry of filing motions for new trial and in arrest of judgment and the order of court thereon, the prayer and grant of appeal, the filing of the bill of exceptions, the bill of exceptions with the papers therein referred to, the supersedeas bond if any, then the certificate duly signed and sealed.

RULE XVI.

TRANSCRIPTS IN CIVIL CASES AT LAW.

The clerks of the several Circuit Courts in making up transcripts of records in civil cases at law, to be transmitted to this court, *shall not*, where the defendant has appeared, set out any summons or other writ or process for appearance, or the return thereof, but in lieu thereof, shall say (*e. g.*) "summons issued January 2, 1885; served January 3, 1885," and if any pleading be amended, the clerk will treat the last amended pleading as the only one of that order in the cause, and he must refrain from copying any pleading that is withdrawn, waived, or superseded by amendment, into the transcript, unless it be called for by the bill of exceptions; and no Clerk shall insert in the transcript any matter touching the

organization or adjournment of the court, or the impanneling, swearing, or names of jurors; or any mention of any motion or affidavit, or order or ruling in reference thereto; or any continuance, or commission to take testimony or the return thereto, or notice to take depositions, or the caption or certificate of the officer before whom taken, or any other merely incidental matter unless the same be specially called for by the bill of exceptions.

RULE XVII.

TRANSCRIPTS IN CHANCERY CASES.

In chancery causes, after the statement as to the court, judge and parties as in suits at law, the complaint should be copied, unless an order of the court properly precedes it, then the exhibits referred to, the order of the court previous to the filing of the answer, then the answer and the exhibits referred to therein.

In all such cases the whole of the evidence shall be embodied in the transcript unless the parties shall agree upon an abbreviated statement thereof.

The depositions will be introduced by the Clerk in this manner:

Depositions read on the part of the plaintiff.

Deposition of A. B. taken for plaintiff at———, on the —— day of ———, 18—.

(Here copy the deposition.)

Deposition read for defendant.

Deposition of C. D. taken for defendant at ———, on the —— day of ———, 18—.

(Here copy the deposition.)

Decree. Appeal and supersedeas bond if any. Opinion of the court.

RULE XVIII.

TRANSCRIPTS IN CRIMINAL CASES.

On appeal in criminal causes the transcript shall begin with the return of the indictment into court, unless a motion shall have been

made to set aside the indictment, in which case the proceedings empaneling the grand jury shall also be copied in the transcript. Then follows the indictment—the pleadings by the defendant and subsequent proceedings as in civil causes and in accordance with the statute.

RULE XIX.

DUE COSTS TO BE PAID BEFORE MANDATE ISSUED.

In all cases reversed or affirmed by this court, the Clerk is not required to issue the mandate but may retain the same until all his costs in the case are paid, except when it is required on the part of the state.

RULE XX.

PRACTICE, WHEN NO SPECIFIC RULE.

In cases where no provision is made by statute, or by these rules, proceedings in this court shall be in accordance with the practice heretofore existing.

RULE XXI.

WHEN RULES TO TAKE EFFECT.

These rules shall take effect on the first day of the next term :—25th May, 1885. And thereupon all formal rules of practice in this court, heretofore adopted, shall cease to be in force. But rules of practice established in the decisions of the court, not inconsistent with these rules, shall remain in force as heretofore.

IN THE SUPREME COURT,
DECEMBER 6, 1884.

PROCEEDINGS IN MEMORY OF

HON. E. H. ENGLISH,

LATE CHIEF JUSTICE OF THE SUPREME COURT.

Messrs. Sol. F. Clark, C. B. Moore and B. B. Battle, members of the bar of this court, presented the following resolutions adopted at a bar-meeting, on occasion of the death of Judge English; Messrs. Clark and Moore, severally, delivering complimentary addresses upon the life, character, and services of the deceased chief justice.

RESOLUTIONS.

"*Whereas,* We have received the sad intelligence of the death of our Chief Justice, Hon. Elbert H. English, who died at Asheville, North Carolina, on the evening of the first day of September, 1884, and desire, at once, to manifest the deep and sincere sorrow which this not wholly unexpected event has cast over the bench, the bar, and all the citizens of the State, and are at the same time conscious that the usual and formal testimonials of re-

spect would fail to express the depth and sincerity of the emotions with which we are impressed,

Resolved, That we bow our hearts in submission to the God whom he reverently worshiped whilst living, Whose mysterious dispensations lead through darkness, in mercy, to ineffable light. It is His will that is accomplished: "so mote it be."

That, in the death of our honored and distinguished Chief Justice, our State, and the legal profession in all the States where our system of law prevails, have lost an able, learned, careful, conscientious and industrious ornament and co-laborer. His whole life had been devoted to the study, the improvement, and the judicial administration of the law, in legislative assemblies, at the bar, in chambers, as reporter, and upon the Supreme Bench. He was a constant attendant at the meetings of the committee which framed the article upon the judiciary of our present constitution; and the members derived incalculable benefit from his advice. He brought to the aid and embelishment of jurisprudence, a cultivated mind and varied information. Eminently conservative in temper, and jealous of theoretical changes; disposed to walk in the old tried ways which had been found effective and wholesome, and to prefer the certainty of fixed decisions to the uncertain benefits of speculative experiments, he was nevertheless prudently progressive, readily embracing and earnestly administering all modifications which commended themselves to his deliberate judgment, or that had been made imperative

by legislative will. Clothed with the confidence of his people, which never faltered, he wore the ermine unspotted, and with dignity through all changes of constitutions and of governments, until now at the summons of the Grand Master of the Universe, calling him to rest, he lays it reverently on the brink of the grave. He has worshiped best who has labored best. The reports of our Supreme Court constitute his best and proudest monument, which will be more enduring than stone.

That, as a patriot, jurist, citizen and Christian gentleman, and in all the relations of business and of social and domestic life, he was uniformly just, upright, genial, and humane. His death leaves a void in our society that will long be felt.

That, we sympathize most sincerely with his wife, his son, his descendants, and relatives, in their bereavement, and desire to tender them now in their affliction, this poor tribute to his virtues, until, upon more deliberate occasions, the pen of the historian, and the remarks of those selected to present these resolutions to the courts of the State, may do higher justice to the melancholy theme."

The Hon. S. R. Cockrill, Chief Justice, made the following response:

"The court unites most heartily with the bar in honoring the memory of the late Chief Justice. The announcement of his death has met with a response of sorrow from all classes, and it seems exceedingly appro-

priate that members of his chosen profession should seek in this tribunal to make some memorial of his life and character, and to give some testimonial of his eminent services; for in the records of this court the chief part of his history is written. He held the Chief Justice's office longer than it has been vouchsafed to any other judge to sit upon the bench. He was the careful reporter of eight volumes of the decisions of this court, and throughout twenty-three other volumes of your State reports he has placed the indelible impress of his learning, and has therein builded for himself an honorable monument, more enduring, as the resolutions presented state, than any we can raise to his memory. From first to last of his long judicial career, he was an upright, conscientious judge. He never undertook to fashion the law according to his private opinion of what he thought it ought to be, for with him authority was sacred, and his delight was to search diligently for the existing state of the law, and when found, declare it. He was potent in enquiry, penetrating in research, patient and persevering in investigation, discriminating in selection, and in all that he undertook an earnest, continuous hard worker. These qualities may not be the elements of genius, but in a judge they are perhaps the best possible substitute for it. The talents the Master gave him, he did not lay idly by, to be returned in his final account without interest; and while his intellect did never flash with splendor, it shone with a steadfast ray that lighted a path of usefulness. It is probable that the official labors of the last few years of his life hastened the end,

Be that as it may, like no other judge in the history of this court, he died in the harness. His fatal malady found him at the post of duty, and when four years of his term of office were unexpired "the pallid messenger with the inverted torch" beckoned and he departed.

"To every man upon this earth
"Death cometh soon or late,"

And how can man die better than steadfastly facing the honest discharge of his duty in the service of his State and her people, while yet in the full ripeness of his power, ere life has fairly turned into the sere and yellow leaf? It was thus Judge English died. The end crowns the work.

Concurring in the sentiment of the resolutions adopted by the bar and presented by the gentlemen selected for that purpose, with apt and appropriate remarks, the court will cause them to be entered on its records."

ORDERED by the court, that the resolutions be spread upon the record, and that the court now adjourn out of respect for the memory of the late Chief Justice.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF ARKANSAS,

AT THE

MAY TERM, 1884.

(*Continued from Volume* 42.)

CASON v. BONE, ET AL.

43 17
73 186

1. EXEMPTION: *None for tort, &c.*
A debtor's property is not exempt from execution for a tort, nor for the purchase price of the property.

2. JUSTICE OF THE PEACE: *Liability for official acts.*
Neither a justice of the peace nor any other person having judicial powers is liable for his official acts.

3. EXEMPTION: *Remedy of claimant of: Waiver of exemption.*
The remedy of an execution debtor, when a justice of the peace refuses a supersedeas upon the filing of his schedule, is by appeal to the circuit court; and a failure to appeal is a waiver of his exemption.

APPEAL from *Independence* Circuit Court.
Hon. R. H. POWELL, Circuit Judge.

H. S. Coleman for appellant.

For appellant we submit that the right to hold the property, claimed by him in his schedule, was guaranteed to him by the Constitution and laws of the State, and of which he could not be lawfully deprived. This right was judicially determined by the Independence Circuit Court in granting the mandamus, by which the Justice was compelled to discharge the duty required of him by law.

No particular form for notice and schedule is prescribed by our statutes. Hence none was necessary. *See Freeman on Executions, Section* 213.

The Court clearly erred in giving instruction number 3 asked for by defendent, Bone, and objected to by plaintiff.

If this instruction is good law, a demurrer should have been interposed and sustained, to plaintiff's complaint, for his whole cause of action was based upon the fact that no *supersedeas* was issued, and that thereby the defendant was enabled to commit the wrong and injury complained of. *See Fain v. Goodwin*, 35 *Ark., Page* 109.

It certainly is a novel proposition, to say the least of it, that it is *too late* to recover damages for a wrong done, *after* the wrong has been committed!

Cason had done *all* that was required of him by the law, in order to protect his rights and exempt his property from sale, and having done *his* part he certainly had a right to expect that the appellees would obey the laws and respect his rights, and when they refused to do this he very properly pursued the *only* remedy left him, viz: mandamus, to compel the officer to issue the supersedeas. *See Fry, Collector, v. Reynolds*, 33 *Ark.*, 450; *Smith v. Ragsdale* 36 *Ark.*, 297.

The principle laid down in Greenwood & Son v. Maddox & Toms, 27th Ark., 660, that injunction could be ob-

tained to stay the sale until his homestead right could be ascertained and established, cannot be applied to this case. *There* the party owned no separate parcel of land, and no homestead could be set apart to him until after partition. *Here* was specific property owned in severalty, selected valued and claimed, and no judgment or order of court was necessary.

An action for damages will lie for the sale of exempt property, to the same extent as if the property of a stranger to the writ had been sold, and *all* parties who participate, direct or encourage the sale are liable as trespassers. *See Freeman on Executions, Sec.* 272-3; *Thompson on Homestead and Exemptions, Sec.* 877, *and the various authorities therein cited.*

When the Court gave instruction "3" the plaintiff declined to further prosecute his action, well knowing that the jury, under that instruction, was bound to render a verdict in favor of defendants, and for that reason he did not object to the instructions numbered 4–5 asked for by defendant, Peete. We submit however that such is not the law; that the defendant, Peete in regard to the Schedule was only a ministerial officer required by law to perform certain duties, and when he refused to perform those duties, he did so at his peril, and should be held liable for any damages his refusal to act may have inflicted on the appellant, without regard to his motives.

Sheriffs, Clerks and other ministerial officers have always been held liable to respond in damages for a failure or refusal to perform duties required of them by law, and we know of no law, or reason why Justices of the peace when acting ministerially should not be held to the same rule.

SMITH, J. Bone had obtained a judgment against Cason before a Justice of the peace, and had taken out ex-

ecution thereon, which was levied upon a horse as the property of the defendant in the writ. Cason, pursuant to notice, filed with the Justice a schedule of his property, claiming the horse as exempt, and demanded a supersedeas, tendering the fee therefor. Bone resisted the issue of this process, and the justice refused to issue it; in consequence of which the constable sold the horse. After the sale Cason applied to the Circuit court and obtained a peremptory writ of mandamus, requiring the Justice to grant him a supersedeas. This order was obeyed, but the horse having passed into the hands of a stranger, it was impossible for the constable or the plaintiff in the execution to make restitution. Cason thereupon sued Bone and the Justice of the peace for damages. But the verdict and judgment were for the defendants.

1. EXEMPTION None against tort. or purchase money.

Nowhere does it appear upon what cause of action the original judgment was founded. If it was for a tort, or for the purchase-money of the horse, the debtor was not entitled to a supersedeas. *Constitution of* 1874, *Art, IX, Sec.* 1. It devolves upon the claimant of an exemption to show that he is entitled to the privilege. *Thompson on Homesteads and Exemptions, Sec.* 879.

The plaintiff evidently supposed that this matter was concluded by the judgment in the proceeding for mandamus. And this may be so with regard to the Justice, who was the defendant in that action; although the writ was improvidently granted, since, the ultimate object that was sought, being impossible of attainment, it must necessarily have proved futile. *High's Extraordinary Legal Remedies, Sec.* 14. But Bone not having been a party, could not be bound by any judgment rendered therein.

2. Officers not liable for official act

Now the Justice was not liable to an action for damages on account of any of his official acts. Wherever the

state confers judicial powers upon an individual, it confers them with full immunity from private suits. This rule applies alike to the highest judges in the land and to the lowest officer who sits as a court and tries petty causes.

And it applies not in respect to their judgments merely, but to all process awarded by them for carrying their judgments into effect. *Cooley on Torts*, 408–9.

3. Supersedeas refused. Remedy,

Cason's remedy, on the refusal of the justice to issue the supersedeas, was to appeal to the Circuit Court. *Act of March* 9, 1877, *Sec.* 1. *Winter & Co. v. Simpson*, 42 *Ark.*, 410.

By failing to appeal, he waived his exemption.

Affirmed.

Platt v. Snipes.

1. Notes and Bills: *Accommodation endorsers: Consideration: Fraud.*

Mrs. Moreland as executrix of her deceased husband, by the advice and atthe request of Lovejoy of the firm of Lovejoy & Co, sold a portion of the property of the estate to pay an account of $200 which the firm had against her husband; Lovejoy agreeing to buy enough to pay the account. At the sale Lovejoy purchased to the amount of the account and took the property purchased in full discharge of the debt. He then let Hinton take it, between whom and the firm there was a private arrangement that he should execute his notes to her for the property. This was done, and she then indorsed them to the firm at the request and by the advice of Lovejoy in whom she placed implicit confidence, and to whom she looked for advice. She did not know Lovejoy's object in putting it in that shape, and neither he nor she intended anything but to give the firm the right to collect the notes from Hinton without making her in any way responsible, and solely for the benefit and accommodation of the firm. Afterwards, Lovejoy died and the surviving partner sued on her

endorsement. HELD: That the facts were a good defense at law; the endorsement being without consideration and for the accommodation of the endorsees:—also a good defense in equity, being a fraud in the surviving partner to abuse the confidence reposed in Lovejoy; and her expression of concern on hearing of the failure of Hinton to pay the note, and asking indulgence from the firm, in ignorance of her rights, ought not to estop her.

2. SAME: *Endorsement: Want of consideration for.*

Want of consideration for an endorsement is a good defense to a suit on it by the endorsee where no new credit is given by him to the maker of the bill or note, or any former party, on account of the endorsement, and where no considerations moved the endorser.

APPEAL from *Lonoke* Circuit Court.

Hon. F. T. VAUGHAN, Circuit Judge.

George Sibly for appellant.

1. The term "*protest waived*" has by general usage a legal signification which includes all those acts which by law are necessary to charge an indorser. *Parsons on Notes &c., Vol.* 1, 578: 1 *Comstock N. Y.* 186: 3 *Denie* 16. It is a technical term to dispense with protest, notice of demand and non-payment, &c.

2. A note endorsed after due is payable on demand. 14 *Ark.* 336. The indorsement in blank by the payee of a non-negotiable note authorizes the holder to write over it a guaranty. The note in this case comes within the rule in *Edwards on Bills and Notes*, 650—3. Mrs. S. not entitled to notice, Ib. 633—6, supposing she had not waived it. But having waived it, she cannot complain. 2 *Burrell's Law Dict.* 349. *Title Protest:* 10 *Reporter* 820.

See also *Smith's Merc. Law p.* 322: 13 *Reporter* 602: 14 *Id.* 734: 14 *Id.* 728; *Story on Notes p.* 68, *Sec.* 63 *p.* 109, *Sec.* 104, *p.* 125, *Secs.* 117 *and* 118 *and notes: Ib. Sec.* 128

and notes, Sec. 148: *Broom's Leg. Max.* 626; *Edwards on Bills and Notes Sec.* 248—261; *K'y Law Journal*, 335.

EAKIN, J. In a suit, by attachment, before a justice of the peace, Platt as surviving partner of Geo. F. Lovejoy & Co., recovered a judgment against defendant Mary A. Snipes, (formerly Moreland) upon two notes; which, with their endorsements, are as follows:

$99.58. One day after date I promise to pay to M. A. Moreland, ninety-nine and 58-100 dollars, for value received, with interest at ten per cent. per annum, from due. This the 29th day of Decemb. 1871.

J. L. HINTON [SE L].

Endorsed "MARY A. MORELAND."

"For value received I assign the within note to Geo. F. Lovejoy & Co. protest waived. This 1st day of January, 1872. MARY A. MORELAND."

$110.00. One day after date I promise to pay to M. A. Moreland executrix of the estate of L. H. Moreland deceased or order, one hundred and ten dollars, for value received, with interest at ten per cent. per annum, from due. This 29th day of Dec'r 1871.

J. L. HINTON. [SEAL.]"

Endorsed.

"For value received I assign the within note to Geo. F. Lovejoy & Co. MARY A. MORELAND."

"Protest waived. MARY A. MORELAND."

The defendant appealed to the Circuit Court, where, upon a trial by jury, there was a verdict in her favor. A motion, by plaintiff for judgment, *non obstante veredicto*, was overruled. Also a motion for a new trial. A proper bill of exceptions was taken and the plaintiff appeals here.

The complaint, which is in writing, sets forth the notes with their endorsements; and makes the allegations which are usual in an action against an endorser.

1. ACCOMMODATION ENDORSERS: Consideration: Fraud.

The defendant is the executrix of the will of her deceased husband, Moreland, who died indebted, by open account, to the firm of Lovejoy & Co. She states, in her answer, that Geo. F. Lovejoy was the active business manager of the firm, and advised her to sell some of the personal property of the estate to pay this account; that he agreed, in behalf of the firm, to become the purchaser of an amount sufficient for the purpose; that, relying upon that advice and promise, she made a sale of a considerable quantity of personal property; and that Lovejoy purchased for the firm, to the amount of $209.58 "which amount he took, and accepted, and received, in payment in full, and in liquidation of the claim of the said indebtedness of Geo. F. Lovejoy & Co. against the said estate."

She proceeds, then, to explain the execution and transfer of the notes, saying; that there was a private arrangement between the firm and one J. L. Hinton, to which she was not a party, and in which she had no interest as executrix, or individually, that the purchase was made by the firm for the benefit of Hinton; and it was arranged that he was to execute two notes for the property, one to herself individually, and one to her as executrix, which are the notes sued on; that Hinton was not in fact the purchaser at the sale; that the matter was put into that shape at the request of said Geo. F. Lovejoy in whom she reposed implicit confidence, and to whom she looked for advice. It was done wholly at his instance and for the benefit and accommodation of his firm. That she would not have extended credit to Hinton, or taken his notes for the property without security. All that she in-

tended, or that said Geo. F. intended, was to pass to the firm the right to collect the notes from Hinton, without making herself in any respect liable. It was all done after said firm had purchased the property. Hinton did not buy it. She did not know then nor does she know now, why said Geo. F. desired the matter put in that shape. She knew nothing about law or business, but reposing implicit confidence in Lovejoy, she yielded to his request without questioning his reason.

She sets up in another paragraph, her marriage with Snipes pending the suit, whereby, as she contends, it was abated. She does not appeal, however, and that need not be considered. The cause was tried upon its merits.

She pleads, further, want of demand and notice; and also, amongst other things, that she only wrote on the papers "protest waived," and signed it, and that the other portions of the endorsements were added. It may be said in passing that this would not vitiate them, as an endorser in blank gives any holder the right to fill up the blank with all that is legally implied by a blank endorsement, though not with any special provision affecting the general rights of an endorser according to commercial law and usage. He may make the endorsement special to himself, as payee, for instance, for that privilege is implied.

2. ENDORSEMENT: Want of Consideration for.

There was enough in this answer to constitute a good defense, if not at law, certainly at equity. It was a plea by one endorsing for the accommodation and convenience of the *indorsee*, that there was no consideration for the contract. This may be done in a suit between the immediate parties to the contract of endorsement, where no new credit is extended by the indorsee to the maker, or any former party, on account of the endorsement, and where no consideration moves the endorser.

"That is to say," says Mr. Daniels in his work on negotiable instruments Vol. 1st p. 146, "between the immediate parties to any contract evidenced by the drawing, accepting, making, or *indorsing*, a bill or note, it may be shown that there was no consideration; or that the consideration has failed; or a set off may be pleaded; but as between other parties, *remote to each other*, none of these defenses are admissible." The plea is substantially this, that after the agreement to dispose of the goods to Lovejoy & Co. had been carried into effect, and the goods had been in effect appropriated to the debt, Lovejoy & Co. were minded to let Hinton have the benefit of the purchase, and, to subserve their real or supposed convenience, induced the defendant to put the matter in this shape, so that they might sue Hinton if necessary, as the assignees of herself and of the estate of Moreland. If the plea be true, she derived no advantage from that, and none was meant for her. The plea was good at law.

Beyond question it was a good equitable defence, being a clear case of confidence reposed and abused, by a partner of the firm which seeks to reap the fruits of the transaction. It is due to the memory of Geo. F. Lovejoy, however, to add that the defendant absolves him of fraud. He is now dead. He meant doubtless what he was supposed to mean. The fraud would be in allowing the surviving partner to convert into an abuse of confidence, what was intended to be in good faith. There was no motion by either party to go over to the equity side. The cause was tried by a jury on its merits, and there is no room now for a motion for judgment, *non obstante*. If the facts set up in the answer be true there is no cause of action left. Questions affecting consideration as well as questions of fraud admit of parol testimony. It is unnecessary to enquire whether a waiver of *protest*

in this case meant a waiver of *demand and notice,* or what it did mean. If there were no consideration, or if the enforcement of the contract would be inequitable, the defense would be still good if demand and notice had been expressly waived.

The court on request of the plaintiff properly instructed the jury, that the endorsement imported a consideration, and that the onus was on the defendant to show there was none; also, what if not strictly correct was in his favor, that if the defendant endorsed the notes when past due, and waived protest, no notice of demand and non-payment was necessary; and that if defendant received any consideration or benefit from the notes endorsed, or, if the endorsement was made for a consideration, she would be liable.

None of the instructions, save one, asked by the defendant were given. What that was we must partly conjecture, as this whole transcript was a remarkably careless one, full of repetitions and omissions. It is sufficiently clear however, that the court meant to say, that if the defendant should be found to be a mere endorser of past due notes, and the plaintiff or holder *failed to apply* within a reasonable time for payment, (unless such presentation was waived), and give notice to the defendant of non-payment, she became thereby discharged from all liability. There is some obscurity in the meaning and intended application of this instruction, unless it be considered as purely abstract. The defendent was not a *mere* endorser, in the sense of being an endorser in blank. She had waived protest, which the court had already told the jury dispensed with the necessity of demand and notice.

The evidence tends to support the position of defendant taken in her answer. The jury could not under the

instructions have based their verdict upon any idea that demand and notice were necessary. It follows that it must have been found upon the defense of no consideration, or the equitable considerations springing from the confidential relations between herself and Geo. F. Lovejoy. In neither case should it be disturbed.

Assuming the facts, which we must suppose the jury found, the verdict commends itself to every one's sense of justice. The debt was not Mrs. Moreland's. She might have required it to be probated, but was willing to give up effects of the husband to save trouble. If that were wrong it does not look well in the firm to complain. Other creditors or distributees might. In strict law she might and should have taken Hinton's notes secured, and would have been bound only to pay over the proceeds upon order of the court, without any personal liability on her own part. She was induced to give up goods enough to pay the debt, and the firm let Hinton take them. To accommodate the firm she put the matter in the shape of a sale to Hinton, without any care for security, or any possible benefit to herself. Her endorsement was gratuitous, in compliance with trusted advice. She afterwards, on being advised that Hinton had not paid, wrote a letter to the firm, expressing concern, and begging favor. It would be hard on the woman, to allow her to suffer, from natural expressions of apprehension springing from ignorance of her rights.

Affirm.

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BRYAN ET AL V. WINBURN ET AL.

1. EQUITY JURISDICTION: *To remove cloud from title.*
Unless the plaintiff's title is a mere equitable one, incapable of ef-

fectual assertion at law, possession is necessary to give a court of chancery jurisdiction to remove a cloud upon it.

2. LANDLORD AND TENANT: *Tenant disclaiming possession.*

A tenant in possession cannot disclaim his landlord's title without surrendering possession to him. He cannot collude with and attorn to another to the prejudice of his landlord.

3. MARRIED WOMAN: *Deed: Acknowledgment.*

Since the adoption of the constitution of 1874 a married woman can convey her separate property the same as if she were single; and where she joins her husband in a deed of her land, and also relinquishes dower, the deed will convey the fee, though she acknowledges only the relinquishment.

APPEAL from *Nevada* Circuit Court in chancery.
Hon. C. E. MITCHELL, Circuit Judge.

Montgomery & Hardy for appellants.

A party asking equitable relief in removing cloud from title, must be in actual possession of land, or they must be wild or unoccupied, or not in the actual possession of another: otherwise the remedy is complete at law. 27 *Ark.*, 233; 24 *Id.* 431; 29 *Id.* 612. The evidence clearly shows that appellees were not in possession at the commencement of the suit.

The deed, and certificate of acknowledgement, from Bell and wife to Georgia E. Winburn, are defective, and appellee acquired no title. 32 *Ark.*, 453; 33 *Id.* 432.

Plaintiffs were guilty of laches in not recording their deeds, until long after the deed to Bryan and Warren was recorded, and in not asserting their claim, until Bryan et al had taken possession under their purchase, and had the tract surveyed into lots and blocks.

Smoote & McRea for appellees.

1. Even if the deed from the Bells was insufficient to carry a good legal title, it invested Mrs. Winburn with

an equitable title, good in chancery against purchasers with notice of her equities. 29 *Ark.*, 548; 30 *Id.* 110. The deed having been executed since the adoption of the present constitution, was good without any private examination, or any acknowledgement at all, against subsequent purchasers with notice, especially as appellants do not claim through Mrs. Bell. Inserting a relinquishment of dower was a mere mistake of the scrivener who drew it. 36 *Ark.*, 335; 4 *Mass.*, 63; 3 *Pick*, 149; 6 *Wendell* 213; 3 *Vt.*, 420.

2. The evidence abundantly proves the deed from the Bells to appellee. But if it did not, the answer fails to deny it except in an indirect, evasive and equivocal way. 33 *Ark.*, *p.* 222–227.

3. Appellants purchased, if not with actual, at least with implied or constructive notice, which in law and good conscience is sufficient. 16 *Ark.*, 340; 27 *Id.* 6–27; 30 *Id.* 250; 29 *Ill.* 80; 15 *N. Y.* 354; 10 *Watts* 67; 6 *Wendell*, 213. Notice to Warren was notice to Mrs. Bryan. Their relationship was much closer than tenants in common. 18 *Pa. St.* 157; 14 *Ark.*, 69. She was also affected by notice to her agent Thos. J. Bryan, who transacted the whole matter on her part. 29 *Ark.*, 99; 3 *Penn.*, 67; 1 *Hall*, 480; 15 *N. Y.*, 637; 4 *Mass.*, 637; 64 *N. Y.*, 159; 2 *Hill* 451.

It is conceded that Johnson had notice. 13 *Peck*, 460.

Actual possession is notice.

4. The weight of evidence proves that appellees were in possession, but this case does not depend upon the clearing away a cloud, to give jurisdiction. There is the question as to the lost deed, and the equitable title under the Bells to be passed upon. 37 *Ark.*, 643–169–187.

SMITH, J. This was a bill to remove a cloud upon Mrs. Winburn's title to a lot in the town of Prescott and to quiet her possession. The tract of forty acres, of which the lot once formed a part, originally belonged to John J. Thomas. He sold and conveyed it in May, 1876 to John D. Anderson upon a credit. Anderson caused it to be laid off into blocks and lots as an addition to the town. In December, 1876, Anderson sold off some of the lots by public auction. The defendant, E. A. Warren, was Anderson's agent in conducting the auction sale. The lot in controversy was bid off by one Bell and the purchase money paid to Warren, who by Anderson's direction paid it to Thomas, the original vendor, or gave Thomas his note for the amount. Anderson made a deed to Bell's wife, and in this deed Thomas appears either to have joined, or to have endorsed upon it a relinquishment of all right to go upon the lot for the balance of purchase-money due him. This deed was never recorded and has since been lost. On the 9th of March, 1877, Bell and his wife conveyed to Mrs. Winburn. Mrs. Bell joins in the granting clause of the deed, which contained likewise a renunciation of dower on her part. And in the acknowledgement appended to the deed, the notary certifies only to the relinquishment of dower by Mrs. Bell.

This is the plaintiff's title. The defendant's claim arose thus: On the 27th of March, 1877, Anderson, being unable to pay for the forty acres of land, reconveyed it to Thomas without any reservation or exception of this lot. And on the same day Thomas sold and conveyed it to E. A. Warren and Mrs. Bryan; the latter acting through her husband, who had actual notice of the plaintiff's title. Warren, as we have seen, was fully acquainted with her rights in the premises; and he, in fact, afterwards signed a memorandum that it was only by

neglect this lot was not excepted in the conveyance made by Thomas to himself and Mrs. Bryan.

The Circuit Court found the facts to be substantially as above stated and decreed for the plaintiffs.

1. EQUITY JURISDICTION: To Remove cloud from title.

It is contended that the plaintiffs were not in possession when the bill was filed. Unless the plaintiff's title be merely an equitable one, incapable of effectual assertion at law, possession is necessary to give a court of chancery jurisdiction in a suit of this character. *Lawrence v. Zimpleton*, 37 *Ark.*, 643 *and cases cited.*

2. LANDLORD AND TENANT: Tenant can not disclaim landlord's possession.

The evidence on this point is that, shortly after the deed was made to them by the Bells, the plaintiffs took possession of the lot, built a house upon it and occupied it as a residence until they removed to the state of Texas; that they then leased it to a tenant, who remained in possession fourteen months and until he was informed by the plaintiffs' agent that they had sold it. The house-keys were delivered to this proposed purchaser, who put a schoolmistress in as his tenant. But from apprehended difficulty in the title, this party declined to consummate his purchase. And when possession was demanded of the school-mistress, she stated that she had no other place to go to and was allowed to remain. Afterwards, as it appears, she colluded with the defendants and agreed to hold under them.

We think the plaintiffs had sufficient possession to maintain this suit. The possession of the school-mistress was their possession. A tenant in possession cannot disclaim his landlord's title, without surrendering possession to him. *Clemm v. Wilcox*, 15 *Ark.*, 102; *Miller v. Long*, 99 *Mass.*, 13.

3 MARRIED WOMAN: Deed: Acknowledgement.

It is further contended that the deed from the Bells and the certificate of acknowledgement, not being in the form prescribed for the conveyances of the wife's estate,

are so defective as not to vest title in Mrs. Winburn, according to the doctrine of *Little v. Dodge*, 32 *Ark.*, 453 and *Wentworth v. Clark*, 33 *Id.*, 432. Perhaps this objection has no great force coming from the appellants, who do not claim through the Bells and who purchased with notice of Mrs. Winburn's rights in the premises, whatever they were. But the deed was executed since the adoption of the constitution of 1874, which enables a married woman to convey her separate property the same as if she were single. Mrs. Bell did join in the operative words of grant, as well as relinquish dower, which last estate, of course, she had not in her own lands. And although her acknowledgment is defective, yet as between her and her grantee, the deed might be good without acknowledgement, or vest an equitable title. *Stirman v. Cravens*, 29 *Ark.*, 548; *Jackson v. Allen*, 30 *Id.*, 110; *Roberts and wife v. Wilcoxon & Rose*, 36 *Id.*, 355; *Donahoe v. Mills*, 41 *Id.*, 421.

Affirmed.

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PETTIGREW ET AL V. WASHINGTON COUNTY.

1. CERTIORARI: *No substitute for appeal.*

The writ of *certiorari* cannot be used as a substitute for appeal to correct the mere errors of an inferior court.

2. APPEAL: *Remedy when County Court refuses to grant.*

When the County Court refuses to grant an appeal, or to act on the application for it, it may be compelled by mandamus; and if the time for appealing has elapsed it will be compelled to make the necessary order by a *nunc pro tunc* entry.

3. COUNTY COURT: *Jurisdiction over defaulting collector of school taxes.*

The County court has jurisdiction to render judgment against a

defaulting collector and his sureties, for school taxes collected by him and not paid over.

4. PRACTICE. *Objections to plaintiff's capacity to sue.*
Objections to plaintiff's capacity to sue must be taken by demurrer or answer. It is too late to make them to the judgment.

5. JUDGE: *Disqualification of.*
It is too late after judgment, to object that the judge was disqualified to try the case on account of consanguinity to one of the defendants.

APPEAL from *Washington* Circuit Court.
Hon. A. B. GREENWOOD, Special Judge.

L. Gregg, for appellants.

The first objection made is by demurer to the jurisdiction of the County Court, and its power to render judgment.

If the County Court had not jurisdiction all subsequent proceedings were invalid and any judgment for costs or otherwise is void.

We submit that by act of the legislature of February 27, 1879, Acts 79, Page 13, all corporate powers were taken away from the counties and it was expressly enacted that the counties should neither sue nor be sued.

Again, while the general Revenue law provides that district school taxes shall be collected in the same manner and by the same person as other taxes, yet there is no statute authorizing the County Court to make settlement for them or requiring the collector to settle them with the County Court—*See Section* 5422 *Gantt's Digest*—and the County Court being a court of limited or prescribed jurisdiction, we submit it could not go beyond the authority by the act conferred upon it, even if previous revenue laws on other subjects had authorized a settlement with the collector when the act creating these pe-

culiar districts and authorizing these taxes, had given no such authority.

The statute not only declares that Counties shall have no corporate powers and that they shall not sue or be sued, but distinctly enacts that each school district shall be a body corporate with power to sue and be sued, &c. &c.,. *See Sec.* 53, *page* 71, *Act* 1877. And hence each district was the only proper party to sue for a right withheld or a wrong done it.

The County Court certainly had no general jurisdiction authorizing it to bring in alleged sureties on a collector's bond and litigate with them, if there was not statutory power for so doing.

The Constitution, *Sec.* 20, *Art.* 7, as well as the statutes, declares a judge shall not preside in a cause where "*either* of the parties shall *be connected* with him," &c. Does this not deprive him of jurisdiction to try a cause wherein *his son* was a party?

And when his son was brought before him in this case did he not know judicially, as well as personally, that Thomas J. Mullins was his son? He was bound under the Constitution to certify this case to the Governor for the appointment of a judge, &c. *See Sec.* 36, *Art.* 7, *Constitution* 1874. In *Freeman on Judgments*, *Sec.* 146, it is said the action of any judge in a matter wherein he is interested is *coram non judice* and void. See 5 *Pickering* 483, and *Coffin v. Cottle*, 9 *Pick.* 287 and *Sigourney v Libley* 21 *Pick.* 101, *Gray v. Minot* 3 *Cush* 252, *State v. Castleberry* 23 *Ala.*, 85 *and Sec.* 144 *of Freeman on Judgments*, this authority says, parties cannot waive objections to relationship and the judgment is void. See *Converse v. McArthur* 17 *Barb. N. Y.* 410 and 41 *Barb.* 200, *Hall v. Thayer* 105 *Mass.* 219 and other cases cited by Mr. Freeman.

The next error complained of is that the County Court refused to grant an appeal upon application made and bond filed. At the first term afterwards the county judge disapproved of the appeal bond, not because the signers were not amply good, but because they were litigants in the case.

But this was quite immaterial. The appeal should have been allowed as a matter of right—*Sec.* 1193 *Gantt's Digest*—and bond or no bond only determined the right to a supercedeas.

As found by the Circuit Court, the county court at its next session adjourned the hearing in the case to a certain hour and before the hour arrived without notice adjourned his court, &c, and without fault or laches on the part of appellants, deprived them of the right to appeal.

Mandamus could not then issue (*High on Extraordinary Legal Remedies, Sec.* 14, *P.* 15) because there was no court in session to allow an appeal and no appeal could be granted at the next term by reason of that being beyond the time allowed by law; hence the only remedy the law afforded was *certiorari.*

Upon the return of which under Sec. 1196 the Court was empowered to hear and determine the same, and correct any *erroneous proceedings* and the next section authorized the hearing of evidence *dehors the record, &c.* See also Sec. 1197.

These statutes modify the general rule and give latitude to reach the merits of the case. 25 *Ark.*, 518; 37 *Ark.*, 318.

The Circuit Court upon the evidence found the fact that appellants had been deprived of their right of appeal without fault or laches on their part, but rejected the practice of hearing the case upon its merits. It also found specifically that the county had no interest in the money sought

to be recovered and the County was the nominal plaintiff and that the county was not a body corporate or other person and had no capacity to sue, and that the judgment was rendered in faver of Washington County for the use of certain school districts, and yet rendered a judgment affirming the proceeding and judgment in the County Court. And the Circuit Court on appellee's motion quashed the writ as to all of appallants but one, and refused to quash it as to him, and adjudged that the judgment of the County Court be affirmed in part and quashed in part.

This, we submit, was a palpable error. Upon appellee's motion the Court was legally bound to quash the writ or overrule the motion. As a Court of Law, it could not divide a judgment and quash it as to one and affirm it as to the others. See *Freeman on Judgments Sec.* 136. He says a judgment void as to one is void as to all.

How strange to assume that when A, B and C are equally liable and sued together, A and C must pay the claim and B be discharged because he is a son of the judge, his discharge being for a want of jurisdiction in the court and not upon any defense personal to himself —such never was the law. See *Shuford v. Cain* 1 *abb. U. S.* 302.

Kitchens v. Hutchins 41 *Geo.* 620, *Com'l Bank v. Wilson* 14 *Grants ch.* 473. *C. M. L. Ins. Co. v. Cloar* 36 *Mo.* 392

B. R. Davidson for appellee.

The relationsphip of the party to the judge was made known for the first time in the circuit court. No objection was made to the judge below and unless made was waived.

Gantt's Digest Sec 1159; 12 *Ark.*, 191; 19 *Ark.*, 97; *White v. Reagan*, 25 *Id.* 622.

But this would not affect this cause as the judgment was quashed as to the relative.

The second ground is that the county court had no jurisdiction as to the subject matter. *Acts* 1874–5 *p.* 144 *Sec* 78. *Acts* 1879, *p.* 115 *Sec.* 8 *sub'd* 8. *Acts* 1875, *p.* 67, *Sec.* 41.

Thirdly, it was claimed by appellants that the county had no interest and was an improper party to the proceeding. The school tax by the acts referred to must be levied by the county court and collected like any other tax. The only forum authorized to make the settlement was the County Court. 14 *Ark.*, 170; 24 *Id.*, 143.

Lastly it is assumed that the county had no legal capacity to sue. It is assumed that this is a suit brought and prosecuted by a county instead of a settlement under statute by the County Court. The act Feb. 27, 1879 had no reference to settlements of this character. This settlement was made *with* the sheriff by the clerk, and was conclusive after approval by the court, and spread upon the record. 14 *Ark.*, 170; 22 *Id.*, 236; 24 *Id.*, 551.

Certiorari could not be resorted to to open up the settlement with the sheriff. If there had been error in the settlement the statute provides that it may be corrected on motion at any time within one year. *Gantt's Dig.*, *Sec.* 5280.

The defendants had a right to appeal and if denied them by the county judge, could have obtained it by *mandamus* or could have obtained an appeal by application to the clerk of the circuit court. *Gantt's Dig.*, *Sec.* 1193, 1057.

It is not enough that a party may have been deprived of an appeal; he must also show that there is error in the record or the court cannot quash upon *certiorari*. 23 *Ark.*, 107; 21 *Ark.*, 426; 17 *Ark.*, 440; *McCoy v. Co.*

Court Jackson Co., 21 *Ark.*, 475; *Jefferson Co. v. Hudson*, 22 *Ark.*, 595.

If the case is to be made out by collateral facts *certiorari* will not lie. 29 *Ark.*, 179; 21 *Ark.*, 426.

It is assumed that the collector's bond was *joint* and not *several*. The record shows nothing of the kind, and such is not the case. If the action may be joint or several the judgment may be quashed as to some and affirmed as to others. *Freeman on Judgments*, 136; 11 *N. Y.*, 294–301; 10 *Ohio St.* 451; 24 *Ohio St.*, 87–96.

Our statute has made all joint obligations the same as joint and several, and all or a part may be sued, and if all are sued judgment may be rendered against all or a part. *Gantt's Digest* 3587, 4480, 4479, 4702, and 4704.

SMITH, J. By a settlement had by the county clerk with the collector of the revenue of Washington County, for the year 1879, it was ascertained that special school taxes belonging to various school districts, aggregating more than $2,300, had gone into the hands of the collector, but had not been paid into the county treasury. A *scire facias* was issued against him and his sureties to appear in the County Court and show cause why judgment should not be rendered against them, for the amount of the defalcation. They appeared and by demurrer questioned the jurisdiction of the Court. This point being determined against them, they answered. A trial was had and judgment rendered in favor of Washington County.

It was sought to quash this judgment upon *certiorari*. This writ cannot be used as a substitute for appeal for the mere correction of errors of an inferior court. *Haynes v. Semms*, 39 *Ark.*, 399 and cases cited.

1. CERTIORARI: No substitute for appeal.

It was alleged in the petition and found as a fact, that the petitioners had lost their right of appeal from said judgment without laches or fault on their part. The judgment was rendered at the July term 1882 of the Washington County Court. The law then in force required the appeal to be taken at the same term or the next succeeding term. *Gantt's Dig. Secs.* 705, 1193. An appeal was prayed orally at the July term, and in writing at the next term, and an appeal bond was filed, which the court disapproved because it was executed only by the defendants in the judgment, without sureties. However, no action was had as to the grant or refusal of the appeal. The application was set down for hearing at 9 A. M. of a certain day, at which time counsel attended, but the court had adjourned an hour before to the next regular term.

2. Mandamus to compel court to grant appeal.

Now the right to appeal being absolute, without regard to merits, if the County Court refused to grant the appeal, or to act upon the application, the remedy was by mandamus to compel it to discharge a plain duty, in the performance of which it was invested with no discretion. Nor was this remedy an ineffectual one, by reason of the fact that the County Court had finally adjourned for the term, and the next term would be too late to appeal; since at a subsequent term it might have been compelled to make the necessary order by a *nunc pro tunc* entry. *McCrary v. Rogers*, 35 *Ark.*, 298.

The circumstances detailed might furnish ground to enjoin the execution of the judgment, if the defendants have any meritorious defense to the action. But nothing is disclosed to invalidate the judgment itself. The court which rendered it had jurisdiction both of the subject matter and of the persons of the defendants. *Gantt's*

Dig. Sec. 5279; *Christian v. Ashley County* 24 *Ark.*, 142 and cases cited.

3 COUNTY COURT: Jurisdiction over defaulting collector of school taxes

Sec. 41 of the act of December 7, 1875, is a re-enactment of Sec. 5422 Gantt's Digest, which requires all taxes for school purposes voted by any school district to be levied by the County Court and to be collected by the same officer, at the same time and in the same manner, as county taxes, and to be paid into the county treasury. The County Court was, therefore, the appropriate forum for adjusting the liabilities of the collector and his sureties for these taxes, and for coercing payment.

But it is insisted that the act of February 27, 1879, deprives counties of their corporate powers, and hence Washington County had not legal capacity to sue. And it is suggested that Sec. 53 of the Act of Dec. 7, 1875, erects each school district into a body corporate.

4. Objections to plaintiff's capacity to sue.

The school districts are the ultimate beneficiaries of the taxes levied for the support of schools. But the law contemplates that the proceeds of such levies shall pass into the county treasury, there to be disbursed on the warrant of the school directors. To hold that the funds may be intercepted on their way to the county treasury, would disturb the harmony of the system, and introduce confusion. The judgment should have been in favor of the State, the obligee in the collector's bond, or of the county treasurer, the real party in interest. *Hunnicutt v. Kirkpatrick*, 39 *Ark.*, 172. It was in fact rendered in the name of the county upon motion of the treasurer. This was matter of form rather than of substance. And since the objection to the plaintiff's capacity to sue for this demand was not taken either by demurrer or answer, it must be deemed to have been waived. *Gantt's Dig. Sec.* 4567.

5. Judge: Disqualification of:

Another objection to the judgment was, that the

County Judge was the father of one of the defendants, and so disqualified to try the cause. This also was waived by failure to call the atention of the County Court to the fact of disqualification. The defendants were numerous and it cannot be presumed that the presiding judge was aware that his son was a party to the action. *Shropshire v. State*, 12 *Ark.*, 190; *Sweepster v. Gaines* 19 *Id.*, 96.

6. Practice: Judgment against only part of defendants jointly and severally liable.

The Circuit Court quashed the judgment against the son of the County Judge and affirmed it as to the other defendants. This is not an error of which the appellants can take advantage. They were severally as well as jointly liable. The plaintiff could, even after service, have stricken out the name of the judge's son, and have proceeded against them alone. *Freeman on Judgments*, *Sec.* 136; *Kitchens v. Hutchins*, 44 *Geo.*, 620. And they may recover of him his due proportion of whatever sum they may be compelled to pay.

Affirmed.

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Leon Levy. Ex Parte.

1. Appeal: *From County Court's refusal of liquor license.*

Upon the refusal of a County Court to grant license to sell liquor the applicant may appeal to the Circuit Court.

2. Liquor: *Discretion of County Court in granting license to sell.*

The County court has the discretion to grant or entirely refuse license to sell liquor at all, in township or city wards, where the county and township, or ward, have voted for license: but if it license some it cannot arbitrarily refuse other applicants in the same township or ward who are of good moral character and comply with the requirementsof the statute; and when some are refused, the Court should give its reasons, so that an appellate court may see whether a sound legal discretion has been exercised.

Leon Levy. Ex Parte.

APPEAL from *Jefferson* Circuit Court.
Hon. J. A. WILLIAMS, Circuit Judge.

N. T. White, H. King White, M. L. Bell, and U. M. & G. B. Rose for appellants.

There can be no doubt as to the right of appeal from the County Court. That is a constitutional right which the legislature could not take away, even if it wished to do so.

Simpson v. Simpson, 25 *Ark.*, 487; *O'Bannon v. Ragan*, 30 *Id.*, 181; *Anthony ex parte*, *Id.*, 358; *Pope v. Ashley* 13 *Id.*; 286.

Although the legislature cannot take away the right, yet it may regulate it. This has been done by an act which declares "that appeals shall be granted as a matter of right to the Circuit Court from all final orders and judgments of the County Court in this State," and which provides a method of taking such appeal. *Act.* 1883, *p.* 49.

Any adjudication that affects a pecuniary or property right may be appealed from; as, for instance, an assessment of property for taxation. *Randle v. Williams*, 18 *Ark.*, 328.

If, in any case where the legislature has failed to prescribe the method of taking an appeal from the County Court, the cause may be taken to the Circuit Court by certiorari.

Lindsay v. Lindley, 20 *Ark.* 581; *Floyd v. Gilbreath*, 27 *Id.*, 683;

On the appeal from the County Court the cause is tried *de novo* in the Circuit Court. *Acts* 1883, *p.* 50, *Sec.* 6.

As the right to an appeal undoubtedly exists, it is a contradiction of terms to say that the Circuit Court, on the appeal, is bound by the decision of the court below.

If the Circuit Court has jurisdiction of the case at all, it must have jurisdiction to decide it. "Where a Court has jurisdiction, it has a right to decide any question which occurs in the cause." *Peck v. Jenness*, 7 *Howard*, 624.

In our opinion the court below wholly misconceived the decision made in *Whittington ex parte*, 34 *Ark.*, 397. In that case it was only decided that as the act of May 30, 1874, (*Acts* 1874, *p.* 49) provided that where the majority of votes is cast for license, "it shall be lawful for the Board of Supervisors to grant licenses," it was not incumbent on the Board to grant licenses as a matter of duty, when there had been a vote for license; that it is still a matter of discretion in the tribunal, which cannot be controlled by mandamus.

I.

The act does not give any power to discriminate between persons equally capable of receiving license. According to its real meaning, and the construction placed on it in the *Whittington* case, the court has only a discretion "to grant licenses," or not to grant them. If the legislature had intended that the County Court should have the right to grant favors to some persons, and to refuse them to others, not laboring under any disability, certainly such an unusual intention would have been clearly expressed.

II.

We deny that under our Constitution the legislature has the power to authorize the County Judge to distribute a legally recognized right to pursue any particular calling exclusively among his favorites. The proposition is at variance with the most fundamental conceptions of our form of government. The sale of ardent spirits may be proscribed; but, if it is legalized, it stands on the

same basis as any other calling, and no monopoly in it can be created.

That Constitution says; "Perpetuities and monopolies are contrary to the genius of a Republic, and shall not be allowed." *Constitution of* 1874, *Art.* 11, *Sec.* 19.

"The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, *upon the same terms*, shall not *equally* belong to all citizens.

Id., *Art.* 11, *Sec.*, 19.

A monopoly is defined as "The abuse of free commerce, by which one *or more* individuals have procured the advantage of selling alone all the particular kind of merchandise. A monopoly is also an institution or allowance by a grant from the sovereign power of the State, by commission, letters patent or otherwise, to any person or corporation, by which the exclusive right of buying, selling, making, working, or using anything is given."

Bouvier's Law Dictionary.

It is obvious that the legislature could not have granted such an exclusive privilege to any eight persons in the County of Jefferson; it is equally obvious that what the legislature cannot do directly, it cannot do indirectly. We do not deny but that the legislature might, for the purpose of promoting temperance, prescribe that the sale of spirits should be made by certain officials with a view to limit its use to medical purposes alone. But this is not a case of that kind. The eight persons belonging to the privileged class have an unlimited power of sale. They are simply carrying on a well recognized branch of commerce, and other citizens are forbidden to interfere with their traffic, or to exercise the privileges which they enjoy, not only *on the same terms*, but on any terms whatever. The case is, therefore, one of monopoly, pure and simple, without a single mitigating or doubtful feature.

See in point 25 *Conn.* 19; 11 *Coke* 84; 7 *Paige Chy* 261; 16 *Wall* 102; 46 *Ill.* 396; 18 *Ohio St.* 293; *Cooley Const. Lim* 390; *Ib.* 391–2–3.

W. E. Hemingway, Amicus Curiae.

We submit that the County Court had the right to license only so many saloons as it thought necessary to carry on the trade; that appellant has been restrained of no liberty he previously had, and hindered in no trade; that the action of the County Court has taken nothing from any one; was in derogation of no individual rights, and not subject to the objection of monopoly.

The law invests the County Court with full discretion to grant or refuse each application for license, considering the fitness of the traffic and of the person to engage in it, and the demands and convenience of the people in the loclity in which it is to be conducted.

The appetites of man demand liquor; experience demonstrates that 'tis best for him and the public that he buy it from a saloon regulated by law. Experience has further shown that the number of saloons should not be greater than is necessary to supply the absolute demand for drink. It should never be exceeded; what it is, when it would be exceeded, must be determined by the County Judge from his knowledge of the drinking habits of the community, and its demands upon the trade.

Sec. 5718 *Gantt's Dig.*; *Acts* '74 *p.* 48; *Acts* 1879, *p.* 34; *Acts* 1881, *p.* 133; *Whittington Ex Parte*, 34 *Ark.*, 394–6–7 *&c.*; 39 *Md.*, 524; 5 *Iredell*, 327; 18 *B. Mon.* 15; 11 *Gratt* 655; 2 *Duer* 618; 1 *Hill* 655; 8 *Mod.* 309; 2 *Jones N. C.*, 288.

Saloons are not permitted for the benefit of the licensee, but for public convenience. 24 *Peck.* 358; 32 *Iowa*, 249; No one has a right to a license. 34 *Ark.*, 397; 18 *B. Mon.*, 15; 39 *Mo.*, 524; 18 *Wall*, 136.

As to the power of the legislature to pass the act as a police regulation, see 11 *Otto* 819; *Best. Stat. Crimes, Sec.* 995; 16 *Wall*, 65, 102; 18 *Wall*, 136; 24 *Pick*, 358; 40 *Ind.* 315; 32 *Iowa*, 249, *&c.*

EAKIN, J. Leon Levy, under the Act of March 8th, 1879, as amended, applied to the County Court of Jefferson county for a license to retail liquors in the city of Pine Bluff, accompanying his petition with a sufficient bond, conditioned as required by law. On the 7th day of January 1884, the petition was rejected, and he appealed from the order to the Circuit Court.

The matter was there heard upon a motion to dismiss the appeal for want of jurisdiction. The court seems to have treated the appeal as a petition for mandamus, which it overruled and dismissed. Levy took a bill of exceptions and appealed here.

The bill of exceptions contains a statement of the facts, with the motion for a new trial, and the order overruling the same.

It appeared that at the last preceding general election, a majority of the voters of the county, and of each ward in Pine Bluff, voted in favor of liquor licenses; that the application of petitioner for a license complied in every respect with the law; that he was himself competent to receive it, and of good moral character; and that the bond was good and sufficient; that at the same term of the County Court seventeen other citizens made, separately, similar applications; that the county court granted the petitions of eight of them and refused the ten others, including that of appellant; and that those whose applications were rejected were citizens of the county, with as good moral character as those whose applications were granted.

Upon these facts the Circuit Judge declared the law to be: "That under the laws of this State, the County Court is

clothed with the exclusive jurisdiction to grant or refuse license for the keeping of dram shops, or drinking saloons; and under that discretion, it has the power and authority to grant to one or more applicants license to sell liquor, and refuse it to all others; even if those refused are, in all respects, equal to those to whom it grants license; and when that discretion has been exercised by the County Court, no other court has the power or jurisdiction to enquire into that discretion on an appeal or otherwise."

Whereupon the court refused to disturb the order of the County Court.

It will be observed that the effect of the declarations of law upon which the court acted, is simply a disclaimer and negation of jurisdiction to entertain the appeal; and does not touch the question of abuse or mistake in the exercise of the discretion. In view however of the public importance of the subject matter we deem it expedient to consider all the questions which the attorneys have meant to make, and which they have considered as involved in the appeal.

The Act of March 8th, 1879 (p. 34 of Pampt. Acts), as amended March 19th, 1881, after prohibiting, generally, the sale of liquors without license, authorizes and empowers the County Courts to grant licenses to keep dram shops, as follows:

By Section 7, as amended, (See Acts 1881, p. 132) it is provided that the question shall at each general election be submitted to the people of each county, as to whether or not license shall be granted for the sale of liquors for any purpose in the county. By the 9th Section, as amended, it is provided that if the vote of the county be not for license, none shall be granted in the county until after the next general election. But if the vote be *for license*, "then it shall be lawful for the County Court of such county, to grant licenses for the purposes aforesaid, to persons of good moral character,

over the age of 21 years, within any township, town, or ward of a city, in such county, where the majority of the vote has been for license."

This court has held under a similar statute, (*Whittington ex parte* 34 *Ark.*, 39[illegible].) that where the vote of the township or ward, may be in favor of license, the County Court is not bound thereby to grant it, but may still exercise a discretion in determining whether any licenses should be granted in the township or ward, and who may be fit subjects of the grant. In determining these questions or similar ones, the court acts as a court, discharging the proper functions of a court, invested with police powers, and making orders affecting the general good of the citizens, with regard to their local concerns. This is within the ambit of their constitutional purpose. It is not like cases where occasional duties of a political or ministerial nature are imposed upon particular boards or officers. (*See Const.*, 1874, *Art VII, Sec.* 28.)

"The Circuit Court shall exercise a superintending control and appellate jurisdiction over County," and other designated courts. *Ib. Sec.* 14.

1. APPEAL: From County Courts refusal of liquor license.

By the 1st Section of Act of Feb. 20th, 1883 (p. 49 Pamph. Acts) it is provided that "appeals shall be granted as a matter of right, to the Circuit Court, from all final orders and judgments of the County Courts in this State." By Section 6 it is provided that the Circuit Court shall proceed to try all such appeals *de novo*.

We think it clear that an appeal lay in this case from the County to the Circuit Court; and that the Hon. Circuit Judge erred in holding that no other court had power or jurisdiction to enquire into the exercise of the discretion ot the County Court on appeal; and in dismissing the cause for want of jurisdiction.

It might suffice, in this case, and it is as far as this court ordinarily goes, to remand the matter to the Circuit Court

with directions to hear and determine the cause upon its merits, considering whether or not the County Court had transcended or abused any discretion it might have in the matter. Yet, in view of the public convenience we will consider the merits, for the purpose of determining, once for all, the only remaining point in the case, which is this:

2. Discretion of County Courts in granting liquor license

Assuming as settled that the County Court had the right under the popular vote to issue any number of licenses in the city—and the discretion to decline to issue any licenses at all; does it follow that it had the discretion, or properly exercised it, after accepting the privilege to issue liquor licenses, and adopting the policy of doing so, to discriminate between individuals equally meritorious and, without apparent reason for the distinction, to grant license to some, and refuse it to others?

This court has held in the case of *Lowman ex parte*, 42 *Ark.*, 370 that the refusal of the Circuit Court to approve a sheriff's bond which appeared proper in form and sufficient in surety, and where upon the record no reason appeared, nor was suggested, for the refusal, beyond the will of the judge, or outside of his private knowledge, was an abuse of his sound judicial discretion.

This proceeds upon the ground that when a court refuses to do an act which is in itself proper to be done, but the doing of which, in a particular instance, is in the discretion of the court, if the refusal affects the rights or interests of the public or of individuals, it must appear to have some rational basis. If it appears to be merely arbitrary, it will be considered an abuse.

There is no vested right in any one to have a liquor license, nor such public necessity, in his case, as would bring into play the decision in *Lowman ex parte*, regarding the sheriff's bond. The question must be determined by the constitution and by the intent of the legislature.

First, then, does the construction of the act, which confers this privilege of discrimination violate any of the provisions of the constitution? This question has never been before us. The decision in *Whittington ex parte*, 34 *Ark.*, 394, went merely to the extent that the County Court had the discretion, notwithstanding the vote of any township or ward, to refuse to grant any liquor licenses to any one whatever; that is to say, to refuse to adopt the policy of granting them. There is an allusion by the Judge delivering the opinion, to a former act, (Gantt's Dig. Sec. 5718) long since repealed, which left it in the county court to determine both the fitness of the traffic and of the persons to exercise it, and a remark that there is nothing to contravene this in the act then in question. But this expression was made with reference to the point before the court in the case then in judgment; and is to be confined to that in its application. That point was the discretion of the County Court to refuse license to any and everybody. The question of discrimination was not raised. This is a case of first impression.

Sec. 19, Art II Const. of Ark., declares that "Perpetuities and monopolies are contrary to the genius of a republic and shall not be allowed." The monopolies which in England became so odious as to excite general opposition, and and infuse a detestation which has been transmitted to the free States of America, were in the nature of exclusive privileges of trade, granted to favorites or purchasers from the crown, for the enrichment of individuals, at the cost of the public. They were supported by no considerations of public good. They enabled a few to oppress the community by undue charges for goods or servites. The memory, and historical traditions, of abuses resulting from this practice, has left the impression that they are dangerous to Liberty, and it is this kind of monopoly, against which the constitutional provision is directed. Not all the States have felt this ap-

prehension. There is no indication of it in the Federal Constitution. It has not been most usual, I think, for State constitutions to inhibit monopolies, in governments whose representatives come directly from the people, and are responsible to them. Mr. Bouvier, in his Law Dictionary, enumerates only three States in which monopolies were forbidden by their constitutions, Maryland, North Carolina and Tennessee. He overlooked our state and may have overlooked some others, but it is quite apparent that a great many of the States have not considered such prohibitions necessary. It is to be regretted that the States which have set up the inhibition, have not, with it, given us some more satisfactory definition of a monopoly than can de derived from its literal meaning, the "sole power to sell," or than can be gathered from the oppressive measures of the Tudors and Stuarts. Evidently, powers to sell, to be exercised by some, and not by all, cannot be wholly prohibited, because that would exclude the power to sell under license. It is no justification of a monopoly that the right has been paid for. Most monopolies were doubtless granted on a *quid pro quo* basis. Even now, I do not think a manifest and palpable monopoly, such as a sole power to make and import farm wagons, could be sustained on the ground that the beneficiary had paid the government a compensation. We are left to conclude that the monopolies meant were such as, in England, had been found detrimental and offensive; such as were directed to the aggrandizement of the wealth of the few; and which to that end, restrained the subject from the exercise of occupations, which otherwise would have been proper.

There are some trades and occupations confessedly dangerous to the public, either as to health, or safety, or morals. Government has the inherent power to regulate or prohibit them. It is not presumed that constitutions meant to prohibit this salutary exercise of power. The retail of liquors

is one of them. As lawful as any other, when permitted, and as fully entitled to protection, it is nevertheless in questions of giving or withholding permission, considered as dangerous.

If the legislature, recognizing this danger, had prohibited the retail of liquors generally, making it unlawful to any one to keep a dram shop, and had at the same time recognized a certain public necessity or convenience to be met by the existence of a limited number of places for such houses; and had provided that the assent of the people having been first obtained, the County Court might grant such number of licenses as it might deem best; it would be just such a statute as the Jefferson Court construed this to be. Although private profits might attend the privilege, they would not be in the contemplation of the law, nor within its purposes. The intention of such a law would be the relaxation of a general prohibition for the benefit of the public in certain localities upon the expression of the desire of a majority of the inhabitants of those localities, and to do so only to the extent which the proper local tribunal might deem best. Although such a selection might result in an exclusive power to sell in the hands of those selected, we think it could not fairly be considered a monopoly in the sense of the constitutional prohibition, but rather a police regulation for the public good. This view of a definition of a monopoly is sustained by the court in *The Slaughter House Cases*, 16 *Wallace*. See remarks of Mr. Justice Miller on page 65, which are addressed to this point.

If the construction of the act adopted by the County Court gives it an unconstitutional effect, it must, we think, result from some other clause. There is another which appellant relies on with much confidence, and which we confess, presents greater difficulty.

Sec. 18 of same article provides that "The General As-

sembly shall not grant to any citizen nor class of citizens, privileges or immunities which, *upon the same terms*, shall not equally belong to all citizens."

It must be conceded that the legislature could not empower the County Courts to do that, which the Constitution prohibits the legislature from effecting. Of course there are things which, on account of jurisdiction, must be done by some special court, like the probate of a will, or the appointment of a guardian, and which the legislature could not do directly; and in such cases, an inhibition against the legislature would not necessarily affect the court. But where a *policy* is forbidden it affects all branches of government, and this clause must be taken to forbid not only an act of the legislature, but any authorization whatever by the legislature. In other words, if this power of selection, and of limiting the number of dram shops, be, in its effects, in the constitutional sense, a grant to some citizens, of privileges or immunities, denied to other citizens upon the same terms, then the County Court has misconstrued the act, and given it a meaning which arrays it against the constitution.

A privilege (*privilegium* in the old law) is quite a different thing from a monopoly. It is, according to Burrell, some peculiar right or favor granted by law contrary to the general rule—an exemption or immuuity from some general duty or burden—a right peculiar to some individual or body—a personal benefit or favor. (*See Bur. Law Dic. in verb*). An immunity is much the same. (*Ib. in verb.*)

Where the retailing of liquors is prohibited by the general law, and some persons may sell it, obtaining license therefor, and be exempt from prosecution, it is difficult to distinguish that from a privilege or immunity. It is expressly held to be a privilege in *Austin v. State*, 10 *Mo.*, 591, although no such constitutional provision as the one

under discussion, was then urged. If it be such, it follows, here, that if granted to one it must be granted to all others upon the same terms. That is to say, those who make application, tender the license fee and bond, propose to sell in the township and ward, and as to whom there can be shown no unfitness as to moral character or otherwise. In other words, it would seem plainly to preclude the County Court from making any arbitrary discrimination. Yet the authorities are conflicting.

In Illinois it is settled that such discriminations cannot be made. In *City of East St. Louis v. Wehrung*, 46 *Ill.*, 392, it was held that the court could not discriminate between persons, charging some a higher rate of license than others, exercising the same calling, under the same circumstances, and with equal facilities for profit, although an ordinance of a city might discriminate between localities. A discrimination as to persons, without reasons, was considered an abuse of discretion.

A late case, *Zanone v. Mound City*, 103 *Ill.*, 552, is one very much like this. A city ordinance provided for the issuance of dram shop license upon certain conditions. Zanoni brought himself within the conditions, yet was refused license. He applied for a mandamus, and showed, as is done here, that he was in every respect a suitable person, and that licenses had been issued to others. The defendants, the municipal authorities, as in this case, showed no excuse, justification or explanation of their action. The court conceded that the authorities might exercise a *sound* discretion, and refuse a license to *unfit* persons, but could not exercise an arbitrary discrimination. The mandamus was ordered. The court says that, "Equality before the law is a fundamental principle of our institutions, and no reason is perceived why applicants for a license to keep a dram shop, who are suit-

able persons to be licensed, should not stand on an equality before the law. Captious discriminations among men of that trade, are as obnoxious as would be such discriminations in regard to other trades." The court concluded also that the city authorities might *limit the number* of dram shop keepers to be licensed, but said that in such case *to avoid favoritism and monopoly* some provision should be made for a fair competition. *The People v. Village of Crotty*, 93 *Ill.*, 180, is cited as sustaining this view of the law; although, on its own grounds, the mandamus, in that case, was refused.

The case of *Zanone v. Mound City, supra*, was decided by a divided court, there being three dissenting members. Yet in connection with the cases cited, it may be considered as settling the law in Illinois, that such arbitrary discriminations are not valid.

In Kentucky, although no similar constitutional restriction concerning equality of privileges and immunities was discussed, yet in the cases of the *City of Louisville v. Divers Parties*, 18 *B. Monroe, p.* 15, it was held, on general principles, that a discretion in a County Court to grant or refuse liquor licenses was not an arbitrary one, but would be controlled. It was held that there might be a general refusal of every one, without any question of reason, just as we have held here; and the City Council might decide *how many taverns* licensed to sell liquor were required in the city. This is an authority, certainly, against an unlimited and arbitrary discretion, such as the courts may not control.

The courts in North Carolina have taken about the same view of the general question of discretion, which has obtained in Kentucky. *Judge Ruffin* in 5 *Iredell* 327, says: that the County Courts are not compelled to issue licenses to every qualified candidate, but that the partic-

ular license is within the sound legal discretion of the court, holding, however, that the reasons for the refusal should appear. *Att'y Gen'l v. Justices of Guilford*, (*ubi supra.*

In other words, the power to give or refuse is held not to be absolute. The learned Chief Justice quotes, approvingly, the case of *Young v. Pitts in* 1*st Burrows*, 556, which arose under the act of 5 and 6 Ed. 6., prohibiting ale houses without a license from two Justices of the Peace. Lord MANSFIELD said: "It must not be permitted to them to exercise an arbitrary and uncontrolled power over the rights of the people; that if they had no *reasonable* objection against the applicant they *ought* to license him, and if they had *they ought to give it.*" This is very hard common sense, to say the least of it, and is independent of constitutional restrictions.

In Missouri the courts seem to favor the arbitrary power of discrimination. *State ex Rel. v. Holt Co.*, 39 *Mo.* 524. The matter there is not put upon constitutional grounds, and the court refers to *Austin v. State in* 10 *Mo.*, which treats a license as a privilege.

The courts of Virginia have reached the conclusion that the discretion of the County Courts in giving or refusing license in a particular case cannot be controlled by any revisory process, but refuse to declare that they have an arbitrary discretion, which they can exercise at pleasure without responsibility. The control in this State is given by appeal, and the authority of the Virginia cases seems scarcely applicable, upon the main point now discussed, although they had in their constitution a clause to the effect that "no man or set of men, are entitled to exclusive or separate emoluments or privileges." The court, however, has not seemed to rely upon this

clause in the case which seems to have settled the practice in that state. *Yeager ex parte*, 11 *Grattan* 674.

In the case of the *Commonwealth v. Blackington*, 24 *Pickering*, 352, the Supreme Court of Massachusetts held directly, that a law giving to County Commissioners the right, at their option, to license as many persons as they should think good for the public, was not in conflict with the clause of their Bill of Rights, which is as follows: "No man, nor corporation, or association of men, have any other title to obtain advantages, or particular and exclusive privileges distinct from those of the community, than what rises from the consideration of services rendered to the public." The court said they might put the decision on the ground that the law required of licensed persons, some burdens for the accommodation of the public, for which the exclusive privilege might be perhaps a consideration, as in case of ferries; but preferred to put the decision on the broader ground that the privilege was not conferred as a privilege to the vendor, or with a view to give him an exclusive right. That the exclusive right is collateral to the peace and good order, and security and morals of the community—and that when these are the obvious purposes of a law, and the exclusive privilege the means, the Constitution is not violated.

The reasoning is not very satisfactory, nor easily grasped. What shall be the exact limit to which exclusive privileges may extend, if they be good in some cases and not in others? The jurisprudence of Massachusetts has its roots in a time when the worthy forefathers of the generation rendering this opinion, were extremely careful to fortify against all arbitrary powers and abuses of the crown, and at the same time very prone to hold up the hands of their own home rulers in the col-

ony, in very arbitrary measures to coerce good conduct at home. The same principles were not always easily adjusted for both purposes. So far as it goes, however, and the court of Massachusetts goes far, as authority, it sustains the action of the County Court.

In the case of *Blair et al v. Kilpatrick*, 40 *Ind.*, 315, it was held that a similar provision of the Constitution had no reference to liquor lincenses. In that case the distinction made by the law, was between males and females, and to that, it is obvious the constitutional provision would not apply. It is intimated, however, that if a distinction, as to this privilege, should be attempted between a white man and a black one, it might alter the case.

It has been held in Georgia that the court, under their law, which in terms, however, is more mandatory than ours, has no right to withhold license from any one applying and bringing himself within the requirements of the law. *State v. Justices of Morgan Co.*, 15 *Ga.*, 408.

In Nebraska it seems to be held that courts have unlimited and uncontrolled discretion as to each license applied for, but no constitutional question was made. *State v. Cass Co. Commr's*, 12 *Nebraska* 54. None could have been well made, as their constitution prohibits only *irrevocable* grants of privileges and immunities.

So in Connecticut where a like discretion has been upheld (*Batters v. Co. Comr's*, 49 *Con.*, 479.) no constitutional question was made, as their constitution seems only to prohibit hereditary privileges.

In *Mayor &c., of Hudson v. Thorne*, 7 *Paige Chancery Rep.*, 261, Chancellor Walworth, upon equitable principles, held a city by-law to be unreasonable, and consequently void, which would permit one person to carry on a dangerous business, and prohibit another who has an

equal right, from pursuing the same business. This principle seems directly applicable to the case now in judgment, since the multiplication of dangers is the only plausible ground upon which the County Judge could base a refusal of a portion of the applicants.

Mr. Cooley, in his work on Constitutional Limitations, lays it down as a maxim of constitutional law, by which all enactments, and we may add, constructions of enactments, are to be tested; that those who make the laws "are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at the plough"—quoting from Locke on Civil Government Sec. 142 (See *Cooley's Const. Lim., Mar. p.* 392.)

In *Lewis v. Webb*, 3 *Me.*, 326, this principle is thoroughly recognized. The court say "On principle it can never be within the bounds of legitimate legislation to enact a special law or pass a resolve dispensing with the general law in a particular case, and granting a privilege and indulgence to one man by way of exemption from the operation and effect of such general law, leaving all other persons under its operation. Such a law is neither just nor reasonable in its consequences. It is our boast that we live under a government of laws and not of men, but this can hardly be deemed a blessing unless those laws have for their immovable basis the great principles of constitutional equality."

The Honorable Judges of the County and Circuit Court of Jefferson County, and the attorneys in this case, have manifested a spirit of candor which is commendable, and which evinces an earnest desire to be thoroughly advised of the proper practice. They have discarded all technical advantages, but have been careful to present to the courts in succession the naked question, whether or not

the County Court, under the law, can without any reason assigned, at its own option, grant licenses to some citizens, and refuse them to others in every respect as well qualified to receive them, and standing before the Court in all respects in the same light. We have endeavored to meet the question in the same spirit, and to settle it for the whole State, have gone somewhat beyond what the case requires.

Upon a review of all the conflicting and modified views, which have been expressed by the courts, a majority of the court determine:

That any construction of law which gives to the County Court the power, arbitrarily to grant licenses to some individuals, and refuse them to others in the same township or ward, equally as competent and as worthy, and without any cause assigned, is contrary to the spirit of our government and in hostility to the declarations of our Bill of Rights, and a misapprehension of legislative intent.

We think the discretion of the County Court extends to determining whither or not any license at all shall be issued in any particular township or ward, after that discretion may have been conferred by the vote of said township or ward, and by the vote of the county. But, having adopted the policy by issuing any license, it has no further discretion in a particular case, than to determine whether the applicant has complied with all the requirements of the law, and is of good moral character, and, we think, upon refusal, the grounds of the objection should be shown, that it may be seen whether or not the court has exercised a sound legal discretion in the matter.

In coming to this conclusion we have carefully weighed, on one hand, the evils likely to ensue upon a multiplicity of licenses. We incline to think a few dram shops in any

locality, although not perhaps as great a nuisance as many, would be quite as pregnant with evils to the morals of the community, as many. The actual supply of intoxicating drinks would be, in each case, about the same, and quite as easily accessible.

Upon the other hand we have considered the true spirit of our free government as to the absolute equality of citizens, the meaning of our provision against exclusive privileges, the dissatisfaction likely to ensue from groundless discriminations, and the danger of corruption which may grow out of favoritism, and the temptation to undue influences to secure the privilege. Nothing of the sort is revealed by this transcript. The County Judge, as shown by the nature of these proceedings, has been conciencionsly desirous of being advised as to his duty. But shocking corruptions may grow out of the practice of an uncontrolled discrimination.

This cause must be remanded to the Circuit Court to be heard *de novo* upon the appeal, and to be decided in accordance with the principles herein announced.

Hon. E. H. ENGLISH, C. J., dissenting.

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WILLEFORD ET AL V. STATE EX. REL., &C.

1. MANDAMUS: *When proper remedy.*
   Mandamus is an appropriate remedy where a public officer is called upon to perform a plain and specific public duty positively required by law, calling for the exercise of no discretion or official judgment.

2. ELECTIONS; *Duty of canvassing boards.*
   The duties of canvassing boards are purely ministerial. They have no judicial functions and no discretionary power to go behind the returns for any purpose.

3. SAME; *Manner of conducting elections: Statute directory.*

The board of canvassers can not reject a poll-book on account of its being transmitted to the clerk through one not an elective officer. Statutes concerning the manner of conducting elections are directory, unless a non-compliance is expressly declared to be fatal to the validity of the election, or will change or make doubtful the result.

4. ELECTION OF COUNTY SEAT; *Jurisdiction of Chancery: of County Court: Appeal.*

Chancery has no power to restrain the counting of votes in a County seat election, for fraud or illegality. The jurisdiction is in the County Court to purge the polls of fraudulent and illegal votes, as an incident to its exclusive jurisdiction over all matters pertaining to the local concerns of the county; and from its decision any person aggrieved may appeal to the circuit court.

5 INJUNCTION: *Issued without authority void.*

A writ of injunction issued in a matter over which the court has no jurisdiction is void, and no one is bound to obey it.

APPEAL from *Prairie* Circuit Court.
Hon. M. T. SAUNDERS, Circuit Judge.

J. E. Gatewood and *S. P. Hughes* for appellants.

Poll books must be returned by judge of election. *Secs.* 41, 42, 43, *&c.*, *Acts* 1875, *p.* 100. The statute is mandatory, *McCrary on Elections, Secs.* 199–200.

The board of canvassers may determine whether what purports to be, *are* the returns, *Ib., Sec.* 82. Proof of genuineness of returns transmitted through private and unauthorized channels. *Ib., Secs.* 160, 441–2–3. In determining whether returns are genuine and ought to be opened and compared, canvassing boards act in a *quasi* judicial character, and are not to be controlled by mandamus. *Ib., Secs.* 331, 333; 3 *Kans.* 88.

If there is no mode for contesting an election for removing a county seat, then there is no remedy at law against the 85 fraudulent votes cast at Hazen, and injunction was proper.

There is no mode of contesting such an election, and in all cases where it has been held equity would not restrain the count of a vote, there was a remedy at law. *McCrary, Secs.* 220, 340, 318, 319; 41 *Pa. St.*, 396; 17 *Ohio St. Rock v. Weddle*; 14 *Ohio St.* 315; *Mosely v. Mack* 30 *Ark.*, 485.

Where no contest is provided for, injunction is the remedy. 48 *Ill.*, 263; 77 *Ib.*, 485. See election laws 1875, *Acts* 1875 *p.* 107, *Secs.* 76–7, 71 *p.* 106 and *p.* 83 *Act* 1883, prescribing *modes* of contests for officers. Also *Story Eq., Secs.* 26, 27 *and* 33; *High on Inj.* 801.

See also *High on Ext. Rem. Secs.* 32, 42, 43.

Appellants bound to obey the injunction whether rightfully or wrongfully issued. *High Ext. Rem., Sec.* 852, 1*st Ed. Ib. Secs.* 847–9, 32, &c.

Geo. Sibly and *Clark & Williams* for appellee.

To count the votes as returned was the plain duty of the canvassing board. It was a plain *ministerial* duty to perform, merely to count the votes as returned and certify to the County court, which, alone, possessed *exclusive* jurisdiction to hear and determine all questions of fraud, illegality or irregularity. The canvassers had no authority to throw out or refuse to count anything, and mandamus was the proper remedy. *Patton v. Coates*, 41 *Ark.*, —; 26 *Ark.*, 100. The injunction was no defense, as the court had no jurisdiction to award the injunction, and it was void. *High on Inj. Sec.* 1250, 1257; *McCrary on Elections, Sec.* 220, 318, 340; 15 *Kans.* 500; 5 *Oregon*, 427.

The County Court has *exclusive* jurisdiction. *Const. Art.* 7, *Sec.* 28, and the County Court must devise the machinery to carry it into effect. The removal of a County seat is clearly a local concern of the county. Under the present Constitution giving County Courts *exclusive* jurisdiction, the County Court must *first* act before equity can interfere for

fraud. The remedy was clearly by contest in the County Court. 17 *Ohio* 271.

Cite further 16 *Wall*, 203; *McCrary on Elections*, *Sec.* 81-2-4, 145, 166.

SMITH, J. Pursuant to an order of the County Court, an election was held in Prairie County on the 15th of February 1883, to determine whether the county seat should be removed from Des Arc to Hazen. Returns were made to the Circuit Clerk, who is ex officio clerk of the County Court, and he called in two justices of the peace to assist him in canvassing the vote. Before the canvassers had performed their duties, a bill in equity was filed by the citizens of Des Arc and a temporary injunction was granted by the County Judge, restraining them from opening and counting the poll-books of the townships of Carlisle, Tyler and Belcher, and from counting more than 180 of the 265 votes that were cast in Hazen township.

It was alleged that the returns from the three townships first above named were transmitted to the clerk through persons who were not election officers; but there was no suggestion that the returns had been tampered with. It was also alleged that 85 illegal and fraudulent votes had been polled in Hazen. Pending this injunction suit, a petition was filed by certain citizens and tax-payers of the county, for a writ of mandamus to compel the clerk and his associates to proceed with the count of the votes of all the townships as returned to them, and to certify the result to the County Court to the end that it might be determined whether the proposition for removal had been carried or rejected. The clerk and justices responded that they had been enjoined, and set up the above mentioned frauds and irregularities. Before the cause came on for hearing, the Chancellor had dissolved the injuction against canvassing the

returns from Carlisle, Tyler and Belcher, retaining the bill, however, to inquire into the 85 alleged fraudulent votes in Hazen. So a peremptory mandamus was awarded against the clerk and justices to proceed with their duties under the law, as to the three townships whose returns had been irregularly transmitted to the clerk, but the writ was denied as to the returns from Hazen. From this judgment both the relators and the defendants have appealed.

1. MANDAMUS: When proper remedy.

Mandamus is an appropriate remedy where a public officer is called to perform a plain and specific public duty, positively required by law, calling for the use of no discretion, nor the exercise of official judgment. *State ex rel. Ins. Co. v. Moore*; 42 *Ohio St.*; *Howard v. McDiarmid*, 26 *Ark.*, 100; *McCrary on Elections, Sec.* 331.

2. CANVASSING BOARDS: Their duties

Now the duties of canvassing boards are purely ministerial. They are not invested with judicial functions and they have no discretionary power to go behind the returns for any purpose. *McCrary on Elections, Secs.* 81 *to* 85 *and cases cited. Coates v. Patton*, 41 *Ark.*, 111.

3. MANNER OF CONDUCTING ELECTIONS: Statute directory.

It is true, Sec. 4 of the Act of March 2, 1875, for the locating and changing of county seats directs that the poll-books be conveyed to the clerk by one of the election officers to be designated by the judges of election. And there is a similar provision in the general election laws (Sec. 42 of Act of January 23, 1875). But statutes concerning the manner of conducting elections are directory, unless a non-compliance is expressly declared to be fatal to the validity of the election or will change or render doubtful the result. *McCrary on Elections Sec.* 200.

4. Election of County Seat: Jurisdiction of chancery: Of County Court: Appeal.

Upon the cross-appeal of the relators: Chancery has ordinarily no jurisdiction of the merits of a contested election. *McCrary on Elections, Secs.* 220, 318, 340; *Dickey v. Rudd*, 78 *Ill.* 261; *Peek v. Weddell*, 17 *Ohio St.*, 271; *Sanders v. Metcalf*, 1 *Tenn. Ch'y* 419.

Our constitution provides, however, that "no county seat shall be established or changed without the consent of a majority of the qualified voters of the county." Art XIII, Sec. 3. And the legislature has provided no mode for contesting a county seat election. Under such circumstances and to protect the rights of the majority intended to be secured to them by the fundamental law, it was held in, *Boren v. Smith*, 47 *Ill.*, 482; *and People v. Wurt* 48 *Id.*, 263, that a court of equity must take jurisdiction of a bill impeaching the election for illegality in holding it, or unfairness in the conduct of it. But the Reports will be searched in vain for a precedent where the court has interfered, collaterally and before the result has been declared, to restrain the officers of election from counting illegal votes.

By Section 28 of Art. VII, Constitution of 1874, exclusive original jurisdiction is vested in the County Court in all matters pertaining to the local concerns of the county. And the removal of a county seat is a matter of local concern. *Blackburn ex parte*, 5 *Ark.*, 21; *Russell v. Jacoway* 33 *Id.*, 191. We do not forget that in *Maxey v. Mack*, 30 *Ark.*, 472, this court decided that the Board of Supervisors had no implied power to enquire into the regularity and fairness of such an election. But that election took place when the constitution of 1868 was in force. And under it, the jurisdiction, powers and even existence of the courts inferior to the Circuit Courts, depended upon the legislative will.

And the Act of May 23, 1874, providing the mode of changing the county seat of Clayton County, had purposely passed over the Board of Supervisors and had directed the returns to be made to the supervisors of the election for a constitutional convention.

The County Court has the authority then to determine in the first instance where the county seat is, and whether the conditions have arisen upon which a removal is required.

This may incidentally involve the question, whether the vote has been fairly taken and the necessity, if fraud has supervened, to purge the polls. A revision of its action may then be had upon the appeal of any person aggrieved, to the Circuit Court. *Constitution of* 1874, *Art. VII, Sec.* 33; *Act of Feb'y* 20, 1883, *Sec.* 1; *Varner v. Simmons*, 33 *Ark.*, 212.

5. Injunctions without jurisdiction void

It follows that the Prairie Circuit Court had no power to restrain by injunction a board of canvassers from canvassing the returns of the election; that the temporary injunction, having been awarded in a matter where the court could not under any circumstances, hear, determine and decree in reference to such matter, was void and could not legally operate on any one, nor could anybody be punished for disobeying it; and the response to the petition for mandamus disclosed no sufficient reason why the writ should not go.

The judgment below, in so far as it awards the peremptory writ to the canvassers to count the vote from Carlisle, Tyler and Belcher is affirmed, but in so far as it refused to compel them to count all the votes that were returned to them as cast at Hazen, it is reversed. And the cause is remanded with directions to issue the writ.

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State of Arkansas v. Nunnelly.

1. Criminal Law: Selling Liquor: *Former conviction, when a defense.*

A former conviction is a bar to any offense of which the defendant might have been convicted under the indictment and proof in the first case. And so when a defendant has been convicted under a valid indictment for unlawfully selling liquor, and under proof of several different sales in a given time, and

the State made no election as to which it would prosecute, the conviction is a bar to a subsequent indictment for any sale to the same party within the same time.

ERROR to *Franklin* Circuit Court,
Hon. H. MATHES, Special Judge.

C. B. Moore, Attorney General, for the State:

It was error to instruct the jury that although the defendant might be guilty of several distinct sales of liquor, yet, if they found that each of said sales had been put in evidence upon a former trial, without any election by the State as to which offense it would rely on, the former conviction would be a bar. 1 *Bish. Cr. L. Secs.* 1065—997—1049—51—52, *&c.*; *Wharton Cr. L., p.* 201, *&c.*

Contra, U. M. & G. B. Rose.

The correctness of the instruction is apparent. 40 *Ark.*, 453; *Whart. Cr. Ev. Sec.* 579; 1 *Russell on Crimes,* 832; 105 *Mass.*, 59; 3 *Greenl. Ev., Sec.* 36; 126 *Mass.*, 259, *S. C.* 30 *Am. Rep.* 674; 9 *Tex.*, 151; 35 *Am. Rep.*, 732; 11 *Am. Dec.*, 741; 2 *Hawkes,* 98; 1 *Tex.* 47; *S. C.* 28; *Am. Rep.* 396.

SMITH, J. Nunnelly was jointly indicted with one Cargile for selling liquor on the first day of March, 1883, to W. J. Nichols, within three miles of Central Institute, in Franklin County, in contravention of the three mile law. He filed a plea of former conviction for the same offense, upon which issue was taken by the State. The trial resulted in a verdict for the defendant and he was discharged. The State has brought error.

Former Conviction: When a defense.

From the bill of exceptions it appears that the defendant, in support of his plea, introduced the record of the proceedings and judgment of conviction upon an indictment pre-

ferred against himself and Cargile for selling liquor on the sixth of March, 1883, within three miles of said schoolhouse, without naming the person to whom the liquor was sold. Parol testimony was also given to show that the previous conviction had been obtained upon proof of several distinct sales to W. J. Nichols during the months of February and March of 1883.

The court charged the jury that, although the defendant might be guilty of some separate sales of liquor, nevertheless if they found that each of said offenses had been put in evidence upon the former trial, without any election by the State as to which offense it would rely upon, the former conviction would be a bar to this prosecution.

The instruction was proper. The first indictment was good; it being unnecessary to name the person to whom the liquor was sold. *Johnson v. State*, 40 *Ark.*, 453.

The established rule is, that the former conviction is a bar to a subsequent indictment for any offense of which the defendant might have been convicted under the indictment and testimony in the first case. *Williams v. State*, 42 *Ark.*, 35; *Wharton's Cr. Ev.*, 579; *Russell on Crimes*, 8th *Am. Ed.*, 832; *Comm. v. Blakeman*, 105 *Mass.*, 53.

Mr. Greenleaf says: "The former judgment in these cases is pleaded with the averment that the offense charged in both indictments is the same; and the identity of the offence, which may be shown by parol evidence, is to be proved by the prisoner. This may generally be done by producing the record, and showing that the same evidence, which is necessary to support the second indictment would have been admissible and sufficient to have procured a legal conviction on the first. A *prima facie* case on this point being made out by the prisoner, it will be incumbent on the prosecutor to meet it by proof that the offense charged in

the second indictment was not the same as that charged in the first." 3 *Gr, Ev., Sec.* 36.

The proof upon which the conviction was obtained was that W. J. Nichols had, on three or five different occasions in the months of February and March, 1883, bought whisky at the "blind tiger" kept by Nunnely and Cargile; but the witness could not remember the days of the month and had no means of refreshing his recollection. The State offered no evidence that the offense charged in the present indictment was not identical with that for which the defendant had been already convicted. Hence the *prima facie* case made by the defendant became conclusive.

In *Commonwealth v. Robinson,* 126 *Mass.,* 259; *S. C.* 30 *Am. Rep.* 674, it was decided that "an acquital on a complaint for keeping a tenement for the illegal keeping and sale of intoxicating liquors, from Jan. 1 to May 28 is a bar to a complaint for the like offense from Jan. 1 to Aug. 20 of the same year, as the same evidence which would have warranted a conviction on the first would warrant a conviction on the second complaint."

Judgement affirmed.

STATE V. TIDWELL.

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1. INDICTMENT. *Assault with a deadly weapon.*

An indictment for an assault with a deadly weapon, in the language of the statute and specifying time and place, is sufficient, without specifying the instrument or weapon with which the assault was made.

APPEAL from *Dorsey* Circuit Court.
Hon. J. M. BRADLEY, Circuit Judge.

C. B. Moore, Attorney General, for appellant.

The indictment was drawn under *Sec.* 1298 *Gantt's Digest*, and meets the statutory requirements *Ib Sec.*, 1796. It need not be in strict statutory form. *Lacefield v. State*, 34 *Ark's.*, 275.

INDICTMENT: Assault with deadly weapon.

SMITH, J. The indictment charged that Tidwell "did unlawfully make an assault in and upon one James Davis with a deadly weapon with the intent to inflict upon the person of him, the said James Davis, a great bodily injury when there was no considerable provocation, contrary to the form of the statute and against the peace and dignity of the State "etc—To this indictment a general demurrer was sustained, and the State has appealed.

It does not appear for what reason the court below considered the indictment defective.

The time and place were sufficiently charged so that the court might see that the crime was alleged to have been committed in Dorsey County and less than one year before the bill was found. It was based on Sec. 1298, of Gantt's Digest and, in the description of the offence, employs the language of the statute. This is in general sufficient. *State v. Witt*, 39 *Ark.* 216. Perhaps it was supposed to be necessary to mention the name of the weapon used, as a pistol, an axe, a stone or whatever it may have been. Clearly this is not required upon principle. "The means of effecting the criminal intent, or the circumstances evincive of the design with which the act was done, are considered to be matters of evidence to the jury to demonstrate the intent, and not necessary to be incorporated in an indictment." 2 *Wharton Cr. Law 6th Ed. Sec.* 1281.

And to this effect are the adjudications in other States upon statutes precisely similar. *State v. Seamons*, 1 *Green (Iowa)* 418; *Martin v. State*, 40 *Texas*, 19; *Bittick v. State Ib.* 117; *Montgomery v. State*, 4 *Texas Ct. of App.* 140;

Reversed and remanded with directions to overrule the demurrer to the indictment and for further proceedings.

STATE v. WARDLAW.

1. CRIMINAL LAW: *Carrying Weapon.*
On the trial of a defendant for carrying a pistol as a weapon, it is not necessary to prove that the pistol was loaded.

2. PRACTICE: *Suggestions of the Judge on trial.*
Our constitution forbids judges to charge juries as to facts, and it is error for a judge to advise a prosecuting attorney in the presence of the jury to dismiss a prosecution for want of evidence.

APPEAL from *Bradley* Circuit Court.
Hon. J. M. BRADLEY, Circuit Judge.

C. B. Moore, Attorney General, for the appellant.

The 3d and 4th instructions of the court were erroneous and misleading. The evidence clearly shows, taking all the circumstances into consideration, that the *Derringer* pistol was carried and intended as a weapon.

SMITH, J. Wardlaw was indicted for carrying a pistol as a weapon. He was tried by a jury and found guilty; but the court set the verdict aside. Upon the second trial the evidence was that the accused was a tenant of one Lynn, occupying land 150 or 200 yards distant from his landlord; that he was on bad terms with his wife and had perhaps used threatening language towards her, in

1. Carrying weapon.

consequence of which she had left him; that shortly before the indictment was found, his father-in-law came to Lynn's house and requested that Wardlaw might be sent for for an interview. Wardlaw came to Lynn's horse-lot, and in the course of the conversation drew out of his pocket a derringer pistol; but the witness did not know whether or not it was loaded. After the evidence was all in, the court suggested to the State's Attorney that he might as well dismiss the case, since, if the jury convicted the defendant, he would set the conviction aside for want of evidence. But the attorney preferred to go to the jury. Thereupon the court charged (1 and 2) that the carrying or wearing of a pistol is not an offense, but it must be carried or worn as a weapon; (3) unless the jury find from the evidence that the pistol was loaded, it was not a weapon within the meaning of the law; and (4), if the jury find from the evidence that the defendant was sent for to meet the witness, at such a place as the pistol was seen, then he is not guilty.

After this charge, the prosecuting attorney threw up the case and the court directed the jury to acquit. The state then moved for a new trial for misdirection, saved objections, and appealed.

The testimony tended to show that the pistol was carried and intended as a weapon. It was not such an arm as would be useful in warfare, but a pocket pistol, of a size to be concealed about the person and used in private quarrels. *Fife v. State*, 31 *Ark.*, 455. The defendant was not upon his own premises, nor traveling on a journey, nor an officer of the law. And the third and fourth instructions were erroneous and misleading. The statute does not require that the pistol shall be loaded. *Act of Feb'y 16th*, 1875, *Sec.* 1. *State v. Duzan*, 6 *Blackf.*, 31. If it did, its value would be seriously impaired; for that is

Pistol need not be loaded.

a fact which can hardly ever be ascertained beyond peradventure, until somebody is shot.

Nor can it affect the guilt or innocence of the defendant that he was summoned to a neighbor's house to meet his father-in-law. Nothing is disclosed in the record from which it could be inferred that the father-in-law came with a hostile purpose.

2. Suggestions of Judge on trial.

The Circuit Court also committed an error in advising the attorney for the State, in presence of the jury, to drop the prosecution for want of evidence. Our Constitution forbids judges to charge juries with regard to matters of fact, *Art. VII, Sec.* 23.

Reversed and remanded for another trial.

McClure v. State.

1. Liquor: *Indictment for selling: The Evidence*

A. asked the defendant in his field if he had any whiskey, and was told that there was some at the house. A. expressed a strong desire for a dram. Defendant replied "all right, I'm tired working and had as lief walk to the house as not." On arriving at the house A. was taken up stairs, the lower room being occupied by defendant as a residence. Defendant poured from a jug, a drink for A. and one for himself. There was sugar the e and two or three bottles of whiskey on a shelf. A. took one of them, holding a pint, and put it in his pocket, laying a half dollar on a table. Defendant was in the room and there was nothing to prevent him from seeing what A. was doing, but he did not direct or encourage A. to take the bottle; but A. wanted the whisky and left what he thought was the worth of it. The Jury found the defendant guilty and this court refuses to disturb their verdict.

McClure v. State.

APPEAL from *Sebastian* Circuit Court,
Hon. R. B. RUTHERFORD, Circuit Judge.

Clendenning & Sandels for appellant.

C. B. Moore, Att'y Gen'l. for appellee.

The instructions of the court are not embodied in the bill of Exceptions—nor do they appear in the transcript.

The evidence, circumstances and surroundings clearly establish, that witness purchased and appellant *did sell* the whisky. It was the merest subterfuge to evade the law.

SMITH, J. The appellant was tried and convicted upon an indictment for selling ardent liquors without license. The only ground of the motion for a new trial was, that the verdict was contrary to law and not sustained by sufficient evidence.

As the charge of the court is not contained in the transcript, we have no means of determining whether the Jury were properly instructed, but for the purpose of this appeal will take it for granted that they were.

The evidence in brief was that Blair Alexander asked the appellant in his field if he had any whiskey and was told there was some at the house. Alexander expressed a strong desire to get a dram. Appellant replied "All right, I'm tired working and had as lief walk to the house as not." On arriving at the house, witness was taken up stairs, the lower story being occupied by appellant as a residence. Appellant poured out from a jug, a drink for witness and one for himself. There was sugar there and two or three bottles of whiskey on a shelf. One of these bottles, holding a pint, witness took down and thrust into his coat pocket, laying down a silver half-dollar on a table. Appellant was in the room and within six or eight feet of witness and there was

nothing to prevent him from seeing what witness was doing. Appellant did not direct nor encourage witness to take the bottle, but witness' idea was that he wanted the whiskey and left what he thought was the worth of it in money.

We think it sufficiently likely that the appellant was guilty that we shall not invade the province of the jury.

Affirmed.

STATE v. WADE.

1. GAMING: *Betting cigars.*

Parties who play at cards under an agreement that the beaten party shall treat the others to cigars are guilty of unlawful gaming under, the statute.

APPEAL from *Bradley* Circuit Court.
Hon. J. M. BRADLEY, Circuit Judge.

C. B. Moore, Att'y Gen'l, for State.

This is clearly gaming or betting under *Sec.* 1564 *Gantt's Dig.* The 3d instruction clearly erroneous.

Wm. P. Stephens, contra.

This is not a case of gaming. Nothing was up; there was only an understanding that the party first "froze out" should pay for cigars, *to be bought after the game ended*, &c., &c.

Unless, the case being reversed and remanded, another jury would upon the same evidence and correct directions,

find defendant guilty, this court will upon the whole record affirm. 17 *Ark.*, 327, concluding paragraph.

SMITH, J. Wade was indicted for betting one cigar of the value of five cents at pocre. The evidence showed that within twelve months next before the finding of the indictment he and others engaged in a game of freeze-out pocre. Each was furnished with a certain number of grains of corn to be used in counting the game. And it was agreed between the parties that he who should first lose all of his counters should treat the rest of the party to cigars. The value of the cigars was proved as alleged. At the end of the game, the loser did pay for the cigars. The witness had never heard any of the players say to the others, "I bet you a cigar."

The court gave in charge the substance of *Sec.* 1564, *Gantt's Digest*, upon which the indictment was founded which prohibits the betting of money or other valuable thing on pocre or any other game at cards. But it refused the following prayers for the State:

"If the jury believe from the evidence that the defendant either won or lost a cigar of value on any game at cards, commonly called pocre, within twelve months previous to the finding of the indictment, they will find him guilty.

"Whether or not the defendant bet a valuable thing on a game of cards called pocre as charged in the indictment, is a fact for the jury to determine from the evidence.

"And in determining this fact it is not necessary for the State to prove by any witness that said witness heard defendant say 'I bet you,' but if all the facts proven show that defendant either won or lost any valuable thing on a game of pocre as charged he is guilty and the jury may so find."

And of its own motion it told the jury that a mere promise to buy and deliver a cigar after the game was played, was not betting money or other valuable thing under the statute, and that a promise is not money or a valuable thing.

Under these instructions the jury brought in a verdict of acquittal. The State moved for a new trial for misdirection, and because the verdict was against the law and the evidence, and reserved exceptions and removed the case to this court.

The statute is leveled at the betting of property as well as of money at cards. And it has not stopped to discriminate between large wagers and small wagers. It regards gambling whether on a large or a small scale, as a pernicious practice, the offspring of idleness and the prolific parent of vice and immorality, demoralizing in its associations and tendencies, detrimental to the best interests of society and encouraging wastefulness, thriftlessness and a belief that a livelihood may be earned by other means than honest industry.

Under a statute of Tennessee, which uses the language "money or other valuable thing," the jury in *Walker v. State*, 2 *Swan*, 287, rendered the following special verdict:

"We find that the defendant, with some six or more other gentlemen, played at a game called ten pins, or handicap. In this game no one played to beat any other gentleman, but each one had assigned to him a certain number of pins to get, with a certain number of balls, some more and some less, according as they were considered good or bad players. If the player did not get the number of pins assigned him, he was to treat to a bottle of champaigne. The defendant did play in this game in Maury County, in less than six months preceding the finding of this presentment, and did sometimes, on fail-

ing to get the number of pins allotted to him, treat to a bottle of champaigne, and sometimes he did not. It was agreed by the parties at the commencement of the playing, that the treat was a voluntary thing, and no one need to do so unless he was perfectly willing. The jury further find, that the defendant and the other gentlemen engaged in this play, did not believe it to be gaming."

Caruthers, J., in delivering the opinion of the court, said: Was this a case of unlawful gaming? We think it very clear that it was. It was a risk of a bottle of wine upon a hazard, whether he knocked down the number of pins designated or not. It was not a bet with any particular individual, but with the whole company. It would certainly be gaming for two or more persons to determine, by the chance of a game at ten-pins, who should pay the boy for setting up the pins, or who should treat, as much as if the same amount was staked up and won and lost upon the game. All these contrivances are regarded and intended as evasions of the law and cannot be tolerated. The law is founded on a principle which must be sustained. It prohibits any game, or match of hazard and address, by which something can be obtained for nothing."

In *Commonwealth v. Taylor*, 14 *Gray*, 26, Shaw, C. J., speaking for the court said: "All gaming is unlawful by the law of this commonwealth; and it is gaming to play any game of hazard for money or other article of value. A game of hazard to determine who shall pay for the beer or other liquor to be drunk is strictly playing for money; it is to determine which party shall pay a sum of money for the other." To the same effect is *Bachelor v. State*, 10 *Texas*, 258.

In *Commonwealth v. Gourdier*, 14 *Gray*, 390, it was held that throwing dice to determine who shall pay for liquor or

for any other article bought, is illegal gaming. The same principle is announced in *McDaniel v. Commonwealth*, 6 *Bush*, 326.

In *State v Maurer*, 7 *Iowa*, 406, the following instruction was adjudged to have been properly refused: "That the playing at cards for drinks of spiritous liquors, before, during, or after the game, the loser to pay for such drinks, is not gambling within the meaning and intent of the statute."

In *State v. Leighton*, 3 *Foster* (*N. H.*), 167, it was ruled that playing at billiards, under a general custom and understanding that the defeated party was to pay for the use of the tables, was a gaming for money.

In *Hichins* v. *People*, 39 *N. Y.*, 454, the keeper of a shop for the sale of beer, cigars, etc., was indicted for suffering gaming on his premises. The proof showed that he allowed his customers to play games for such articles, he furnishing them at the end of the games and charging the loser therefor. His counsel requested the court to charge that playing for beer, cigars, etc., was not gambling within the statute. The court refused and the Court of Appeals declared that the trial court was right in denying the request, saying: "All will agree that gambling for a barrel of beer or box of cigars is within the statute. It follows that gambling for a gallon or less quantity is equally within it. No exception is made by the statute on account of the smallness of the quantity, or the use to which it is applied by the winner.

In this case the jury were misdirected and their verdict was contrary to the law and the evidence. The judgment is accordingly reversed and the cause remanded with directions to put the defendant again upon trial.

FORT SMITH v. AYERS.

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1. MUNICIPAL CORPORATIONS: *Power to license wagons, drays &c.*
The power to regulate wagons, drays &c., conferred by the municipal corporations act of March 9th, 1875, includes the power to license as a means of regulating.

2. SAME: *Same.*
A license fee demanded by a municipal corporation for running a dray, when imposed as a mere police regulation and not as a measure for raising revenue, is not a tax upon an occupation, but a compensation for issuing the license, for keeping the necessary record and for munincipal supervision over the business.

3. SAME: *Same.*
If a license upon an occupation is so large as to have been manifestly imposed by a city for the sole or main purpose of revenue, it is, in effect, a tax upon the owner or his property, and not within the power conferred by the statute.

APPEAL from *Sebastian* Circuit Court.
Hon. R. B. RUTHERFORD, Circuit Judge.

C. M. Cook, City Attorney and *Attorney General Moore*, for appellant.

Municipal corporations in this State have express power to regulate drays, carts &c. &c; the power to regulate includes the power to license, and to charge a reasonable amount, as a means of regulating. *Acts* 1875, *Secs.* 17, 6, 12, 22; *Const., Art. II, Sec*, 23; 10 *Ohio*, 257, 261; 12 *Cent. L. J.*, 379; 20 *Am. Law Reg.*, 473, 476 *and notes*; 88 *Ill.*, 221; 11 *Mich.*, 352; 40 *Id.*, 258; 60 *Penn. St.*, 451; 31 *Ark.*, 608; 33 *Id.*, 436; 1 *Dill. Mun. Corp.*, 2*d Ed., Sec.* 93 *and notes, and p.* 174, *note* 1; 1 *Rich S. C. Law*, 364; *Russelville v. White*, 41 *Ark.* 435.

SMITH, J. By an information filed under oath before the mayor, Ayers was charged with the violation of an ordinance of the city requiring draymen to take out a license. Upon a trial he was found guilty and a fine of $2 was imposed. He appealed to the Circuit Court and there interposed a demurer to the affidavit and warrant upon which he was arrested, denying the jurisdiction of the Mayor's court, the validity of the ordinance and the sufficiency of the facts to constitute an offence.

His demurrer was sustained and he was discharged. *Sec.* 17 *of the Municipal Corporations Act of March* 9, 1875, empowers the council of a city to regulate all carts, wagons, drays, hackney-coaches, omnibuses and every description of carriages kept for hire. The power to regulate includes the power to license as a means of regulation. *Russellville v. White*, 41 *Ark.*, 485 and authorities there cited.

1. MUNICIPAL CORPORATION: Power to license wagons, drays, etc.

The ordinance in question is construed to be a mere police regulation and not a measure for raising revenue. And the license fee demanded is not a tax upon an occupation, but a compensation for issuing the license, for keeping the necessary record and for municipal supervision over the business. *Allerton v. Chicago*, 9 *Bissell*, 552; *Munn v. Illinois*, 94 *U. S.* 113; *Frankford and Philad. Passenger Co. v. Philadelphia*, 58 *Pa. St.*, 119; *Johnson v Philadelphia*, 60 *Ib.*, 445; *Chicago Packing &c. Co. v. Chicago*, 88 *Ill.*, 221; *Cincinnati v. Bryson*, 15 *Ohio*, 625; *Ash v. People*, 11 *Mich.*, 347; *State v. Herod*, 29 *Iowa*, 123; *Welch v. Hatchkiss*, 39 *Conn.*, 140; *City Council v. Pepper*, 1 *Rich.* (*S. C.*) *Law*, 364.

2. SAME.

The reasonableness of the fee exacted in this case is not properly before us. If it is so large as to have been manifestly imposed for the sole or main purpose of revenue, it is, in effect, a tax upon the vehicle used, or its owner,

and not necessary to secure the objects of the above grant of power to the city. The distinction is between the taxing power and the police power. *Dillon on Mun. Corp., Secs.* 357–61, 768; *Taylor, Cleveland & Co. v. Pine Bluff*, 34 *Ark.* 603; *North Hudson Bay Co. v. Hoboken*, 41 *N. J. L.*, 71; *Mayor v. Avenue R. Co.*, 32 *N. Y.*, 261; *Dunham v. Rochester*, 5 *Cowan*, 462; *Commonwealth v. Stodden*, 2 *Cush.*, 562.

Reversed and remanded with instructions to overrule the demurrer to the charge, and for further proceedings.

TAPPAN, MCKILLOP & CO. v. HARBISON, et al.

1. FRAUDULENT CONVEYANCE: *Innocent purchaser: Equitable garnishee: Practice.*

On the 17th of May, 1872, Harbison executed a note to Filer, Stowell & Co., for $618.13. On the 25th of October, 1872, Harbison and wife conveyed to Curry in fraud of his creditors, a large body of lands, and afterwards on the 20th of December, 1872, Curry conveyed the lands to Mrs. Harbison without any consideration paid by her, and afterwards Mrs. Harbison sold and conveyed the lands to Hamlet for $2000, one third cash, the balance on time. On the 16th of February, 1876, Filer, Stowell & Co., recovered judgment on the note, and afterwards levied execution on the lands and filed their bill in equity to uncover the fraud and sell the lands for satisfaction of the judgment, or if that could not be done, that Hamlet be held as an equitable garnishee and pay the judgment out of the unpaid purchase money. It conceded that Hamlet was an innocent purchaser. Harbison and wife answered, denying the fraud, and Harbison filed a cross-bill alleging that Hamlet had purchased the judgment pending this suit, for one-fourth of its amount, and the suit was prosecuted for his benefit to get credit on the purchase money for the full amount of the judgment. HELD: That it being conceded in the bill that Hamlet was an innocent purchaser, he could

be held only as an equitable garnishee to the amount of the judgment: but if he had in fact purchased the judgment at a discount, he could not speculate upon his purchase, but would be allowed as a credit on the unpaid purchase money only the sum he had paid for the judgment and interest on it. HELD FURTHER: that the matter of the cross-bill might be set up by supplemental answer of Mrs. Harbison on return of the case to the Circuit Court

APPEAL from *Ashley* Circuit Court in Chancery.

Hon. J. M. BRADLEY, Circuit Judge.

M. L. Hawkins and *T. B. Martin* for appellants.

Conveyances made to hinder or delay or defraud creditors are void. *Gantt's Dig. Sec.* 2954; 14 *Ark.*, 69; 4 *Vt.*, 405; *Bump Fr. Couv.*, 234; 3 *John. Ch.*, 500; 23 *Ark.*, 259; 29 *Ala.*, 607; 3 *Dev.*, (*N. C.*) 39. The frauds in the Harbison–Curry conveyances were participated in by all parties to them. 17 *Ark.*, 146; 26 *Conn.*, 480; 37 *Ill.*, 341. If these conveyances are fraudulent and void they conveyed no title, and plaintiff's judgment and execution were valid liens upon the land. 14 *Ark.*, 69.

If Hamlet bought before the levy he is an innocent purchaser and will be protected, if after, he had notice of the lien. Even if an innocent purchaser, the balance due from him is subject to equitable garnishment to pay appellant's debt.

EAKIN, J. This is a bill by a creditor firm, which has obtained a judgment and levied upon certain lands.

The object of the suit is to set aside as fraudulent, sales and conveyances of the lands emanating from the debtor after the debt had been contracted, in order that there may be a clear title made on the execution sale. The debtor and others claiming under him are made defendants.

The pleadings and evidence disclose beyond reasonable controversy, the following facts:

On the 17th of May, 1872, P. F. and J. P. Harbison executed to Filer, Stowell & Co. their note for $618.13, due Jan. 1st, 1873, with interest at ten pr. ct. pr. annum. This note was endorsed by the payees to Tappan, McKillop & Co., for collecton.

On the 25th day of October 1872, P. F. Harbison with M. J. S. Harbison, his wife, for the expressed consideration of $2250 conveyed to R. S. Curry a body of lands containing in all 760 acres, together with certain horses, mules, cattle, hogs and all his farming utensils, and household and kitchen furniture of whatsoever description. Mrs. Harbison released all her dower in the lands, and conveyed all her interests in the other property. This was filed for record on the 18th of December, 1872. Curry is the brother-in-law of Harbison. He paid nothing on the purchase, but executed his notes for the purchase-money. He did not take possession of the property, but left it all in the posseesion, and under the control of P. F. Harbison.

On the 20 of December, 1872, R. S. Curry for the expressed consideration of fifty dollars, paid in cash, and for "other good and valuable considerations," conveyed to said M. J. S. Harbison all of said lands save a quarter section, being the S-W¼ of sec. 31, in township 16, S. of R. 8 W., and conveyed also all the personal property, by the same general description, which had been conveyed to him by her husband and herself. In consideration of this conveyance, his notes which he had executed for the property, were given up and he did receive the fifty dollars in cash, although there is no proof that it was paid to him by Mrs. Harbison, out of any separate fund of her own. This deed was duly acknowledged on

the day of its execution, but not filed for record until the 7th day of October, 1874.

Afterwards Mrs. Harbison sold and conveyed the land to Thomas Hamlett, who, on all hands, is conceded to have been an innocent purchaser. The deed to Hamlett is not exhibited, but is admitted to have been made, for the consideration of two thousand dollars, of which one-third was paid in cash. The balance remains unpaid.

The judgment against J. P. and P. F. Harbison, in favor of these complaints, was recovered on the 16th of February, 1876. Execution was issued on the 10th of October following and levied upon all the lands conveyed as aforesaid to Curry.

The complainants, charging that the foregoing deeds were made in fraud of creditors, seek to subject the lands to the payment of the judgment; or conceding that Hamlett's purchase was *bona fide*, they seek to hold him as an equitable garnishee, with regard to the unpaid purchase-money, to the extent of the judgment. This was for the sum of $811.19 with interest thereafter at the rate of ten pr. ct. pr. annum, and costs. Harbison and wife, Curry, and Hamlett were made defendants.

All answered in accordance with the facts above stated, but each denying the fraudulent intent, and protesting good faith. Mrs. Harbison says that she paid the money to Curry out of her own means, which she explains by saying that she owned property before her marriage out of which it was raised.

P. F. Harbison, the husband, says in addition, that the note upon which the judgment was recovered was a forgery, but alleges no *sufficient* reason why that defense was not made at law, in the suit in which judgment was had. He further makes his answer a cross-bill, alleging that the judgment in question had been purchased pending

the suit, by Hamlett at a large discount, about one-fourth; that the present suit was now prosecuted in the name of complainants by collusion, in order that Hamlett might obtain the full amount of the judgment with interest as a credit upon the unpaid purchase-money due Mrs. Harbison. There is a prayer for general relief. All the other parties save Curry and Mrs. Harbison are made defendants to the cross-bill. A demurrer to it was sustained by the court, to which P. F. Harbison excepted. There was no judgment dismissing the cross-bill.

The cause was heard upon the original bill, pleadings, exhibits, and depositions, and the original bill was dismissed for want of equity. The complainants appeal.

Without recapitulating the evidence we may say it is plain, that P. F. Harbison being indebted at the time, made the conveyance to Curry in the hope and expectation of saving the property from execution. He did not consider it fraudulent to do that, as he thought J. P. Harbison, his partner, ought to pay the debt, and it is quite probable that Mrs. Harbison and Curry shared in that view. Yet the deed and concurrent circumstances contain several *indicia* of fraud. The lands do not lie in a body suitable for farming or any purpose likely to induce a purchaser to desire them all together. The relation of the parties is such, as properly to require their transactions to be regarded with care in matters detrimental to creditors. The sweeping conveyance with the lands, of personal property having no connection with the only avowed object of Curry, which was a hope of reselling the lands at a profit; the conveyance of all the household and kitchen furniture; the continued possession and control of the vendor; the fact that Curry paid absolutely nothing save his note which was given by the husband in a short time to his wife, and redelivered to Curry

upon a conveyance to Mrs. Harbison of the whole body of the lands save a quarter section; the want of any clear showing that the fifty dollars paid him was the *separate* property of the wife, are all too potent to be resisted. The conveyances from Harbison to Curry, and from the latter to Mrs. Harbison were such as the law avoids, as against creditors, although good as between parties. The property stood before the conveyance to Hamlett, precisely in equity as if there had been no circuitous course, but as if P. F. Harbison had made, directly, a gratuitous conveyance to his wife, for love and affection. It was still liable to execution in favor of creditors.

The bill, somewhat strangely, in view of all the facts shown in evidence, which should have put Hamlett on enquiry, concedes that he was an innocent purchaser at the time of the bargain and conveyance to him. It results from this concession which complainants had the right to make, that Hamlett is entitled to protection not only as to the cash payment, but also as to any advantages of his bargain. He is subject to equitable garnishment for the unpaid purchase-money, to be enforced, if necessary, by a sale of the property, but the balance of the purchase-money, if any, would belong to Mrs. Harbison. No one, save creditors, has any right to complain of any advantages given to her by her husband and her connection, Curry.

Equitable garnishment.

The complainants have an equity to subject the debt due Mrs. Harbison for the land from Hamlett, by way of equitable garnishment, for their debt to the amount that may be due them. The court erred in dismissing their bill. This equity may be worked out by the court, through any of the ordinary proceedings which the Chancellor may deem most appropriate. An account should be taken either by the Chancellor, or if necessary,

through a master, and if the amount, when ascertained, should not be paid by Hamlett it may be enforced by sale of the lands, and distribution of the proceeds, in accordance with the rights of the parties.

As this cause must for this error be reversed, and as it will be necessary to remand it for further proceedings it becomes necessary to complete justice, to notice the matter attempted to be set up by the cross-bill to which a demurrer was sustained. The matter of it was evidently in behalf of Mrs. Harbison, although it was set up by her husband, who had no interest in the debt for which Hamlett was endeavoring, as alleged, to obtain improper credits by speculation. Ordinarily this court does not encourage the making of new cases, or important changes in the matters pleaded, after the parties have gone to hearing, but the rule is not inflexible that there should be no changes nor amendments at all. The matters attempted to be set up by Mrs. Harbison's husband concern her very materially. Whether they be true or not we cannot determine; but if they be true, and Hamlett has bought in the claim of complainants, he must be held to have bought for his vendor's benefit; and would only be entitled to a credit for the amount paid with interest. As the amount of the decree in the equitable garnishment against himself, would be the measure of his credit upon the debt due Mrs. Harbison, she has certainly an equitable defense *pro tanto*, against that claim. If she be still allowed to set it up, it will not be the assertion of any new matter distinct from the suit, but equitable matter proper to the determination of the correct amount for which the decree against her should be rendered, and that arising pending the suit, or at least from all that appears, discovered afterwards. We think it equitable that she shall not, by her husband's informal and mis-

taken effort to make this defense for her, be cut off from all opportunity of showing her rights whilst the matter may be *in fieri*.

There is, therefore, nothing in this decision which is intended to preclude the Chancellor from allowing her to set up this matter still, by supplemental answer, if she be so advised; and that upon such terms as he may deem just to all parties.

Reverse and remand for further proceeding, consistent with this opinion, and with the principles and practice in equity.

STATE v. SPRINGER.

1. INDICTMENTS: *Not amendable.*
   An indictment when filed in court is a record and can not be withdrawn for amendment or any other purpose. If insufficient, a *nol prosequi* should be entered and a new indictment found.

ERROR to *Chicot* Circuit Court.
Hon. J. M. BRADLEY, Circuit Judge.

Moore, Atty. Gen'l, for State.

No *re-signing* by the foreman of the Grand Jury was necessary. It was returned into court in the presence of the Grand Jury, and filed, docketed and numbered. The original file mark was not erased, but it was *refiled* and signed by the clerk. This was sufficient.

SMITH, J. The defendant in error, a Justice of the Peace, was indicted for non-feasance in office. The Grand Jury,

which preferred the accusation, were, as it appears, regularly selected, sworn and empaneled. The indictment was returned and filed in open court on the 4th of July, 1883, signed by the Prosecuting Attorney and endorsed "A true bill" over the signature of the foreman. It charged the defendant with a failure to file, on or before the commencement of the July Term, 1883, with the County Clerk, an abstract of all misdemeanors tried before him since the last term of the Circuit Court, giving the style of the case, the nature of the offence, how he obtained jurisdiction thereof, whether the offender was acquitted or convicted, and if convicted, the amount of the fine or punishment imposed. On the 5th of July, the case was, upon motion of the Prosecuting Attorney, referred back to the Grand Jury, who, on the same day returned the same indictment into court, with the following interlineations in the part descriptive of the offence: "The names of the parties" (accused) "and the name of the officer collecting same" (fine). The record shows that this interlined indictment was presented to the court in the presence of the full panel and was filed, docketed and numbered. It was also marked "Refiled July 5, 1883," and signed by the clerk.

At the next term the defendant moved to set aside the indictment because the endorsement "A true bill" was not re-signed by the foreman after interlineations were made. This motion was sustained and the indictment dismissed. The State excepted and sued out a writ of error.

Indictments not amendable.

When the original indictment was returned into the court by the Grand Jury and filed, it became a part of the records of that court and thereafter could not be withdrawn for amendment or for any other purpose either by the Grand Jury or the Prosecuting Attorney. If the indictment was supposed to be insufficient either for uncertainty, or for want of proper legal words, the proper practice was to enter a

nolle prosequi and have the Grand Jury find a second indictment on the original evidence. But there is no such thing known to our law as the amendment of an indictment, although an error as to the defendant's name will not vitiate the proceedings (*Gantt's Dig. Sec.* 1785); and there are some formal defects which will be cured by verdict. *Dennis v. State*, 5 *Ark.*, 230. In fact there are Constitutional objections to such amendments.

Affirmed.

STATE v. ELLIS.

STATE v. CONNER.

43 93
57 562
43 93
67 310
43 93
180 314

1. INDICTMENT; *For concealing death of bastard child.*
An indictment for concealing the death of a bastard child must expressly and distinctly allege the child to be dead; but it need not state whether the child died before, at, or after its birth, nor how the mother endeavored to conceal its death.

APPEALS from *Carroll* Circuit Court.
Hon. J. M. PITTMAN, Circuit Judge.

Moore, Att'y Gen'l, for State.

The indictment is in the language of the statute and good. *Gantt's Dig., Sec.* 1275.

SMITH, J. These two indictments were, the one against the mother of a bastard child for endeavoring to conceal its death, and the other against an accessory for aiding

and abetting her. The first charged that the defendant, "after having given birth to a bastard child, did feloniously and unlawfully conceal the death of said bastard child, so that its death might not come to light;" and in a second count that she did by the procurement and assistance of one A. W. Conner, feloniously and unlawfully, privately conceal the death of the issue of her said body, said issue then and there being a bastard, so that its death might not come to light" "The second indictment charged that Connor did unlawfully and feloniously assist and procure the said Mary Ellis to conceal privately, the death of said bastard child which was the issue of her body, so that its death might not come to light." To both indictments demurrers were sustained, because the facts set forth do not constitute a public offence; the charge being vague, indefinite, uncertain and ambiguous.

According to all of the precedents and authorities, the indictment for this offence must expressly and distinctly allege the child to be dead, although it need not state whether it died before, at, or after its birth; nor in what manner, or by what acts the mother endeavored to conceal its death. Here is no direct averment of the child's death, nor is its death noted, except in the averment of its concealment. Nothing can be taken by intendment or by way of recital, to supply the want of certainty in an indictment.

Bishop on Statutory Crimes, Sec. 778; *Russell on Crimes,* 8 *Am. Ed.,* 574; *Douglass v. Commonwealth,* 2, *S. & R.,* 40.

Affirmed.

43 95
188 394

Liles et al v. State of Arkansas.

1. Liquor: *Evidence of selling.*

The having a government liquor license in one's house prior to the passage of the act of March 13, 1883, making the possession of such license *prima facie* evidence of a "blind tiger," was not evidence that the owner or occupant of the house was selling liquor.

APPEAL from *Washington* Circuit Court.
Hon. J. M. Pittman, Circuit Judge.

Moore, Att'y Gen'l, for the State.

There is no question of law in this case. The evidence, though not extremely lucid and perhaps somewhat contradictory, is sufficient to support the verdict.

Smith, J. The appellants were convicted upon an indictment charging them with selling ardent and intoxicating spirits within three miles of the Arkansas Industrial University, contrary to the Act of March 6, 1875. Their motion for a new trial was denied. No ruling of the court below was complained of and the single question is, "Was there evidence to support the verdict?"

Clements, the person to whom, as it is alleged, the liquor was sold, testified that he went to the business house of Liles in Fayetteville and there met Stirman, whom he told that he wanted some whiskey, at the same time producing a half-pint bottle and laying down twenty-five cents on the counter. Stirman replied "You go out and I will get you some." Witness then left, was gone about six minutes, returned and found his bottle full of whiskey on the counter, which he picked up and departed. Witness saw Liles in an adjoining room of the store, but had no conversation with him, and did not know that Liles had any connection with the transaction, nor from what place the whiskey came.

By another witness it was proved that Liles had an Internal Revenue license from the United States Government to sell whiskey at Fayetteville.

The defense produced a witness, who swore he was present when Clements applied to Stirman for the whiskey; that Stirman took the bottle and money and proceeded in company with witness to Driskell's and gave Driskell the bottle and the money and Driskell went into a back room with the bottle; that Stirman was not in the employ of Liles, but was working at a lumber yard near the depot. Another witness, who was also in Lile's store at the time, gave testimony to the same effect.

There is nothing here tending to connect Liles with the sale of the liquor, nor any proof which would justify an inference that Stirman was his agent in the matter. The only suspicious circumstance is his having license from the general government, but parties cannot be convicted of criminal offences upon a bare suspicion. After this sale is alleged to have taken place, the legislature on the 30th of March, 1883, enacted a law, making the finding of a United States liquor license in a house, under certain circumstances, *prima facie* evidence that the party owning or controlling the house, was keeping a "Blind Tiger." But that cannot affect this case.

The judgment against Stirman is affirmed; but as to Liles it is reversed and a new trial awarded.

Seelig v. State of Arkansas.

1. Criminal Law; *Sabbath breaking by keeping store door open.* To commit the offense of Sabbath breaking by keeping a store door open on Sunday, it is not necessary to keep it so opened as to in-

duce customers to enter and trade. It is sufficient if the door is partially open, or intentionally left unlocked, so that any person may enter as readily as if left open. Or if it is opened to the knocking of a stranger and he admitted or invited in, this is a keeping open within the prohibition of the statute.

APPEAL from *Phillips* Circuit Court.
Hon. M. T. SANDERS Circuit Judge.

Thweatt & Quarles for appellant.

No offense is charged in the indictment. The mere fact that the door was open, or opened, is no crime. The indictment must set forth the charge in the words of the statute. *Gantt's Dig. Sec.* 1618; 22 *Am. Dec. p.* 774–5; 38 *Ark.*, 519.

There is a total want of evidence to support the verdict. No proof that defendant was at the store, or that the door was open with his knowledge, or by his consent or directions, and he cannot be held criminally responsible for the acts of his kook-keeper.

Moore, Att'y Gen'l, contra.

It was not necessary to prove a sale, the *keeping open of his store* was a complete offense under the statute. *The act was unlawful*, and if he had any excuse or other defense he should have shown it. *Gantt's Dig., Sec.*, 1618; 34 *Ark.*, 447; 36 *Ib.*, 222.

SMITH, J. Seelig was charged by affidavit before the Mayor of Helena with Sabbath-breaking, by keeping open the door of his store. He was convicted and fined there, and again on appeal to the Circuit Court.

He moved for a new trial for misdirection and because the verdict was contrary to the evidence.

Stansell, the City Marshal, swore that he saw a side door of the store open on a certain Sunday shortly before the prosecution was begun, and saw a boy pass out with a bundle. Another witness went to the store in company with Sexton, defendant's book-keeper, found the door closed but not locked; entered and remained five or ten minutes. Sexton staid to write letters. And while Sexton was within, a negro knocked at the door and was admitted. Sexton also went out of the side door, leaving it open, and walked across the street to speak to his employer.

The court charged as follows:

1. If the jury find from the evidence that the defendant kept his store open on Sunday as alleged, within twelve months next before the commencement of the prosecution, or that any door thereof, through which the public might pass, or had the opportunity of doing so, was kept or left open on Sunday, he would be guilty as charged.

2. If the jury believe from the evidence that a door of the defendant's store was not kept or left wide open, but that it was partially open, or that the locks or fastenings were intentionally left unsecured, so that any person desiring to do so might enter the store as readily as though it were standing open, the defendant would be guilty.

3. If any person, who is a stranger, goes to a store on Sunday and, upon knocking, the door is immediately opened and such person admitted, or invited into the store, this is a keeping open within the prohibition of the statute.

The following prayers were denied:

Keeping open a store in contemplation of law is such a keeping open as would induce customers to enter for the purpose of trade or traffic; and under this charge it is

necessary to prove that the defendant did, in fact, keep open his store; and the mere fact that the defendant's door was opened for a few minutes and was not kept open for any length of time, nor for the purpose of inducing trade or traffic is not sufficient proof of guilt.

If the jury find that the defendant was not in the store and gave no directions to any one as to keeping the door open, or that defendant was not present at the time and knew not that the door was open, he was not responsible for its being open.

We perceive no objections to the charge of the court. And as to the prayers refused; Where an act is in itself indifferent and only becomes criminal when done with a particular intent, there the intent must be proved. But if the act be unlawful, as to keep open a store on Sunday, the law implies the criminal intent and proof of justification or excuse must come from the defendant. *Gantt's Dig.*, 1618; *Shover v. State*, 10 *Ark.*, 259; *Britton v. State*, *Ib.*, 299.

The last prayer was inapplicable to the state of facts in proof. No testimony had been offered as to what directions, if any, the accused had given upon the subject of keeping open on Sunday, and his own witness proved he was just across the street at the time the door stood open.

Certainly there is no total lack of evidence to sustain the verdict. Compare *Bennet v. State*, 13 *Ark.*, 694.

Affirmed.

Carr v. State of Arkansas.

1. Evidence: *Impeaching witness: Indictment for felony.*

The State cannot impeach the character of a witness, nor discredit

him before the jury, nor impair the weight of his testimony by evidence that he had been *indicted* for a felony.

2. SAME: *Excluding improper, from jury: Presumption as to verdict.*

Where improper evidence is admitted and afterwards excluded from the jury, it is presumed that their verdict is based upon legal testimony only.

3. RES GESTAE: *What are?*

Res Gestae are the surrounding facts of a transaction, explanatory of an act, or showing a motive for acting. They may be submitted to the jury provided they can be established by competent means, sanctioned by the law, and afford any fair presumption or inference as to the question in dispute.

4. SAME: *Same.*

Circumstances and declarations contemporaneous with the main fact under consideration, or so nearly related to it as to illustrate its character and the state of mind, sentiments and disposition of the actors are parts of the *res gestae*—are regarded as verbal facts indicating a present purpose and intention and therefore admitted in proof as any other material facts. And they need not be strictly coincident as to time, if they are generated by an excited feeling which extends without break or let down from the moment of the event they illustrate; but they must stand in immediate causal relation to the act and become part, either of the action immediately preceding it, or of action which it immediately precedes.

5. CRIMINAL PRACTICE: *Admission of evidence:*

The Circuit Courts should, in the trial of criminal causes, admit all testimony offered, of which they doubt the competency.

6. ARREST: *Killing a resisting or flying felon:*

If a felon resist arrest or fly so that he cannot possibly be apprehended alive by those who pursue him, whether private persons or public officers, with or without a warrant from a magistrate, he may be lawfully slain by them.

7. ARREST: *Who may make.*

Where a felony has in fact, been committed, either an officer or a private citizen who has reasonable ground to suspect a particular person may, acting in good faith, arrest him, without incurring any liability, civil or criminal, though the suspicion prove unfounded. But if no offence be in fact committed a private per-

son making such arrest will not be justified by such suspicion and good faith, though an officer will be.

8. CRIMINAL LAW: *Liability for acts of accomplices.*

When persons combine to do an unlawful thing, if the act of one proceeding according to the common plan, ends in a criminal result, though not the particular result intended, all are liable.

APPEAL from *Howard* Circuit Court.
Hon. H. B. STUART, Circuit Judge.

Dan W. Jones, J. E. Borden and *W. G. Whipple* for appellants.

1. It was improper to require defendant's witnesses to answer whether they had not been indicted for this same crime. *Anderson, v. State,* 34 *Ark.*, 257. This was not cured by the court directing the jury to exclude from their consideration and pay no attention to the fact that they had once been so indicted. 123 *Mass.*, 222; 25 *Am. Rep.*, 85.

2. Evidence of what was said and done at the church the night before, was clearly admissible as part of the *res gestae.* 1 *Bishop Cr. Pro., Sec.* 1085.

3. By the laws of this State any person may arrest one who he has reasonable cause to believe has been guilty of felony. *Gantt's Dig., Sec.* 1679; 33 *Ark.*, 321; 2 *Bish. Cr. Law, Sec.* 646, 652 *and* 1 *Bish. Cr. Pro., Sec.* 181 *Sub.*

4. If the original purpose of defendant was lawful, he could not be held criminally responsible for the outcries and statements made by others of the party in which he did not join, and which had no connection with the original design and common plan, unless he incited or aided, abetted or encouraged. 1 *Bish. Cr. Law, Sec.* 634, 637 *and* 641.

C. B. Moore, Attorney Gen'l, Contra.

SMITH, J. After the case of *Carr et al v, State,* reported in 42 Ark., 204, had been remanded to the Circuit Court,

Carr elected to sever, was put upon trial, convicted of murder in the first degree and a second time sentenced to be hanged. The evidence amply justified the verdict, and the court successfully ran the gauntlet of passing upon twenty-six prayers for directions prepared by the energetic counsel for the prisoner.

1. EVIDENCE: Impeaching witnesses by proof of *indictment* for felony.

Two of the defendant's witnesses were required to answer upon cross-examination if they had not once been indicted for this same murder.

It was not competent for the State to impeach the character of these witnesses, or discredit them before the jury, or impair the weight of their testimony in this manner. *Anderson v. State*, 34 *Ark.*, 257.

When, before final submission of the cause, irrelevant evidence, which had been admitted, was withdraw from the jury and they instructed to disregard it, the presumption is that the jury based their verdict upon legal evidence only. *Pennsylvania Co. v. Ray*, 102 *U. S.*, 451.

2. Excluding improper evidence from jury. Presumption as to verdict.

The court afterwards repaired this error by directing the jury to exclude from their consideration and pay no attention to the fact that these witnesses had previously been under indictment for the same offence.

The defendant also offered to prove by a witness that he and some twenty or thirty other colored men assembled, on the night before Wyatt was killed, at a church in Hempstead County, near the house of Wyatt, who resided in Howard, for the purpose of concerting means to secure his arrest; that they had reasonable grounds to believe that he had just before committed two distinct felonies in Hempstead, namely, an assault with intent to kill, and an attempt to ravish. That they were acting under legal advice, or supposed they were; that the meeting on the following morning was to carry into execution the plan and design then formed and entered into, the sole object being to arrest Wyatt and take

him before a magistrate to be dealt with according to law and not to kill him or in any wise to do him a bodily injury. But the court rejected the evidence.

3. Res Gestae: What are.

Res gestae are the surrounding facts of a transaction, explanatory of an act, or showing a motive for acting. They are proper to be submitted to a jury, provided they can be established by competent means, sanctioned by the law, and afford any fair presumption or inference as to the question in dispute.

The fact that Wyatt came to his death by violence at the hands of a mob, of which Carr was the ringleader, not being seriously controverted, it became necessary to determine whether malice entered as an ingredient into such killing; and if so, then whether it was accompanied by those evidences of deliberation and premeditation which characterize the highest degree of murder. Now circumstances and declarations which were contemporaneous with the main fact under consideration or so nearly related to it as to illustrate its character and the state of mind, sentiments or dispositions of the actors are parts of the *res gestae*.

They are regarded as verbal facts, indicating a present purpose and intention, and are therefore admitted in proof like any other material facts. 1 *Gr. Ev. Secs.* 108-111; *Wharton's Cr. Ev. Secs.* 262-270; 1 *Bishop Cr. Pro., Secs.* 1083-1087; *Cliuton v. Estes*, 20 *Ark.*, 216; *Beaver v. Taylor*, 1 *Wall*, 637; *Ins. Co. v. Mosley*, 8 *Id.*, 637.

Thus on the trial of Lord George Gordon for treason, the cry of the mob who accompanied the prisoner on his enterprise, was received in evidence, as forming part of the res gestae and showing the character of the principle fact. 24 *Howell's Sb. Tr.*, 542.

In *Pitman v. State*, 22 *Ark.*, 254, uncommunicated threats, made by the deceased on the day of the killing, were admitted.

Nor need any such declarations be strictly coincident as to time, if they are generated by an excited feeling which extends without break or let down from the moment of the event they illustrate. But they must stand in immediate causal relation to the act, and become part either of the action immediately preceding it, or of action which it immediately precedes. *Wharton's Cr. Ev., Sec.* 263; 2 *Bishop Cr. Pro. Sec.* 625.

Thus in *Cornelius v. State,* 12 *Ark.,* 782, when defendant was tried for larceny of his neighbor's cow and it was proved he had killed the cow in his pen about three a. m. declarations made the night before in presence of his family and visitors, of his intention to kill the cow before day and sell her for beef and that he had authority from the owner so to do, if he would pay for her, and directions given to his slaves in reference to the matter, were adjudged to be competent evidence to show his intentions in killing the cow.

4. SAME: Same.

Evidence, then, of what was done and said at the church on the night before, was clearly admissible, provided any connection is shown between those proceedings and the subsequent homicide. And the exclusion of the same was a reversible error. For appellate courts are not at liberty to speculate what effect the evidence would have had, if admitted, or whether it would have altered the result. On the contrary, we are bound to reverse for any erroneous ruling below, which prevents a party from getting his case properly before the jury. In other words, we are bound to see that he has a fair trial. And in this connection we recommend to the Circuit Judges, in the trial of criminal cases, to admit all testimony that may be offerded, about the competency of which they are in doubt. For, if the accused be guilty, he will be, in the vast majority of instances, convicted, notwithstanding the admission of such evidence.

5. Admission of evidence.

Whereas the rejection of it, if it turns out to be competent evidence, is fatally erroneous.

Two other questions are presented by the record, which it is deemed important to discuss, because they are reasonably sure to arise upon a second trial. The court was requested to charge that by the laws of this State any private person may arrest one who, he has reasonable cause to believe has been guilty of a felony. Therefore if the jury should find from the evidence that Carr had, on the 31st of July, 1883, reasonable grounds to believe that Wyatt had attempted to commit a rape or an assault with intent to kill and that Carr was engaged in securing his arrest therefor, he had a right to visit Wyatt's place for that purpose without a warrant and to take steps necessary to that end; and it is immaterial whether Wyatt had in fact been guilty of any crime. And this request was repeated in several forms, all of which were denied. 6. ARREST: Killing a resisting or flying felon.

"A private person may make an arrest where he has reasonable grounds for believing that the person arrested has committeed a felony." *Gantt's Dig. Sec.* 1679. 7. Who may arrest.

This statute is in affirmance of the common law. "If a person, having actually committed a felony, will not suffer himself to be arrested, but stand on his own defense, or fly, so that he can not possibly be apprehended alive by those who pursue him, whether private persons, or public officers, with or without a warrant, from a magistrate, he may be lawfully slain by them." 1 *Hawkins, P. C. p.* 81, *Sec.* 11.

If a felony be committed and the felon fly from justice, or a dangerous wound be given, it is the duty of every man to use his best endeavors for preventing an escape; and if in the pursuit the felon be killed, when he can not be otherwise overtaken, the homicide is justifiable. This rule is not confined to those who are present, so as to have ocular proof of the fact, or to those who first come to the knowledge of

it: for if in these cases first pursuit be made and a *fortiori* if hue and cry be levied, all who join in aid of those who began the pursuit are under the same protection of the law." 1 *East P. C.*, 298.

Here the rule is stated with its limitations, namely: that if the offence has been in fact committed and an individual has reasonable cause to suspect a particular person, he may, acting in good faith, arrest him, without incurring any liability, civil or criminal, should the suspicion prove unfounded. And when the felony is past the only distinction between the power of an officer and a private person arresting without a warrant is this: "Should the one arrested be found not to be guilty, the private person will not be justified unless an offense has been committed by some one; while the officer is justified though no offence has been committed; yet both must have had reasonable cause to suspect the one apprehended. For when a charge of this high nature is made to an officer, he is bound to act upon it and pursue and arrest the suspected person at once; and it would block the wheels of justice if he could not do his official duty without being answerable, should the event prove that the reasonable suspicion could not be made good by evidence. 1 *Bishop Cr. Pro. Secs.* 168, 181.

There was no proof in this case that Wyatt had committed any felony.

7. CRIMINAL LAW: Liable for act of accomplice.

The court gave this instruction, which is rather too favorable to the defendant: "If the defendant was jointly with others assembled together in the commission of a trespass, or perpetration of a crime, and one or more did a criminal thing in no way connected with the joint understanding, the defendant is not liable."

The law upon this subject is, that "a man may be guilty of a wrong which he did not specifically intend, if it came naturally or even accidentally from some other specific, or a

general, evil purpose. When, therefore, persons combine to do an unlawful thing, if the act of one, proceeding according to the common plan, terminate in a criminal result, though not the particular result meant, all are liable." *Bishop Cr. Law, Sec.* 636, and authorities there cited.

Thus in *Stephens v. State*, a recent unreported decision of the Supreme Court of Ohio, where several agreed to rob a man at his house and one remained outside on guard, while the others went inside and in order to rob him, killed him, it was held that the one outside was guilty of murder also, although murder was not contemplated in their conspiracy, but it was the only means of accomplishing their ends.

Reversed and remanded for a new trial;

HANNA v. MORROW.

1. INJUNCTION; *Against Judgments: Diligence, &c.*
   To entitle a party to enjoin a judgment he must show, not only that the judgment was unjust, but that it was not the result of any inattention or negligence on his part. That he omitted to defend the suit in consequence of being mislead by the clerk of the court as to its character, was inexcusable negligence.
2. HOMESTEAD; *When attaches: Lien.*
   Quere: Can a valid lien fixed upon land before it acquires the character of a homestead, be displaced or impaired by the subsequent occupation of the land by the debtor as a homestead?
3. JURISDICTION OF J. P.; *Judgment beyond, incurable.*
   A judgment before a Justice of the Peace upon a claim above his jurisdiction is void and can not be cured, or set off against another judgment.

APPEAL from *Washington* Circuit Court in Chancery.
Hon. A. B. GREENWOOD, Special Judge.

B. R. Davidson for appellant.

1. The complaint shows a good defense to the sale of the land. Hanna was mislead by the information received from the clerk and prevented from defending. The clerk is the custodian of the records and papers. No copy of a complaint is served on a defendant. Appellant was guilty of no laches and entitled to relief. *Pom. Eq. per. Sec.* 856; 11 *Ark.*, 443; 4 *Cush., Miss.*, 341; 3 *Robertson*, 637; 7 *Cranch*, 335–6; 51 *N. H.*, 385; 40 *Id.*, 441; 14 *Ill.*, 375; 22 *Id.*, 161; 28 *Id.*, 479; *Story Eq. Jur., Sec.*, 110.

2. The summons was not in compliance with law. It was not to answer a *complaint in equity*, nor to answer in 20 days, &c. *Gantt's Dig., Sec.* 4504–7. It did not authorize the judgment.

L. Gregg for appellee.

Where a lien once attaches it cannot be defeated by a claim of homestead. *Thompson on Homesteads, &c., Sec.* 317 *and note; Ib., Sec.*, 715, 244–6 *and* 260, 648, *&c.*

Appellant shows an utter want of legal diligence; he employed no attorney, neglected to attend court, made no inquiry of opposing party or counsel, did not look at the docket, &c., &c., and alleges no fault or fraud on appellee. Hence is entitled to no relief. *Herman on Ex., p.*, 618; *Hilliard on New Trials p.* 521-2 *and note; Ib., p.* 529, 549 *and* 550; *Freeman on Judg., Sec.*, 115; *High on Inj., Sec.* 85, *p.* 55, *Secs.* 86, 99, 128, 136 *and* 165-6; *Story Eq. Jur., Secs.* 887-8; 3 *Cain*, 132; 29 *Cal.*, 422; 16 *Id.*, 377; 71 *N. C.*, 232; 64 *N. C.*, 624; 9 *Gratt.*, 40; 26 *Geo.*, 485; 5 *Ark.*, 185-6.

SMITH, J. Hanna, in his bill for injunction, filed in 1880, alleged that Morrow had, in 1876, recovered a de-

cree in Chancery against him for $222 and costs; that in 1877 an execution had been levied on one hundred and thirty acres of land, which constituted his homestead, and he had accordingly filed a schedule, claiming the land as exempt from execution and had procured a supersedeas to be issued; that afterwards Morrow had filed his petition to quash said supersedeas and subject the land to the payment of his debt; that the said judgment debtor was duly summoned to answer this petition and had applied to the clerk of the court for a sight of said petition, but was informed that the only suit pending against him in that court was a proceeding by *sciere facias* to revive said judgment; that he believed and relied on these representations of the clerk, in consequence of which he made no defence, and judgment by default, was rendered against him, and the sheriff is now about to sell his lands; that the plaintiff is a married man and head of a family and has resided on the lands for two or three years next before the filing of his bill, and the lands are in the county and worth not exceeding $2,500; that he had filed a schedule of all his property and demanded a supersedeas, but the clerk had refused to issue it.

The bill further alleged that Hanna had a judgment against Morrow for $300, which he exhibited and offered to set off against the judgment sought to be enjoined.

To this bill a demurrer was sustained and the plaintiff declining to plead further was dismissed out of court.

Only two questions properly arise upon the record.

It was specified, as one of the causes of demurrer, that the bill showed no sufficient excuse for not answering Morrow's petition to quash the supersedeas granted by the clerk.

A bill seeking relief of this nature is watched with extreme jealousy and the grounds upon which the interfer-

1. Injunctions against judgments. Diligence, &c.

ence will be allowed are somewhat narrow and restricted. The general principle upon which the relief is founded is stated by Lord Redesdale in *Bateman v. Willoe*, 1 *Sch. & Lef.*, 204: "It is not sufficient to show that injustice has been done, but that it has been done under circumstances which authorize the court to interfere. Because, if a matter has been already investigated in a court of justice, according to the common and ordinary rules of investigation, a court of equity can not take on itself to enter into it again." Hence, it must appear that the judgment complained of was not the result of any inattention or negligence on the part of the person aggrieved and he must show a clear case of diligence to entitle himself to an injunction. *High on Injunctions Secs.* 85, 86, 99, 128, 161, 165; *Dugan v. Cureton*, 1 *Ark.*, 31; *Andrews v. Fenter Ib.*, 186; *Watson v. Palmer*, 5 *Id.*, 501; *Bently v. Dillard*, 6 *Id.*, 79; *Hempstead v. Watkins, Id.*, 317; *Conway v. Ellison*, 14 *Id.*, 360; *Clapton v. Carluss*, 42 *Id.*

The plaintiff here was guilty of inexcusable neglect. Every suitor should personally attend to his case, or be represented by an attorney.

After Hanna had been duly served with process, he neglected to attend court, made no inquiry of the opposite party or his counsel, and did not examine the docket for the case, but suffered himself to be lulled into security by loose declarations of the clerk to the effect that no such suit was pending. No fault or fraud is attributed to the adverse litigant or his solicitor. And solemn judgments cannot be vacated where there is an utter absence of legal diligence. *Freeman on Judgments, Sec.* 115; *Gardenhire v. Vinson*, 39 *Ark.*, 270.

These considerations relieve us of the necessity of determining whether Hanna had any meritorious defence against Morrow's petition to vacate the supersedeas

theretofore issued, staying the sale of the lands. It appears from the bill that Hanna was not occupying these lands at the date of the rendition of the judgment, but that after the judgment lien had attached and before the levy of the execution, he had established his residence upon the lands. Whether a valid lien fixed upon land before it acquires the character of a homestead, can be displaced or impaired by a subsequent occupation of the land by the debtor as a homestead, is a point upon which the following authorities may be profitably consulted: *Thompson on Homesteads and Exemptions, Sec.* 317 *and cases cited*; *Moore v. Granger*, 30 *Ark.*, 574; *Patrick v. Baxter*, 49 *Id.*; *Constitution of* 1874, *Art. IX, Sec.* 4; *Tumlinson v. Swinney*, 22 *Ark.*, 400; *Norris v. Kidd*, 28 *Id.*, 485.

Then to the bill, considered in its aspect of enforcing the plaintiff's right to set off his judgment against Morrow's judgment, there is an insuperable objection to relief. The plaintiff sued before a Justice of the Peace, since the adoption of the present Constitution, for $439, and recovered judgment for the full amount of his claim. He afterwards entered a remittitur for the $139 in excess of the magistrate's jurisdiction. But his judgment was not a mere irregularity; it was a nullity, of no avail, or effect whatever, and incapable of being cured.

Decree affirmed.

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NIEMEYER & DARRAGH v. LITTLE ROCK JUNCTION RAILWAY ET AL.

1. CHANCERY JURISDICTION: *To restrain railroads from taking land for track, &c.*

Where the proposed action of a railroad company in taking land for its track is unauthorized, Chancery may restrain it by injunction.

2. RAILROADS: *Proceedings to condemn right of way.*

The statutory proceeding to condemn land for right of way for railroads is special, to ascertain the compensation to be paid the owner for the land to be taken. No provision is made for any issue upon the *right* to condemn, and the owner can not in that proceeding question the legality of the corporation.

3. CORPORATIONS:

Although the existence of corporations voluntarily organized under general statutes, can not be questioned collaterally, yet if they have resulted from fraudulent combinations of individuals to procure powers under circumstances, and for purposes not within the scope and purpose of legislative intent, and under shelter of their charter are about to exercise powers oppressive to an individual, they may be restrained by private suit of those injured or about to be.

APPEAL from *Pulaski* Chancery Court.
Hon. DAVID W. CARROLL, Chancellor.

Caruth & Erb for appellants.

The right of property, and its quiet enjoyment are higher than any Constitutional sanction. It is subject only to the taxing power and the State's right of Eminent Domain. These powers must be legally and Constitutionally exercised. *Const., Art. II, Sec.* 22. No one can be compelled to part with his property. 60 *Maine*, 290.

The statute only makes articles of incorporation presumptive evidence and hence may be enquired into by the courts.

A corporation conceived and created for fraudulent purposes is amenable to two classes of proceedings—By the Attorney General in behalf of the State—By a private individulal, where private rights are directly affected·

High on Injunctions, Sec. 594. And a Court of Chancery will interfere to prevent irreparable injury or continuing trespasses. *Ib., Sec.* 411; 35 *Wis.*, 425; 1 *Dr. & Sm.*, 154; *Greene's Brices Ultra Vires, p.* 601; 18 *Mich.*, 212.

An injunction is not in the nature of a prohibition to courts of co-ordinate jurisdiction—it simply *restrains the parties. Story Eq. Jur., Sec.* 875.

Contend that the L. R. Junction Railway has perpetrated a fraud upon the incorporation laws of the State; that it is not, and is not intended to be, a railroad company, but a Bridge Company, attempting to evade the revenue laws of the State and secure exemption from taxation, &c., &c.

An injunction ought not to be dissolved merely because equity is defectively stated, nor upon a question of law, unless plain beyond a reasonable doubt. 3 *Tenn. Ch.*, 338.

See particularly case of *Cent. R. R. v. Penn R. R.*, 31 *N. J. Eq.*, 475, which is precisely in point.

John McClure for appellees.

Injunction will not lie to prevent the commission or repetition of a trespass, when there is an adequate remedy at law. 11 *Ark.*, 304. There must be something particular or special, for which a court of law cannot afford relief. 8 *Geo.*, 118; 35 *Ala.*; 599; 9 *Gill & J.*, (*Md.*) 468.

Condemnation proceedings are *special proceedings*, under the statute, and equity will not interfere, 5 *Abb.* (*N. Y.*) 171, even on the ground of irreparable damages. 66 *Penn. St.*, 155.

If the Defendant Junction R'y Co. *is a corporation*, it has the right to pursue the statutory remedy for condemnation—*if not*, the complainants can show that fact in the court of law as well as in equity. See 18 *Barb.*, 222;

16 *Fed. Rep.*, 522; 134 *Mass.*, 593; 11 *Paige*, 384; 34 *Ill.*, 378; 11 *Iowa*, 523.

"Owners of land not being shareholders, and not having contracted with the Co. as a corporation, may deny the existence of a corporation." 37 *Cal.*, 354; 10 *R. I.*, 144; 5 *Ohio St.*, 276; 15 *Oh., St.*, 21; 57 *Md.*, 267; 33 *Oh. St.*, 429; 45 *Penn., St.*, 81; 14 *Cal.*, 424; 72 *N. Y.*, 245; 46 *Md.*, 372; *Boyce v. M. Church*, 75 *N. Y.*

If there is no such corporation, *Quo Warranto* would not lie, 78 *N. C.* 57; 5 *Iowa*, 366, and if not, how can this action be maintained?

The fee of streets and alleys being in the city, a court of equity will not at the suit of an individual, enjoin a Railway Co. from operating its road laid without permission, but will leave the redress to the public authorities. 75 *Ill.*, 588; 23 *La. Ann.*, 535.

When large and extensive works are sought to be stopped, it should clearly appear that it is a case for equitable intervention, and that there is no equitable remedy at law. 54 *Penn. St.*, 164; *Ib.*, 401.

The charge is, not that the *Company* is not duly organized in accordance with law, or that it is abusing its powers, but that the *corporators* have practiced a fraud on the *law*. Admitting this to be true, the *Company* cannot be held responsible for the fraud of the *corporators*. The condemnation is not sought by the *corporators* but by the *Company*. 33 *Oh. St.*, 436.

The State for the fraud, if one has been perpetrated, may proceed by *Quo Warranto*. 53 *Cal.*, 694.

EAKIN, J. Appellants own a half block of ground in Little Rock, lying on the North side of an alley dividing the block, and consisting of lots numbered from 1 to 6, inclusive. It has, along its river front on the North side of

the block, a railway track, being part of the line of the defendant Company, the "Little Rock, Miss. River & Texas Railway." Upon the opposite side of the Arkansas River, the line of the defendant Company, the "Little Rock & Fort Smith Railroad Company," comes in to its Eastern terminus at the town of Argenta. Up to the time of the proceedings involved in this suit there had been no connection between the two roads.

The defendant the "Little Rock Junction Railroad" was organized recently, under the general act of the State, for the avowed purpose as expressed in the articles, "of building, operating, maintaining and owning a line of railroad, with all the necessary turnouts, side tracks, turn-tables, depot station houses, switches and all things thereunto appertaining; commencing at some suitable point east of Commerce Street in the City of Little Rock * * * where a connection may or can be made with the line of road of the Little Rock, Miss. River & Texas Railway, thence in a northwesterly direction on the most practical route, across the Arkansas River to a point at or near Baring Cross * * * where a suitable connection may be made with the Little Rock & Ft. Smith Railway." In obtaining this charter it seems that all the forms prescribed by the act were followed, and all the requirments of the act fulfilled. The Company stands *prima facie* as a proper corporation, entitled to all the rights and franchises granted by the general act.

In locating its track, the Junction Company proposed to to pass along the alley on the South side of the lots, and obtained a grant of the privilege from the municipal authorities of the city. It required also the use of the lots for its proper purposes, (if its franchise be valid), and commenced proceedings in the Circuit Court, under the statute, for their condemnation to its uses. The proceedings being likely to retard the prosecution of the work, the Circuit Court, under

Sections 4950-1, of Gantt's Digest, directed that the sum of $5,750 be deposited by the Company in the German Bank subject to the order of the court; providing that then "it shall and may be lawful for the petitioner to enter upon the property herein described, and proceed with its work through and over said land prior to the assessment and payment of damages, as is provided by" said Sections. The deposit was made, and the certificate thereof filed in court. What further progress towards the assessment of damages in that court has been made, the transcript does not disclose.

Appellants brought this bill afterwards to enjoin the prosecution of the work along said alley, and the taking of the lots, alleging that the organization of the Company was a fraud upon the State in this: that it was not a bona fide Compauy organized to build and operate a railroad as pretended, but in effect a Bridge Company; taking the guise and semblance of a Railroad Company for the purpose of building, using, and deriving revenue from the bridge with the exemption from taxation accorded by statute to the bridges of railroads; that in truth the bridge is to be built, used, and controlled by the two old Companies, which for that purpose have combined in a colorable scheme, to set up a pretended separate Company, to accomplish a junction, and enjoy the revenues of the bridge.

Some of the specific allegations are that the two older companies are under the same management, forming together one road which is directed and controlled by the same parties; that the incorporators of the Junction Company filed their articles at the instance of the old companies; that the proposed road is to be only about two miles long; that the articles are silent with regard to a bridge; that they are claiming to assert franchises for the purposes of a bridge, which a bridge charter would not have conferred; that the incorporators of the Junction Co. are stockholders, officers, or employes, of

one or the other of the old Companies, and that its capital stock is "largely held by, or in trust for, persons owning large amounts in, or largely concerned in their management: that the old companies paid for the surveys, estimates, plans and specifications for the bridge and its approaches; deposited the fees for the articles of incorporation; and are now through their general offices disbursing all the expenses of bridge construction; further that, simultaneously with its incorporation, the Junction Co. before beginning work, conveyed the road and bridge about to be built, to two gentlemen in Boston who were stock holders and officers in the old roads, in trust to secure a proposed bonded indebtedness of $400,000, with interest at 7 per ct.; that at the same time, with the execution of this trust deed and in connexion with it, the three companies entered into a contract in writing by which control of the bridge property was given to the old Companies, which, on their part bound themselves, with other things, to guarantee, or provide for the payment of the interest on said bonded indebtedness; further, that said bridge is intended for foot passengers, vehicles, and general use, to serve the purpose of a common highway, as regards modes of travel. Further, that in order to reach the bridge at the point selected, the Little Rock, Miss. & Texas Road is obliged to build a line for some distance in the city, parallel to its present track, which new line it would not have authority of itself to build, and that it thus became necessary to resort to an application to the city authorities by a new company.

The injury apprehended by appellants is represented thus: that their lots are of great business value; that a line through the alley, with the river front track already built would so hem in the lots as to make them inaccessible and inconvenient for the despatch of business, thereby diminishing the market value. They show further the commence-

ment of the proceedings for condemnation, and allege that the Junction Railway has never offered them a reasonable compensation for the lots or the right of way over them.

They pray that the Junction Company be enjoined from laying the track through the alley, and from entering upon and using the lots.

An injunction as prayed was ordered by the Judge of the County Court, issued by the Clerk, and duly served. The General Manager of the roads disregarded it, and proceeded to lay the track along the alley. On the 15th of August, 1884, a rule was made upon him by the Chancery Court, to appear and show cause why an attachment should not issue against him for contempt. He responded, setting up want of notice of the application for the injunction, and want of authority in the County Judge to order it, inasmuch as it did not appear that the Circuit Judge was absent from the county, either by the complaint or any other paper; also setting forth the order and authority of the Circuit Court to proceed with the work, on making the deposit; and the authority of the city council to use the alley. The Chancellor held that he was not justified thereby in disobeying the injunction, although he was of the opinion that the writ had been improvidently and irregularly issued. The Manager was let off upon payment of all the costs arising out of the issuing of the injunction, and the proceedings for contempt.

Appellants then prayed that the injunction be extended so as to restrain the defendants from further prosecution of the proceedings in the Circuit Court for condemnation of the lands.

On the 8th Sept., the petition for a restraining order was heard and dismissed. The appellants announced that they would stand upon their complaint. It was

therefore ordered that the injunction which had been issued be dissolved, inasmuch as it was improvident, and the track had already been laid along the alley. The bill was dismissed for want of equity, and an appeal granted.

An ancillary injunction as prayed below has been made by this court to hold all matters *in statu quo*, while the case is being considered. It has been advanced as involving interests of great public importance and the whole matter submitted.

1. Power of Chancery to restrain taking right of way.

The injury impending over the real property of appellants is of a permanent and material nature. Something more than a mere trespass by an intruder which may be compensated, or punished for example, leaving the property in as good condition as formerly. Lots closely confined by railroad tracks on both sides, front and back, are ill suited to business purposes, much less for residences. Of course the permanent damage would be greater if the lots themselves should be condemned. If the proposed action of the Junction Railroad Company be unauthorized there can be no doubt of the power to arrest it by injunction. Real estate has always been thus protected. Partly from the original feudal sentiment, and partly from its intrinsic nature, all real estate is considered as having a peculiar value to its owner, as being the subject of local affection. No one piece of land is in law as good to the owner as another piece of the same value. In truth, no two pieces are alike. Hence the market value of land before and after injury, affords no just measure or criterion of compensation for a wrongful act, affecting it permanently. Nor is it at all clear to our minds, that the appellants have a full, complete and adequate remedy at law, to be obtained by way of defence to the special proceedings in the Circuit Court for condem-

nation. The Junction Company, in all purely legal aspects, is a proper corporation, clothed with franchise of eminent domain to the extent of its necessities. The proceeding under our statute, is a special one, directed solely to the object of determining the compensation to be paid the owner of property, proposed to be taken. No provision is made for any issue upon the *right* to condemn. It could not be there pleaded that the Junction Co., was not a corporation. To attack its existence collaterally is not permissible. (See cases cited in Abbot's Dig. of Law of Corp. pp. 365 et seq.) A plea in the nature of *nul tiel* corporation would not be safe in the face of complete articles of association. If the objection were made on the ground of fraud in obtaining the franchise, it would still be true that the jurisdiction and proceedings in Chancery to relieve against fraud are more complete and effective than at law.

2. RAIL ROADS: Proceedings to condemn right of way.

Besides, it is plain that the legislature never contemplated any such defence as a want of right to condemn in the corporation. For where the proceedings are liable to delay, it is made the duty of the court to fix a sum to be deposited by the company, and to allow the property to be taken and used in anticipation of the settlement of damages. That was done in this case, and appellees contend that the order allowing the Junction Co. to proceed and take the property is in the nature of *res judicata*, and cannot be now enjoined.

But the power to condemn the right to the franchise, was not a question at issue. Further, with regard to corporations not acting under special charters of legislative grant, but voluntarily organized under general laws; although their existence *as corporations* cannot be questioned collaterally, yet if they have resulted from fraudulent combinations of individuals to procure powers under

3. CORPORATIONS: Fraudulent; when restrained.

circumstances, and for purposes not within the scope and purpose of legislative intent, and the corporators, under shelter of their articles, are about to exercise powers oppressive to the individual they may be restrained by private suit of those injured or about to be. Fraud has no immunity anywhere, in any guise (*Patterson et als v. Arnold et als*, 45 *Penn. St.* 410; *Central R. R. Co., N. J., v. Penn. R. R. Co.*, 31 *N. J.*, (*Eq.*) 475.) This is the course that, in this case, has been pursued. We think the Chancery Court properly entertained the bill, and had jurisdiction to enjoin the Company if the merits of the case required that relief. The real question presented by the appeal, is this: Does the bill, taking as true all allegations of fact properly made, and discarding all vague and general language imputing fraudulent intent, make such a case as should invoke the interposition of a court of equity. In this consideration the nature and the extent of the damage, as being permanent and irreparable, cannot aid the bill. It results, if the company be a lawful one, from the authority of the State in the exercise of its right of eminent domain.

The statute provides that any number of persons, not less than five, being subscribers of stock in a contemplated railroad, may be formed into a corporation, for the purpose of constructing, owning and maintaining such railroad, by compliance with certain forms and requirements, which as above noted, have all, in this case been fulfilled. Amongst other powers granted, they are clothed with the right to take, and use, all lands and real estate "necessary for the construction and maintenance of the railroad and stations, depots and other accommodations necessary to accomplish the object for which the corporation is created, upon paying to the owner a compensation agreed to by the parties, or ascertained and paid or deposited as therein after provided. Pro-

vision is made for application by the company to the Circuit Court, when the compensation cannot be agreed on, to have the damages assessed by a jury of twelve men. They are empowered to construct the road upon or across any stream of water, water-course, road, highway, railroad or canal, intersected by the route, and to cross, intersect, join or unite it with any other railroad before constructed on any point on its route; and upon the grounds of such other railroad company, with the necessary turnouts, sidings and switches, and other conveniences, in furtherence of the object of its construction; and to borrow money to be applied to the construction of their road and fixtures, and the purchase of their engines and cars. In case of application to the court for assessment of damages it is provided that when the determination of the question in controversy is likely to retard the progress of work on, or the business of, the railroad company, the court, or judge in vacation shall designate an amount of money to be deposited by such company, subject to the order of the court, for the purpose of compensation afterwards to be fixed, and upon making said deposit it shall be lawful for such company to enter upon the land and proceed with the work. Further, it is expressly provided, that any railroad then, or thereafter chartered, under existing laws, may purchase, and hold any connecting road and operate it, or may consolidate their companies, and make one company. (*See Gantt's Dig. Title Railroads.*

By Act of Dec. 9, 1874, the purchasers of any railroad become invested with all its rights, franchises, &c., and might organize under the same, or a different name, with power to issue bonds whenever deemed expedient. This act was expressly supplemental to the general railroad act.

By Act of Feb. 28th, 1881, all railroads authorized to cross a river or stream are empowered to construct bridges over the same, adapted to highway purposes as well as to

the use of said road, with suitable approaches and ways; or to sell, lease or otherwise convey to any corporation, organized for that purpose, the right to construct such bridge. Power was given to take tolls at fixed rates; and the company building the bridge, whether the road company, or its lessees, were invested with the same rights and powers of condemning land and property, with other privileges and franchises as were then, or might thereafter be, conferred upon railroad companies, to be governed by the same proceedings.

Under the Revenue Act of 1883, Railroads in making their schedules of property for taxation, are not required to include, or value, embankments, tunnels, cuts, ties, tressels or bridges. They are thus exempt so far as these specifications are concerned, but are required to value all improvements, stations and structures including the railroad track.

Such is a brief view of the railroad legislation of the State in recent years, from which it is easy to perceive a prevailing policy to encourage not only their construction by separate companies, but their combination into continuous lines. It is a policy which our growing State demands, to keep her abreast of the march of improvements in other States, and to open to our farmers a speedy market with easy transportation, and a quick connection with the great marts of the nation. By these acts and in the light of this manifest purpose, the allegations are to be tested and viewed, so as to determine whether the company in following the letter of the law, and endeavoring to avail itself of its grants and immunities, has been guilty of anything intended or directed to contravene this policy. If there has been no fraud upon the State, there can be none predicated on hardship to individuals. Every citizen is required to yield to the right of eminent domain, and be satisfied with compensation, whenever the right to exercise that right has been lawfully acquired.

Through the bill, and its own judicial cognizance, this court is advised that the Ft. Smith road runs from the extreme Western border of the State, at a point accessible from the Indian Territory by a navigable river, thence South-westerly through the middle of the State to a point on the Arkansas River opposite Little Rock. In Little Rock begins the Little Rock, Mississippi River & Texas Road, continuing the same course, South-westerly, to the great water artery of commerce, the Mississippi. Separated, these two roads failed of that full accommodation to the wants of the people which it was the manifest design of the legislature to meet and afford, by its liberal legislation. United, they would open to both sections uninterrupted communication with New Orleans and the Eastern Southern States, which would be available to large numbers of citizens, invite the settlement and improvement of waste lands, and develop the latent wealth of the State. The gap about two miles long, required to be closed by a railroad. It was difficult to conceive how a mere toll bridge would have served the public necessity, with the best approaches for vehicles, horsemen, cattle and foot passengers. It would have been comparatively a mere local convenience for the residents of Little Rock and those upon the north side of the river near enough to come to the city in vehicles. No great public purpose, affecting the mass of citizens would have been subserved. This was, of course, apparent to the two railroads, whose managers and owners saw also in a junction railway their own best interests. They had a right to look to those interests and promote them by legitimate means. Their own charters did not allow them to construct the junction. But that does not seem to afford any clear reason why they should not encourage, promote and even aid, another company in obtaining a separate charter, and

afterwards even buying out the franchises of the new company, if they felt disposed. This would not be in contravention of the State policy, but, it seems to us, rather in aid of it.

The law does not prescribe any maximum or minimum length of the road. It certainly is not a fictitious railway. It is not denied that one is in process of being built. But it is only alleged that the present corporators never mean to equip and run it. But it is not alleged that they mean to abandon it after it is built, or that it will not, *bona fide*, afford the people the conveniences of transportation which they have a right to expect in return for the grant of franchises by the State.

The corporators are individuals, and make a Company separate and distinct in law. They propose doing what their charter expresses. Even though most or every one of them were officers or closely interested in the old roads, they have nevertheless the right to become members of a new and distinct corporation, and may legally be vested with distinct franchises. Concede that they acted at the instance of the old roads, their right is none the less. Business men in their enterprises constantly act at the instance of others for their mutual benefit. It is rather commendable to do so.

If as a road the Junction Company acquired the right to make its road over the Arkansas a public highway, and take general tolls, and to hold this bridge property without valuing it to be taxed, who is defrauded? It is done by grace of public law, binding both State and County. It is a concession to induce just such enterprises. Neighborhood toll bridges have not the same public and general importance as those which keep open great arteries of commerce, through which may pulsate the trade and travel of many States. There is a reason for the distinction. We think it cannot

be taken as a badge of fraud that this Junction Company availed itself of this advantage. What the law openly and avowedly allows is right.

The Junction Company had the right to borrow money for its construction, and to issue its bonds. Conceding that the old Companies furnished the money, and acquired the right, or endeavored to do so, of controlling the Junction Co. for its security, that would not render the Junction Company fraudulent in its inception or vitiate its articles. Whether or not the old Companies transcended their powers in entering upon an enterprise germain to their purposes, is a matter between them and the State, or between their officers and stock holders and those dealing with them. It cannot affect the right of the Junction Company to exercise its right of condemning and taking lands for its own construction. It only goes to show that the old Companies had a great interest in the completion of the Junction Company, and expected to derive great benefit from it. But no burden is thereby surreptitiously and fraudulently imposed on those whose property is taken, greater than would have fallen upon them, if the new Company had been organized by capitalists who were strangers to both the old roads.

We have carefully examined the case of the *Central Railroad Co., of New York and others v. The Pennsylvania Railroad Company and others, Supra.*, which has been earnestly pressed upon us by counsel for appellants. In many respects it is strikingly like this, and an injunction was granted. There are however points of difference, one of which is commented on by the court. It is that the Junction Company was organized in the interests alone of a private corporation, a storage company, to afford access to their docks, and that it seriously interferred with the business of a great railroad organized for the public benefit. The propriety of an injunction depends much upon the particular circum-

stances of each particular case. It is not a matter of strict right but of some discretion.

We have not before us the whole of the legislation of the State of New Jersey upon the subject of railroads. There is an intimation in the opinion that the law could not be applied to affect purely private purposes. It was conceded in that case by the affidavit of the President of the Storage Company that the projected road which ran from its docks to the line of the New Jersey road was merely its own private enterprise. We do not deem deem it necessary however to seek points of distinction, in order to decline making the opinion of the learned court of New Jersey a guide in the decision of this case. Each State has its own policy, and it is the duty of its courts to carry it into effect.

The policy of this State in encouraging the building of new roads is extremely liberal. It is also an avowed policy to encourage the connection of old roads to make continuous lines. All the great marts of commerce lie without our borders, and this is essential to the prosperity of our people.

To close the gap, between the roads terminating one at Fort Smith and the other at Arkansas City, far down the Mississippi on the way to New Orleans is a work of vast importance. It is a commercial necessity, if the people above Little Rock are to have fair means of competing in their products with those below. Such a road interferes with no other franchise of equal public importance. It should be a very clear and palpable fraud, which would justify the courts in stopping this work at once, and perhaps forever. It is not at all probable that a mere bridge company will ever be organized, and it would not without just such co-operation with the railroads, which it was charged was frandulent in the Junction Company, be of commercial importance to the majority of citizens. The companies

charged with fraud in promoting and aiding the Junction Company, are public corporations for public convenience, which convenience will be largely increased by what it is charged they propose to do. That they should have the incentive of private emolument from increased business is simply necessary to human activity.

Viewing this case under all its peculiar aspects, we are of the opinion that the Hon. Chancellor did wisely in refusing the injunction. The dismissal of the bill without formal demurrer, or leave to amend, was it seems in accordance with the wish of appellants, to hasten an appeal and final settlement. It is irregular practice, but, under the circumstances, no ground of reversal. Affirm.

CAUTHRON v. STATE.

1. JURISDICTION: *Circuit Court: Forfeited Bail Bond in Mayor's Court.*

   The summary proceedings on a forfeited bail bond authorized by Sections 1739 to 1742, Gantt's Digest, must be in the court in which the party was required to appear. The Circuit Court has no jurisdiction under them to render judgment upon a forfeited bail bond in a Mayor's Court, for failure of a party to appear in that court to answer for a violation of a municipal ordinance.

2. SAME: *Power of Mayor to take Bail Bond.*

   Whether a Mayor of an incorporated town, not a city, can issue a warrant of arrest for the violation of a town ordinance which does not constitute a public offense against the criminal laws of the State, and take a bail bond for the defendant's appearance, *Quere.*

APPEAL from *Logan* Circuit Court.
Hon. R. B. RUTHERFORD, Circuit Judge.

T. C. Humphrey for appellants.

C. B. Moore, Att'y Gen'l for the State.

The Mayor has the same power and jurisdiction as Justices of the Peace, in all matters, civil and criminal, &c. See *Sec.* 45 *Act of March 9th*, 1875, (Municipal Corporation Act), and while he is not *specially* empowered to take bail it is within the implied and general powers and jurisdiction *as a Justice of the Peace.*

"All persons shall before conviction be bailable by sufficient sureties, &c." *Declaration of Rights*, *Sec.* 8. See also *Sec.* 1670 *Gantt's Dig.* The bail bond was properly made payable to the State. *Ib. Sec.* 1723.

EAKIN, J. At the Sept. Term 1882 of the Logan Circuit Court, in a case entitled "State of Arkansas v. Thos. Cauthron and W. P. Cauthron," the defendants filed an answer which alludes to a certain bond the subject of controversy. The record proper does not disclose any complaint, *scire facias*, or other summons. A reference to the evidence in the bill of exceptions, shows, however, that the State adduced on trial, a warrant of the Mayor, addressed to the Marshal of the town of Boonville, for the arrest of T. R. Cauthron for the violation of a town ordinance, which does not appear to have been an offense under the criminal laws of the State. The Marshal arrested the party and released him on his bond, signed by the above named defendants, T. & W. P. Cauthron, conditioned to appear before the Mayor on the first day of June. The bond was to the State of Arkansas in the sum of two hundred and fifty dollars. Upon it there is an endorsement of the Mayor, showing that the party arrested having failed to appear on that day, he had adjudged the bond to be forfeited. It was then filed with the Circuit Clerk on the 7th of August, 1882, and was

evidently taken by the court in lieu of a formal complaint. It was endorsed also with the approval of the Mayor. There was no ordinance of the town shown authorizing the Mayor to admit to bail persons charged with municipal offenses.

The answer of defendants relies upon the following points: 1st. That the bond was not taken in the manner prescribed by the statute.

2nd. That the Mayor had no jurisdiction to admit to bail for the violation of an ordinance: or, 3d, To take a bond in such case in the name of the State: or, 4th, That the person taken was ever legally under arrest.

The cause was submitted to the court, which declared that the Mayor was a magistrate and could take such a bond, and hear and determine the matter of the liability of the sureties thereon. That he having found the sureties indebted to the State of Arkansas in the amount named, his finding should be affirmed. Judgment was rendered accordingly for that sum and costs. After motion for a new trial and a bill of exceptions, the defendants appealed.

1. Jurisdiction of Circuit Court on forfeited bail bond from Mayor's Court.

It will be observed that both the attorney for the State, and the court proceeded upon the idea that the declaration of forfeiture made by the Mayor, authorized in the Circuit Court the summary proceedings prescribed by Sections 1739 to 1743 of Gantt's Digest. This is a misapprehension. These sections provide the mode of enforcing bail bonds by the court in which the prisoner is bound to appear. No other court has jurisdiction to proceed in this manner. Without a complaint showing cause of action the suit should have been dismissed.

In deference to the State and the attorneys who prosecute this appeal, we remark that the question whether

the Mayor of an incorporated town, not a city, can issue a warrant of arrest for the violation of an ordinance which does not constitute a public offense against the criminal laws of the State, and take or authorize a bail bond for appearance, is a grave one which we prefer to reserve until a case arises which may require its adjudication. If the power exists it must be found in the statutes. Otherwise officers and courts cannot assume it, however convenient it may appear. It does not exist at common law as incident to municipal corporations. The proceedings in our criminal procedure, regarding bail, are all directed to offenses against the State. It must appear that the party is charged with a "public offense." *Gantt's Digest, Sec.*, 1726. Breaches of municipal regulations, which are not offenses against general and public law, are not essentially criminal. *Dillon on Mun. Corp., Sec.* 429.

In this case the proceedings of the Circuit Court are unauthorized by any law. That court had no connection whatever with the bail bond. It had no criminal jurisdiction regarding the offense committed. The prisoner was not bound to appear there. The forfeiture was not incurred there. The paper was simply brought there from the Mayor, with his endorsement without any complaint. This was in violation of Sec. 1742 of Gantt's Digest which provides that the action on the bail bond (referring to the statutory proceeding) shall be in the court in which the defendant was or would have been required to appear for trial.

Reversed and remanded with instructions to dismiss the cause.

Carter v. The State.

1. Criminal Practice: *On bail bonds. Surrender of principal by bail.*

Carter, the security in a bail bond of Spain, surrendered his principal to the Deputy Sheriff (or supposed Deputy), in the manner provided by the statute, on the 31st day of October, 1882. The Sheriff had been elected in 1880 and again in 1882, and was qualified under the last election on the 30th day of October, 1882, but had not been commissioned. After his qualification on the 30th he had not reappointed the deputy. It did not appear that either the surety or the deputy knew that the Sheriff had qualified under his new term on the day before. The surrender seemed regular, according to law, and in good faith and without collusion of the surety for the escape of the principal. *Held*, in a suit against the surety on the bail bond, that the parties had reason to believe that the deputy was an officer *de jure* as well as *de facto* and that the surety should be discharged.

APPEAL from *Sebastian* Circuit Court.
Hon. R. B. Rutherford, Circuit Judge.

Clendenning & Sandels for appellant.

Wright, to whom appellant surrendered Spain, was a Deputy Sheriff. Falconer, the Sheriff, had not qualified under his new election.

As to the sufficiency of the surrender see *Sternberg v. State*, 41 *Ark.*

C. B. Moore, Att'y Gen'l, for the appellee.

Wright, was not a Deputy Sheriff, and the surrender to him of Spain was not a delivery to the Sheriff or jailor.

Eakin, J. Appellant was surety in a bail bond of one Spain, charged with a misdemeanor. Spain failed to appear in accordance with its terms. The bond was declared forfeited and the State proceeded by the statutory mode against

the surety. Carter pleaded a delivery of the prisoner to the Sheriff with copy of the bail bond. The case was submitted to the court, and it was shown on trial that appellant had delivered the prisoner according to law to a deputy, or supposed deputy of the Sheriff, on the 31st day of October, at a place ten miles distant from the County site. The receipt for the prisoner was endorsed on the copy of the bail bond in the name of the Sheriff by the deputy. The Sheriff had been elected and qualified in 1880, and re-elected in 1882. After his re-election he qualified by taking the oath of office on the 30th day of October, 1882, but did not receive his commission until a few days later, in November. After his qualification on the 30th he had not renewed the appointment of the deputy before the next day when the prisoner was received.

The court held that the powers of the deputy had ceased upon the 30th, and that a delivery to him was not valid. Judgment was rendered accordingly against the surety, from which he appeals.

The receipt for the prisoner was in the Sheriff's own name by deputy, and there is nothing to indicate that he had ever repudiated his former deputy's action. It is most probable that neither the surety nor the deputy knew, at the time, that the Sheriff had qualified under his new term on the day before. He had not then received his commission. Everything seemed to have been done regularly, in the utmost good faith, with the intention of complying with the law and with no appearance of collusion on the part of the surety, with the subsequent escape of the prisoner.

This is certainly a great hardship, and must have so appeared to the Hon. Circuit Judge, who nevertheless felt constrained "*strictissimi legis*" to hold that the deputy had no further power to bind his principal. In this we think he was too rigid. There is a certain amount of discretion, to a

limited extent, in the breast of Circuit Judges, in determining the validity of excesscs set up by sureties, and in this case, where the officer was certainly one *de facto*, and where the parties, without any laches, had every reason to believe he was one *de jure*, we think the legal doctrine regarding dealings with officers *de facto*, might without danger to the public, have been applied in exoneration of the surety. Of course each case will stand upon its own circumstances and it will devolve on the judges to see that this doctrine is not abused. We think it most just to remand this cause with these remarks, for further proceedings, in accordance with these views.

Reverse and remand.

Graves v. Cowan.

1. Sale: *Delivery, what sufficient*: *Replevin.*
Cowan made a crop on shares with Graves. Before it was gathered he sold his interest in it to Long for 900 lbs. of seed cotton to be delivered by Long at a certain gin in the neighborhood. Graves afterwards assumed Long's obligation to deliver the cotton for Cowan and did deliver 1100 lbs. to the gin, 200 lbs. of which he sold to the ginner, leaving 900 lbs. in a stall for Cowan. Held: that the sale and delivery were complete and Cowan could maintain replevin for the cotton.

APPEAL from *Johnson* Circuit Court.
Hon. G. S. Cunningham Circuit Judge.

Geo. L. Basham for appellant.

There was no such separation, setting apart or delivery of the cotton, as would authorize replevin. If the cotton

had been burned or destroyed at the gin the loss would certainly have fallen on Graves. See 16 *Ark.*, 90; 33 *Ib.* 830; 35 *Ib.*, 169; 39 *Ib.*, 442.

If the delivery of any property is accompanied by any act to show that it is qualified it will not become absolute. 106 *Mass.*, 433; 111 *Ib.*, 453. See also, 25 *Ark.*, 545 where it was held that the cotton must be weighed with the concurrence and acquiescence of the vendee. Also 19 *Ark.*, 567 *and* 24 *Ib.*, 545.

J. E. Cravens for appellee.

This case is clearly distinguishable from *Wade v. Worthington*, 33 *Ark.*, 830 and upon the authority of *Piazzek v. White* (23 *Kans.*, 621) 33 *Am. Reports p.*, 211 and cases cited, the recovery is unquestionably right. See also *Young v. Miles*, 20 *Wis.*, 646.

SMITH, J. This was an action of replevin for 900 lbs. of seed cotton. The plaintiff had judgment both in the court of the Justice of the Peace, where the cause originated, and in the Circuit Court on appeal. In the last mentioned tribunal, where the trial was without the intervention of a jury, the ultimate facts were found to be as follows: Plaintiff Cowan had made a crop upon shares with defendant Graves. Before the crop was gathered, plaintiff sold his interest in it to one Long for 900 lbs. of seed cotton to be delivered by Long at a certain gin in the neighborhood. The defendant afterwards assumed to fulfill Long's obligation to deliver the cotton at the gin for the plaintiff, and did haul 1100 lbs. to the gin, 200 lbs. of which he sold to the ginner, leaving 900 lbs. in a stall for plaintiff. This was before the action of replevin was brought.

And the court declared the law to be that the cotton

was sufficiently separated and set apart to be replevied by Cowan.

The motion for a new trial attacked the findings of fact as unsupported by evidence and the declarations of law as unsound. The testimony was conflicting as to the delivery of the cotton to the ginner for Cowan's benefit, and in such cases it is our settled practice to decline to review the findings of facts by the court, where there is evidence to sustain them. And taking the facts so found as conclusive upon us, there was a sufficient delivery, identification and appropriation of the cotton to Cowan's use to base the action upon.

Substantial justice has been done, as it appears and the judgment is affirmed.

OUACHITA COUNTY v. TUFTS.

1. STATUTE OF LIMITATIONS; *Pleaded by a County: Evidence.* When a County pleads the Statute of Limitations to an action against it, the plaintiff must prove both; the cause of action and the commencement of legal proceedings within the time mentioned by the statute.

APPEAL from *Ouachita* County.
Hon. B. F. ASKEW, Circuit Judge.

Barker & Johnson for appellant,

1. All fees allowed in criminal cases, shall, if the defendant is acquitted, be paid by the County, and if convicted, hen by the defendant, if he has property sufficient for that

purpose, if not, then they shall be paid by the County where the conviction is had. *Acts* 1874-5, *page* 169, *Sec.* 5; *Gantt's Dig., Sec.* 2015.

Nor is the County liable for costs in cases of conviction, until execution shall have been issued against the property of such convict, and returned unsatisfied for the want of property, unless the court trying the case shall certify that the costs cannot be made out of the defendant, *Ib. Sec.* 2016.

The proof, in the case does not show, that any of the defendants in the list of cases, in which appellee claims fees, were at any time acquitted; nor that any of them were convicted and did not have property to pay the costs; nor that execution ever issued against any of said defendants and returned unsatisfied for the want of property to satisfy same, nor that the court in which the cases were pending, had at anytime adjusted and certified the costs and expenses therein, down to the County Court. The appellee wholly failing to show any inability on the County to pay any of the costs claimed by him, he is not entitled to recover.

2. Our Statute of Limitations in its scope and application, is general. And Counties and municipal bodies, not possessing the attributes of sovereignity are subject to its restrictions. *Bouv. Inst. Vol.* 1, *Sec.* 859; *See also, Lane v. Kennedy,* 13 *Ohio St;* 42 *Callaway v. Nolly,* 31 *Mo.,* 393.

The rights involved in this case are of a private nature in reference to which, there is no reason why a County should not fall within the limitation statutes, and be affected by them. *Dillon on municpal corporations,* 3, *Ed. Sec.* 675., *See also Sec.* 668.

The proof shows that appellee's right of action did not accrue, if at all later than the winter of 1874-5, and that the answer of the Statute of Limitations is a complete bar. *Gaines et al v. Hot Spring County,* 39 *Ark.,* 262.

H. G. Bunn for appellee.

The County is made by law liable for the costs of criminal prosecutions originating in her Circuit Court, of offences committed within her teritory; *Gantt's Dig., Sec.* 2015, *and* 2016.

It matters not whether there is a conviction or acquittal; the responsibility of the County is the same, except that in case of convictions, the County is not liable until insolvency of defendant is determined by return of execution or order of the court. There is no claim that any convictions were ever had in the cases in which appellee makes his charges.

Not only so, but the County is responsibile for the laches and negligence of the prosecution. *Gantt's Dig., Sec.* 1864-65.

A critical examination of our Criminal Statutes, leads inevitably to the conclusion that the Statutes of Limitations has no application to the claim of the appellee, since the date of the accrual of the right of action in the first instance, is dependent upon the conduct of the State, or the prosecutions. 10 *Ark.*, 223, and all subsequent decisions on the subject.

In this case the accrual of the right ot action is determined on the general principle, that one, having waited a reasonable length of time for another to act so as to protect his rights, has the right to say when the right of action accrues. In other words the State becomes a kind of trustee. 22 *Ark.*, 1.

Besides the State (the sovereign) and her paymaster (the County) are not permitted to plead the Statute of Limitation.

At the time of the presentation of his claim to the County Court for allowance, he had a right to assume that the criminal prosecution had been dismissed or abandoned.

The memorandum sworn to by him immediately after the destruction of the records of the County, Dec. 19th, 1875,

and made out a year before on his retirement from office is as full as he was permitted to make, *Gantt's Dig., Sec.* 1799-1800, and that his testimony in confirmation of the truth of the same, is sufficient to raise the presumption of its truth. It being shown that no other proof could be had, the proof is sufficient.

SMITH, J. Tufts in 1883, presented to the Ouachita County Court his account for services rendered in certain criminal cases when he was County Clerk and Ex-Officio Clerk of the Circuit Court, some nine years before the exhibition of his claim. Upon a rejection of his demand, he appealed to the Circuit Court, where a jury being waived, the cause was tried before the Court upon an issue raised by the plea of the Statute of Limitations. And the finding and judgment were in favor of the claimant. The motion for a new trial insisted that this finding was without evidence to support it.

1. STATUTE OF LIMITATION: Pleaded by a county: Evidence.

It was settled by this court in *Gaines v. Hot Spring County*, 39 Ark. 262, that a County could plead the statute in bar of a demand against it. And when it is pleaded, the burden is on the plaintiff to show any suspension of the statute or the existence of any facts on which he relies to create an exception from the general rule. In other words the plaintiff must show both a cause of action and the commencement of legal proceedings within the period mentioned in the statute. *Abbott's Trial Evidence*, 822-3; 2 *Gr. Ev., Sec.* 431; *Taylor v. Spears*, 6 *Ark.*, 382; *McNeil v. Garland*, 27 *Id.*, 343. Now the only evidence is, that the services were rendered prior to the Fall of 1874, when Tufts went out of office; that he then made out a list of fees due him in unsettled cases; that in the Winter of 1875 the records of the clerk's office were destroyed by fire and that this necessitated the finding of new indictments in every one of these cases then pending; and that Tufts considered his fees

to be due and payable by the County at that time. He does not know the final disposition of the cases, nor the character, nor the grade of the offences with which the parties were charged. No judgment is shown to have been rendered against the County for costs in any one of the cases.

Assuming for the purposes of this appeal that Tufts is correct in his theory that the County became liable to him when, after the fire, the old prosecutions were dropped and new ones resorted to, no excuse is shown for not sooner preferring his claim.

The judgment is reversed and a new trial ordered.

School District No. 3 v. Bodenhamer.

1. School Districts; *May sue and be sued.*
   By section 53 of the common schools Act of December 7, 1875, each school district is constituted a body corporate with power to sue and be sued in any of the courts of this State having competent jurisdiction.
2. Mandamus: *Against School Directors*
   Mandamus to compel a public corporation to pay a debt can be employed only after judgment establishing the amount of the debt.

APPEAL from *Baxter* Circuit Court.
Hon. R. H. Powell Circuit Judge.

J. L. Abernethy, for appellant.

This was a simple money contract for services rendered as teacher. If the directors made any such contract they exceeded their powers and authority, and the appellant as a

quasi public corporation is not bound. *Story on Agency, Sec.* 172; *Perry on Trusts, Vol.* 2, *Sec.* 475, 511. The directors may be personally liable, but not the district. 2 *Ark.*, 338; 38 *Ib.*, 454. See *School Act* 1875 *Secs.* 61, 62, 67, &c.

Mandamus was the proper remedy, after demand and refusal. *Gantt's Dig., Sec.* 4150; 6 *Ark.*, 9; 26 *Ark.*, 257.

J. Frank Wilson and *Z. M. Horton* for appellee.

The Justice of the Peace had exclusive jurisdiction. *Const. Art. VII, Sec.* 40, *Clause* 1.

Each school district is a body corporate and *may sue and be sued as such. Sec.* 53, *p.* 71 *School Act, Dec.* 7, 1875, and the action of the directors bind the District. *Ib. Sec.* 62.

2. Mandamus not the remedy until after judgment. *Wells Jurisdiction of Courts, Sec.* 472 *and notes;* 26 *Ohio St.* 365; 34 *Mich.*, 201; 20 *Kans.*, 404.

SMITH, J. This action was begun before a Justice of the Peace to recover a balance of $75 due for teacher's wages, pursuant to the terms of a written contract entered into between the plaintiff and the defendant's directors. The plaintiff had judgment and the School District appealed to the Circuit Court. There, after a motion to dismiss and a demurrer for want of jurisdiction, the defendant declined to contest the matter further in that forum, and allowed judgment to go, and has appealed to us.

By Section 53 of the Common Schools Act of December 7, 1875, each School District is constituted a body corporate, with power to sue and be sued in any of the courts of the state having competent jurisdiction. And the cause of action was within the exclusive original jurisdiction of the Justice of the Peace. There is no force in the suggestion that the plaintiff's remedy was mandamus to

compel the directors to issue an order upon the County Treasurer for her wages. The writ of mandamus is frequently employed to compel public corporations to perform their duties towards their creditors. But there must first be a judgment to establish the validity and amount of the debt.

Affirmed.

Fry & Co. et al v. Kruse and Wife.

1. Chancery Practice: *Joinder of several creditors against fraudulent conveyance.*

Separate judgment creditors may join as plaintiffs in the same bill to set aside a fraudulent conveyance of their common debtor.

APPEAL from *Chicot* Circuit Court in Chancery.
Hon. J. M. Bradley Circuit Judge.

Mark Valentine for appellants.

The bill shows equity and was properly brought, and the proceedure is that recommended by this court. 31 *Ark.*, 546; *Bump on Fraud. Conveyances p.* 551.

There was no misjoinder of plaintiffs. All were interested in the subject matter, *i. e.*, the object of the suit. *Gantt's Dig., Sec.* 4475; *Story Eq. Pl., Sec.* 72; *Culvert on Parties, Ch.* 1, *Sec.* 1, *p.* 3–11; 6 *John. Ch'y,* 139; *Bump. Fr. Conv., p.* 547.

C. H. Carlton for appellees.

Plaintiffs had no common interest. Both judgments were rendered after the conveyance was made, and the rec-

ord fails to show whether the debts were created before or after the conveyance, or that Kruse did not have other property sufficient to pay his debts. A mere allegation that a conveyance is fraudulent or made with a view to defraud creditors, without showing in what the fraud consists, is not sufficient.

SMITH, J. This was a bill of two several judgment creditors of Kruse to set aside an alleged fraudulent conveyance by him to his wife and to subject the property to the satisfaction of their debts. The plaintiffs allege that they had respectively recovered judgments against Kruse by the consideration of the Chicot Circuit Court, the one in July, 1876, and the other in January, 1880; that the judgments remain wholly unpaid, notwithstanding the issue of executions which had been returned *nulla bona*. That in January 1876, before the rendition of either of said judgments, but after Kruse had become indebted to them, he had conveyed a lot of land in Chicot County, of which a particular description is given, to his wife and co-defendant; that the purpose of this conveyance was to hinder, delay and defraud his creditors; that Kruse having no other property liable to be taken in execution, they had caused *alias* executions to be issued and levied upon the land so fraudulently conveyed away. And they now ask the aid of Chancery to declare Mrs. Kruse's title to be fraudulent as against them and to remove the obstruction fraudulently interposed against the execution at law. Certified copies of the judgments, of the executions with their returns, and of the deed complained of are exhibited.

This bill was dismissed upon demurrer. The only special cause assigned was a misjoinder of parties plaintiff— that the creditors, having separate and unconnected debts, had no common interest. This objection was not

CHANCERY PRACTICE: Misjoinder of Parties &c

tenable. "Several creditors may join in filing a bill, for they have similar rights with respect to the property of of their debtor. It is, therefore, proper for them to unite in the same suit for effecting the same end. Such a bill is not multifarious, for it relates to one subject matter." *Bump on Fraudulent Conveyances* 3d *Ed.*, 547.

We perceive no lack of any of the essential allegations of a creditors' bill. The plaintiffs show unsatisfied judgments upon causes of action that accrued prior to the conveyance, the issue of the process and inability to get satisfaction out of the unincumbered estate of the debtor; and that the debtor being possessed of property out of which their demands might have been satisfied in whole or in part, conveyed the same for the purpose of defrauding his creditors. *Meux v. Anthony*, 11 *Ark.*, 411; *Clark v. Anthony*, 31 *Id.*, 546.

In seeking the interposition of the court to settle the question of title before a sale under execution, the plaintiffs have pursued the practice recommended in *Sale v. McLean*, 29 *Ark.*, 612.

The decree below is reversed and remanded with directions to overrule the demurrer to the bill and to require the defendants to answer.

Case & Co. v. Hargadine.

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1. Mortgage: *What is a sufficient filing for record.*
The deposit of a mortgage by the mortgagee in the recorder's office for record, the endorsement on it by the clerk, of the date of filing, and the putting of it in the place in the office where unrecorded mortgages are kept for record, are sufficient to affect

with notice all who subsequently deal with the property, though the mortgagee do not expressly direct it to be recorded, and the endorsement do not say filed "for record."

2. SAME: *Same.*

A mortgage is filed within the meaning of the statute when it is delivered to the proper officer, and by him received, for the purpose of being recorded; and his neglect to make the proper endorsement upon it, or to record it, will not prejudice the mortgagee.

APPEAL from *Washington* Circuit Court.
Hon. J. M. PITTMAN Circuit Judge.

B. R. Davidson, for appellant.

There was no attempt to *file* this mortgage under the Act of March 10, 1877.

A mortgage is *filed* when it is *delivered* to the proper officer for the purpose. *Jones Chat. Mort.*. 2d *Ed.*, *Sec.* 271; 25 *Minn.*, 81; 12 *Ark.*, 64; 28 *Ark.*, 248–250, no matter whether endorsed by the clerk or not, 6 *Ark.* 211.

The law requires all mortgages to be recorded, *Gantt's Dig.*, 5021. There being no endorsement on the mortgage as required by the Act of March 10, 1877, it was the duty of the clerk to record the mortgage. If he neglected to do so, it would not defeat the priority of the mortgage lien. 28 *Ark.*, 247–257.

The reception by the clerk and depositing with the instrument held by him for record, is sufficient to create a lien without any indorsement. If properly indorsed it continued to be a lien although removed, misplaced or temporarily lost. 15 *Gray* (*Mass.*) 517.

L. Gregg for appellee.

To create a lien on chattels there must be exchange of

possession or a strict compliance with the registration acts. *Herman on Ch. Mort., p.* 158–200.

No notice will bind subsequent purchaser, &c., without notice by a record *duly* made. *Gantt's Dig., Sec.* 4288; *Carnall v. Duval*, 22 *Ark.*, 136, and an execution purchaser acquires title superior to a mortgagee when the mortgage is not duly registered. 22 *Ark.*, 136; 20 *Ib.*, 190; 18 *Ib.*, 105; 9 *Ib.*, 112.

Recording after judgment and execution levied, creates no prior lien or notice to an execution purchaser and a deed being in the recorder's office in no way creates a lien. *Bowen v. Fassett*, 37 *Ark.*, 507; *McKinnon v. May*, 39 *Ark.*, 442. The statute must be literally or strictly complied with to create a lien. *Herman Ch. Mort.*, 162, 303; *Jones on Mort.*, 248–9.

The mortgage was marked filed but not "filed for record," nor was there any compliance with the Act March 10, 1877.

The execution being a lien from the time it came to the sheriff's hands, 18 *Ark.*, 414, the purchase at execution sale by appellee gave him a good title.

SMITH, J. This was replevin for a grain separator and fixtures. Case & Co. held a mortgage on the machine which was properly acknowledged and filed with the Clerk of the Circuit Court, who is by virtue of his office the recorder of *mesne* conveyances for his county. He made the following endorsement upon it, over his signature: "I hereby certify that the within mortgage was filed in this office on the 12th day of June 1882," and placed it among the deeds filed for record, where it remained until the following April when it was recorded. No specific directions were given for the recording of the instrument, but the mortgagee supposed it would be done. He told the clerk that he would pay his fees upon

presentation of the bill; and this assurance seems to have been satisfactory, and the clerk did not demand his fee in advance.

Hargadine claims under a purchase at execution sale against the mortgagor, pursuant to a levy made before the mortgage was actually recorded.

The Circuit Court, before which the case was tried without a jury, having found the facts substantially as above stated, declared the law to be that Hargadine's title was acquired under a prior lien and gave judgment accordingly.

The case appears to have been decided upon these considerations:

1. Inasmuch as the mortgagee had not endorsed upon the instrument that it was to be filed, but not recorded, therefore no lien was acquired by the simple act of filing with the recorder, under the Act of March 10th, 1877, and,

2. As the recorder had omitted, in making his file mark, to use the words "for record," notice was not imparted to subsequent purchasers independently of that Act.

The first proposition is undoubtedly correct. The Act of March 10th, 1877, provides for the fixing of lines upon chattels by filing the mortgage or deed of trust which creates the encumbrance and dispenses with the recording of it in full under certain conditions. But no attempt was made to comply with the requirements of that law, and there is a proviso in its 8th Section that the Act shall have no application to any instrument not endorsed, "to be filed, but not recorded."

The question then recurs whether the deposit of the mortgage by the mortgagee, the indorsement of the date of filing by the clerk and the putting of it in the place in

1. MORTGAGE: What is sufficient filing for record.

the office where unrecorded mortgages are kept for record, are sufficient to affect with notice all who subsequently deal with the property.

2. Same.

A mortgage is filed, within the meaning of the statute, when it is delivered to the proper officer and by him received for the purpose of being recorded. The neglect of clerical duties by the recorder in making the proper indorsements, or in recording the instrument, does not affect the mortgagee. These are matters over which he has no control. His filing it is regarded as equivalent to registration, so far as he is concerned, and his rights will be protected though it be not recorded at all. The clerk is not his agent or servant for whose negligence he is responsible, but he is the officer designated by the law to perform the duties of receiving, filing and recording the instrument. It would be a harsh rule to punish an individual, who in the prosecution of a right, has done everything that the law required him to do, for omission by a public officer to comply with forms prescribed to him as his duty. *Jones on Chattel Mortg.. Sec.* 271–2; *Wade on Notice, Secs.* 154, 170–1; *Oates v. Walls*, 28 *Arks.*, 244, *and cases there cited; Gorham v. Simmons*, 25 *Minn.*, 81; *People v. Bristol*, 35 *Mich.*, 28; *Dodge v. Potter*, 18 *Barb.*, 193; *Throckmorton v. Price*, 28 *Tex.*, 605; *McGregor v. Hall*, 3 *Stuart & Porter* (*Ala.*), 397.

The mortgagee left his mortgage in the proper office with the evident intention that it should be recorded. The clerk testified that he did not believe it to be necessary to record a chattel mortgage. He does not say, however, that he derived this impression from the conversation or conduct of the mortgagee. This makes the case very different from *Bowen v. Fassett* 38 *Ark.*, 507, where the beneficiary of a trust deed left it in the recorder's office with instructions not to record it.

Reversed and remanded for a new trial.

THOMAS v. STATE.

1. CRIMINAL LAW: *Confederates—Standing watch.*
Where one stands watch while his confederate is robbing a house, both are equally guilty.

ERROR to *Baxter* Circuit Court.
Hon. R. H. POWELL, Circuit Judge.

C. B. Moore, Att'y Gen'l, for defendant in error.

No exceptions was taken to the instructions of the court, and no instructions were asked by either the State or defendant.

The evidence sustains every material allegation in the indictment, and the verdict is not such as "to shock the sense of justice."

SMITH, J. The plaintiff in error was convicted upon an indictment which contained two counts—one for burglary and the other for larceny. A new trial was awarded and he was again convicted upon the count for larceny and was sentenced to a term of two years in the penitentiary. His motion for a new trial assailed the verdict as being contrary to the evidence.

The proof was that, in the night of December 25th, 1883, the store of R. C. Bennett, in Monticello, was entered and among other things a watch was stolen. About a month afterwards, this watch was found by the Sheriff on the person of the plaintiff in error. In explanation of his possession, he stated that the watch had been given to him by one John Preddy, his confederate in the burglary, for his share of the spoils—that he had watched on the outside while Preddy robbed Bennett's house. If this were so, both were equally guilty. Carr v State, *ante* 99.

Judgment affirmed.

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STATE v. BAILEY,

SAME v. WELLS—3 cases.

1. LIQUOR: *Indictment for selling: Name of purchaser: Druggist.*
An indictment for selling liquor in violation of the Three Mile Law, need not allege the name of the purchaser, nor negative that the defendant was a druggist selling for medical purposes only.

2. INDICTMENT: *Exception in statute.*
An exception in a criminal statute not contained in the enacting clause need not be noticed in an indictment. It is matter of defense.

3. LIQUOR: *Local option; Prohibitory order can designate but one point.*
An order of the County Court prohibiting the sale of liquor within three miles of two different points is void, and a violation of the order is no offence.

APPEALS from *Bradley* Circuit Court.
Hon. J. M. BRADLEY, Circuit Judge.

C. B. Moore, Attorney General, for appellant.

It was not necessary to negative the prescription by a physician. All attempts to state anything in reference to physician's prescriptions may be treated as surplusage. The exceptions in the law are not in the exacting clause and need not be negatived. It is matter to be shown in defence. *Wilson v. State*, 35 *Ark.*, 414; *Blackwell v. State*, 36 *Ark.* 178.

Nor was it necessary to state to whom the liquor was sold., *Johnson v. State*, 40 *Ark.*, 453.

1. LIQUOR: Indictment for selling. Name of purchaser. Druggist.

SMITH, J. To these four indictments for violations of the Three Mile Act, the Circuit Court sustained demurrers. In one of the cases it was objected that the indictment did not specify to whom the liquor was sold. Such an allegation

was unnecessary. *Johnson v. State*, 40 *Ark.*, 453, and cases cited.

2. Exception in statute.

And in all of the cases it was objected that the indictments did not negative the fact that the defendants were druggists selling for medical purposes only. The indictments do allege that the liquors were not sold upon the certificate of a practicing physician. But this was surplusage. The exception in the statute, not being contained in the enacting clause, needed not to be noticed, but was matter of defense. *Wilson v. State*, 35 *Ark.*, 414 *and cases cited; Blackwell v. State*, 36 *Id*, 178.

3. Local Option: Prohibitory order.

There is, however, a defect apparent on the face of the indictments, but not specially assigned as cause of demurrer, which goes to the root of the whole matter. The charges are that the several defendants did sell intoxicating liquors within three miles of the Methodist and Baptist churches in the town of Warren, Bradley County, after the County Court had made an order prohibiting such sales, within three miles of said churches. In *Williams v. Citizens, &c.*, 40 *Ark.*, 290, we held that the County Court had no power to make such an order upon a petition which designates two points within three miles of which sales of liquor are to be prohibited. A circle can have but one center.

The judgments are affirmed.

Winn v. State.

1. Practice: *Suspension of trial for evidence.*

The suspension of a trial after it is begun to obtain further evidence, is within the sound discretion of the court.

2. Liquor: *Selling alcohol.*

Under an indictment for selling liquor in violation of the Three

Mile Law of March 21st, 1881, the defendant could be convicted on proof of selling alcohol, when it was plain that it was a mere subterfuge for evading the law.

APPEAL from *Franklin* Circuit Court.
Hon. G. S. CUNNINGHAM, Circuit Judge.

C. B. Moore, Att'y Gen'l, for the appellee.

The instructions are not embodied in the bill of exceptions, nor does the record show any restriction of the counsel to a five minute speech.

It was within the sound discretion of the court to suspend the trial to procure evidence of the prohibitory order. *Johnson v. State*, 32 *Ark.*, 309.

The evidence clearly shows that appellant kept an *alcohol saloon* with all its paraphernalia and appliances, and it was a mere subterfuge to evade the law. *State v. Witt*, 39 *Ark.*, 216.

The alcohol was sold as a beverage to be drunk on the premises, and he was properly convicted of selling intoxicating liquors, etc.

SMITH, J. Winn was indicted by the Grand Jury of Johnson County for selling intoxicating liquors within three miles of the public school-house in the town of Coal Hill, after the County Court had made an order prohibiting such sales. Upon his application the venue was changed to Franklin, where he was tried, convicted and fined $25. His motion for a new trial contains five grounds:

1 and 2. That the verdict was contrary to the evidence and the law;

3. Misdirection of the jury;

4. Error of the court in suspending the trial, after the jury were sworn, until record evidence could be procured from Johnson County that a prohibitory order had been made

for the territory within three miles of the school-house in question.

5. Error in limiting the argument of one of the counsel to five minutes.

Of the third and fifth assignments, nothing more needs to be said than that no part of the charge of the court is embodied in the bill of exceptions; and the record does not disclose the fact that the court imposed any restriction upon counsel as to the time to be consumed in argument.

1. PRACTICE: Suspending trial for evidence.

4. The suspension of proceedings after a trial is begun, to enable one of the parties to procure additional testimony, is a matter within the sound discretion of the court. *Johnson v. State*, 32 *Ark.*, 309. Morever, the defendant, in order to prevent the delay incident to procuring further evidence, admitted that, previous to the sales charged in the indictment, the order of prohibition had been made by the County Court in pursuance of the Act of the Legislature and had been entered of record.

2. LIQUOR: Selling alcohol.

This only leaves the first and second grounds of the motion to be considered. The evidence shows that the intoxicating liquor sold was alcohol and that the sales were made prior to the passage of the Act of March 26, 1883, which is aimed at the sale of alcohol as well as of ardent, vinous and malt liquors. In *State v. Martin*, 34 *Ark.*, 340, and in *State v. Witt*, 39 *Id.*, 216, this court held that alcohol was not within the purview of the laws regulating the sale of ardent and vinous spirits. But in the last named case it was intimated that, upon an indictment for selling liquor, a conviction might be had upon proof of the sale of alcohol, where it was plain that it was a mere subterfuge of the liquor-seller for evading the law.

Now the case there supposed is precisely the present case. The defendant kept an alcoholic saloon, with all the conveniences and appliances of a dram shop—sugar, hot and cold

water—spoons and tumblers; but the only intoxicant sold was alcohol, which was prepared in the shape of toddies, punches, etc., according to the tastes of customers. It was sold over the counter in small quantities to be drunk upon the premises. And the proof is unmistakable that the defendant's customers sought it is an intoxicating beverage and an excellent substitute for whiskey.

Affirmed.

STATE v. DILLINGHAM.

1. EVIDENCE; *Variance between proof and allegations.*

Mrs. Dillingham was indicted for an attempt to bribe a witness to withhold his testimony in a criminal proceeding before a J. P. against Tom Dillingham. For evidence of the proceeding the docket of the Justice was offered, from which it appeared that Tom Dillingham and John Royal had been arrested on an affidavit charging them jointly with stealing a cow. The cause was styled "The State of Arkansas v. Dillingham and Royal." That they severed and on trial Royal was discharged, and afterwards Dillingham was put on trial and bound over to the Circuit Court. HELD; That there was no material variance between the docket and the indictment as to the description of the proceeding and the docket was admissible.

2. CRIMINAL PRACTICE; *No trial without plea.*

In a criminal case there can be no valid trial without plea of the defendant.

APPEAL from *Miller* Circuit Court.
Hon. C. E. MITCHELL Circuit Judge.

C. B. Moore, Att'y Gen'l, for appellant.

This is an indictment under *Sec.* 1423 *Gantt's Dig.*

The court clearly erred in excluding the testimony offered.

The charge was dismissed as to Royal, and proceeded against Dillingham *alone*, but if it had not, a case against Dillingham and another was a case against Dillingham, as the greater includes the less.

1. EVIDENCE Variance from pleading.

SMITH, J. Mrs. Dillingham was indicted, under Sec. 1423 of Gantt's Digest, for an attempt to bribe a witness to withhold his testimony in a criminal proceeding against Tom Dillingham, depending before a Justice of the Peace. A jury was impaneled, but no plea was entered by the defendant so far as we can discover. The official character of the magistrate being admitted, his docket was produced. From this it appeared that Tom Dillingham and John Royal had been arrested upon an affidavit which charged them jointly with stealing a cow, the property of one Shuflin; that the cause was entitled the State of Arkansas, plaintiff v. Dillingham and Royal, defendants; that they demanded and were accorded separate trials; that Royal's case was first investigated and the charge against him was dismissed; that the Justice then proceeded to examine into the case against Dillingham and he was held to bail for his appearance at Circuit Court. The court, upon inspection of this record, refused to permit it to go before the jury, because the style of the case on the Justice's docket, was against the two defendant's jointly, and the indictment described the cause as an examination of Dillingham alone on a charge of grand larceny.

The State then offered in evidence the original subpœna and the officer's return thereon to show that Shuflin was cited to appear before the Justice and testify against Dillingham alone and not against Royal. This also was excluded.

The State then offered to prove by Shuflin that, after he had been subpœnaed as a witness against Dillingham and while the examination of the charge was still pending, Mrs. Dillingham offered him at first $75 and afterwards $175 to absent himself from the court and not testify in said cause. But the evidence was ruled out. And the court directed the jury to return a verdict of not guilty and the defendant was discharged.

The variance between the indictment and the proposed proof, with regard to the style of the cause, was an extremely technical objection. After the severance of the accused and especially after the Justice had decided that there were no reasonable grounds for detaining Royal, the case stood against Dillingham only. That the Justice continued his entries under the original heading, was wholly immaterial.

2. No trial without plea.

But without plea there could be no valid trial. 1 *Bishop Cr. Pro., Sec.* 733; *Lacefield v. State*, 34 *Ark.*, 275.

Reversed and remanded with directions to require Mrs. Dillingham to plead to the indictment and for further proceedings.

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McGehee, as Trustee, et al v. McKenzie et al.

1. Married Woman: *Deed: Acknowledgment.*

The deed of a married woman executed prior to the adoption of the Constitution of 1874, and not acknowledged according to law is absolutely void.

2. Acknowlfdgment: *Curing Act of* 1883.

The Act of 1883 curing defective acknowledgments, could not, in any case, interfere with rights of third parties vested at the time of its passage.

McGehee, as Trustee, et al v. McKenzie et al.

APPEAL from *Phillips* Circuit Court in Chancery.
Hon. M. T. SANDERS Circuit Judge.

Tappan & Hornor for appellant.

A deed defectively acknowledged conveys an equitable title. The Act of 1883, curing defective acknowledgments perfected the acknowledgment to the deed, and although executed to the firm of Mayfield & Myrick, it passed the title to be held in trust for the benefit of the firm. 3 *Snead, p.* 595; *Parsons on Part.*, 333; 4 *Heisk* (*Tenn.*) 506; 55 *Miss.*, 348; 19 *Vt.*, 615.

The sale by Mayfield of all the assets of the firm to Myrick, gave Myrick an equitable right to the whole of the lot. This sale was before the execution of the deed by Mayfield to Mrs. Myrick. 35 *Iowa*, 83.

Appellees bought with notice of appellants' rights; they took nothing by their quit claim from Porter and wife as they had already disposed of what interest they had.

Stephenson & Trieber for appellees.

1. The deed of a *feme covert* defectively acknowledged, executed prior to the adoption of the present Constitution is absolutely void at law and in equity. See cases from 15 *Ark.*, 531, to 39 *Ark.*, 531; 33 *Ark.*, 432.

2. The curing Act of 1883 could not cure deeds *absolutely void.* Nor can a legislature validate defective acknowledgments of a deed so as to affect the vested rights of parties. 12 *Iowa,* 389; 6 *Minn.*, 292; 25 *Tex.*, 408; 28 *Ib.*, 452.

EAKIN, J. This is an appeal from a decree of the Circuit Court in Chancery dismissing a bill after a demurrer had been sustained thereto, and the complainant had de-

clined to amend. The only question is whether the bill makes a case for relief.

The material allegations show: That Ann A. Porter, a married woman, and one of the defendants was, in 1873, the owner of a certain lot numbered 405 in that part of the city of Helena, called "Old Helena;" that on the 14th day of January of that year she sold the same to Mayfield & Myrick, a business firm in that city. A conveyance was drawn signed and delivered by herself and her husband, to which was attached a certificate of acknowledgment, conceded by the complainant to be defective under the law then in force, regulating the mode by which married women might convey their property, and that Myrick afterwards became the owner of all the assets of the firm. That Myrick afterwards joined in the execution of a deed of trust including this property, to secure a debt due the firm of McGehee, Snowden & Violett of New Orleans, which deed was duly executed and acknowledged on the 6th of August, 1877, but not filed for record until the 4th day of January, 1878; that default having been made in the payment of the debt, the property was sold under the trust and purchased as trustee for others by complainant, who took as the nature and condition of the property would permit. His deed bears date the 12th of April, 1879. The action was begun on the 2nd of November 1882 against certain parties who are trustees of a church, and who also claim the land through *mesne* conveyances under the original sale and supposed conveyance from Ann A. Porter to Mayfield & Myrick. It is asserted that in 1875, Myrick had induced Mayfield to make a conveyance of this lot to Mrs. Josephine Myrick, his wife, which deed was held up and not recorded, in order to induce McGehee, Snowden & Violett to accept the deed of trust, but afterwards recorded

before the deed of trust; and that afterwards Mrs. Myrick conveyed it to the trustees of the church who had full notice of complainants rights. Before the institution of this suit, the trustees obtained, without consideration, a deed of the lot from Ann A. Porter and her husband, which was duly acknowledged and recorded. They are made defendants.

It is the settled doctrine of this court that the deed of a married woman in this State, executed prior to the adoption of the Constitution, and not acknowledged in accordance with law, is absolutely void and of no effect.

Unlike the case of a man or *femme sole*, whose deeds convey *proprio vigore* so as to pass title without any acknowledgment whatever, except as to subsequent purchasers without notice, it is in the case of married women the *acknowledgment* which is the consummating and indispensable act of conveyance without which her deed is absolutely worthless. The statutory acknowledgment to divest the title of married women, was the substitute for the English common recovery. Without it not even an equity passes. The doctrine is as rigid in one court as another.

It is useless to discuss the comparative equities of complainant and the church as they would stand if Mrs. Porter had never conveyed to the latter. She did convey, and is herself a defendant. It may well be conceded that if she were acquiescing in her first attempted conveyance, and had given no vitality to the church claim, the trustees would not be allowed to enjoy the benefit of a fraud against the complainant's grantor, the trustee in the trust deed. But such is not the case. By her subsequent conveyance to the church she asserts a continuing claim to the land. She might freely give it away.

The Acts of 1883 curing defective acknowledgments,

had not been passed at the commencement of this suit and have no application. They could, in no case, have interfered with rights of third parties, vested at the time of their passage.

Complainant shows no right to the lot, in law or equity.

Affirm.

STONE V. STONE ET AL.

1. MARRIED WOMAN: *Her conveyance of separate property: Acknowledgment.*

Since the adoption of the Constitution of 1874 a married woman can convey her separate property as a *femme sole*; and in the acknowledgment of her deed no privy examination, nor disclaimer of compulsion or undue influence of her husband, is necessary. Her deed is good without acknowledgment as to all parties with notice of it.

2. PRACTICE IN CHANCERY: *All interested must be parties:*

Ordinarily, parties should see that all persons to be affected by the decree should be brought before the court; and if they do not, the court should, of its own motion, direct them to be brought in.

APPEAL from *Saline* Circuit Court in Chancery.
Hon. J. M. SMITH, Circuit Judge.

W. C. Ratcliffe, for appellant.

The acknowledgment of the deed to Henderson was defective, and hence the deed was void. Chenault had *actual* notice that Mrs. Stone claimed the property. It was owned by appellant prior to her marriage, which was consummated in 1873, prior to the adoption of the Constitution of 1874, and was not such a separate estate as could be conveyed by her as a *femme sole*.

John Fletcher for appellees.

The property was the *sole and separate* property of Mrs. Stone, and she had a right to sell as a *femme sole*. No acknowledgement was necessary. *Donohoe v. Mills*, 41 *Ark.*, 421.

The court found as a fact that it was the sole and separate estate of Mrs. Stone at the time the deeds were made, and that there was no fraud. These proceedings are as conclusive as the findings of a jury, and will not be disturbed if supported by any evidence. 24 *Ark.*, 431; 2 *Daniel, Pl. and Pr.*, 1315-1316.

EAKIN, J. The appellant, a married woman, filed this bill against her husband and divers others, to annul and cancel certain deeds of some land, being her separate property. The facts are that she, with her husband, conveyed the land to a third party, without any consideration in order that they might be reconveyed to the husband, which was done. The husband afterwards for a valuable consideration sold and conveyed the lands to defendant Chenault, who had notice of the wife's claim.

The gravamen of the charges in the bill, consists in this: that the deed was obtained from her by fraud and undue influence on the part of her husband; that it was without consideration, and not acknowledged in accordance with the forms prescribed for the conveyance of real estate by a married woman.

The charges of fraud are denied, and it appears that the deed was executed after the adoption of the Constitution of 1874. It is acknowledged by husband and wife jointly, without privy examination, or disclaimer of compulsion or undue influence.

Upon the hearing the Chancellor found no fraud nor com-

pulsion, nor undue influence, and dismissed the bill for want of equity. From this she appeals.

1. MARRIED WOMAN: Her conveyance.

Upon a review of the evidence it is clear enough that there was no proof of fraud, compulsion or undue influence. She executed the deed voluntarily, with the intention of vesting the property in her husband. She did so because she desired him to improve it, and make it their common home and to induce him to do so, as owner. She had children by a former husband, to whom it would otherwise have descended on her death. It was a fair transacton. The husband after partially improving it sold it to Chenault. This may have been unkind to her, in disappointing her just expectations, but she made no provision against such a change of purpose on his part. From all that appears it may have been judicious. We cannot say, and it is a matter of no consequence as determining any legal or equitable right. She had empowered him to do so by making him complete owner without reservation.

Acknowledgment.

No privy examination was necessary. The property had been her sole and separate property before her marriage and before the adoption of the Constitution. It does not appear to have been in trustees for her use, with any restrictions upon her power of alienation. The Constitution provides, Art. X, Sec. 7, that the real and personal property of any *femme covert*, acquired either before or after marriage, in any manner, may be "conveyed by her as if she were a *femme sole*." This repeals, as to such property, the former statutory mode of conveying by privy acknowledgement. *Bishop on Married Women, Vol.* 1, *Sec.* 199; *Roberts and wife v. Wilcoxon & Rose*, 36 *Ark.*, 355; *Donohoe v. Mills*, 41 *Ib*, 421. The acknowledgment was proper. Her execution of the deed itself without any acknowledgment would have been enough.

2. Practice: All interested must be parties.

We observe in the transcript an inadvertent error in practice, not affecting the merits of the case but which demands notice. During the litigation, Chenault died, and the suit was revived against the administrator alone, without his heirs. Chenault was the real defendant, and the suit concerned his title. The heirs were necessary parties, as no decree in favor of Mrs. Stone would have bound them. It has been the habit of this court, in such cases, to decline any consideration of the merits, and to remand causes for proper parties. But that is a matter upon which it may not be improper to exercise sound discretion. Appellant still has her remedy against the heirs of Chenault to whom the lands have descended if she may still be advised she has any rights to assert. She shows none in this case, and it would only be imposing upon her additional costs to remand it. To affirm will be to leave all parties *in statu quo*, and is the most prudent course. The Chancellor was right upon principle. The case is exceptional. Ordinarily parties should see to it that all persons to be affected by the decree are brought before the court, and if not done by the parties, it should be directed by the court on its own motion.

Affirm.

Walker v. Jessup, ad.

1. Chancery Practice: *Foreclosure on administrator's sale of land.*

A bill by an administrator against a purchaser of land sold by him under an order of the Probate Court, for foreclosure and sale of the land for the purchase money bid at the sale, must allege that the sale has been confirmed by the Probate Court. Courts can not presume that such a sale has been confirmed.

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2. SAME; *Decree of foreclosure: Tender of deed.*

Chancery will not decree for an administrator, against the purchaser, a foreclosure and sale of land for the purchase-price, without requiring the administrator to bring into court a deed to the purchaser for the land.

3. MARRIED WOMAN; *Capacity to contract.*

Neither the Act of April 28, 1883, nor Sec. 7, Art. IX, of the Constitution of 1874, nor any subsequent legislation expressly enlarges the power of married women to contract *generally*; though by implications of that statute she may charge her separate estate, and bind, in equity, a new estate acquired by purchase; and the provision authorizing her to carry on any trade or business on her sole and separate account may imply the power to make contracts in relation to it, and to execute notes and bills upon which she would be personally liable.

APPEAL from *Yell* Circuit Court.

Hon. G. S. CUNNINGHAM, Circuit Judge.

Harrison & Crownover for appellant.

1. The sale was never reported to nor confirmed by the Probate Court, nor was any deed brought into court. 38 *Ark.*, 80, 81.

2. A married woman cannot bind herself by promissory note or writing obligatory to pay for land. *Challa v. Temple* 39 *Ark.*; 29 *Ark.*, 351; 35 *Ark.*, 365. Nor has the Constitution of 1874, nor the married woman's Act since, enlarged her power to contract. She may *convey* as a *feme sole*, but cannot bind herself by executing contracts. 38 *Ark.*, 57; 36 *Ib.*, 555, 386, 367; *Felkner v. Fighe*, 39 *Ark.* See also 35 *Ark.*, 365; 33 *Ib.*, 265; 32 *Ib.*, 446; 36 *Ark.*, 356.

One who signs a note with a married woman is the only party bound. *Am. Law Reg.*, 1878, *p.* 202. A judgment *in personam* cannot be rendered against a married

woman to charge her separate estate. *Myers Ky. Code Pr.* 292 *top* (*E.*) 9 *Reporter*, 378.

3. The sale was not made in accordance with law. *Sec.* 2679 *Gantt's Dig.* It was not at the court house door or on the premises.

L. C. Hall, for appellee.

The failure to allege the confirmation of the sale was not objected to below (in fact, such approval was admitted) and therefore waived. 35 *Ark.*, 111; *Newman's Pl. & Pr., p.* 475.

Under the Const. 1874, a married woman has the right to acquire and convey real estate as a *femme sole.* She may bind herself or her separate property for her own peculiar benefit. The note sued upon was for the purchase-money, and a judgment on the same may be enforced against her separate property. 39 *Ark.*, 238; 33 *Ark.*, 265. The intention to charge her separate estate may be inferred. 5 *Am. Reports*, 675. No duress is shown. *Parsons on Cont. Vol.* 1, *p.* 392; *Chitty on Cont. p.* 208.

SMITH, J. Jessup as admistrator of the estate of one Harrell, filed this bill in Chancery against Mrs. Walker, alleging that he, in his representative character and by virtue of authority from the Probate Court, had exposed to sale by public auction upon a credit, certain lands of his intestate; that the defendant became the purchaser at the price of $1280, receiving a certificate of purchase, and executing her bond for the purchase-money with her husband and another as sureties; that the term of credit had expired and nothing had been paid. The prayer was for a personal judgment against the defendant and for a decree of foreclosure and sale.

Mrs. Walker, in her answer, admitted the purchase and the execution of the bond, as stated in the bill, but plead-

ed her coverture in defence and further that she had acted in the matter under coercion of her husband.

Depositions were taken which tended to prove that Walker and his wife were on bad terms, and that she had bid for the lands—a portion of her former husband's estate—in deference to his wishes and for fear of disobliging him.

The Circuit Court rendered a judgment against Mrs. Walker for the principal and interest of the bond and condemned the lands to be sold for its satisfaction.

1. Bill to foreclose on administrator's sale: Necessary allegations.

The bill did not allege, as it should have done, that the sale had been reported to and confirmed by the Probate Court, which had ordered it. It was a judicial sale and confirmation was necessary to its validity. Courts are not at liberty to presume that such a sale has been confirmed. And if it had been shown that the sale had been duly confirmed and that the plaintiff was empowered to convey to the defendant the decedent's interest in the lands, the Court should, before decreeing foreclosure, have required the plaintiff to bring the deed into court. *Bell v. Green*, 38 *Ark.*, 78.

2. Decree of foreclosure: Tender of deed.

3. MARRIED WOMAN: Liability on her contracts.

Moreover, a personal judgment was rendered against Mrs. Walker. She was not legally liable upon her purchase-bond, although the land in her hands may be, as also her sureties, who are not before the court. *Bedford v. Burton*, 106 *U. S.*, 338; *Gardner v. Burnett*, 36 *Ark.*, 476; *Unangst v. Fitler*, 84 *Pa. St.*, 135.

There was no law in force in this State at the date of this transaction (1879 or 1880) which enabled a married woman to buy real estate on a credit and bind herself personally for its payment. The Act of April 28, 1873 (*Gantt's Dig. Secs.* 4192 to 4200) the provision in the Constitution of 1874 (*Art. IX, Sec.* 7) and the subsequent legislation were designed to secure to married women the

separate use and disposition of property which would otherwise pass to their husbands. They do not expressly enlarge the wife's capacity to contract generally; although doubtless the statute carries with it the fair implication to charge her separate estate, if she has one, or even to bind in equity the new estate acquired by purchase. So the provision authorizing her to carry on any trade or business on her sole and separate account may imply the power to make contracts in relation to the business and to make notes and bills upon which she would be personally responsible; since it would be a vain and useless thing to give the power to engage in business without the right to conduct it in the way and by the means usually employed. Compare on this subject 2 *Bishop on Married Women, Secs.* 80 *to* 88, 232 *to* 236, 249–50; *Knapp v. Smith*, 27 *N. Y.*, 277; *Tale v. Dederer*, 18 *Id.*, 265, *and* 22 *Id.*, 450; *Ballin v. Dillaye* 37 *Id.*, 35; *Frecking v. Roland*, 53 *Id.*, 422.

But the purchase or sale of real estate is not a separate business within the meaning of the statute, which relates to mechanical manufacturing or commercial pursuits. *Nash v. Mitchell* 71 *N. Y.*, 199.

We have not discussed the question of marital coercion. The court below seems to have been of opinion that the facts disclosed did not amount to duress. And this is doubtless true, although we have not considered that branch of the case very attentively. What we have said will probably be sufficient to dispose of all issues that have arisen, or are likely to arise.

The decree is reversed and cause remanded, with leave to the parties to amend their pleadings, if so advised, and for further proceedings. Upon confirmation of the sale by the Probate Court and the production in court of a sufficient deed, the plaintiff will be entitled to a decree; but the relief must be limited to the land, so far as Mrs. Walker is concerned.

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FLOURNOY V. SHELTON & CO., ET AL, TAYLOR V. SHELTON & CO., ET AL.

1. LABORER'S LIEN: *Overseer of farm.*
A farm overseer is not a laborer within the meaning of the laborer's lien laws of this State.

APPEAL from *St. Francis* Circuit Court.
Hon. M. T. SANDERS, Circuit Judge.

O. P. Lyles for appellant.

In *Dano v. M. & L. R. R. R.*, 27 *Ark.*, 564, there was an attempt to construe the laborer's lien law of 23d of July, 1868.

In that decision, the court seems to have adopted Mr. Webster's definition, which says:

"A laborer is one who labors in a toilsome occupation, a man who does work that requires but little skill, as distinguished from an *artisan.*"

The plaintiff in his complaint describes the work and labor by him performed, and says he plowed some, hoed some, and fixed plows and hoes, and did work and labor all over the plantation, &c., &c. See the complaint.

Is he an *artisan?* We think not. Was it the intention of the legislature to leave him unprotected and refuse him a lien simply because his labor was worth $400 per annum instead of $100? We think that such could not have been the intention of the legislature.

The case of *Burge v. Davis*, 34 *Ark.*, 179, only decides that the laborer has a lien only as against that part of the crop owned by his employer.

In *Taylor & Radford v. Hathaway*, 29 *Ark.*, 597, this court simply reversed the case because the jury found *no amount* in the J. P. or Circuit Court.

We now come to consider the Act of the Assembly of the 6th of March, 1875. See Acts of 1874 and 1875, page 230.

We contend that this act did not appeal or modify the law in Gantt's Dig., section 4092, because said section 4092 gives a lien to all laborers. The Act of the 6th of March, 1875, does not cover the whole subject, but is exclusively in reference to contracts made beyond the limits of this State, leaving Gantt's Digest exactly where it found it. See *Pulaski County v. Downer*, 10 *Ark.*, 588.

The law in Gantt's Dig., and the Act of 6th of March, 1875, may both stand. See *State, use Higginbotham's Admr., Watts et als.*, 23 *Ark.*, 305; *Osborn ex parte*, 24 *Ark.*, 479; *Reynolds v. Holland, Sheriff*, 35 *Ark.*, 56; *Babcock v. The City of Helena*, 34 *Ark.*, 499.

Sanders & Husbands for appellees Estes, Doan & Co.

1. An overseer or manager is not a *laborer* within the meaning of the statute. 27 *Ark.*, 564; *Isbell v. Dunlap & Ward*, 17 *S. C.*, 583.

2. The within contract was not acknowledged and filed as required by Acts of 1875, which was intended as a substitute for the Act of 1868. It covers the entire subject, and was evidently intended as a substitute. 37 *Mich.*, 217; 10 *Ark.*, 590; 31 *Ib.*, 17; 58 *Ind.*, 333; 1 *Dakota*, 63; 7 *Otto*, 546; 11 *Wall*, 88; 9 *U. S. Dig.*, 694; *Bishop on Written Laws*, 158.

SMITH, J. These were actions by overseers or managers of plantations to enforce laborer's liens for their wages. The defendants in both cases were A. G. Shelton & Co., the plaintiff's employers, and Estes, Doan & Co., the purchasers of the crops. Estes, Doan & Co., demurrered to the complaint because the services rendered were not such as are contemplated by the statutue, giving laborers a lien upon he production of their labor; and,

2. The contracts upon which the labor was performed were for a longer period than one month and the same were not acknowledged and filed as required by law. The demurrers were sustained and the plaintiffs declining to amend, final judgments were rendered discharging Estes, Doan & Co.

LABORER'S LIEN. The laborer's lien law (*Gantt's Dig., Secs.* 4079-97) has been construed by this court in *Dana v. M. O. & R. R. R. Co.*, 27 *Ark.*, 564 *and Taylor, Radford & Co. v. Hathaway*, 29 *Id.*, 597. In these cases it was adjudged that the act, providing as it does for a remedy summary in its character and contrary to the course of the common law, must receive a strict construction; and that the claimant of the lien must bring himself strictly within the terms of the Act. The plaintiff must perform manual labor and there must be some product of his labor to which the lien must attach. "An overseer is one who is employed not to labor himself, but to overlook and direct the labor of those who are employed to do the manual work of planting, cultivating and gathering a crop, and it would be a confusion of terms to call such a person a laborer." *Isbell v. Dunlap*, 17 *S. C.*, 581; *Whitaker v. Smith*, 81 *N. C.* 340. Same case 31 *Am. Rep.*, 503.

Farm overseer not a laborer. We need not consider the record cause of demurrer. That involves the question whether the Act of July 23, 1868 is repealed by implication by the Labor Act of March 6th, 1875. A farm overseer is not a laborer within the meaning of said Acts.

The affirmance of these judgments is without predjudice to the right of the plaintiffs to proceed against their employers for a personal judgment. No service appears to have been had upon A. G. Shelton & Co., nor did they enter an appearance.

Affirmed.

GREELY BURNHAM GROCERY CO. v. GRAVES, AD.

1. ADMINISTRATION: *Settlements of administrators, how corrected.* Chancery has no power to correct the mere errors in an administrator's settlement; it must be done by appeal to the Circuit Court.

2. SAME; *Fraudulent settlements. Notice of the settlement.* It is a very great irregularity for the Probate Court to confirm an administrator's account before the notice of filing the account has been given as required by law; but the omission of the clerk to give the notice can not make the account fraudulent.

APPEAL from *Chicot* Circuit Court in Chancery.
Hon. J. M. BRADLEY, Circuit Judge.

John G. B. Simms for appellant.

No notice was given as required by *Sec.* 129 *Gantt's Dig.* and appellant had no day in court. See 30 *Ark.*, 66; 20 *Ark.*, 526. The charging illegal commissions, and expenditures by the adm'r. was a fraud, and a Court of Chancery should set aside the settlement, as appellant had no notice and could not appeal. He was without remedy at law.

C. H. Carlton for appellee.

Appellants remedy was by appeal. Courts of Chancery will not set aside settlements in the Probate Court for mere irregularities or errors. The failure on the part of the clerk to give notice as required by law, will not vitiate the settlement.

SMITH, J. This was a bill in chancery to open an administrator's account, which had been confirmed by the Probate Court, for alleged frauds in obtaining credits for traveling expenses while on business of the estate and for

excessive commissions. It was stated that the clerk had omitted to give notice of the filing of said account. The bill was dismissed on demurrer.

It is the settled doctrine of this court that mere errors of the Probate Courts in making allowances to administrators can be corrected only on appeal, and that they afford no ground for impeaching the settlements in a Court of Chancery. *Ragsdale v. Stuart*, 8 *Ark.*, 268; *Ringgold v. Stone*, 20 *Id.*, 527; *Mock v. Pleasants*, 34 *Id.*, 64; *Jones v. Graham*, 36 *Id.*, 383.

There is no pretence that these allowances were obtained by misrepresentation, deception or imposition upon the court, but only that they were illegal.

It is a very great irregularity for the Probate Court to confirm an administrator's account before the notice prescribed by law has been given. But the clerk's omission of his duty does not render the account fraudulent.

Decree affirmed.

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MASON ET AL v. WILSON ET AL.

1. STOPPAGE IN TRANSITU: *When the right of ends.*

The right of the unpaid vendor of goods to stop them *in transitu*, upon the bankruptcy or insolvency of the purchaser, is not defeated by their mere arrival at their destination. The *transitus* is not at an end until they have come to the vendee's actual possession, or to his constructive possession by delivery to his agent; and *a fortiori* the right may be exercised where the purchaser declines to receive them.

2. COMPROMISE; *As consideration for contract.*

A compromise of a disputed claim, however void of merit or foundation, is a sufficient consideration to support an express promise for its settlement.

APPEAL from *Pulaski* Circuit Court.
Hon. F. T. VAUGHAN, Circuit Judge.

Cohn & Cohn for appellants.

I. *a.* When a suit is *bona fide*, brought on probable cause, a promise to compromise is a valid consideration. 1 *Chitty on Cont.* 46 (16 *Am. Ed. and note m.*); 1 *Whart. on Cont., Secs.* 533 *and* 193; 29 *Ark.*, 131; 21 *Ib.*, 69; 17 *Am. Dec.*, 118; 6 *T. B. Monroe*, 91; 9 *La.*, 397; 29 *Am. Dec.*, 448 *and note p.* 452; 45 *Ib.*, 257; 2 *Douglass*, 344; *Pollock on Cont. p.* 396.

b. An erroneous deduction of law is no cause for annulling the contract. 5 *Am. Dec.*, 626; 2 *Bibb*, 448.

c. Nor where parties are ignorant of their rights, will courts refuse to enforce. 26 *Am. Dec.*, 52; 1 *Watts*, 163.

II. Indeed it is doubtful whether the Wilsons could ever have enforced the contract, if M. & T. had chosen not to observe it, for they had no kind of title to the butter. 1 *Whart. on Cont., Sec.* 532–3

III. *a.* If this is a bailment, the appellees are estopped to deny title, unless they can show that they turned the butter or its proceeds over to a third person and that such person was the owner. *Whart on Ev.*, 1149, 36–34–5; *Edwards on Bailments p.* 62–3, 295, 305, 306, 535; 14 *Mich.*, 392; *Bigelow on Estoppel*, 2d *Ed.*, *p.* 387 *et seq; Stephens Dig., Law of Ed.* (*Eng. Ed.*) *Art.* 105*p.* 127.

b. If not a bailment, but the Wilsons obtained possession from appellants, the same doctrine applies. Cases *supra* and 23 *Am. Dec.*, 407; 7 *J. J. Marsh*, 318; 9 *Vt.*, 37; 31 *Am. Dec.*, 605; 9 *Porter* 434; 33 *Am. Dec.*, 324; 101 *Mass.*, 193.

P. C. Dooley for appellees.

A delivery of goods by the vendor to the carrier is a delivery to the vendee and the title vests, subject only to the right to stop in transit. This right exists only so long as the goods are in the hands of the carrier *as carrier*, and actual or constructive delivery to the vendee or his agent puts an end to the right. *Hutchinson on Carriers, Sec.* 421, 417; *Benjamin on Sales, Sec.* 838; 29 *Am. Dec., note p.* 309; 105 *Mass.*, 272; 57 *N. H.* 454; 17 *Am. Dec.*, 319; *Benjamin on Sales, Sec.*, 849, 854 *and p.* 390-1; *Ib., Sec.* 841–848.

The full and complete right of property was then in Mayfield from the moment they were delivered to McLean, and they were attached as their property, and no compromise of M. & T. or promise on Wilson's part to pay over proceeds after paying his debt, could divest the attachment liens, or relieve Wilson from paying Mrs. Traylor her debt to the extent he was garnished for, and that he had in his hands. There was no essential element of estoppel in the case, *Bigelow on Estoppel, p.* 480, and no deception, fraud or collusion on Wilson's part.

SMITH, J. Mayfield Bros., merchants of Little Rock, had purchased of Mason & Trusdell, of St. Louis, a lot of butter of the value of $109.52, but had not paid for the same. The butter was shipped by rail, consigned to the vendees; but before it was delivered to them they failed in business and sent the following telegram to Mason & Trusdell: "Little Rock, Ark., Dec. 6, 1882. Business suspended. Goods at depot. Telegraph orders to agent. Mayfield Bros." Meantime, one McLean, a transfer agent at Little Rock, under a general authority previously given him by Mayfield Brothers to receive all goods consigned to them, took it upon himself to transport the butter from the depot to their place of business. And finding the store closed, he deposited it at a certain ware-

house in Little Rock, where an attachment was immediately levied upon it as the property of Mayfield Brothers, at the suit of W. T. & R. J. Wilson. Mason & Trusdell thereupon brought replevin against the constable for the butter and obtained judgment against him; but afterwards made an arrangement with the Wilsons by which the butter was turned over to them upon an understanding that they were to account to Mason & Trusdell for its value, less the amount of the claim of the Wilsons against Mayfield Brothers, say $50. However, before the excess in the hands of the Wilsons had been paid over, another creditor of the Mayfields had caused a writ of garnishment to be served upon them to answer what effects of the Mayfields they had in their hands. And thereafter such proceedings were had that judgment was rendered against the garnishees for this surplus of $59.52. The Wilsons then refused to account to Mason & Trusdell for this sum; and the last mentioned firm sued them before a Justice of the Peace for the value of the butter and recovered judgment for $109.52. But on appeal to the Circuit Court the cause was tried *de novo* before the court, a jury being waived, when the foregoing facts were developed in evidence. The plaintiffs claimed judgment for $59.52 according to their agreement for compromise with the defendants. But the court decided that the right of stoppage *in transitu* had been lost; that the butter was the property of Mayfield Brothers, when the writs of attachment and garnishment were sued out and served; and gave judgment for the defendants.

1. Stoppage *in transitu*. When right of ends.

The right of the unpaid vendor to stop goods *in transitu*, upon the bankruptcy or insolvency of the vendee, is not defeated by the mere arrival of the goods at their destination. The *transitus* is not at an end until they have come to the vendee's actual possession, or his construct-

ive possession by a delivery to his agent, *Benjamin on Sales*, 651; *Whitehead v. Anderson*, 9 *M. & W.* 518; *S. C. Tudors Lead. Cas. Mer. Law* *632 *and notes*; *Jackson v. Nichol*, 5 *Bingh. N. C.* 508 (35 *E. C. L. R.*, 202); *Crawshay v, Edes*, 1. *B. & C.*, 181 (8 *E. C. L. R.*); *Mottram v. Heyer*, 5 *Denio*, 629.

A fortiori the right may still be exercised where the purchaser declines to receive the goods. Thus in *James v. Griffin*, 2 *M. & W.* 623, the buyer, knowing himself to be insolvent, determined that he would not receive a cargo of lead that he had not paid for, but on its arrival at the wharf, where he had been in the habit of leaving his lead with the wharfingers as his agents, it became necessary to unload it, in order to set the vessel free. He therefore told the captain to put it on the wharf, but did not tell the wharfingers of his intention not to receive the lead; and they probably deemed themselves his agents to hold possession. After this the goods were stopped. Parke, Bolland and Alderson. B. B. (Abinger C. B. dissenting) held the *transitus* not ended and that the buyer's intention not to receive being proved, the wharfingers could not receive as his agents without his assent. See also *Atkin v. Burwick*, 1 *Strange*, 165; *Bertram v. Farebrother*, 4 *Bing.* 579 (13 *E. C. L. R.*); *Bolton v. Lancashire & Yorkshire R'y Co.*, *L. R.* 1, *C. P.* 431.

But the present case goes one step beyond this. "Where the buyer has become insolvent after his purchase, he has a right to rescind the contract with the assent of his vendor, while the goods are still liable to stoppage; and then the subsequent delivery of the goods into the buyer's possession cannot affect the vendor's rights, because the property in the goods will not be in the buyer." *Benjamin on Sales*, 652.

Here both parties to the contract of sale have by mu-

tual consent rescinded it. The buyer has said, In honesty the butter ought to go back, as I cannot pay for it; and he sends a telegram to the vendor signifying his willingness that it should get back to him, if by law it might. No creditor of Mayfield Brothers had then acquired any specific lien upon it, and there is nothing in our law which prevents an insolvent debtor from preferring one creditor to another. *Salte v. Field*, 5 *Durnf. & E.*, 211; *Nicholson v. Bower*, 1 *E. & E.*, 171 (102 *E. C. L. R.*); *Heirnkey v. Earle*, 8 *E. & B.*, 423 (92 *E. C. L. R.*) *Ash v. Putnam*, 1 *Hill*, 302; *Naylor v. Dennie*, 8 *Pick*, 198; *Grout v. Hill*, 4 *Gray*; *Clemson v. Davidson*, 5 *Binn.*, 392.

The butter, then, was the property of Mason & Trusdell, and not of Mayfield Brothers, at the date of the service of the attachment and garnishment. And they might have recovered the whole of it, or its value. But to avoid litigation they have agreed that the Wilsons might deduct their debt of $50 against the Mayfields out of the proceeds of its sale. And the compromise of a disputed claim is a sufficient consideration to support an express promise, although there may have been no merit or foundation for such claim. *Richardson v. Comstock*, 21 *Ark*, 69; *Snow v. Grace*, 29 *Id.*, 131; *Livingston v. Dugan*, 20 *Mo.*, 102.

True, the Wilsons have not performed their part of the agreement. But the reason for that was the service of the writ of garnishment and the subsequent judgment that the surplus in their hands be paid to the attaching creditor.

These proceedings and orders do not affect the plaintiffs, as they were no parties to them. But they explain the conduct of the defendants in not paying the surplus to Mason & Trusdell, until legally compelled to pay.

And their right to retain their own debt due from Mayfield Brothers is not forfeited by their conduct.

Reversed and remanded for a new trial.

STATE v. MURPHY.

1. INDICTMENT: *Charging offence to be "unlawfully" done.*
It is not necessary for an indictment to charge that an offense was "unlawfully" done, if the statute describing the offense does not use the word "unlawful."

APPEAL from *Van Buren* Circuit Court.
Hon. F. T. VAUGHAN, Circuit Judge.

C. B. Moore, Att'y Gen'l, for appellant.

The indictment is *in the words of the statute. Gantt's Dig., Sec.* 1512; 33 *Ark.*, 140; 40 *Ark.*, 361.

J. M. Murphy, pro se.

The indictment was based upon the Act of March 21st, 1881, and fails to follow the language. It is clearly insufficient. *Acts of* 1881, *p.* 135; *State v. Moser*, 33 *Ark.*, 140.

It is not good under Sec. 1512, Gantt's Digest, as it does not contain the word "unlawfully," which is as necessary in misdemeanors as "maliciously" is in felonies. 34 *Ark.* 550; 40 *Ark.*, 361.

SMITH, J. The indictment in this case charges that "J. M. Murphy, on the first day of October, 1882, in the County, &c., then and there, being at the private residence of one W. L. Niday, did make use of profane and insulting lan-

guage in the presence of, about, towards and in the hearing of Mrs. Rachel Lucinda Niday, wife of the said W. L. Niday, which language in its common acceptation was calculated to cause a breach of the peace, against the peace and dignity of the State. &c."

The court below sustained a general demurrer to it and discharged the defendant.

1 INDICTMENT: Charging offense "unlawfully" done.

The indictment follows the language of Section 1512, of Gantt's Digest, upon which it is based, and which creates the offence. And upon a comparison of it with the forms approved in *Hearn v. State,* 34 *Ark.*, 550 and *State v. Hutson,* 40 *Id.*, 361, it will be found to differ trom them only in the omission of the word "unlawfully." It is insisted that this omission vitiates the indictment.

In Chitty's Criminal Law, Vol. 1, p. 341, it is said: "The term 'unlawfully,' which is frequently used in the description of the offence, is unnecessary wherever the crime existed at Common Law and is manifestly illegal. So it has been adjudged that it need not be used in an indictment for a riot, because the illegality is sufficiently apparent without being averred. But if a statute, in describing the offence which it creates, uses the word, the indictment founded on the act will be bad if it be omitted; and it is, in general, best to resort to it, especially as it precludes all legal cause of excuse for the crime".

Every indictment should show plainly on its face, whether the crime is treason, felony or misdemeanor. The indictment for treason alleges that the act was committed traitorously; for felony, that it was done feloniously; and the omission of these words indicates that the offence was no more than a misdemeanor, 1 *Bish. Cr. Pro. Sec.* 534.

The disturbance of the public peace by the use of profane, violent, abusive or insulting language is a statutory offence. But the statute, in describing the offence, does not use the

word "unlawfully". And wherever this is the case, and the act charged in the indictment appears to be unlawful, it is unnecessary to allege it to have been unlawfully done, *Capps v. State*, 4 *Clarke* (*Iowa*) 502.

It can be understood from this indictment that it was found by a grand jury and that the offence was committed within the jurisdiction of the court, prior to the finding of the indictment. And the offence is stated with such a degree of certainty as to enable the court to pronounce judgment on conviction. *Gantt's Dig. Sec's.* 1781-2.

Reversed and remanded with directions to overrule the demurrer and to require the defendant to plead.

COCHRAN V. COBB AS LAND COM'R AND COCHRAN V. COBB AS COM'R OF STATE LANDS.

1. STATUTES: *Unconstitutional, effect of*

When a statute is adjudged unconstitutional it is as if it had never been. Rights can not be built up under it. Contracts depending upon it for their consideration are void. It protects no one who has acted under it.

2. LEVEE BONDS: *As payment for lands. Mandamus.*

The Commissioner of State Lands can not be compelled by Mandamus to issue a patent for land previously sold for levee bonds, though a certificate of purchase was issued and the bonds have not been returned to the purchaser. The bonds are void and worthless in the hands of any one.

3. SAME: . *Same. Rights of the State and her vendee. Tender.*

When the state has executed a deed for lands sold for levee bonds, and the lands have passed into the hands of an innocent third party for value, the State is estopped by its grant to resort to the land, but may sue the grantee for the purchase price. But where the

land though patented, is in the hands of the original vendee or those holding under him, except by purchase for a valuable consideration without notice that the entry money is unpaid, and in *all* cases where no deed has been made but the original purchaser or his vendee holds only a certificate of purchase, the State may treat the payment as a nullity and subject the land to the pur-

debt; and no tender of the bonds before suit, or with the bill, will be necessary.

APPEALS from *Pulaski* Circuit Court.

Hon. F. T. VAUGHAN, Circuit Judge.

W. F. Henderson for appellant.

1. The lands were bought and paid for in 1873 while the Levee bond act was supposed to have been in force and before the passage of the act of Dec. 14, 1874 prohibiting the Treasurer from receiving levee bonds. *Woodward et al v. Campbell*, 39 *Ark.* 580, is not in point, because in that case notes were given for the deferred payments, and the payments were made *after* the passage of the act of Dec. 14. In this case the transaction was an *executed* one on the part of the purchaser, and the State was simply a trustee. Plaintiff was instantly entitled to a patent, or his claim was wholly void. If not wholly void, it was a sufficient basis for a demand for a patent.

The levee bond act was so far a lawful authority on the part of the commissioner as to make an executed sale binding on the State. An officer cannot be required to determine whether an act of the Legislature is constitutional or not.

2. Payment in levee bonds is no stronger than a payment in counterfeit or forged notes, and in such case must be returned or offered within a reasonable time. The Treasurer took and retained the levee bonds, and plaintiff is entitled to

the land or the money value of his levee bonds. The act of an officer in discharge of his duties under an act of the Legislature binds the State. *Cook v. U. S.* 91 *U. S*, 389.

3. If the payment was void, no legal or equitable rights accrued to the holder of the certificate, and he has no right to a patent, and there is no impediment to a re-sale of the lands.

Paul Bagley, Amicus Curiae.

C. B. Moore, Attorney General, for the appellee.

SMITH, J. In the first of these cases, both between the same parties, it was alleged that one John M. Peck had, in 1873, purchased from the State 440 acres of swamp lands and had paid the price therof $330, to the Commissioner of Immigration and State Lands, who thereupon gave the purchaser a certificate of purchase, acknowledging the receipt of the purchase money in Arkansas Levee Bonds; that Peck had in 1877 transferred said certificate to the petitioner, who had produced the same to the Commissioner and demanded a patent deed for the lands, but his request had been denied. And the prayer was that the defendant might be compelled by Mandamus to issue the patent. This petition was dismissed on demurrer.

1. Effect of unconstitutional statute.

In *Smithee v. Garth,* 33 *Ark.* 17, it was declared that the supposed Act of March 23, 1871, under which the Levee Bonds were issued, had not been constitutionally passed. And in *Woodward v. Campbell,* 39 *Id.* 580, it was decided that payment for the lands of the State in Levee Bonds was no payment at all, and the purchaser acquired no additional rights thereby, "When a statute is adjudged to be unconstitutional, it is as if it had never been. Rights can not be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one

who has acted under it." *Cooley's Cons't. Lim. 4th Ed.* 227 and cases there cited.

2. Levee Bonds.

Nor can it make any difference that the so called bonds were never returned to Peck or to the petitioner. They were worthless in the hands of any one—mere waste paper. *Jones v. Ryde, Taunton*, 488. (1 *E. C. L. R.*), *Markle v. Hatfield.* 2 *Johns.* 455, (*per Kent, J.*); *Watson v. Cresop*, 1 *B. Mon.* 195.

3. Same: Rights of the State. Tender.

In the second of these cases, the petitioner stated that he had applied to the defendant in his capacity of State Land Commissioner to purchase a certain tract of eighty acres, which had been duly confirmed to the State as swamp land, and had tendered in payment the price therefor fixed by law in swamp land refunding certificates, but the defendant had refused to permit such entry and purchase because it appeared from the records of his office that another person had, in 1874, made application to purchase the same tract and had paid the purchase price in levee bonds and had received a certificate of purchase, which had not been surrendered, nor other notice given of the abandonment of his claim. And it was sought to compel the defendant to accept payment and issue a patent to the petitioner for said land, notwithstanding the previous sale, which was alleged to be void, because the payment had been made in an unlawful medium. To this petition also a demurrer was sustained and final judgment rendered, refusing the writ of Mandamus.

The theory of the petition is, that the land, never having been paid for, is still vacant public land; that the officer had no authority to sell upon a credit, nor did he undertake to do so, and that the total failure of consideration affects the validity of the entry and avoids the whole transaction.

But to this reasoning we cannot assent. The State has already sold this land once, and there is an outstanding certificate of purchase in the hands of some one. True, there

has been no valid payment. It is the same as if counterfeit money had been received. But there are only two ways in which a contract can be rescinded. One is by mutual consent; and the other by decree of a competent court.

The rights of the State and of purchasers who have paid for lands in levee bonds are these: Where the contract has been executed, that is to say, where a deed has been made and the lands have passed into the hands of innocent third parties who have paid value for it, the state is estopped by its own grant to resort to the land, (*Fletcher v. Peck*, 6 *Cranch* 87), but may maintain an action against its grantee for the purchase price. But where the land, though patented, is in the hands of the original vendee or of those claiming under him, except by purchase for a valuable consideration without notice that the entry money is unpaid; and in all cases where the contract is still executory, no deed having been made but the purchaser or his assigns holds a certificate of entry, the State may treat the supposed payment as a nullity and may subject the land to the purchase debt.

And no tender of the bonds, either before suit brought, or with the bill, will be required, but a statement of the circumstances under which they were received will suffice. *Young v. Cole.* 3 *Bing. N. C.* 724, (32 *E. C. L. R.*); *Gompotz v. Bartlett*, 2 *E. and B.* 849. (75 *E. C. L. R.*); *Gurney v. Wormersly*, 4 *E. and B.* 133. (82 *E. C. L. R.*).

The judgment in both cases is affirmed.

HANEY v. CALDWELL.

43 184
89 539

1. INSTRUCTIONS: *Repetition of.*

A multiplication of instructions announcing in effect the same le-

gal principle, tends only to encumber the record, perhaps to confuse the jury, and ought not to be encouraged.

2. CONTRACTS: *Dependent.*

Where agreements go to the whole of the consideration on both sides, the promises are dependent, and one of them is a condition precedent to the other; and before one of the parties can recover of the other he must show a performance, or readiness to perform his part of the contract.

APPEAL from *Pulaski* Circuit Court.
Hon. J. W. MARTIN Circuit Judge.

U. M. & G. B. Rose for appellant.

The court erred in modifying the first instruction asked by plaintiff by inserting the words "assenting to its terms, and thereafter holding himself in readiness to perform the same."

When two persons enter into a verbal contract and subsequently reduce it to writing, that constitutes a valid contract. It is then consummated, and no holding in readiness to perform is necessary to make it binding. If either party fails to perform, or hold himself in readiness to perform, the other may sue him for a breach. But this is subsequent to the perfecting of the contract. A contract is binding by the mutual assent of both parties. The promise of one is a sufficient consideration for that of the other.

The 4th instruction, asked by the plaintiff, is copied literally from the opinion of the court in this case when here before, see 35 *Ark.* 167 and is certainly the law of this case.

E. W. Kimbell and W. G. Whipple for appellee.

1. It was for the jury to ascertain from all the evidence what the contract was. *Parsons on Cont. Vol.* 2 * *p.* 493 *note*; 16 *Penn. St.* 43; 5 *Whart.* 393; 3 *M. and W.* 404.

An uncertain contract is void for uncertainty, see opinion in this case, 35 *Ark.* 164; 23 *Ark.* 67.

2. It was not for the court to decide what the contract was. If plaintiff had not held himself ready to perform, he would thereby have abandoned the contract. 38 *Ark.* 178.

3. The 5th instruction given by the court is clearly unobjectionable, 3 *Ark.* 259.

4. There never was any merit in plaintiff's claim.

HENDERSON, SP. J. This case was before this court and reported in 35 *Ark.*156. It was then reversed for errors of the Circuit Court in giving and refusing instructions to the jury. On the second trial exceptions were saved for alleged errors committed in the same way. It will serve no useful purpose to re-state the pleadings and evidence presented in the record, for the reason that the cause was tried the second time on substantially the same evidence it was on the first, and the opinion as reported in the 35 *Ark.* contains a very full statement of the evidence in all its material parts.

The plaintiff brought this suit to recover the sum of twenty hundred and eight dollars and thirty three cents for salary due under a contract with the defendant in the following terms:

LITTLE ROCK, DEC. 21, 1871.

J. H. HANEY, ESQ.

Dear Sir: You are hereby employed to act as my engineer in connection with my contract for the completion of the Little Rock & Fort Smith Rail Road, at a salary of twenty five hundred dollars per annum. Yours truly,

JOSIAH CALDWELL.

The defendant answered in substance and effect denying that he employed plaintiff as stated in the complaint or otherwise and that plaintiff served him as engineer or otherwise, saying that if he wrote the letter referred to it was with the

distinct understanding between him and the plaintiff that the employment and salary of defendant were both wholly dependent and contingent upon defendant's obtaining and carrying out a contract to complete the Little Rock & Fort Smith R. R. and that if he obtained the contract to complete said Rail Road plaintiff was to be employed by him. That the contract to complete said Rail Road was never obtained by defendant and that he had fully paid plaintiff for all the services he had at any time rendered him.

The plaintiff on cross-examination said: "I do not know whether the contract between the Rail Road Company and the defendant was ever signed by the parties or not. The copy shown me by the defendant was not signed, but he spoke of it as having been executed, and he did not express any doubt about going on with the work. I performed no services for the defendant under my contract with him. I did not regard myself as subject to his orders. If he had given me any directions I might have obeyed them as a matter of form or accommodation, but I understood I was the engineer of the Company and not of the defendant, and that it was the Company that had control of my time and services."

The defendant in his deposition says that in December 1871 a scheme was on foot to consolidate the Little Rock & Fort Smith and the Memphis & Little Rock Rail Roads and to lease the consolidated lines to the Southern Railway Security Company—that company having previously entered into an agreement to take a lease upon certain terms amongst which they required that the Little Rock & Fort Smith Rail Road should be completed to Fort Smith. A contract was entered into between the Little Rock & Fort Smith Rail Road Company and said defendant by which he was to complete the Railway if said Companies were consolidated and the two roads so consolidated were leased as aforesaid. The

Southern Railway Security Company refused to accept the lease and the consolidation failed and his contract never went into effect.

The plaintiff was engineer of the Little Rock & Fort Smith Rail Road Company and was present at many of the interviews had during the negotiations for consolidation and was well aware of the fact that the Southern Security Company had declined to accept the lease and that the defendant's contract with the Little Rock & Fort Smith Company had come to an end, and that it was pending those negotiations that the letter was written and the employment tendered.

The plaintiff asked the following instructions:

1. If the jury find from the evidence that the plaintiff and defendant made an oral contract substantially as set forth in letter of defendant of Dec. 21, 1871, and that at the request of the plaintiff the defendant wrote the paper dated on the day and date last aforesaid and delivered it to the plaintiff who received it as the evidence of the agreement between the parties—this was an acceptance by the plaintiff and no other acceptance was necessary to make it a binding contract.

4. The word "my" in the letter of Dec. 21, 1871 is of but little importance. It, the word "engineer", and the words preceding it in the letter, construed together, evidently mean that the defendant proposed to employ or had employed the plaintiff in the capacity of an engineer as the proof may show a contract or not. Defendant could have employed the plaintiff to serve another in the capacity of an engineer as well as himself. As to the interpretation of this letter the question is, is it a contract; and if a contract what services did the defendant thereby employ plaintiff to render, and what did he thereby agree to pay for such services? If it is a contract it is immaterial whether the plaintiff regarded himself subject by the terms of the contract to the control of the

defendant or not, provided he performed or offered or held himself ready to perform the stipulated services.

The 4th was refused and 1st given as modified by adding thereto—"assenting to its terms and thereafter holding himself in readiness to perform the same."

The Court on its own motion instructed the jury as follows:

1. The plaintiff Haney claims of the defendant Caldwell the amount of salary which he alleges is due him by contract made with plaintiff and reduced to writing in the letter or instrument of date Dec. 21, 1871. The defendant denies that he is indebted to the plaintiff in any amount and claims that the proposition of defendant contained in the letter of Dec. 21,1871 was a conditional undertaking only, and that it never in fact became operative as a contract. It is for you to settle the issues in the case. The burden of proof being on the plaintiff to satisfy you by a preponderance of evidence that under the agreement contained in said letter as explained by the other evidence in the cause he is entitled to a recovery of the defendant. You are the judges of the credibility of the witnesses and the weight of their testimony.

2. A contract is in legal contemplation an agreement between two or more parties for the doing or not doing some specified thing. 1. Parties competent to contract. 2. A consideration to support the contract. 3. The assent of the parties. 4. The subject matter of a contract or what the parties proposed as its effect.

3. It is conceded that the parties in this case were competent to contract. *As to the consideration*—The mutual undertaking of the parties to a contract or promise to pay on one side, and offer of services on the other, are sufficient considerations to support a contract binding on the parties.

4. *As to assent*—In order to constitute a valid and

binding contract there must be the assent of both parties to the same thing in the same sense. And while one party will not be permitted to avoid a valid and binding obligation upon the mere pretext that he did not understand or assent to it in the sense of the other party, yet if in fact there is an honest difference in the intention or undertaking of the parties to a contract in regard to any of the essential terms thereof, such contract could not be enforced against either party.

5. If the jury find the fact to be that by the letter of December 21, 1871, as explained in the light of all the evidence in this case the defendant's obligation was conditioned to be binding only in connection with a contract to be thereafter entered into by him for the completion of the L. R. & F. S. R. R., and they further find that such contemplated contract was in fact never made, then the defendant would not be liable.

6. But if, on the other hand, they find that the proposition was an absolute and unconditional agreement to pay such salary and was accepted by the plaintiff, and he in accordance therewith held himself in readiness to perform the same, then plaintiff would be entitled to recover the amount of his salary for such time as the same remained in force. Or if they find that the obligation o the defendant was conditioned upon his making the contemplated contract with the said Railroad Company, and that said condition was fulfilled by the making of said contract, then the plaintiff, if holding himself in readiness to perform his part of the contract, would be entitled to recover according to the terms of the contract.

7. If, in view of all the surrounding circumstances proved in this case, you find that the writing or paper as explained by these circumstances constituted a valid and binding contract under the law as given you herein; then

you should find verdict for the plaintiff and assess the amount of damage he is entitled to recover. But if, on such inquiry, you find there was no binding contract, the judgment will be for the defendant.

8. The letter or instrument of Dec. 21, 1871, is the written evidence of the alleged contract upon which the plaintiff claims to recover. As a general rule, oral evidence is not admissible to contradict or vary the terms of a valid written contract. The law will not make or permit to be made for parties a contract other than that which they have made for themselves, but if a contract is certainly not intelligible by itself, extrinsic testimony is admissible to show the intention of the parties, and this intention will be taken as the meaning of the parties expressed in the instrument, if it be a meaning which may be distinctly derived from a fair and rational interpretation of the words actually used. But if it be incompatible with such interpretation, the instrument will be void for uncertainty or incurable inaccuracy. In all such cases the extrinsic testimony is not admitted to prove what the parties to the instrument may have secretly intended, or to add to, take from, change, contradict or modify, but to find out what is the meaning of the written words they have used and the true sense thereof as they have used them.

9. The words "my engineer," as used in the letter of defendant to plaintiff are not necessarily to be construed as limiting the contract to the employment of Haney as engineer of defendant Caldwell instead of the Rail Road Company. It is for the jury to say, in view of all the circumstances, in what sense the words were used.

Two instructions given on motion of the defendant and excepted to, are as follows:

1. If from the letter of Dec. 21, 1871, from Caldwell

to Haney, and the other evidence in the case, after a fair and full consideration of the same, the jury are unable to determine what the contract between the plaintiff and defendant was, the same will be void for uncertainty, and their verdict should be for the defendant.

2. If the jury find from the evidence, taking all the surrounding circumstances into consideration, that the defendant, by his letter of Dec. 21, 1871, employed or proposed to employ the plaintiff to act as engineer for himself instead of for the Rail Road Company, and that the plaintiff did not accept such employment, and never held himself in readiness to act as such engineer of defendant Caldwell, then the plaintiff cannot recover in this action.

This court, on the first appeal, declared that "it was the province of the jury to determine whether or not the above-mentioned letter became a contract under the instructions of the court as to what is necessary to constitute the same a contract; and the meaning thereof being dependent on extrinsic facts which were disputed, it was a question of fact for the jury to decide under the instructions of the court as to the law of the case." *Haney v. Caldwell*, 35 *Ark.*, *p.* 167.

The instructions given by the court very fully and very clearly defined the law and submitted to the jury for their determination and decision, every question of fact presented on the trial. They were correctly told what the issues were, as made by the pleadings; what the disputed facts were; the necessary elements or facts to establish a valid, legal contract, and that it was their province, alone, to say in what sense the words employed in the instrument of Dec. 21, 1871, were used. There was an unqualified submission of every fact important or material to the determination of this case to them.

The 9th instruction given by the court, of its own motion, when considered in connection with those preceding it, covered all the ground of the 4th asked by plaintiff, and was in form to be readily understood and applied by a jury. A multiplication of instructions announcing in effect the same legal principle tends only to encumber the record, perhaps to confuse the jury, and is not to be encouraged. *Saddler et al, adm., v. Saddler*, 16, *Ark.*, 628 *Hanger et al v. Evins & Shinn*, 38 *Ark.*, 334. 1. Repeating instructions is to avoided.

The modification of plaintiff's first instruction was correct. "Where agreements go to the whole of the consideration on both sides, the promises are dependent and one of them is a condition precedent to the other. *Parsons Con., Vol.* 2, 676–7. 2. Dependent contracts.

Haney made no pretense of having performed, or offered or held himself in readiness to perform his part of the contract as set forth in the letter of Dec. 21, 1871. and without this he could not recover, although the contract may have been entered into and accepted by the parties as contended by appellant's counsel.

Affirmed.

Wright et al v. Morris.

1. Toll Bridge: *Avoiding tolls by crossing elsewhere: Obstructing highway.*

Appellant by license from the County Court erected a toll bridge at the crossing of a stream by the public road, and to prevent parties from crossing the stream at a ford where the old public road through his land crossed it he extended his fence across the old road. Defendant pulled down the fence and crossed at the ford and induced others to do likewise. The old road had never been

vacated by the County Court. Plaintiff sued the defendant for travelling the old road across his lands and tearing down his fences, and also for inducing others to avoid paying tolls at the bridge. HELD: That the road not being vacated the defendant had the right to travel it and to remove the obstructions, provided he did no wrongful act to make him a trespasser *ab initio*: 2. A party is not liable for damages for avoiding a toll bridge and the payment of tolls by crossing eleswhere, or for inducing others to do likewise.

APPEAL from *Sebastian* Circuit Court.

Hon. R. B. RUTHERFORD, Circuit Judge.

Rogers & Read for appellants.

It was error to exclude the charter. For the nature and character of these special privileges of franchises see *Kents Com.* 3d *Vol. Marg. p.* 458, (12 *Ed.*).

The County Court had jurisdiction to grant the franchise, and no *informality* in its order vitiated its action, or subjected it to collateral attack. *Const. Art.* 7. *Sec*, 28; *Acts* 1874-5 *p.* 242; 33 *Ark.* 191; 36 *Ib* 641 *and* 467; 19 *Ib.* 561. The power to hear and determine a cause is jurisdiction, 34 *Ark.* 105; 6 *Pet.* 709; *Cooley Const. Leni.* 398.

If the toll gate, was, as to the defendant, *no* obstruction, he being allowed to cross free, he could not be justified in law, in trespassing on plaintiffs' lands, because of the existence of the toll gate. Even if plaintiffs did obstruct the highway every day, this did not justify defendant in doing unlawful acts, or mitigate damages. When one erects a fence across a public highway, the act though unlawful, will not justify one in "destroying" the fence. He may *remove* but not destroy as by burning or chopping to pieces.

Clendenning & Sandels also for appellants.

Duval & Cravens for appellee.

The County Court had no authority to make such a contract and the charter was void, and correctly excluded. *Acts* 74-5 *p.* 242, *repealing secs* 638 *to* 645 *Gantts Dig.* A county has only specific powers, and where the Legislature points out one or prescribes the mode of the performance of its granted powers it is bound to observe them. 2 *Kans.* 115; 26 *Ark.* 454; 5 *Gratt.* 241; 92 *U. S.* 307.

Grants of franchises are construed strictly, and cannot be extended by intendment or construction. *Cooley Const. Leni.* 3*d Ed.* 394-6; 4 *Pet.* 514; 11 *Ib.* 544; 23 *How.* 462; 17 *Ala.* 576; 8 *How.* 569; 3 *Wall.* 51; 11 *Pet.* 420; 6 *Ib.* 691.

The obstruction by plaintiffs of the highway was a nuisance, and defendant had a right to abate it. *Ward on Nuisances* 763-768, *Secs* 250-256. A highway once established does not cease by non-user, until discontinued by proper authority. *Ib. Sec.* 299.

Anyone may abate a common nuisance. *Blackstone, Book* 3. *p.* 5; *Book* 4 *p.* 167 *notes.*

As to the alteration, vacation and establishing roads, see 12 *Ohio St.* 87; 5 *Ohio* 271; 24 *Ib* (*St.*) 60; 12 *Ib.* 635; 3 *Am. Dec.* 635; 35 *Ark.* 497.

EAKIN, J. Appellants sued Morris in two counts. The first premising that the plaintiffs were the owners of a toll bridge over Vache Grasse Creek, duly authorized to take tolls, charged defendant with a disturbance of their franchise, in this; that he had unlawfully and maliciously opened up, and kept open, over the lands of plaintiffs, divers roads and passages, leading to the bed of the creek and across it, in the near vicinity of the bridge, and into the public road; and had passed along said ways, with a gun inducing and guiding divers persons traveling with wagons, buggies, horses &c., to avoid the bridge, and the payment of tolls. Special damages in the loss of tolls are alleged to the extent of $92.70.

The second count is in the nature of *quare clausum fregit*, charging him with having maliciously and forcibly entered the close of plaintiffs, breaking, and tearing down the fence on the premises; throwing the rails and plank into the creek, burning a portion of the same to the value of ten dollars, driving off the plaintiffs' employes; and other specified enormities.

During the trial the plaintiffs asked leave so to amend their complaint, in accordance with the evidence which had been adduced, as to bring their case within the provisions of sec. 5743, of Gantt's Digest, which gives double damages for voluntarily throwing and leaving open bars, gates, fences &c., of another. This was refused and the plaintiffs excepted.

The jury found for the defendant on the first count, and for the plaintiffs on the second, assessing damages at $15, for which amount, with costs, judgment was rendered. The plaintiffs filed a motion for a new trial which was overruled; they made a bill of exceptions and obtained a grant of an appeal. Defendants filed no application for a new trial nor did they save any exceptions by bill, on their part, but prayed and were granted cross-appeal by this court in session.

The points presented by the motion for a new trial will be taken up seperately, with such additional statements of facts as may be necessary to make the special application of law, as to each, intelligible.

First: The court excluded from the jury a certified transcript from the County Court Records, which was offered to show that plaintiffs had been properly authorized to build a bridge and charge tolls; also to show that the bridge was upon the public highway; and that the County Court had established the bridge as a part of it. These points were embraced in the first three grounds of the motion.

In considering this it may be well to premise that as to

the first count of the complaint, the verdict and judgment of the court for the defendant on that, would not be disturbed on account of any error on trial. The count is not for a trespass on lands, although it is incidentally stated that defendant entered and passed over the lands of plaintiffs. But this is not the gravamen of the charge nor was it so intended. The gist of the complaint embodied in this count is for avoidance of tolls, by passing around the bridge, and guiding others around, so that plaintiffs were damaged by diminution of profits. It is a common law count in *case*. A bridge franchise authorizes the collection of tolls from those whose necessity, convenience, or pleasure may induce them to cross it. But it is not like an ancient common law mill to which all the inhabitants of a district were compelled to bring their corn to have it ground and tolled. Any one has the individual right to get across a river as he pleases, at his own risk, or to show others how they may do the same, and even persuade and aid them to do so, if he exacts no compensation. It makes no difference whether he does so from general benevolence, or from some ungracious dislike to the owner of the bridge. If one has an absolute and unqualified right to do a thing, the law cannot inquire into his motives in doing it, or advising others to exercise the same right. He may not trespass in doing it, but in that case he becomes liable for the trespass which is the gist of the second count. The first count shows no cause of action, and the judgment, if proper at all, must be supported by the finding on the second count. The grounds of the motion will be considered with reference to that alone.

The record tendered showed that in April, 1877, the court took up a petition of plaintiff's "with reference to the establishment of a toll bridge over Vache Grasse creek, where the same crosses the Little Rock and Ft. Smith Road in Sebastian county"; that thereupon, the County

by the County Judge, entered into an agreement with plaintiffs in this suit which was reduced to writing and spread on the record. It sets forth that the bridge over said creek where the same crosses said road had been out of repair, and that it was too burdensome on the people of the county to repair and keep it up, by a tax; that the plaintiffs had rebuilt the bridge and had it in repair; and the county was not able to pay for it. The contract went on to state that in consideration of the premises, and that the plaintiffs would, for 20 years keep in good repair said bridge with its abutments and approaches at the point aforesaid, the county "makes and establishes "said bridge across said stream a toll bridge, and gives "and grants the revenues arising therefrom to the said "Wright & Woodruff for the period aforesaid," reserving to the county the right, on payment, to take the bridge at the end of ten years at a valuation by commissioners, and to the contractors the right to remove the same at the end of 20 years if the county, then, should be unwilling to purchase it. There were other mutual agreements not important for notice. After setting forth the agreement the record proceeds to state that the contractors gave bond as required by law which was approved by the court which being fully advised did then ordain and establish rates of toll which are also set forth. This transcript was duly certified. Being offered it was objected on the ground that it only showed a contract with the county, through the County Judge, for which there was no authority in law, and that it did not show any grant of privilege to keep a toll bridge, from the county itself. The court sustained the objection.

By Act of April 3d, 1873, when the functions of the County Court were performed by a Board of Supervisors, said board was authorized to make such a contract as

that above set forth, and to grant the privilege of taking tolls, conditioned to keep the bridge in constant repair, and to take a bond to that effect from the contractor. *Gantt's Dig. Secs.*, 638, 640.

The Board of Supervisors for counties was abolished by the Constitution of 1874, and County Courts under a County Judge, established, with exclusive jurisdiction amongst other things, of roads, ferries and bridges. It was expressly provided that the Court should be a continuation of the Board of Supervisors, and all laws then in force not in conflict with the new Constitution were continued also. See *Schedule to Constitution, Secs.* 1 and 23. By the law as thus left, it would have been the legal mode of granting such a franchise, to do so by a contract between the County Judge, in court, and the grantee; and by taking bond.

By Act of March 6, 1873, the Sections above cited of Gantt's Digest were repealed, and the County Courts were authorized generally to grant the privilege to any person to build a toll bridge in the county over any water course, &c., where it might be deemed necessary to the public convenience, and too burdensome for taxation. This privilege was made exclusive in so far that the County Court after having once granted it to one person, could not confer it upon another to the injury of the first. It was transmissible by descent or assignment, but was to remain under the general supervision of the court to compel repairs. The court was also required to fix rates of toll. The provisions of the former law regarding the contract and bond are not revived.

It is plain enough in the light afforded by this legislation to see exactly what the court meant to express in the record. It took the old form of a contract with the Judge in behalf of the county which contract was embod-

ied in the order itself; but in substance and effect it is a plain grant of the privilege to complainants to build and keep a toll bridge under circumstances prescribed by the Act.

The County Court has exclusive jurisdiction in such matters. It is a court of record, ranking, within its ambit, as a superior court. All presumptions are in favor of the correctness of its orders. It is a court entrusted by the Constitution to the management of men who are not required to be learned in the law, or versed in technical forms; men who, in fact, are generally selected with more regard to their plain practical sense, and interest in county affairs, than to their familiarity with forms. It is essential, indeed, that the record upon its face, aided only by the law, should show with reasonable certainty what was done, and that it was something which the court was authorized to do, but that being done, the record is valid, and the order effective. Complainants had, and from all that appears still have the right to maintain the toll bridge, at the place designated and to take the tolls. The record was admissible, and if it were relevant or material on the second count it was error to exclude it from the jury. This leads us to consider the matters at issue on that count. The answer of defendant denies or justifies the trespass and wrongs. It is apparent from the evidence that he did tear down fences of the plaintiffs, and to reach the fords did pass over their lands along old tracts which had been obstructed by complainant; and that at least one of these passages to the fords, had constituted the old highway established by legislative enactment, and which had been generally used until the bridge was built. The only purpose which could have been served by the record offered would have been to show that they had the right to erect and maintain a toll bridge.

Conceding that, it would not give them the right to obstruct the highway leading to the ford. The order does not expressly, nor by any fair implication, vacate so much of the road as passed the ford. The bridge, although at the place was not exactly over either of the old fording ways, one of which was the old surveyed route below the bridge and the other a neighborhood way above it. It cannot be *presumed* that the County Court in granting the privilege to keep a toll bridge over a small stream, flush with water only a few months in the year, meant thereby to cut off from the community the privilege of fording the stream by the old highway, all the summer and fall, when there would be no use for a bridge whatever. This would be intolerable oppression, and throw the burden of keeping up the bridge largely upon travelers and inhabitants, passing to and fro, who would not need it, nor be benefitted by it. A toll bridge, at the crossing of a road worked and kept in repair by the county is a different thing from a toll gate on a turnpike. The latter is to take compensation for the use and convenience of the road which is built and maintained by the Turnpike Company. The gates are placed at suitable intervals for convenience, and it is a fraud on the company to go round them. Toll bridges on county roads, are simply for the convenience of those who are obliged, or prefer, to use them. The owners do not keep up the roads, and citizens of the county have the right to use the roads to the stream on each side and cross it at their own risk, without any fraud on the owner of the bridge.

TOLL BRIDGE: Avoiding tolls by avoiding the bridge. Obstructing highway

It is not necessary to decide whether the County Court has power on establishing a toll bridge to vacate so much of the road as afforded access to a ford. In view of the duties of the court to the citizens, it certainly will not be

presumed that it so intended, where the ford road would be available for the greater part of the year.

It results then that the plaintiffs, by virtue of their franchise, had no right to obstruct the old established road leading to the ford, and across the creek. It would not have benefitted them to have shown their franchise. Whether or not they were entitled to a verdict depended upon the acts of defendant in removing the obstructions which they had made of the several ways leading down through the creek channel, with the avowed purpose of compelling the whole travel to pass over the bridge. This they had no right to do, although clearly entitled to keep a toll bridge. A fair passage along the old established road should have been left open. The defendant was authorized by law whether or not the bridge was free for him individually, to remove obstructions to a public highway, and to pass over the lands of complainant along the highway, provided he did no wrongful act to make him a trespasser *ab initio*. But this he did, as shown by the evidence. He removed obstructions also on the way above the bridge, which was not the highway, and both above and below he seems to have committed unwarrantable acts of violence, not necessary to the object of opening the highway. The jury found for the plaintiffs on this count, and it cannot be well conceived how they could have rightfully done better for the plaintiffs, if their franchise had been shown, for that franchise did not warrant them in making obstructions in the first place. They were not hurt by the exclusion of the transcript, and, in that, there is no reversible error.

The remaining ground for a new trial concerns instructions refused for plaintiffs, and given against objections for defendant. It would be long to take them up *seriatim*, It suffices to say that so far as they may have been erro-

neously given or refused, they were cured by the verdict in favor of plaintiffs, and upon the point as to what constitutes a trespass, they are in accordance with the principles announced herein. That is to say, that although the defendant might lawfully pull down and remove obstacles in the highway, and pass over the lands of the plaintiffs along the highway, yet if he should commit any act in doing so destructive to property and not fairly necessary to the exercise of the right, not only to pass, but to remove a purpresture, he would be liable in damages.

The plaintiffs having given occasion to the conduct of defendant by their own wrongful act, are not in a meritorious position to claim vindictive or exemplary damages for any excess of the defendant, not plainly prompted by malice. The verdict well covers all actual injury, and there is nothing in the case of which plantiffs may complain. To throw open and leave open the fences was in this case permissible, and the acts done are not within the mischief of the act giving double damages.

The defendants took no bill of exceptions, and made no motion for a new trial. We find no error in the record proper, and there is nothing in their cross appeal of which we may take hold.

Affirm.

DIVER ET AL. V. FRIEDHEIM

1. TAX SALE: *When land purchased from U. S. is subject to taxes.* Land purchased from the United States becomes subject to taxes as soon as the entry is made and the price paid, though no patent has been issued; but until the price has been fully paid, however long after the entry, the land can not be taxed, and a sale for taxes is void:

2. TITLE TO LAND: *Surrender of deed by grantee to grantor.*
A grantee can not re-vest his grantor with title to land by returning the deed to him.

APPEAL from *Ouachita* Circuit Court in Chancery.
Hon. C. E. MITCHELL Circuit Judge.

Barker & Johnson for appellants.

The parol purchase from L. R. Meek by J. L. Meek was valid, as he paid purchase money, and was then entitled to possession and title. *Carroll v. Wilson*, 21 *Ark.* 32; *McNeal v. Jones* 21 *Ark.* 279. Appellant's deed should be canceled for fraud on his part, as he paid nothing for it, and had notice of the right of appellant. *Wynn v, Garland* 19 *Ark.* 23; *Sheilds v. Tramel et al.* 19 *Ark.* 61; *Cook v. Bronawgh* 13 *Ark.* 183.

The decree below should be reversed, even if the deed of appellee should not be canceled, because appellant should be entitled to have the purchase money of the land refunded to him, at least his cost, and the $100. *Kelly heirs v. McGuire et al.* 15 *Ark* 593.

The cause of appellee was barred by Statute of Limitation, appellant and those under whom he claims having been in peaceable, adverse possession for more than seven years before suit brought, and which is got up in the answer and cross-bill. *Gantt's Digest, Sec.* 4113.

H. G. Bunn for appellee.

The title of the land in controversy remained in the U. S. until tke right to a patent, by the purchaser, was complete; and as L. R. Meek, the original purchaser, had not paid the full amount due to the U. S., it was not subject to taxation,

and a sale of the land for non-payment of taxes thereon was void.

The right to the patent was not complete until payment of all money due on all the land.

The law, as applicable to this case, is fully discussed and definitely settled in 16 *Wallace U. S. p.* 603 *and* 22 *Wallace p.* 460.

SMITH, J. Friedheim brought ejectment against Diver for W. ½ N. E. ¼, E. ½ N. W. ¼ and N. W. ¼ S. E. ¼ Sec. 17, T. 12 S. R. 18 W. The evidences of his title consisted of a patent from the United States to Linzey Meek, made in the year 1881, but based upon an entry in 1860, and deeds of conveyance from the patentee and his wife to the plaintiff in 1880 and 1881.

Diver's chain of title was, 1st. A deed made in 1876 by Linzey Meek to one Donaldson for E. ½ N. E. ¼, S. E. ¼ N. W. ¼ and N. W. ¼ S. E. ¼ of said section 17; 2d. An alleged lost deed from Donaldson to J. L. Meek; and 3d. A deed of J. L. Meek to Diver for the same lands that are described in the deed to Donaldson. The answer alleged that there was a misdescription of the first tract (E. ½ N. E. ¼ being used for W. ½ N. E. ¼) and an unintentional omission of one parcel of forty acres (N. E. ¼ N. W. ¼) in the defendants title papers. And the prayer was that the deeds to plaintiff might be canceled as a cloud upon the defendant's title. The cause was transferred to Chancery and the plaintiff filed a reply, treating the answer as a cross-bill. He admitted that Linzey Meek had conveyed the lands to Donaldson in 1876, but insisted that this trade had afterwards been rescinded by mutual consent and that Donaldson had surrendered his deed and the possession of the land to his vendor.

The appellant, Keith caused himself to be made a party defendant to the suit and set up sundry tax-titles, founded

upon forfeitures of the lands for non-payment of state and county taxes for the years 1875 and 1876. The decree below was in favor of the plaintiff for all of the lands.

1. TAX TITLE: Government entries when taxable.

The claim of Keith was without merit. These lands were not taxable in 1875-6. This is not because the government had not at that time parted with the legal title, for lands that have been entered an paid for become at once and before emanation of the patent subject to taxation. *Witherspoon v. Duncan*, 21 *Ark.* 240; affirmed on error, 4 *Wall.* 210.

But the reason is that the right of Linzey Meek to a patent was not then complete. He had purchased the land in 1860 from the proper agent of the government, at the price, as he supposed, of twenty five cents per acre; had paid $50 and had received a certificate of entry. But when the transaction was reported to the General Land Office at Washington, it was discovered that the price was seventy five cents per acre. The payment was therefor short by $100; the entry was suspended and the patent was not issued until the deficiency was made good. This was not done until the 27th of October, 1880, when the defendant Diver paid the amount due the Government. Thus an act remained to be done, going to the foundation of Linzey Meek's right, before the equitable title was fully vested in him. *Railway Co. v. Prescott*, 16 *Wall.* 603; *Railway Co. v. McShane*, 22 *Id.* 444.

The defendant, Diver, wholly failed to connect himself with the title of the patentee. His grantor, J. L. Meek, never had any interest, legal or equitable, in the lands. The alleged lost deed from Donaldson to him had no existence in fact. It is apparent from J. L. Meek's own testimony, not only that he had no deed from Donaldson, or from any other person, but that he had no contract with Donaldson in relation to the land. According to his own version, he merely found the deed of his brother, Linzey, to Donaldson

in a house where it had been left when his brother removed from the county. He took possession of the paper and he says he afterwards bought the land from his brother. In this he is not borne out by his brother's evidence and it is not the title set up in the answer. But if the fact was as he states it, the purchase was a void one for the want of any writing. And it was not taken out of the operation of the statute of frauds by any delivery of possession.

2. Title not restored to grantor by surrender of deed to him.

This leaves the plaintiff's title clear to all of the lands which Linzey Meek had not previously conveyed to Donaldson. With regard to them, the attempted cancellation by parol and the surrender by Donaldson of his deed and of the land did not operate to re-vest title in Linzey Meek. In those lands, therefore, Linzey Meek had nothing in 1880-1, which he could convey to the plaintiff. *Cunningham v. Williams*, 42 *Ark.* 170, and cases cited.

The Donaldson deed does not appear to have been recorded; but the plaintiff bought with a full knowledge of its existence.

The decree is affirmed so far as it relates to W. ½ N. E. ¼ and N. E. ¼ N. W. ¼ of sec. 17; but as to the remaining eighty acres, viz: S. E. ¼ N. W. ¼ and N. W. ¼ S. E. ¼, it is reversed and a decree will be entered here, dismissing the plaintiff's complaint. No affirmative relief can be given to Diver in respect to these; but he was in possession at the commencement of the suit and that possession must be respected until a better right is shown. Diver is also entitled to his costs in this court.

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HICKMAN ET AL V. FORD & CO.

1. REPLEVIN: *Identity of goods: Separate value of each article.*

In ascertaining the separate value of each article of goods replevied from a sheriff who had seized them under an attachment, it is admissible for the jury to take to the jury room the invoice of the goods taken by the sheriff when he took possession of them, where the invoice is proved to be correct in description and value.

APPEAL from *Benton* Circuit Court.
Hon. J. M. PITTMAN Circuit Judge.

E. S. McDaniel for appellants.

It was error to permit plaintiff, after submission of the case to the jury to amend the complaint. *Gantt's Dig., Secs.* 4613–4616. The jury should have found the separate value of each article. 37 *Ark.*, 545.

E. P. Watson for appellees.

The bill of exceptions not setting forth the instructions nor all the evidence, this court will affirm. 40 *Ark.*, 185.

The amendment was proper. *Gantt's Dig.*, 4616; 33 *Ark.*, 811; 1 *Metc.* 339. So the sending the jury back to amend their verdict. *Gantt's Dig., Sec.* 4699, 4619; 7 *How.*, 21; *Hilliard on New Trials, p.* 107–8–9.

SMITH J. This was replevin for a stock of merchandize against a sheriff, who had seized the same by virtue of sundry attachments against parties from whom the plaintiffs had previously purchased. The jury found the issues for the plaintiffs and ascertained the aggregate value of the goods. This verdict the court refused to receive and directed the jury to find the separate value of each article. As there were several hundred articles and it was obviously impossible for the jury to remember all of them and the value of each, they were permitted to take with them to the jury-room a certain invoice of the goods. It had been proved on the trial that this invoice had

been made after the sheriff had taken possession of the goods and while they were still in his hands; that it contained a correct list of them and that each article was of the value annexed to it in the invoice. The jury then found the total value of the merchandize and the separate value of each article to be as stated in the invoice. The bill of exceptions does not contain the charge of the court, nor any of the testimony except what related to the identification and value of the goods.

The only question, therefore, is whether the identity of the goods was sufficiently proved and their value found by the jury, within the rule announced in *Harp v. Ford*, 37 *Ark.*, 544.

Upon these points we entertain no doubt and the judgment is accordingly affirmed.

BLACKWELL v. GLASS

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1. EVIDENCE: *Practice in other States. how proved.*
Matters of practice in another State may be proved by the testimony of lawyers skilled in the laws, usages and practice of the State.

2. EVIDENCE: *Of Justice's judgment from another State.*
A. Justice's judgment from another State can not be proved by a certified copy of his minutes like a certified transcript from a court of record. The original minutes must be produced, or a copy verified by the testimony of witnesses who have compared it with the orignal.

APPEAL from *Yell* Circuit Court.

Hon. H. S. CARTER Special Judge.

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W. D. Jacoway for appellant.

The return endorsed on the summons was signed by a "Deputy Sheriff," without disclosing the name of his principal, and is *void*. *Freeman on Judgments* 3*d Ed. Sec.* 521; 1 *Ark.* 268.

The record was not duly authenticated. *Act of Cong. May* 20*th* 1790; *Hempst.* 538. Judgments of Justices of the Peace are not within the Act of Congress, 1 *Gr. on Ev. Sec.* 505 *and note* 6; *Gantts Dig. p.* 136, *note b. &c.*; 5 *Wend.* 148; 21 *Am. Dec.* 172; *Freeman on Judg. p.* 134 *note* 1, 3*d Ed. and* 577; 13 *Ark.* 33.

Justice's Judgments must be proved by the oath of witnesses who have compared the copy produced with the original. *Freeman on Judg. Sec.* 577; *Gr. on Ev.* 13*th Ed. Vol.* 1 *Sec.* 513.

Harrison & Crownover for appellee.

The service by the "Deputy Sheriff" was complete and good. *St. of Tenn. Sec.* 4147, and it was proper to prove the laws, customs, practice &c. by the testimony of lawyers skilled in the laws of that State as was done in this case. 17 *Ark.*, 154; 11 *Ib.* 157; 10 *Ib.* 516; 12 *Ib.* 672.

The transcript was sufficiently and properly authenticated, and was conclusive as to all matters except jurisdiction of the person and subject matter. 35 *Ark.*, 331; 11 *Ib.* 368; 12 *Ib.* 756; 13 *Ib.* 431; *Morris v. Curry MS.*

The Statutes of Tenn. introduced and the evidence of skilled atty's. showed jurisdiction of the subject-matter, and the summons and return show service, giving jurisdiction of the person.

As to the conclusiveness of judgments in Sister States, see 13 *Ark.*, 436; 2 *Chitty Pl.*, *top p.* 243, 244 (6 *Am. Ed*); 3 *Am. Law Reg. p.* 110; 4 *Ib.* 8; 12 *Ib. p.* 45.

SMITH, J. This was an action upon a judgment render-

ed by a Justice of the Peace in the State of Tennessee. The defendant pleaded *nul tiel* record, that the supposed judgment was rendered without any notice to the defendant, that the Justice of the Peace had no jurisdiction of the person of the defendant, nor of the subject-matter of the action, and *nil debet*. On the trial the plaintiff read in evidence what purported to be a certified copy of the proceedings and judgment of the Justice, authenticated under the Act of Congress of May 20, 1790.

1. EVIDENCE: Proof of practice in other states.

The introduction of the transcript was resisted by the defendant. One objection was, that the return of the process designed to bring the defendant before the Justice was signed by a person who describes himself as Deputy Sheriff without disclosing the name of his principal.

It is a general rule that a deputy has no power to act officially except in his principal's name, *Hyde v. Benson*, 6 *Ark.*, 396; *Rowley v. Howard*, 23 *Cal.* 401. But in this case the depositions of practicing attorneys in Tennessee, skilled in the laws, usages and practice of the courts of that State, were taken to prove that such a return was sufficient there to authorize judgment. And as this is a question of local practice, such depositions were competent proof. In *Barkman v. Hopkins*, 11 *Ark.*, 157, it was ruled that it might be proved by witnesses that according to the law, usage, practice and decisions of the courts of Louisana, service of citation upon one partner authorizes proceedings and judgment against the firm. And in *McRea v. Mattoon*, 13 *Pick.*, 39, the Supreme Judicial Court of Massachusetts decided that it might be proved by the evidence of witnesses that, by the law of North Carolina and usage there, the bail was so far a party to the record against his principal as to be bound to take notice of proceedings against him.

2. SAME: Of Justice's judgment in other states.

A more serious objection to the admission of the transcript is, that the Act of Congress for the authentication of

judicial records and proceedings does not apply to judgments of Justices of the Peace. The Act directs that the judicial proceedings of other States shall be proved by the certificate of the clerk, authenticated by the signature of the judge. This goes upon the supposition that the court whose proceedings are to be thus authenticated, is so constituted as to admit of such officers. And it has been held to follow that the adjudications of Justices of the Peace, who do not record their proceedings formally through a clerk, are not within the act, either as it regards the means of authentication, or their effect when proved. The judgment of a Justice of the Peace of a Sister State must consequently be proved by the production of the original minutes, or by the oath of witnesses who have compared the copy produced in evidence, 1 *Gr. Ev. Sec.* 505,515 ; *Freeman on Judgments, Sec.* 577 ; 2 *Am. Lead. Cas. 5th Ed.* 660, note to the case of *Mills v. Durgee* and *McElmoyne v. Cohen.*

The Circuit Court erred in the admission of the transcript without due proof of its authenticity, and its judgment, which was against the defendant, is for that reason reversed and the cause remanded for another trial.

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Abbott v. Jackson.

1. Married Woman: *Partner in trade.*

A married woman may, under the Act of May 28, 1873, form a partnership as a sole trader with a third person other than her husband, and will, as to her separate property, be bound by all the contracts of the firm as effectually and to the same extent as if she were a man.

APPEAL from *Randolph* Circuit Court in Chancery.
Hon. J. G. FRIERSON Circuit Judge.

N. & J. Erb, for appellant.

Mrs. Jackson was engaged in business on her own account as a partner of Conner, and they bought the land as a partnership investment and it was used for partnership purposes. Being so used, it ought to be treated as personalty, and the $1000 invested by her can be entitled to no superior recognition or preference.

The Act of 1883 cures all defects in the acknowledgment of the mortgage. She was estopped, if not by her own acts and conduct, by those of the firm of which she was a member.

W. F. Henderson, for appellee.

The nature of Mrs. Jackson's estate prevented her from conveying her estate except as prescribed by statute. 15 *Ark.*, 479; 29 *Ib.*, 346; 30 *Ark.*, 30; 32 *Ib.*, 458.

The mortgage and note being void as to her, and she having put her money into the land, and being a joint tenant and owner with Connor, she had a preferred lien for the amount due her with interest.

Connor could not bind her by taking stock in a wild-cat concern, nor has she ever done any act by which she conveyed or bound her estate.

EAKIN, J. This is the same case which was before us at the May Term, 1880, under the style of *Connor, Ford's Adm. et als, v. Abbott*, (35 *Ark.*, 365), and then remanded for further proceedings, under such amendments as the parties might be advised to make.

Abbott filed an amended bill, stating that since the commencement of the action the mills and machinery of

the Fourche Manufacturing Company had been destroyed by fire, leaving only the lands, and a damaged Turbine wheel; that in the formation of the company the lands and mill had been valued at $16,000, for which stock was issued to the members of the company in shares of $100 each; that he himself took 25 shares, to be credited on a mortgage debt at the date of the acceptance of the stock, leaving a balance of his mortgage debt secured by 240 acres of land in the original mortgage, not sold to the Mill Co. and also by $6000 worth of shares in the Mill Company which he held as collateral, the same being the property of Webb Connor. The other owners of stock are designated and made parties showing their respective shares, one of them being Ford, one of the mortgage debtors, who has 30 shares. He prayed for a sale of the mill property, that the proceeds might be divided, *pro rata*, and that the amount coming to Webb Connor on the $6000 of stock which complainant held as collateral, should be applied to his mortgage debt, and further that his mortgage be foreclosed on the remaining 240 acres of land not owned by the company. So far the prayer is strictly in accordance with the former opinion of this court as to his rights. He prayed in addition that the proceeds on Ford's shares, who was as above stated, one of the mortgage debtors, should be applied to the debt. Ford had died and the suit was revived against his administrator. As to Mrs. Kate Martin, the suit was dismissed.

Afterwards, Mrs. Martin, who meanwhile had become a widow, and had intermarried with Jackson, came with her husband into court, and, by leave, they were made defendants for the purpose of filing a cross complaint. That set up an interest in Mrs. Jackson of a moiety of all the lands, alleging that they had been conveyed by

title deed to her and Connor from Ford; and that she had never parted with any of her interest to the manufacturing company or otherwise. They allege that the lands were not capable of division without deterioration of value, and pray that all may be sold together for partition.

The plaintiff answered this cross bill, setting up the facts, that Mrs. Martin and Connor had entered into partnership regarding the land and mill upon it, for the purposes of trade. That it had been sold (or rather 440 acres of it) to the Fourche Manufacturing Company for purposes of trade, or rather converted into the property of a joint stock company, by said firm of Connor & Co. That said firm, in which Mrs. Martin had a half interest received from the company for the land thus put in, the full amount of sixteen thousand dollars in paid up stock; which, under Connor's management, was all, or mostly, used; first, in paying off $3000 balance of the original purchase money; 2nd, in paying $2500, and making a collateral deposit of $6000 with Abbott to secure a loan which had been made to Connor & Co., of money which had been used in a great part, to improving the mill property; and, 3d, in paying off creditors of Connor & Co.

Upon hearing of the case upon evidence which does not materially affect the facts as set forth above, and in the former opinion, the Chancellor decreed a sale in separate lots, of the mill property, and the 240 acres originally purchased and not transferred to the company. He further found that Mrs. Martin had paid one thousand dollars of the purchase money to Ford, and that it had never been repaid to her. Sales of the property were made on time and the proceeds brought by the commissioner into court. In the final decree the court decreed

that Mrs. Martin (now Mrs. Jackson) should be repaid her $1000 with interest out of the proceeds of all the different lots according to a *pro rata*; as a preferred lien.

A decree for the mortgage debt less $2500 for the stock, and a further credit of $500, was rendered against Connor and the estate of Ford, with interest according to the face of the paper, amounting in the aggregate on the 18th of Aug., 1882, to $6752.38.

After paying Mrs. Jackson, it was decreed that all the money arising from the sale of the company's property be divided *pro rata* amongst the stockholders, in which division Abbott was to receive the dividends on the $6000 which he held as collateral and to credit the same on his judgment. The dividends on the $2500 of stock to be received as his own. It was also decreed that after paying the *pro rata* to be assessed for Mrs. Jackson as a part of her allowance of a thousand dollars, he should receive the whole of the proceeds of the sale of the 240 acre tract not belonging to the company. Abbott appeals.

The decree is only complained of in one particular; that it recognizes the right of Mrs. Jackson to withdraw from the proceeds of the lands the amount which she originally paid. We fail to perceive any sound principle to sustain this special provision of the decree. She does not ask rescission, and could not have it upon asking, since she has enjoyed the benefit of the purchase and does not propose to refund. A married woman may receive a conveyance, legal or equitable, although she cannot bind herself personally to pay the consideration. The vendor's lien, however, remains.

1. MARRIED WOMAN: May be partner in trade.

It is well settled too that a married woman under such statutes as that of April 28th, 1873 can form a partnership as a sole trader with a third person other than her husband, and will as to her property be bound by all the

contracts of the firm as effectually, and to the same extent, as if she were a man. *Newman v. Morris*, 52 *Miss.*, 402; *Schouler on H. & W. Sec.* 317; *Contr. of Mar. Women*, (by Kelly) *Chap.* 6, *Sec.* 16; *Bishop on Mar. Women*, *Vol.* 2.

This point was not decided in the former opinion. It is raised now by the plaintiff in opposition to a cross bill filed by Mrs. Jackson, claiming half of the whole proceeds of the sales as her own. She is *actor* now, and must offer to do equity. She had gone out on the former decision as defendant, upon the ground (as then appeared) that she was not bound by the note or mortgage to Abbott. The latter, in obedience to the mandate of this court, had amended his bill to wind up the affairs of the Fourche Company, and have the proceeds applied, *pro rata*, to the stockholders. His object was to realize the most he could on the note through his own stock and that which he held as collateral. Mrs. Jackson comes in by leave again and claims half those proceeds. He had the right to show that she was not equitably entitled to them.

Whatever may have been the object in buying the lands from Ford, nothing was done before the passage of the Act of April 28th, 1873, or at least very little. Either from that date, or afterwards, there existed a partnership between her and Connor, under the firm name of Connor & Co. Her husband had no interest in it. She was a sole trader, and was liable for all proper debts of the firm. She united in borrowing money from Abbott for mill purposes. It is the law of this case now, announced upon a transcript which did not fully reveal all the facts, that she is not bound by that note, legally, nor by the mortgage, yet it cannot be held, equitably, that she may repudiate payments made with her assent express or implied, upon that debt.

Whilst the land was still bound to Ford for $3000 the

firm of Connor & Co., unite with others and put a part of the land into a joint stock company, agreeing to take for it $16,000 of paid up stock, and continue the business. This paid up stock was almost wholly applied to paying balance to Ford, which relieved her of the lien, in paying part of Abbott's debt, in giving Abbott collaterals which satisfied him in full as to all claims against the partnership property, and in paying large debts of the firm for which she was bound. She was present on the place all the while, and made no objection; was sued with her husband and made none, on this point; became discovert and made none; married again, and being it seems, first advised by the opinion of this court that she was not bound by the note and mortgage to Abbott, now avails herself of that position to claim half the proceeds of the sale of the mill property. It is a *non sequitur*. She may be bound neither on the note or mortgage, and still may have so acted through her partner as to vest an unincumbered title in the company which paid her and her partner full value for the property and continued the business with Connor & Co., still remaining partners.

It would be so palpably and grossly inequitable to the members who formed the company to now allow her to reclaim a moiety of the property, without any offer to refund, that the mere statement of the case carries conviction.

It does not improve her equity in the least that she paid in a thousand dollars, and got nothing back. *Feme covert* traders must incur the risks of trade. Those with whom they deal are not insurers against loss.

We see no reason, however, why she cannot have half the proceeds of the 240 acres in another tract. That was never put in the Fourche Co., and with regard to it she and Connor were tenants in common. It is as we have

said the law of this case that the mortgage as to her was void. The decree must be corrected in this also. Defendant did not appeal on this point, but may have been satisfied with the whole decree. If the appellant is allowed the correction of the error as to the $1000 it is fit that he should be compelled to correct errors for which the $1000 may have been taken as compensation.

Affirm the decree in all respects save in the points above indicated, and remand with directions to the court below in administering the proceeds of sale to pay *all* the products of the sales of the Fourche Co. property to the stockholders, *pro rata*, in the manner already provided after the court below had erroneously deducted the $1000 for Mrs. Jackson. If the dividends of Abbott's own stock and that which he holds as collateral may not pay the debt, he may then exhaust half the proceeds of the sale of the 240-acre tract. The other moiety from that tract will be adjudged to Mrs. Jackson. Of course there may be execution for the balance. The costs below will still be in the discretion of the Chancellor. The costs of this proceeding will be here against the appellees.

PERKINS ET AL v. HOLMAN ET AL.

1. CITIES AND TOWNS: *Annexation of territory to*: *Proceedings to quash.*

   The petition of parties for *certiorari* to quash an order of the County Court annexing territory to a town, must show that the petitioners have an interest in the question as residents or owners of property, either in the old town, or the territory annexed.

2. PRACTICE IN SUPREME COURT: *No reversal for errors without injury.*

The Supreme Court will not reverse except for errors which are substantial and injurious to the appellant.

APPEAL from *Sevier* Circuit Court,
Hon. R. G. SHAVER Special Judge.

J. E. Borden and *Eben W. Kimball*, for appellants.

(Argue upon the question of notice, and the merits generally, which questions are not gone into by the Court.)

B. B. Battle for appellees.

The petition of appellants does not show that they are interested parties. Under Sec. 81, Act Mch. 9, 1875, Acts 1874–5, p. 34, 35, &c., no one other than interested parties have a right to interfere to prevent annexation. The petition does not show that the territory had been accepted by the town of Locksburg. Petitioners have shown no right to complain. *Powell on Appellate Proceedceedings, p.* 352, *Sec.* 10, *and Acts* 1874–5, *p.* 34, *Sec.* 80–81

SMITH, J. Perkins and thirty-six other persons joined in a petition to the Circuit Court of Sevier County, praying that the proceedings and order of the County Court in the matter of the annexation of certain territory to the incorporated town of Locksburg might be brought up on *certiorari* and quashed for the want of the notice prescribed by law and for other causes. The County Judge and the Mayor, Aldermen and Recorder of the town were made defendants to this petition. After the proceedings and orders of the County Court had been certified up, the defendants filed a motion to quash the writ of *certiorari*—in legal effect a demurrer to the petition—because it appeared that the judgment and proceedings were regular

and in pursuance of law. This motion was sustained and the petition dismissed.

Without considering the merits of the controversy, there is one insuperable obstacle in the way of reversing the judgment below. Neither the petition, nor any other part of the record, shows that the petitioners have any interests to be affected by the determination of the question sought to be presented. It is not alleged that they, or any of them, reside, or own property, either in the old town, or in the territory proposed to be annexed. It does not appear what right the petitioners have to interfere to prevent annexation. This is a subject upon which no presumptions can be indulged by an appellate court. There must be a substantial error, injurious to the appellants, before we can disturb the judgment of the Circuit Court.

Affirmed.

DEFEE V. SMITH.

1. NOTES AND BILLS: *Draft on particular fund: Conditional acceptance.*

Kendrick delivered to Smith the following draft:

"Mr. John M. Defee:

"Please pay to J. G. Smith the sum of four hundred and fifty dollars, amount due me for carrying the mail from Camden to El Dorado for the last quarter of 1880."

R. S. KENDRICK."

Defee accepted the draft for payment as soon as he could get a settlement of his accounts with the Government for the same service. In a suit on the acceptance, HELD: 1st, That the draft was not on a particular fund, but absolute and unconditional. 2nd, Both parties were bound by the conditional acceptance, and the condition being performed, the acceptor must pay the draft.

APPEAL from *Union* Circuit Court.
Hon. C. E. MITCHELL Circuit Judge.

H. G. Bunn, for appellant.

The instrument is not a bill of exchange, but a mere certificate of indebtedness from appellee to the drawer. 11 *Ark.*, 314. It was drawn on a particular fund. 16 *Ark.*, 494. The acceptance was contingent and the contingency might never happen. The most that could be said of the order and acceptance is, that an action for money had and received might be maintained. 14 *Ark.*, 389; 5 *Ark.*, 401. The acceptance was for an uncertain and undetermined amount; and for this reason a mere accommodation and without consideration, &c.

G. W. Williams and *W. H. Langford* for appellee.

The instrument has all the requisites of a bill of exchange. It is not drawn on a particular fund. It is an absolute order to pay with a direction to the drawee to reimburse himself out of a designated fund. *McLeod v. Snee*, 2 *Stra.*, 762; *Dan. on Neg. Inst.*, 43; 51 *Me.*, 433; 6 *Tex.*, 229; 6 *Mich.*, 326; 34 *Mich.*, 29; 33 *Ind.*, 511; 23 *Mich.*, 260; 33 *Ib.*, 32; 64 *Me.*, 37; 4 *A. & E.*, 786; 122 *Mass.*, 74; 5 *Duer*, 207; 33 *Ark.*, 37; 6 *Cush.* (*Mass.*), 6, *&c.*

The instruments in 11 *Ark.*, 314; 14 *Ark.*, 389; 16 *Ib.*, 594, and 5 *Ib.*, 401, were not bills of exchange, and these cases not applicable.

2. The complaint alleges that the bill was accepted; this was admitted, by the demurrer, to be true.

NOTES AND BILLS. Draft on particular fund. Acceptance.

SMITH, J. The payee sued the drawee upon his alleged acceptance of the following draft:

"EL DORADO, Ark., Jan'y 13, '81.

MR. JOHN M. DEFEE,

Will please pay to J. G. Smith the sum of four hun-

dred and fifty dollars, am't due me for mail service for carrying the mail from Camden to El Dorado and from Camden to Hampton for the last quarter of 1880.

R. S. KENDRICK."

The complaint alleged that the draft had been presented to the defendant on the 29th of January, 1881, and that he then accepted in writing the same for payment as soon as he could get a settlement of his accounts with the Government for the same service, provided there were no deductions on account of Kendrick's failure to carry the mail on said routes; that said account had been settled and the defendant had received his pay for said quarter before the institution of the suit and without any diminution of the amount for any delinquency of Kendrick.

It was further alleged that the defendant had retained the draft and refused to return it after demand therefor, or to pay its contents. To this complaint a demurrer was overruled and the defendant saying nothing further, final judgment went against him.

It is insisted that the order sued on was not a bill of exchange at all, being drawn upon a particular fund. The reference in the draft to the "amount due" the drawer "for mail service," is merely an indication to the drawee how to reimburse himself or to show to what account it should be charged. Such a statement as to a particular fund does not vitiate the bill. This was decided as long ago as the case *McLeod v. Snee*, 2 *Stra.*, 762; *S. C.* 2 *Ld., Raym*, 1481, where the instrument requested the drawee to pay a certain sum, "as my quarterly half pay to be due from 24th of June to 27th of September next, by advance."

In *Redman v. Adams*, 51 *Me.*, 433, where the bill said, "and charge the same against whatever may be due me

for my share of fish," it was held that payment was not limited to the proceeds of the fish. And in *Wells v. Brigham*, 6 *Cush.*, 6, the form of the instrument was—Mr. Brigham, Dear Sir: You will please pay Elisha Wells $30, which is due me for the two-horse wagon bought last spring and this may be your receipt." Shaw, C. J., delivering the opinion of the court, said: "The parties are all specially named, the drawer, the drawee and the payee. The draft is payable at a time fixed, to-wit, on demand; on no contingency or condition, but absolutely, for a sum certain, out of no special fund, but by the drawee generally. The fact that the draft indicates a debt due to the drawer as the consideration between drawer and drawee does not make it the less a cash order or draft." See also 1 *Daniel Neg. Inst.*, Sec. 51 2*nd Ed.*

It is further insisted that the acceptance was for an uncertain amount and was nothing more in effect than an undertaking on the part of the defendant to withhold payment of his undetermined indebtedness to Kendrick, in order to pay it over to the plaintiff. Sec. 554 of Gantt's Digest enacts that every person upon whom a bill of exchange is drawn and to whom the same may be delivered for acceptance, who shall refuse within twenty-four hours after such delivery, or within such time as the holder may allow, to return the bill to the holder, shall be deemed to have accepted the same.

But no special importance is attached to this statute in the present case. According to the pleadings, the acceptor has made, and the holder of the bill has taken, a conditional or qualified acceptance, and both parties are bound by it. 1 *Daniel Neg. Instr.*, *Secs*, 508–9, 515, *et seq.*; *Story on Bills*, *Secs.* 239, 240.

The complaint alleges, and the demurrer admits, the performance of the condition.

Affirmed.

MEMPHIS & LITTLE ROCK RAIL ROAD AS RE-ORGANIZED v. SANDERS ET AL.

43 225
67 516

1. RAIL ROADS: *Negligence in killing stock.*

To excuse a rail road company for negligence in killing stock wrongfully upon its track, it must appear that there was no negligence of the engineer in keeping watch or in observing signals of danger, and that reasonable care was exercised to avoid the collision after the danger was discovered.

APPEAL from *Lonoke* Circuit Court.
Hon. F. T. VAUGHN Circuit Judge.

Geo. Sibley for appellant.

While the instructions, most of them, are law, they were not applicable to the proof in this case, and hence abstract and misleading. 37 *Ark.*, 591-598.

The court should have added to the 8th instruction, the prayer of defendant, "it is only for culpable negligence of defendant after being apprised of the situation of plaintiffs' property that defendant is chargeable." This is elementary law.

Where the injury is the proximate cause of plaintiff's negligence he cannot recover. 36 *Ark.*, 46, 376-7; 5 *Otto* 442; 15 *Rep.* 555; 16 *Ib.* 141; 12 *Ib.* 69; 14 *Ib.*, 542; 1 *Redf. on R'y.* 500-573; 22 *Am. Law Reg.* 117. The horse by the use of ordinary care and skill of plaintiff could not have been upon the track.

Defendant after becoming aware of the situation of the horse exercised due care, and this was all that was required. 39 *Ark.*, 419; *S. & R. on Neg. Sec.* 36. *n.* 1; 1 *Redf. on R. R.* 573 *note* 15; 22 *Am. Law Reg.* 117. Seeing Miller on the track was no indication of danger or notice of the peril, and

disregarding him was not negligence. 1 *Sh. on R.* 573 *note* 15.

The testimony of defendants' witnesses as to the manner of striking the horse is entitled to more weight than the opinion of plaintiffs' witnesses who did not see the striking. 7 *Ark.*, 470; 1 *Whart. on Ev. Sec.* 415. This shows that the injury resulted from the horse falling into the trestle, and not from being struck by the engine.

It was negligence to stop the horse so near the track, seeing the engine approaching, allowing a loose rein &c. Such gross negligence disentitles the plaintiff to recover. 5 *Am. Rep.* 201; 13 *Rep.* 45; 12 *Id.* 69; *Ib.* 547-616; 22 *Am. Law Reg.* 117.

His being on the track was negligence. Defendant had a right to expect a clear track. 36. *Ark.*, 46-50-376, 377.

The words "after becoming aware of the situation of plaintiff's horse," should have been added to plaintiff's 1st instruction. *Sh. & R. on Neg.* 36 *and cases cited*; 36 *Ark.*, 46-376-7; 1 *Redf. on R.* 500-573.

Jno. C. and C. W. England for appellees.

The instructions for plaintiff are law. 37 *Ark.*, 563; 27 *Ark.*, 598; *&c., &c.*

The 8th instruction was fair to both parties.

The evidence fully sustains the verdict and in such case this court will affirm.

EAKIN, J. Appellees sued the Rail Road Company below, for damages, on account of injury to a horse, done by a running train. The defendant denied the alleged injuries, and set up, also, contributory negligence on the part of the plaintiffs. Upon trial, a jury returned a verdict in favor of plaintiffs for 90 dollars damages. After a motion for a new trial had been overruled, and a bill of exceptions allowed, the defendant appealed.

The 1st five grounds of the motion are all to the effect that the verdict is contrary to the evidence; or not sustained by it. There was proof tending to show, that upon a dark night, a person to whom plaintiffs had hired the horse, was riding him along a dirt road, near the track, but not there crossing it. The road was overflown with water from one to three feet deep. The railroad crossed the low ground upon an embankment several feet above the water, having overflown ditches on both sides. The rider stopped to let his horse drink, being at the time in view of the headlight of an approaching train, which was yet a great distance off. The horse whilst drinking scared at some object and started. Before the rider could gather up the slack of the reins, and control him, the horse ran up the embankment, and along the track to a culvert, at which he fell, throwing the rider over his head. The rider rose, and, first endeavored to get the horse off the track, but finding that impossible, he ran towards the approaching train, waving his hand and cap, and calling out to stop it; until the engine came so near that he jumped off the track to avoid it. The engineer first saw the man on the track waving his hand, but paid no attention to the warning. When the man jnmped off, he could see the horse by the light of his headlight, and he then made every reasonable effort, by the aid of the fireman to stop the train. It was too late. The horse was pushed from the track and badly injured. Damages were proved.

RAILROADS: Negligence in killing stock.

The jury might, upon this, find some negligence, unqualified by any proof of contributory negligence. The engineer says that he did not heed the warning, because it is customary for persons to get upon the track, and jump off just as the engine comes up. It was for the jury to say, whether or not that sort of annoyance fairly excused the engineer from disregarding the only warning of danger, which under the circumstances, it was possible to give. The company,

through him, took the responsibilty of doing so. Fortunately, in this case, the only injury was damage to an animal. It might, for aught the engineer could know, have involved the death of a human being lying helpless on the track, or, far worse, the wreck of the train in a broken culvert, and the death of the persons on board. For if the engineer could not see the horse in time to stop the train, he could not have discovered the damaged condition of the culvert if it had been broken. Considering the time, place, and circumstances; the darkness of the night, the longe levated embankment, the water floods upon each side, which would deter animals from leaving the track; we can easily understand that his conduct might impress the jury as somewhat reckless. The verdict finds ample support in the proof. As to contributory negligence it may be as well to say, once for all, that there is not a particle of proof of it in the whole transcript.

It is true enough, in one sense, that railroad trains have a right to a clear and unobstructed way along their tracks. No one may obstruct these, without a trespass and a wrong, unless it be done accidentally or unavoidably. Still this right must be exercised reasonably, with a fair consideration of the rights of others, and with reference to the circumstances of the country. The servants and agents of the companies for whose acts they are responsible, have not the right wantonly, recklessly, or even carelessly, to destroy whatever they may find in their way. Roads are useful to citizens, but the right to a fair and reasonable protection of property is useful to them also, not to be overbalanced by the inconvenience of a slight delay of a train, to say nothing of the far higher consideration—the lives and limbs of human beings on the train, whether brakemen or passengers.

The instructions have been very carefully given and refused by the Hon. Circuit Judge. His rulings have been in

accordance with the views of this court previously expressed, or necessarily implied. Only one has met with serious objection on the part of appellant's counsel.

The 8th instruction given for the defendant was, that "if the property of plaintiffs was wrongfully on the defendant's track, as the defendant was entitled to a free and unobstructed track, as against the plaintiffs, it is only for negligence of the defendant after being apprised of the situation of plaintiff's property, that defendant is chargeable." This is correct upon the hypothesis that there was no previous negligence in keeping watch, or disregarding signals of danger. It was perhaps too favorable for defendant as given. The defendant by counsel insisted, however, that his honor should add: that "it is only for *culpable and gross* negligence of defendant, after being apprised of the situation of plaintiff's property, that defendant is chargeable." This was properly refused. It is not sufficient to exercise a slight degree of care and attention, the omission of which would constitute *gross* negligence, to excuse one from inflicting damage to which the injured party has contributed. After the discovery of a danger, brought about by the negligence of another, one must in all cases use a reasonable diligence to avoid the consequences, and, where human life is involved, to be reasonable it must be everything that humanity would prompt, and which might be reasonably thought of in the emergency. In ordinary cases like this, involving property, it must be ordinary care. Such care as a prudent man, of average careful habits, would be prompted to use, to avert an injury to property of his own. Gross negligence implies only absence of slight care. The degree of care should be proportional to the pending danger to be apprehended. To have given the instructions as asked might have been misleading. *L. R. & Ft. Smith R. R. Co. v. Finley*, 37 *Ark.*,

562; *Citizens St. Railway v. Steem*, 42 *Ib.*, 321; *L. R. & Ft Sm. R. R. v. Turner*, 41 *Ib.*, 161.

We find no reversible error.

Affirm.

JONES v. TERRY.

43 280
56 188

43 280
70 78

43 230
182 420

1. PLEADING: *Demurrer abandoned by pleading over.*

The civil code does not change the rule that by pleading over after demurrer overruled, the party abandons his grounds of demurrer.

2. SAME: *To an action on a judgment.*

Nothing can be pleaded to an action on a judgment that could have been litigated in the original action, except the question of jurisdiction of the court rendering the judgment. All other matters are merged in the judgment.

3. SAME: *Same. Evidence.*

In an action upon a Justice's judgment the defendant may show in contradiction of the recitals of the judgment, that he was not served with process, nor appeared to the action, and that the judgment is therefore void for want of jurisdiction. Recitals of their jurisdiction either of the matter in controversy, or over the parties to the action, are only *prima facie* evidence, and may be disproved.

4. SAME: *The complaint on a J. P's. judgment.*

The complaint on a judgment of a court of special jurisdiction must allege that the court had jurisdiction of the subject matter and the person of the defendant, or that the judgment was duly given or rendered.

APPEAL from *Drew* Circuit Court.
Hon. J. M. BRADLEY Circuit Judge.

J. G. Taylor for appellant.

The transcript of the proceedings in the Justice's Court shows no valid judgment in favor of J. S. Terry against defendant.

Wells & Williamson for appellee.

1. Judgments of Justice's are tested by their substance rather than their form. *Freeman on Judg. Sec.*47-53, 53 *a &c.*, 55 *and note.* The form of the docket entry is sufficient.

2. Defendant does not allege that he was *not* duly summonsed, nor does he allege that the judgment was rendered without notice or fraudulently. *Gantt's Dig. Sec's.* 4738-9; *Wait's Actions and Defences p.* 805-6-11.

3. The record shows jurisdiction of both person and subject matter, and as the record imports verity (fraud excepted) the courts presume in favor of jurisdiction. *Black. Com. Book* 3, * *p.* 24; *Freeman on Judg. Sec.* 125.

4. The plea of limitation was bad as to the *debt*, which was merged in the judgment. So the plea of payment; as it was a plea of payment of the *debt*, and not of the judgment. He should have pleaded this in the Justice Court. 19 *Ark.*, 420.

SMITH, J. This was an action upon a judgment which, as the plaintiff alleges, he had recovered against the defendant on the first day of September, 1877, for $185.44, upon a promissory note, before a Justice of the Peace of Drew County; more than five years having since elapsed, which prevented the issue of execution.

A demurrer to the complaint was overruled; but as the defendant pleaded over, he abandoned his ground of demurrer. The cases decided upon this point by this court are collected in *Rose's Digest pp.* 270-1. And the rule has not been changed by the Code. *Bliss on Code Pleading Sec.* 417.

1. Pleading over waives demurrer.

The answer in effect denies that the Justice had ever acquired jurisdiction over the defendant's person, and pleads

the statute of limitations and payment in bar of the plaintiff's debt. To this answer a demurrer was sustained; and the defendant declining to plead further, final judgment was rendered against him.

2. PLEADING: To action on a judgment.

The last two pleas are obviously bad. The defendant was not sued for the original debt. That was merged in the judgment, if there has been a valid one. And all matters which might have been litigated before the Justice, save only the question of jurisdiction, are concluded by that judgment, *Ellis v. Clark*, 19 *Ark.*, 420; *Peel v. January*, 35 *Id.* 331 *and cases cited*; *Morris v. Curry* 41 *Id.* 75.

3. SAME: Evidence: Jurisdiction may be disproved.

But it may be shown by extrinsic evidence, in the face of a recital in the judgment that the defendant was served with process or appeared to the action, that in fact he had no notice and that the judgment is therefore void for want of jurisdiction. Justices of the Peace have no unimpeachable memorial of their transactions. Any statement in relation to jurisdiction found in their minutes is only *prima facie* evidence; in opposition to which it may be shown by any satisfactory means of proof, that the authority of the court did not extend over the matter in controversy, nor over the parties to the action. *Freeman on Judgments Sec.* 517; 1 *Rob. Practice* 220; *Salladay v. Bainhill*, 29 *Iowa* 555; *Clark v. Holmes*, 1 *Day* (*Mich.*) 390; *People v. Cassels*, 5 *Hill*, 164; *Barber v. Winslow*, 12 *Wend.* 102.

As the cause must be remanded for further proceedings, we call attention to a defective statement in the complaint of the cause of action. In pleading the judgment of a court of special jurisdiction, it was necessary at common law to allege that the court had jurisdiction of the subject matter and of the defendant's person. The Code has changed this rule. Instead of stating the facts which conferred jurisdiction, it is now only necessary to say that the judgment was duly given or made. This is equivalent to an averment that

the court had jurisdiction and that the judgment was in all respects lawfully and regularly obtained. *Ganst's Dig. Sec.* 4603; *Hunt v. Dutcher*, 13 *How. Pr. R.* 538.

The present complaint conforms neither to the old system of pleading, nor to the Code. It does not allege the service of process upon the defendant or his appearance before the Justice; nor that the judgment was duly given or made.

Reversed with directions to overrule the demurrer to the defendant's plea setting up a want of jurisdiction of his person, and to give both parties leave to reform their pleadings.

TURNER V. HARRISON

1. JUSTICE OF THE PEACE: *Transcript to Circuit Court. Certification of.*

The transcript of a Justice of the Peace containing the entries of each day's proceedings, over his official signature, and ending with the following memorandum, "Transcript to Circuit Court, Bradley Co., Ark., B. M. Tussel J. P." is sufficient to support an appeal to the Circuit Court.

2. SAME: *Verdict of jury, when a judgment. Appeal from.*

The verdict of a Jury in a trial before a Justice of the Peace is, itself, in legal effect, a judgment, (when no formal judgment has been entered by the Justice,) from which an appeal may be taken to the Circuit Court.

APPEAL from *Bradley* Circuit Court.
Hon. J. M. BRADLEY Circuit Judge.

W. F. Slemons for appellant.

The Justice failed to properly authenticate his transcript. *Gantt's Dig. Sec's.*3825-3828; 2 *Eng.*, 203; 16 *Ark.*, 485; 19 *Ark.*, 647.

There was no judgment rendered in the Justice's Court, hence there could be no appeal.

The judgment in the Circuit Court was *coram non judice* and void.

McCain & Crawford for appellee.

The certificate of the Justice to the transcript, though informal, was good enough in the absence of special objections in the court below. The cases cited by appellants counsel were cases of *judgment by default.* See the later cases, 31 *Ark.*, 489; 33 *Ib.*, 745 *and* 42 *Ib.*, 563.

Where the record shows a verdict, that shows a final disposition of the cause. The entry of the judgment is mere clerical work. *See Sec's.* 3827-8 *Gantt's Dig.*

SMITH, J. This cause originated before a Justice of the Peace and the sole question is whether the Circuit Court had any jurisdiction to try it on appeal from his judgment. It was an action upon an account for $50; the defendant was duly summonsed; the parties appeared on the day of trial and the case was tried before a jury, who found a verdict for the defendant. But no judgment was entered by the Justice upon this verdict. The plaintiff prayed an appeal to the Circuit Court, which was granted and he filed the affidavit for appeal prescribed by the statute. The papers, process and docket entries, showing the foregoing facts, were sent up to the Circuit Court. There the parties again appeared and without any objection to the regularity or validity of the proceedings, the case was tried anew and the plaintiff obtained a verdict and judgment for $30.

1. APPEAL FROM J. P.: Transcript to Circuit Court: Certification of.

It is now insisted that this judgment was void for two reasons: 1. The transcript of the Justice was not authenti-

cated by his certificate that it contained a copy of all the entries made in his docket relating to the case; and 2. No judgment was rendered by the justice.

The statutory provisions bearing on these points are as follows:

Gantt's Dig. Sec. 3825.—"On or before the first day of the Circuit Court next after the appeal shall have been allowed, the Justice shall file in the office of the clerk of such court a transcript of all the entries made in his docket relating to the cause, together with all process and all papers relating to such suit.

Sec. 3826.—"Upon the return of the Justice being filed in the clerk's office, the court shall be in possession of the cause, and shall proceed to hear, try and determine the same anew, on its merits, without any regard to any error, defect or other imperfection in the proceedings of the Justice."

Sec. 3827.—"No appeal from a Justice of the Peace to the Circuit Court shall be dismissed or stricken from the docket when any specific sum shall be found by said Justice: first, because the Justice has not rendered a formal judgment upon his record or docket; second, because he has not entered upon his docket that an appeal was prayed for and granted. But if all the requisites, as they are required in this act for taking appeals, be substantially complied with, the cause shall be deemed to be in court and be subject to be tried anew upon its merits."

Sec. 3828.—"In all cases of appeal from Justices of the Peace for trial *de novo*, the Justice before whom the cause was tried may be required, whether in or out of office, to appear before such court upon the motion of either party, and amend any defect or ommission, either in form or in substance, according to the right and truth of the case, in the proceeding had before him, not the fault or omission of either of the parties, so that no such appeal shall be dismissed

for want of jurisdiction because of the fault or neglect of the Justice to mark any paper filed, for any defect in the affidavit or obligation for the appeal, or order granting the appeal or any defective entry made, or informal judgment rendered by him."

In this case the Justice sets out the entries of each day's proceedings over his official signature and at the end of them is this memorandum: "Transcript to Circuit Court, Bradley Co., Ark. B. M. Tussel J. P."

In *Watts v. Hill*, 7 *Ark.*, 203, it was said that the statute contemplates such a filing as will give credence to the transcript; and that without a certificate that the transcript contains all the entries, or some other form of authentication, the Circuit Court can not judicially know of the appeal. In that case the paper that purported to be a transcript of the proceedings had before the Justice was authenticated neither by his certificate nor official signature. And moreover the judgment of theCircuit Court was by default.

Baker v. Calvert, 16 *Ark.*, 485 was also a case of default, and nothing had been sent up except a copy of the judgment and the note sued on. Of course this would not do as there was nothing to show that the defendant had been summoned or had appeared, or that there had been a trial, or any appeal sought to be taken.

2. SAME: Verdict of jury: When a judgment.

In regard to the second point—that no judgment was rendered by the Justice—it was ruled, in *Adams v. Thompson*, 12 *Ark.*,670, that until the rendition of judgment, no appeal lies to the Circuit Court. That case arose in this way; the jury in the Justice's court returned a verdict on the 5th of August, 1848, but no judgment was entered up until November 5th 1849, when in obedience to an order of the Circuit Court, the Justice's successor entered up a judgment as of the date of August 5th, 1848. An appeal was taken November 17, 1849, and in the Circuit Court the cause was

regularly tried, no exception being taken to the proceedings touching the appeal. And it was held the Circuit Court had rightful jurisdiction.

In *Lynch v. Kelly*, 41 *Cal.*, 232, it was adjudged that the failure of the Justice to enter a judgment in his docket upon the verdict of a jury which found a sum certain for the plaintiff was a mere irregularity which did not avoid a subsequent execution and sale of land thereunder.

In *Felton v. Mulliner*, 2 *Johns.*, 181, a plea of former judgment in favor of the defendant was held to be supported by proof of a verdict in his favor, upon which the Justice ought to have rendered judgment, but had omitted to do so. The Court said: "We are to overlook matters of form, and to regard proceedings before Justices of the Peace according to the merits * * * The Justice was bound to render a judgment according to the finding. He had no descretion." See also *Young v. Overaeker*, 2 *Johns.*, 191, for same principle; *Hess v. Beckman*, 11 *Johns.*, 457 and *Fish v. Emmerson*, 44 *N. Y.*, 376.

In *Gains v. Betts*, 2 *Dougl.* (*Mich.*), 98, it is said: "The verdict is, itself, the judgment of the law in the case, and the Justice is simply required to make the entry on his docket. If he neglects to do so, still the verdict must be considered the final determination of the cause." And this case was followed in *Orroal v. Pero*, 7 *Mich.*, 315. In this state, after a cause is tried by jury, a Justice of the Peace has no power to arrest the judgment, or to grant a new trial, but it is his imperative duty to enter judgment upon his docket forthwith. *Gantt's Dig. Sec's.*, 3762-3. And as this entry is a mere clerical duty, he or his successor in office may be required at any time to perform it. Or if no steps be taken to cure the omission, the verdict may be considered in legal effect a judgment.

Justices of the Peace are not required to be learned in the

law. In point of fact they are, as a class, without previous legal training and frequently have had but a limited education.

"To insist upon their keeping their records with that accuracy and formality required in courts of record would end in the complete overthrow of most of their proceedings." *Freeman on Judgments, Sec's.*, 53 *et seq.*

If a motion had been made in the Circuit Court to dismiss the appeal, the statutes above quoted would have required that it should be denied. The Circuit Court was in possession of the cause to try it anew upon its merits without regard to any error, defect or other imperfection in the proceedings of the Justice. And it was expressly prohibited from dismissing the appeal because the Justice had neglected to render a formal judgment, or on account of any defective entry.

Affirmed.

CALHOUN v. ADAMS

1. REVIVOR OF JUDGMENT: *Defense to.*
Errors or irregularities in obtaining a judgment can not be set up by demurrer or plea to a *scire facias* to revive it.

2. SAME: *Petition to revive*
A petition to revive a judgment is unnecessary: The *scire facias* is both a declaration and a summons, and may be issued for the assignee of the judgment, but it must run in the names of all the plaintiffs in the judgment against all the defendants, when all are living; and if it does not, yet if it is so certain in description that the defendant must know what judgment was intended, and the revivor is in fact made in the names of the parties in the judgment, this court will, on appeal, consider that the writ was properly amended below.

APPEAL from *Chicot* Circuit Court.
Hon. J. M. BRADLEY Circuit Judge.

D. H. Reynolds for appellant

The assignment of the judgment did not confer upon Adams the right to sue in his own name. Judgments are not included in our statute of assignments, and in regard to their assignable qualities they are mere choses in action. 11 *Ark.*, 744, 748; 23 *Ark.*, 171.

While Adams had an equitable interest or claim to the judgment and the right to use the names of the firm, or possibly to sue in equity in his own name, still, when he seeks a remedy he must conform to the practice, whether it be by suit at law or in equity. 35 *Ark.*, 583; 37 *Ark.*, 185-7. The suit should have been in the name of the original plaintiffs.

B. C. Brown for appellee.

The second ground of demurrer needs no notice. The matter stated could not be raised by demurrer and would have been bad if pleaded. 9 *Ark.*, 176.

It is argued here that there were not sufficient parties. Even if this contention is right the objection was waived. This was made by the Code a *specific* ground of demurrer. *Gantt's Dig. Sec's.* 4564, 4567.

If the demurrer had been sustained the only effect would have been to require an amendment. This being the law, it was the duty of the court "in furtherance of justice" to amend the pleadings in this formal matter. This court may well conform the pleadings to the facts admitted by the demurrer *Gantt's Dig. Sec.* 4616, and treat them as so amended.

The judgment was revived in the name of the original plaintiffs. Justice has been done, no one injured.

A revivor gives no new right. It merely removes an obstacle to the enforcement of a right already adjudicated. The assignment of a judgment, gives a party the right to control it, and having the right to control it, he has the right to revive it. 11 *Ark.*, 743, 748. The objection is too technical, especially when made here for the first time.

SMITH, J. In 1872 the firm of Adams, Cockburn and Picton recovered a judgment in the Chicot Circuit Court against John C. Calhoun for $6,444.62. In 1882 Adams, one of the plaintiff firm, filed his petition in the same Court, suggesting that said judgment, which was alleged to be wholly unsatisfied, had been assigned to him and praying for a revivor to the end that he might have execution thereof. A *scire facias* was issued, which correctly described the judgment, recited the averments of the petition and required the defendant to show cause against the revivor. The defendant appeared and demurred to the petition and *scire facias* because 1, They do not state sufficient facts; 2, The judgment had been irregularly and illegally obtained. The demurrer was overruled and the defendant declining to plead further, the judgment was revived, not in the name of Adams individually, but as it was originally entered.

1. REVIVOR OF JUDGMENTS: Defense to *sci fa.*

The second cause of demurrer needs no notice. The matter stated could not be raised by demurrer and would have been bad if pleaded. No errors or irregularites are perceived in the original judgment; but if there had been such, they could not be taken advantage of in this proceeding. *Anthony v. Humphries*, 9 *Ark.*, 176.

2. SAME: Petition to revive not necessary.

The petition of Adams was unnecessary. The writ of *scire facias* performs the double function of a declaration and a summons. *Trapnall v. Terry*, 27 *Ark.*,70. So far as the right to revive was concerned, it was wholly imma-

terial whether Adams was sole owner of the judgment, or whether the ownership continued as at the time of its rendition. The petition, therefore, which was designed to advise the court of the change of ownership, may be disregarded.

The writ is undoubtedly framed upon the notion that Adams, having become the real party in interest, may maintain proceedings to revive the judgment. Now a *scire facias*, being a judicial writ, ought to pursue the nature of the judgment. It should run in the names of all the plaintiffs in the action against all the defendants, where all the parties are in existence. It is not the institution of a new suit, but the continuation of the old one. And the object is, not to procure a new judgment for the debt, but execution of the judgment that has already been obtained. *Greer v. State Bank*, 10 *Ark.*, 455; *Bolinger v. Fowler*, 14 *Id.*, 27; *Brearly v. Peay*, 23 *Id.*, 172; *Austin v. Reynolds*, 13 *Tex.*, 544; *Carson v. Moore*, 23 *Id.* 450.

Yet inasmuch as the judgment of revivor was correct and as the recitals in the *scire facias* point to the judg' ment sought to be revived with such certainty that it is impossible for the defendant to have been mis-led to his prejudice, the formal amendment of the writ so as to make the proceedings harmonize and the whole record consistent with itself, must be considered as having been made below. For this abundant authority may be found in our statutes and decisions. *Gantt's Dig. Sec's.*, 4611-12, 4616-17, 4619, 4699; *Anthony v. Humphries*, 9 *Ark.*, 183; *Same Case*, 11 *Id.*, 663; *King v. Caldwell*, 26 *Id.*, 405.

Affirmed.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF ARKANSAS.

AT THE

NOVEMBER TERM, 1884.

MOORE ADM'R. T. M. JACKS v. TURNER, SH'FF., &C.

1. TAXES: *Quashing assessment: Want of oath of Assessor.*
The failure of the tax assessor to take the oath of office required by law is no ground for quashing the assessment on *certiorari*. His official character cannot be questioned in such collateral proceeding. *Parker v. Overman, 13 How., 137*, explained.

2. SAME: *Same: Affidavit to assessment.*
The Assessor of Phillips county attached to his assessment the following affidavit:
"I, B. W. Greene, assessor etc., do swear that I have made diligent enquiry to ascertain all the taxable property subject to taxation in Phillips county; that so far as I have been able to ascertain, the same is correctly set forth in the foregoing return." HELD: That the omission to state in the affidavit, as required by law "that he had appraised each tract or lot of land at its true value in money," was no cause for quashing the assessment on *certiorari*, in the absence of any showing that the assessor had not

made such appraisement. It would be presumed, in the absence of any charge to the contrary, that the Assessor, in making the assessment, had complied with the law.

3. FILING ASSESSMENT: *Date of filing. Presumption.*
When there is nothing to show the date of filing an assessment list with the County Clerk it will be presumed to have been filed on the day of the date of the assessor's affidavit attached to it.

4. SAME: *Same: Failure of Assessor to examine lands.*
The failure of the Assessor to personally view lands to ascertain their value is no cause to quash the assessment on *certiorari*.

5. TAXES: *Filing assessment. Time not essential.*
The filing of the assessment list with the County Clerk *by* the 3rd Monday in September, as required by section 6. of the revenue act of 1873, was not essential to the validity of the assessment or the levy of taxes at the succeeding term of the County Court.

6. PRACTICE: *Certiorari not converted by the court into bill for injunction.*
Proceedings by *certiorari* are of a special nature, having an appropriate practice, which was not destroyed by the Legislature abolishing forms of action; and they may not be converted by the court of its own motion into proceedings for injunction and transferred to the equity docket. This can be done only by the parties upon moulding their pleadings for equitable relief.

APPEAL from *Phillips* Circuit Court.

Hon. M. T. SANDERS Circuit Judge.

Tappan & Hornor for appellant.

The County Court had no jurisdiction to levy the taxes because no legal assessment of lands had been made by the assessor, for:

1. He did not file in the clerk's office his official oath required by law. *Sec.* 20, *Art.* 19, *Const.* In addition to this he is required to take the oath prescribed by *Acts* 1875, *Sec.* 6 *p.* 223.

2. He did not view each particular tract of land before valuing same. *Gantt's Dig. Sec.* 5117.

3. He did not return and file the assessment list of real property on or before the 3rd Monday in September. *Gantt's Digest, Sec.* 5116.

4. He did not append to his return the affidavit required by law. *Acts* 1775, *Sec.* 6 *p.* 223,

When the Legislature prescribes certain formalities in the assessment of property, they must be complied with. They are not useless, but are intended for the protection of the citizen from improper and unjust exactions, and enforcing the equal burdens of taxation. Time is essential to the performance of all these acts.

Certiorari is a direct proceeding to set aside the assessment and levy which are a judgment, and to stay execution for errors affecting the jurisdiction of the court, and is the proper remedy to reach an illegal levy. 34 *Ark.*, 419; 27 *Id.*, 675.

The assessment and levy is in the nature of a judgment, and when delivered to the collector with a warrant of collection is a process in the nature of an execution. 19 *Ark.*, 602; 21 *Id.*, 578. A valid assessment is necessary to give the County Court jurisdiction; if there be none, there is no charge upon lands. 21 *Ark.*, 578; *Hilliard on Taxation*, 291. There can be no legal assessment in any other mode than such as is expressly provided for that purpose by statute. 1 *Bush.* 259. The law must be followed to give the County Court jurisdiction. *Hilliard on Taxation*, 308; 7 *N. Y.*, 517.

U. M. & G. B. Rose for appellees.

1. Whether the assessor took the oath or not, he was assessor *de facto*, and as such his acts are valid. 22 *Ark.*, 559; 24 *Id.*, 474; 28 *Id.*, 312; *Burroughs on Taxation, p.*

200; 14 *Iowa*, 585; 10 *Ohio*, 278; 4 *Pet.*, 349; *Cooley on Taxation, p.* 191; *Blackwell on Tax Titles, p.* 98; 7 *N. H.*, 113; 17 *Ib.*, 420; 2 *Greenl.*, 218; 2 *Aiken*, 145; 16 *Iowa*; 509; 36 *Miss.*, 693.

2. The affidavit to the return is a substantial compliance with the law. It contained the one essential allegation that the assessment was correct. The others are immaterial. Revenue laws are now construed liberally, they are remedial in their character. 10 *Wall.*, 406; *Sedgwick on Construction*, 2d *Ed., p.* 288. The tax levy of an entire county should never be quashed for a mere technicality or irregularity. *Sec.* 35 *N. Y.*, 462; 48 *Id.*, 93; 5 *Pick.*, 496; 39 *Cal.*, 511; 21 *Me.*, 472; 7 *Kan.*, 210; 9 *Id.*, 296; 8 *Id.*, 561; 14 *Wis.*, 618; 11 *Id.*, 496; 17 *Id.*, 284; 22 *Ill.* 36. The writ of *certiorari* will never lie to quash a tax levy on account of mere irregularity. *Cooley on Taxation, p.* 533; 104 *Mass.*, 462; 48 *Barb.*, 173.

The act of Dec. 15, 1875 (*Acts* 1875, *p.* 178.) gives a person aggrieved by an assessment a remedy *by appeal*; where an appeal lies there is no remedy by *certiorari*. 18 *Ark.*, 380. *Certiorari* is not a writ of right, but is only granted in the discretion of the court to correct some grievance. *Id.*; *Cooley on Tax, p.* 530.

3. The fact the assessor did not view the lands does not appear from the record, and in this proceeding nothing can be considered which does not appear from the face of the record. 18 *Ark.*, 449; 21 *Id.*, 476; 30 *Id.*, 441. But if so, and plaintiff sustained injury he should have appealed.

4. Provisions as to time are usually held directory merely, unless the act specially provides that the act cannot be validly done after the time named. 22 *Ala.*, 126; 28 *Iowa*, 577; 21 *Pick.*, 76; 8 *Met.*, 181; 2 *Denie*, 160; 20 *Barb.*, 167; 17 *Ohio st.*, 608; 5 *Lans.*, 16; 30 *Iowa*, 355; 34 *Md.*, 569,

Moore ad. T. M. Jacks v. Turner, Sheriff, etc.

EAKIN, J. At the May Term, 1883, of the Phillips Circuit Court, Thos. M. Jacks filed a petition for a writ of *certiorari*, against Turner as collector, and Jarmon as clerk of the County Court, showing that he was the owner of a large amount of real estate in the county, a list of which was exhibited as a part of the petition, with the valuation and total tax of each tract or lot extended in separate columns, for the years 1881 and 1882. It is without authentication or file mark.

Further, that at the October Terms for the years 1881 and 1882, at the times fixed by law, for the purpose, the County Court levied taxes on said lands, without any jurisdiction or power. That they were not legally chargeable with taxes for those years, because no legal or valid assessment of the same had been made by the assessor, or filed in the clerk's office within the time required by law. That the pretended assessor had not taken the oath of office, required by law; that he had not appended to his assessment list the proper legal affidavit; and that in making the pretended assessment he had not viewed the lands to ascertain their value. He filed with, and as part of, his petition certified orders of the County Court, levying the taxes, and also a certified transcript of the affidavit made by the assessor, to the assessment list which he filed in 1880. This affidavit is dated Oct. 8th, 1880, and runs as follows:

"I, Barton W. Green, assessor, &c., being duly sworn, "make oath that I have made diligent effort to ascertain all "the taxable property being, or subject to, taxation in the "County of Phillips; that, so far as I have been able to as- "certain the same, it is correctly set forth in the foregoing "return."

The official oaths of the assessor for any of the years before, and up to 1882, could not be found on file in the office. The petitioner charged that said collector was

then attempting to enforce the payment of the taxes so illegally levied, and would return the lands delinquent. He prayed for a writ of *certiorari* to the clerk of the County Court, to bring up a transcript of said orders, levying taxes, and of the assessor's oath, and his affidavit to the return of the real estate assessment of 1880; and, further, that the collector and clerk be restrained from further proceedings to collect the taxes on said lands; and for all other proper relief.

The defendants acknowledged service, and waived notice, but filed no demurrer, response, or other pleading.

The Circuit Court denied the writ and dismissed the petition. Jacks appealed, and, having died since, the cause has been revived in the name of his administrator.

The counsel for appellant rely upon four points which will be considered separately.

1. TAXES: Quashing Assessment. Want of oath of Assessor.

First: That the assessor had never taken an official oath, and was not authorized to act as such.

If it were conceded that the presumption should prevail, that he had not taken an official oath, because none could be found by the clerk on diligent search, the point would still be not tenable. His official character in this proceeding is attacked collaterally. It is conceded by fair implication in the petition that he was acting as assessor and was recognized as such. Every consideration of public policy, upon which the rule of law is grounded that the character of officers *de facto* shall not be questioned in collateral proceedings, applies with equal, if not greater force, to the officers engaged in the collection of the revenue. It is essential to the well-being of the whole community that collections should be made promptly to meet the exigencies of the government. Endless embarrassment in the administration of the laws, and in maintaining the public credit, might occur, if each and every tax-payer

on the eve of the collections might impede them by questioning the official character of some one concerned in the chain of legal formalities, through which taxes are exacted. There is no ground for the distinction, and so far as we are advised, no adjudication sustaining it, save the case of *Parker et al v. Overman* decided by the Supreme Court of the United States, on appeal from the Circuit Court of Arkansas (13 *Howard* 137). That case, although it has never given satisfaction in this State, is distinguishable from this in several important particulars, which may have afforded ground for taking it out of the general rule. Under the Constitution of 1836, then in force, there was no such officer as an assessor. It was provided by statute that the sheriff should be such *ex officio*, and it was required of him that he should, *each year*, file a certain affidavit, before a certain day, for the faithful and impartial performance of the duties specially pertaining to assessments. Upon his neglect to do this within the time prescribed by statute it was provided that his office should be *deemed vacant*, without further action on the part of any court or person. (*Digest by English in* 1848, *p.* 871). The case of *Parker et als v. Overman* (*Supra*) seems from a statement by Mr. Justice Grier, delivering the opinion, to have originated in a State court here, in Chancery, by proceedings on the part of Overman to confirm a tax title, which was resisted by Parker et als, residents of another State, and removed to the Federal Court. There Overman was successful. Upon appeal to the U. S. Supreme Court, it was held that in such a proceeding, expressly provided to give every one interested, an opportunity to contest the legality and regularity of every step in the proceedings, it might be shown that the preliminary affidavit was not filed in time. This is regarding the affidavit not as an oath of office, but as a preliminary step to the assessment proceedings—a part, as it were, of the legal machinery by which the revenue was to

Parker v. Overman, 18 *How.* explained.

be collected, or the citizen deprived of his property; and this is certainly the correct view of the case as our law then stood. Oaths of office are taken once for all, during the term. This affidavit was taken *each year* by the sheriff, in the inception of his duties regarding assessment for that year, and with reference to those duties.

Now, under the Constitution of 1874, Assessors are distinct officers, not *ex-officio*, but by right of their election and commissions as such. They stand upon the same ground with other county officers taking one general oath of office for their whole terms (*See Sec.* 46 *of Art.* 7, *and Sec.* 20 *of Art.* 10.). This oath has no special connection with any particular proceeding, as did the old oath of the Sheriff taken, as preliminary to the act of assessing. If he should fail to take it, before the first day of January succeeding his election his office may be *declared* vacant (*See sec.* 7 *of Act of March* 5*th* 1875, *p.* 224.). But this presupposes some step to be taken for the purpose, and if none be taken it leaves the presumption *prima facie* at least, that there had been an oath of office filed.

Unless the decision in the case of *Parker et als. v. Overman, supra,* can rest upon the distinction between a general oath of office, and a special oath required by an officer each year as a preliminary step in a special duty, then I think it should be disregarded as not well considered.

It is contrary to reason and the current of authority, all of which go to show that the acts of an officer *de facto* are to be taken as valid in all collateral proceedings. See, specially with reference to assessors (*Rockendorf v. Taylor's lessee*, 4 *Peters* 358; *Ray v. Murdock*, 36 *Miss.*, 693; *Scott v. Watkins* 22 *Ark.*, 559. And also abundant authorities cited by Mr. Cooley pp. 189 and 190 of his work on Taxation; and by Mr. Burroughs in his work on p. 200). The fact, that

it did not appear that the assessor had ever taken the *oath of office* afforded no ground for quashing the assessment.

The 2nd ground urged by appellant's counsel is that the proper oath was not filed with the return of the assessment. The form prescribed by the statute is as follows:

"I —— ——— Assessor, do solemnly swear, that the foregoing is correct, and that I have appraised each tract or lot of land at its true value in money." 2. Affidavit to assessment.

As will be seen by reference to the affidavit heretofore set forth as actually made; and denuding the latter of surplusage; the assessor failed only to state "*totidem verbis*" that he had appraised each lot or tract *in money*. He does say that his return correctly sets forth the taxable property of the county so far as he has been able to ascertain it. The assessment list is not given but we must presume that it was drawn up in columns as required by law, with an appraisement extended to each tract representing its value, and the law required that value to be expressed in money. Whether the term "correctly" can be fairly extended to cover the whole of the list, with all its columns, showing owners, sections, ranges, townships, acres, value per acre, as improved or unimproved, and total value, is the question. To be *correct*, if the affidavit covers all these, it is necessary that the valuations should be in money. If it can only cover the the description of the lands by metes, bounds and acres, then it is not in compliance with the statute. It is certainly an irregular and defective affidavit, in its best aspect, but aided by the presumption which prevails in favor of officers, that they have discharged their legal duties, and in the absence of the slightest proof that the assessment list itself was illegally made up, we are loth to attach such importance to the defect, as to make it jurisdictional, and defeat the whole tax levies of the county, made under it, for that and successive years. The question presented is purely jurisdictional, sup-

possing that an assessment had been legally made, in accordance with the money value of the property and that it had been returned by the assessor and was before the court when the orders were made levying the taxes; and that there was nothing in the assessment or levy intrinsically unjust towards the petitioner, as imposing upon him unfair or disproportioned burdens; all which we must suppose in the absence of charges to the contrary, upon the general ground that officers are presumed to have done their duty: then did the ommission in the affidavit so paralyze the County Court, that it had no power to proceed and levy the taxes?

In the outset we may well say that to hold in the affirmative, would be fatal to any tolerably accurate estimate, in advance, of public revenues. Assessors are not necessarily men skilled in forms, and if their affiidavits, made in good faith, should when critically analyzed, be found defective in expressing some material thing, and that should annul all levies made upon them, then upon each annual tax-gathering, the County Courts, and officers would be so overwhelmed and be-pelted with *certioraris* and injunctions, that the business of tax collecting would be wholly inadequate to the public necessity. Upon the other hand each citizen has the right to claim that he shall not be called upon to contribute to the public revenues except in accordance with strict and uniform laws. The *argumentum ab inconvenienti* is well balanced, but the tendency of the courts in modern times seems to be more liberal towards the government, in which is wrapped the common prosperity of all, than zealous of the rights of individuals, who show no substantial grievance; especially in cases, where the contest is not between A and B, for the ownership of a particular piece of property alleged to have been improperly sold for taxes, but between some citizen and the whole community as to whether the collector has the right to collect any taxes at all from anybody. For

jurisdictional questions cut that deeply. Where the tax is not intrinsically unjust or oppressive the great mass of citizens would prefer to discharge it by payment. But if the whole levy be quashed they have not that privilege.

The question has been one of much perplexity, to determine the degree of strictness with which statutes for taxation must be followed. So much so that the Supreme Court of Wisconsin in the case of *Mills v. Gleason*, 11 *Wis., p.* 496, remarked through Mr. Justice Paine, that "perhaps the only method of solving the difficulty would be to hold, that no objection which did not go to the very groundwork of the tax, so as to affect materially its principle, and show it must necessarily be illegal, ought to have the effect of rendering the whole tax invalid. But where the objection is a mere non-compliance with some direction of the statute, notwithstanding which the tax may have been entirely just or equal, it ought not to have that effect. If it did the collection of taxes would be rendered practically impossible."

That was an action to enjoin a sale of land for taxes on the ground of an illegal levy by the city of Madison. The proceedings had been full of irregularities, and omissions of acts required by statute. The assessors had not met for the purpose of hearing objections, as required by the charter of the city—the tax list had not been returned to the County Treasurer within the time required by law, and there had been other omissions. With regard to all, the court remarked that "neither of them, necessarily, impeach the justice of "the tax, and there is nothing in the case to show that the "complainant was especially aggrieved by either," and added, "we do not think he can sustain a bill in equity to enjoin the collection of a tax, legal and just in itself, merely on account of such irregularities." Perhaps this case goes further in sustaining tax levies than most courts are yet ready to follow, yet it illustrates the strong pressure of the necessity to

do so, in the interests of the public when the tax is just and is attacked upon grounds of form by those who have suffered no especial wrong.

In accord with these views, was decided the case of *Parish v. Golden*, which is very much like the one here in judgment upon the special point now being considered. (35 *N. Y.*, 462.) Assessors of the town of Oswegatchie, in their affidavit to their return to the assessment roll, omitted to state, as by law required, that they had excluded such property as was exempt from taxation. This was certainly a substantial omission, as the object of requiring such a clause in the affidavit could have only been to protect such property from becoming beclouded with tax claims. It was held, nevertheless, that "the omission of the assessors to comply with an "important provision of the statute, regulating their duties, "cannot be regarded as a *jurisdictional* defect without subject-"ing public officers to unnecessary vexation and embarrass-"ment." The decision was placed upon a broad foundation. The court declined to use any nice reasoning to show that the affidavit might be construed to fulfill the substantial requirements of the statute, but met the issue face to face on the ground that it did not. Mr. Justice Morgan, speaking for the court, says that "if it is a material statement, the "omission of it ought not to be regarded as fatal to the as-"sessment roll. Its omission is not evidence that the "assessors have not performed their duty in making the "valuations." The decision goes upon the ground that the affidavit is a simple verification, in which immaterial omissions may be wholly disregarded, or material ones, at any time supplied by amendment, even after the time required for the return of the roll, or its delivery to the supervisors.

The case of *VanRensselaer v. Witbeck* (7 *Barb.* 133) is somewhat in point. That was an action against the collector and one of the supervisors of the town who had signed the

collector's warrant. It was in trespass for taking property under the warrant, and the power to collect the tax was relied on in defense. Plaintiff insisted that the assessment roll was void; one of the grounds being that the certificate of the assessors attached thereto was not, either in form or substance, as required by statute. The court below held the warrant a sufficient justification, and directed a non suit. Upon appeal a new trial was denied. Mr. Justice Harris, after alluding to several provisions of the statute defining the duties of assessors, as being directory, upon this point said: "So, too, I think the certificate required by the 26th section of the statute is to be regarded. If the assessors have performed their duty in *making* the assessment roll, as they *may be presumed to have done*, the certificate amounts to nothing more than a solemn declaration on their part, that they *have* performed such duty. It forms no part of their adjudication upon which the action of the board of supervisors is to be taken. It is but the evidence of what the assessors have done, and therefore, it seems to me, would not, even in a direct proceeding, bringing in question the validity of the the assessment, be the subject of review. At any rate, the *entire want* of such certificate, much less the omission of the assessor to adopt the form prescribed in the statute could not invalidate a tax charged by the board of supervisors upon the persons and property specified in the assessment roll, if the assessment itself were in all respects conformable to law." This case was reversed by the Court of Appeals, upon the ground that the assessors did not show affirmatively that they had violated the law, and also upon the ground that a proper certificate was necessary to give jurisdiction (3*d Section* 517), yet these views of the Supreme Court were approved in the case of *Sibley v. Smith et al*, 2 *Mich.*, 487. In that case, it was held that the failure of the assessors to sign the roll was fatal, although they did sign a proper certificate—the statute

requiring both. The distinction was taken that the signature to the *roll* was necessary to complete it and give jurisdiction —was in fact an essential part of it, whilst the certificate to be appended was merely directory, might be omitted, and could not therefore, if added, supply another essential requisite, to-wit: the signature of the roll.

The affidavit required by our statute, is of the same nature as the certificate in the two cases last cited—having precisely the same object and purpose. It would seem to follow that if the assessment itself were properly made and delivered to the County Clerk for the court, which we may presume in the absence of any showing to the contrary, jurisdiction to levy the tax would attach, notwithstanding a defect in a merely historical affidavit with regard to the mode of assessment.

Without protracting, to inconvenient length, the discussion on this branch of the case, we may cite as in accord with the view that the affidavit in the prescribed form is not jurisdictional, the cases of *Townsen v. Wilson*, 9 *Pa. St.* 270, in connection with *Sec.* 5206 *of Gantt's Digest*; *Keller v. Savage*, 20 *Maine*, 199; *Buffalo & State Line R. R. Co. v. Board of Supervisors of Erie Co.*, 48 *N. Y.* 93, in which the court seems to recede somewhat from the final position taken in the case of *VanRensselaer v. Witbeck*, *in* 3d *Selden* (*Supra*) and places that decision on the ground that it was a case where no presumption could be indulged; strongly intimating an approval not only of the decision of the *Court* in *Parish v. Golden*, *Supra*, but also of the expressions of Mr. Justice Morgan, who delivered the opinion upon the broad grounds above quoted.

Bangor v. Lancy, 21 *Maine*, 472, is an authority to show that an assessment list returned without due authentication, will be cured by a supplemental list afterwards filed, and duly authenticated, referring to the first.

County Courts and Courts of Probate within the range of subject matters entrusted to them, are Courts of Record with original jurisdiction, and the rule applies to them, as well as to public officers, that whatever they have been required by law to do, they will be presumed to have done, and that properly, unless the contrary be shown. It was the duty of the assessor to make an assessment and valuation of lands at money value, and it was the duty of the court to levy taxes with that assessment before it. The record in this case shows that an assessment was made and the affidavit of the assessor goes in aid of the presumption so far as to show that it was made correctly, and no wrong is shown. In view of the deplorable consequences which would ensue from holding that under such circumstances a whole tax for a County might be defeated, and supported by the views of the courts which we have cited, we conclude, that in this case the court did not fail of jurisdiction to levy the taxes in question, by reason of the failure of the assessor to set forth that the lands had been appraised at money value. Upon the petition for *certiorari* to quash the levy, we think the Circuit Court held properly, that to issue it would be an unwise exercise of its proper discretion.

3. Failure of Assessor to examine lands.

Another objection to the assessment is that it does not appear that the assessor personally viewed the property to ascertain its value. If that might be shown by parol in this proceeding, which certainly cannot be done, it would not avail. That duty is certainly directory, and impracticable, literally. No assessor can undertake to actually see every foot of land in his county, and the statute does not contemplate it. It is only one of the modes by which he is directed to ascertain value, and he ought to use it if necessary, but not the only one. He must determine the true value of each separate tract "from actual view, and from the best sources of information within his reach." If a whole levy could be

quashed because the assessor had neglected this duty in some instances, where he had sufficient information to act without it, it would be monstrous.

4. Filing Assessment.

There remains another objection to the levies, which is of a very grave nature. It is that the assessment list was not filed by the assessor in the time required by law.

Date of:

There is nothing to show when the assessment lists of 1880 were actually delivered to the Clerk of the County Court. The Clerk certifies to a copy of the affidavit of the assessor, as it appears of record for that year and as transcribed above. It bears date the 8th of October, 1880, which was on Friday preceding the 2nd Monday in the month.

Presumption.

The presumption is that the date is correct, and that the affidavit was attached at the time of the return, and delivered with it. We have none of the court proceedings of that year. The orders, levying the taxes complained of, were made respectively on the 3d day of October, 1881 and the 2nd day of October, 1882.

5. Time of Filing assessment not essential.

Section 61 of the Revenue Act of 1873 directed, that each assessor should, on or before the 3d Monday in September, 1876, and every fourth year thereafter, deliver to the clerk an assessment list of real property, its value, &c., according to a prescribed tabular form, accompanied with his affidavit that he had appraised it at money value. The year 1880 was the second period for real estate assessments. Two questions arise: 1st, Was the time so important to the tax payers as to make its observance essential; and if so, 2nd, Is there room for the presumption that it may have been done in time, and the affidavit mis-dated or appended afterwards.

The same Act provided (Sec. 67) that the Board of Supervisors (which then formed what is now the County Court) should be a County Board for the equalization of real property, to meet on the 3d Monday in September, 1876, and every fourth year thereafter; and that the County Clerk

should then lay before them the returns of the real property made by the County Assessor. Whereupon, it was made the duty of said supervisors after having first taken an appropriate oath, to proceed to equalize the values of real estate, so that each tract might be entered on the tax-books at its true value in money.

The object then of requiring the assessment list to be delivered to the clerk on or before the 3d Monday in September, was obviously that it might be there for the action of the Board of Supervisors. It is also apparent that the object was not to give the citizens any time for previous inspection, as the assessor was not obliged to return it until the day when the supervisors were to meet.

Before the first periodical assessment was made, in 1876, the Constitution was changed, the Board of Supervisors abolished, and the County Court established in each County, in its stead; and as a continuation of the Board. All laws were continued in force not inconsistent with the new Constitution.

By Act of December 15th, 1875, Sec. 67 of the Act of 1873, which required the Board of Supervisors to meet quadrennially for equalization, was repealed as Section 5127 of Gantt's Digest; and it was made the duty of the assessors themselves, when the owners should undervalue their property, to place it at "a fair and common valuation;" providing that any person who might be aggrieved by the assessor's valuation should, five days before the term of the County Court, give notice to the assessor that he would file his complaint, returnable to the first term of he County Court, after the valuation. It was made the duty of the County Court to investigate the matter; and, if proper, correct the valuation, and amend the assessment, (Acts of 1875, p. 178). Section 61, however of the Act of 1873, requiring the assessment to

be delivered to the clerk on or before the 3d Monday in September was not repealed.

By Act of Feb. 5, 1875, the regular terms of the County Courts were to be held each year all over the State, with some exceptions, not here applicable, on the first Monday in October; and by Act of March 18, 1879, a full court, composed of the justices, was to meet for the purposes of levying taxes, &c., on the first day of that term. Its duration, however, was not limited, for if a majority of the justices should not be present on that day, the absentees were to be summoned and power was given to those present to adjourn from day to day.

So the law stood in 1880. It must be presumed that if any levies of taxes were made at all that year, it was done after the assessment book had been delivered to the clerk by the assessor, and the assessment completed. The same object *as to time*, had been accomplished, which was contemplated by the Act of 1873. That is, the assessment was brought into court as the basis of the levies. Meanwhile there had been, however, a special provision made for the protection of the land owner by which, on giving five days notice before the first day of the court he might have the valuation of his land corrected. Did the return of the assessment after the beginning of the October term, when the notice was produced, cut off from the tax payer any material right? That seems to be the proper criterion for determining whether the time of the return was essential to its validity.

In *Walker et als v. Chapman, Gov., &c.* 22 *Ala., new series p.* 126, a rule is laid down which seems to us reasonable and in accord with all the authorities. It is "that a statute "specifying a time within which a public officer is to per- "form an official act, regarding the rights of others, is direc- "tory merely, *as to the time* within which the act is to be "done, unless, from the nature of the act to be done, or the

"phraseology of the statute, the designation of the time "would be considered a limitation on the power of the offi- "cer. * * * * "If this rule," says the court, "is cor- "rect in its application to individual rights, *a fortiori*, should "it prevail in relation to public interests."

The phraseology of our statute does not, anywhere, express, or, of itself, imply, that the filing of the assessment list after the 3d Monday in September shall be invalid. The obvious nature of the Act is to have it before the court for inspection when taxes are levied, unless we may further perceive that a failure to file it at the time prescribed, has the effect also to preclude a just right. This would give the time an essential nature.

The language of the Act of 15th Dec., 1875, p. 178 of Pamphlet Acts, gives a right to contest the valuation which is not, it seems, necessarily, cut off by filing the assessment after the meeting, or first day of the County Court. It is not specially provided that the relief, as to the valuation, is to be granted at the October term, and no other. The notice to be given, by complainant, to the assessor, is to be returnable to the first term of said court to be holden after said valuation is made. There is nothing to prevent a correction of the valuation at the January term, although it would be attended with some inconvenience to the officers. That does not concern the tax payer if he gets his right. It must be confessed that this reasoning is somewhat nice, and would not be applicable to a case which *might* arise, where the assessment might not be completed and delivered to the clerk until within five days before the October term. But it is the legislative *intent* which we seek, and the intent not to make time material, may consist with omissions to provide for accidental cases, where time would become so—if they be of a nature to be probably overlooked.

Further: There remains the doubt as to whether we

might not hold, as some authorities would sustain us in doing, that the date of the affidavit, which is not shown to have been appended to, or endorsed upon, the assessment list, does not necessarily fix the true time of delivery to the clerk. There is opposed to it the counter-presumption in favor of the propriety and legality of the acts of courts and officers. Confessing these doubts after using all attainable means of clearing our minds, we are unable to say that it clearly appears to us that the levies of 1881 and 1882 should be quashed. The consequences would be probably disastrous to the business of the community.

We prefer to rest this case upon the following considerations:

The customary and proper obedience which citizens pay to the judgments, orders, and decrees, of their courts, is the foundation of social order, and the distinguishing feature of governments which can dispense with standing armies. The sentiment is to be encouraged, and such obedience should not be too strictly at the peril of the citizen. Although it is the duty of superior courts to keep those of inferior or limited jurisdiction within their proper boundaries, and by *certiorari*, on seasonable application, to check their excesses; or when no appeal can be had, correct their errors, yet it is not incumbent upon them to do so when the countervailing evils would be greater than to leave untouched what had been accomplished, especially after long acquiescence and when rights of property had been adjusted in accordance with the action of the courts. In this view the writ of *certiorari* when sought to remove and quash proceedings has never been considered a writ of right, but one in the sound discretion of the court invoked for its issuance.

Speaking with reference to such cases as this, Mr. Cooley says: "The common law writ is not one of right but is "granted on the special facts; and the court has a discretion "to refuse to grant it in any case, when great mischiefs might

"be likely to follow the setting aside the proceedings com-
"plained of. It may even dismiss the writ, after it has been
"granted, without a consideration of the merits, if it was
"granted improvidently. The writ must be applied for *in*
"*due season*, and before the proceeding which it is desired
"to review has passed beyond the control of the tribunal
"in which it was taken." (*Cooley on Taxation, p.* 530). He cites the case of *Libby et al v. Town of West St. Paul*, 14 *Minn.*, 248, which is very analogous to this. A few citizens of the town applied for a writ of *certiorari* to bring up and quash what was alleged to be an illegal assessment. The court held that the relief affected all the other tax-payers of the town, as this affects, if granted, all the real estate tax payers of Phillips Co. It held that it was not "*just and right*" that the proceedings for the collection of the tax should be arrested, without giving the other tax payers an opportunity to be heard, saying that such a precedent would, as a general rule, necessarily result in great public detriment and inconvenience. The court denied the writ expressly in the exercise of a sound legal discretion, without considering the legality of the assessment, and, wholly, from considerations of public detriment and inconvenience, and the want of inherent justice and rectitude in the claim. Stronger still is the case of the *School District No.* 1. *of Owosso v. The Joint Board of School Inspectors*, 27 *Mich.*, 3, cited also by Mr. Cooley. It was an application, by *certiorari*, to remove the the action of certain town boards in creating a school district. The application was made fifteen months after the action was taken which it was sought to reverse. The court held that after such a lapse of time it might be presumed that the district had been organized in fact, officers elected, and expenses incurred, and it declined at that late day to review the proceedings by *certiorari*, without any regard to the legality of the organization.

The case of the *People v. Supervisors of Alleghany*, 15 *Wend.*, 198, presents an exhaustive discussion of this particular question, and copious authorities to sustain the position that the sound discretion of the court in matters of *certiorari* may and should be governed by considerations of public convenience. It is the English doctrine, and had been the recognized doctrine in New York from an early period. The court cites *Lawton v. Commissioners of Highway*, 2 *Caines*, 182, in which Spencer, J., announced that "though the general power of the court" (to issue the writ and quash illegal proceedings) "is indisputable, there are cases where they will not interfere," citing as one of them an assessment of a land tax. Although this is more sweeping than this court is disposed to be, for there are cases of land taxes illegally assessed which it might be proper to quash where no great public detriment would ensue, yet it is strong in support of the right and propriety of the exercise of a wise discretion. See, further, as to the discretion of the court being controlled by considerations of public policy, the cases, in New York, of *People ex rel, Onderdonk v. Supervisors of Queens*, 1 *Hill*, 195; *People v. Commissioners of Taxes*, 43 *Barb.*, 494; *Fitch v. Comm'rs of Kirkland*, 22 *Wend.*, 133; *Mott v. Comm'rs of Highways*, 2 *Hill*, 472.

In the case of *Martin Lantis et als*, 9 *Mich.*, 324, the court announced that the writ of *certiorari* was, at common law, not one of right, but resting in the sound discretion of the court, to be allowed or not as might best promote the ends of justice; and that this discretionary power was not taken away by a statute requiring the writ to be issued within two years. In that case a writ of *certiorari* was quashed because of laches for only eleven months. In accord are the Arkansas cases of *Payne v. McCabe*, 37 *Ark.*, 318; *Burke v. Coolidge et als*, 35 *Ark.*, 180, which fully recognize the discretion of the court to refuse the writ.

It would not be easy to imagine a case appealing more strongly than this does to the court to exercise that discretion. The assessment was returned at least as early as the 8th of October, 1880. Taxes, we must presume, were levied and collected on it for the years 1880, 1881 and 1882 from the mass of land owners. No objection seems to have been made to it by petitioner or any one else until May 1883, which lacks but about four months of being three years afterwards. Two legislative sessions had intervened, which might by special act have provided for a valid assessment, if this be invalid. If the prayer be granted and the whole levies be quashed there will have been no valid collections of taxes from 1880 to 1884, the time of the next quadrennial assessment, at least on the great mass of lands which could not properly be brought into the annual assessments. If it be urged that these might have been, then we must presume they were for the years 1881 and 1882, and the petitioner has no case. The lists of those years are not shown.

Courts do not lend their aid either by injunction or *certiorari*, or any other discretionary process, in which those who invoke it are not entitled to stand upon strict legal rights, to cut down through the healthy business strata and overgrowths of several years, for the purpose of eradicating even the most glaring irregularities, which have been acquiesced in until they become encysted in the business affairs of the community and become harmless. In such cases the popular maxim to "let well enough alone," becomes one of jurisprudence. The consequences would be too far reaching, and too detrimental to the public to justify interference. It would be doing a great public wrong for the sake of doing a little technical right. The petitioner does not pretend that his lands were not taxable, or that they were assessed too high, or that if he had paid his taxes, as others, we may presume,

have done, he would be one whit the worse, than if the assessment had been entirely unimpeachable.

The State herself by long acquiescence, and recognition of a municipal corporation, illegally created, may, on the same principles as those herein announced, and for the same reasons, become precluded from an information to deprive it of its franchises, and hold all its actions void, *State v. Leatherman et als*, 38 *Ark., p.* 81.

We are satisfied that the Hon. Circuit Judge exercised a sound discretion in the public interests, even if we were clear that the assessment was illegal.

It was not his duty to treat the petition for a *certiorari* as a bill in equity for an injunction, and if had been there was no equity in it, in that aspect. It professed to be only a prayer for a writ of *certiorari*, attempting to show cause, and asking a restraining order. The statute authorizes the Circuit Court to make restraining orders, in proper cases, in connection with the law proceeding by *certiorari;* and to ask it, does not convert the case into an equity suit. *Gantt's Dig. Sec.* 1196.

6. PRACTICE: How certiorari converted into injunction.

Proceedings by *certiorari* at law are of a special nature, having an appropriate practice. With regard to proceedings by mandamus it was held by this court in *Crawford, Auditor v. Carson, Ex'r, et als*, 35 *Ark.*, that even if the nature of it was prohibitory it could not take the place of an injunction, unless reformed to assume that nature and filed on the equity side. In other words the Legislature, in abolishing forms of action, did not intend to destroy the distinct nature of these sorts of special legal proceedings, which retain their distinctive practice. If parties adopt those remedies they must abide by the practice and rules of law appertaining to them. Parties may, by leave of court, amend, and convert these proceedings into bills of equity, but they must choose for themselves. It is neither a just conception of the Code

of Civil Practice, nor a fair means of testing its promised benefits, to suppose the legislature meant to make an amalgamation of all possible applications to the courts for any conceivable thing, to be thrown into the courts indiscriminately, and taken up by the courts on their own motion, and assigned to their proper branches of proceedure. That duty does perhaps devolve on the courts in ordinary suits and actions, and in plain cases, but it does not extend to special proceedings. Cases of mandamus, *quo warranto*, and those begun by *certiorari*, remain strictly cases at law, and parties can only have legal relief, as long as they choose to adhere to those forms.

We find no error in the record.

Affirm.

WASHINGTON COUNTY v. STATE, USE BENTON COUNTY.

1. FINES AND FORFEITURES: *Who entitled to, where change of venue.*

Where there is a change of venue, in a criminal case, from one county to another, the forfeiture of a bail bond for the defendant's appearance in the latter county, or a fine imposed in that county, belongs to the county in which the offense was committed and the indictment found.

APPEAL from *Washington* Circuit Court.

Hon. J. M. PITTMAN Circuit Judge.

L. Gregg for appellant.

Fines, forfeitures, &c., are payable into the treasury of the county *where imposed* or *where the conviction is had.* *Sec.* 1, *Act Dec.* 14, 1875, *p.* 135.

The payment of costs by a county does not entitle it to the fine or forfeiture. The payment by Benton county was voluntary. She perhaps looked to *Secs.* 2015–16–17, *Gantt's Dig.*, and *Ouachita County v. Sanders*, 10 *Ark.*, 467, made under former statutes. But the Code of Practice and the amendment of 1871 modified the sections above referred to and Sec. 5, Act Feb. 25, 1875, p. 169, explicitly declares that *the county where the conviction is had shall pay the costs.* *Bradley Co. v. Bond*, 37 *Ark.* 226.

L. H. McGill for appellee.

Under the *Revised Statutes Ch.* 45, *Sec.* 203 *&c.*; *Gantt's Dig.*, *Secs.* 2014–16, and the decisions therein, *Pulaski Co. v. Irwin*, 4 *Ark.*, 473; *County of Ouachita v. Sanders*, 10 *Id.*, 467, where the venue in a criminal case was changed, the county in which the crime was committed or indictment found was liable for the costs, and hence entitled to the fine or forfeiture.

Reviews and comments upon *Acts* 1874–5, *p.* 169; *Sec* 286 *Cr. Code as amended*; *Acts* 1871, *p.* 259; *Rev. St. Ch.* 45, *Sec.* 203; *Gantt's Dig.*, 1974; *Acts* 1868, *p.* 230–1, *Sec.* 1; *Sec.* 2831, *Gantt's Dig.*, *&c. &c.*, and contends that the legislature, by the Act of 1875, intended to return to the old policy as declared in *Pulaski Co. v. Irwin, and Ouachita Co. v. Saunders, supra.* See *Independence Co. v. Dunkin*, 40 *Ark.* 329; *Bradley Co. v. Bond*, 40 *Ark.*, 227. *Finley v. Erwin*, *N. C. Law Repository*, 105.

The words, "where the conviction is had," evidently refer to prosecutions before justices and other inferior courts where there can be no change of venue to another county.

The evident policy was to restore to counties the revenue which, for a while, under the Act of 1871, had been diverted.

1. FINES AND FORFEITURES: Which county entitled to on change of venue.

SMITH, J. One Harrell was indicted by the Grand Jury of Benton County for an offence committed in that county. On his application the venue was changed to Washington county; and at the time of making such application he entered into a recognizance in the sum of $1,000, for his appearance in Washington Circuit Court. He afterwards made default, his recognizance was declared forfeited and his surety paid the amount in Washington county warrants to the sheriff of Washington county, who paid the same over, less his commission and the fees of the prosecuting attorney, to the Treasurer of Washington county.

Three other persons were also indicted in Benton county and likewise took a change of venue to Washington, where they were tried, convicted and fines imposed to the amount of $450.

These fines were collected in Washington county warrants and ultimately found their way into the Washington county treasury. Benton county paid the costs of the prosecution in Harrell's case, and in the other cases the costs were paid by the defendants themselves.

This action was begun in the Washington County Court, in the name of the State for the use of Benton county, to recover these several sums in Washington county warrants. That court dismissed the complaint upon demurrer. But upon appeal to the Circuit Court the demurrer was overruled, the cause tried upon an agreed statement of facts, the law declared to be in favor of the plaintiff, and judgment entered accordingly. Motions in arrest of judgment and for a new trial were denied.

From the year 1838 down to 1871, the law of this State was that all fines imposed on convictions for crimes or mis-

demeanors, as also all fines in any other case should, unless otherwise expressly appropriated, be paid into the county treasury of the county in which the indictment was found or fine imposed. *Gould's Dig.*, *Chap.* 52, *Sec.* 218. The latter clause of this section (where fine imposed) referred to fines imposed by inferior courts, where no change of venue to another county was permitted. The former clause (where indictment found) referred to prosecutions in the Circuit Court, where the venue might be changed. And the whole section meant that fines were to be paid into the treasury of that county where the offence occurred.

Forfeitures also constituted a part of the county revenue, *Lawson v. Pulaski County*, 3 *Ark.*, 1; *Christian v. Ashley County*; 24 *Id.*, 142.

On the 23d of March, 1871, the legislature passed an Act, diverting the revenue accruing from fines, penalties and forfeitures to the general school fund of the State. *Gantt's Dig. Sec.* 5289. But on the 14th of December, 1875, the former policy of the State was restored and an Act passed requiring all fines and forfeitures when imposed, (not where imposed, as counsel on both sides have quoted it) to be paid into the county treasury for county purposes. And the question is, into the treasury of which county is such revenue to be paid, where the prosecution has originated in one county, and has afterwards been transferred to another?

The legislature of 1875 undoubtedly intended to return to the old, settled policy, which prevailed before the era of reconstruction, of giving this branch of revenue to the counties to enable them to defray the expenses of those prosecutions to which they were made liable. Hence, the county which would have been chargeable with the costs, in case of an acquittal, or in certain cases of conviction, is entitled to the fines on conviction or to the benefit of the forfeiture, if the defendant fails to appear. And that is the county where the

offence was committed and in which the prosecution was begun. *Independence County v. Dunkin*, 40 *Ark.*, 329 and cases cited.

The same conclusion was reached by the Supreme Court of North Carolina, from a process of reasoning and construction in *Finley v. Erwin, Carolina Law Repository*, 105, where the State had apparently no previous established policy on the subject. See also *County of Rock Island v. Mercer County*, 24 *Ill.*, 35.

Judgment affirmed.

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WHITMORE v. THE STATE.

1. CRIMINAL LAW: *In jeopardy: Discharge of juror.*
A prisoner is in jeopardy from the time that the jury is impaneled and sworn in a court of competent jurisdiction upon an indictment sufficient in form and substance to sustain a conviction; and the entry of a *nolle prosequi*, or discharge of a juror, after that, without his consent, operates as an acquittal, except in cases of overruling necessity, as the death or illness of the judge or a juror, or inability of the jury to agree on a verdict.

2. SAME: *Grand juror not incompetent for petit juror.*
A grand juror who assisted in finding an indictment is not thereby disqualified as a petit juror to try the case. It is only cause of challenge for implied bias.

APPEAL from *Madison* Circuit Court.

Hon. J. M. PITTMAN Circuit Judge.

W. F. Pace for appellant.

1. Serving on the grand jury that found the indictment is no disqualification from serving on the petit jury, it is only grounds for challenge. *Gantt's Digest*, Sec. 1911.

2. When the jury was sworn the jeopardy commenced, and when it was discharged or a juryman withdrawn it operated as an acquittal. *Const., Art.* 2, *Sec.* 8; *Bishop Cr. Law*, 856–8; 26 *Ark.*, 260.

3. Defendant being charged with a felony, waived none of his legal rights by failing to move the court to discharge him when the juror was withdrawn. 19 *Ark.*, 205.

C. B. Moore, Attorney General, for the State.

Defendant waived the jeopardy by not objecting to the discharge of the juror. 15 *Ohio St.* 155; 16 *Ark.*, 568.

SMITH, J. Whitmore was indicted for a penitentiary offence. The indictment was not so defective that no valid judgment could be rendered upon it. The cause coming on for trial upon the plea of "not guilty," a jury was impaneled and sworn and the prosecuting attorney proceeded to open the case. At this point Daniel Blevins, one of the jury that had been so selected and sworn, interposed and stated that he had been a member of the Grand Jury which returned the indictment. Thereupon, to use the language of the bill of exceptions, "the court upon its own motion and without the consent of the defendant, discharged said Daniel Blevins juror as aforesaid and called in his stead one James Frisby." The jury was then sworn again and the trial proceeded, resulting in the conviction of the prisoner, who moved in arrest of judgment and for a new trial because the first jury that had been sworn was discharged without his consent.

"A prisoner is in legal jeopardy when he is put upon trial, before a court of competent jurisdiction, upon an indictment which is sufficient in form and substance to sustain a con-

viction, and a jury is charged with his deliverance. And a jury is thus charged when they have been impaneled and sworn. The defendant then becomes entitled to a verdict which shall constitute a bar to a new prosecution; and he cannot be deprived of this bar by a *nolle prosequi* entered by the prosecuting officer against his will or by a discharge of the jury." *Cooley's Const. Lim.* [*327]; 1 *Bishop Crim. Law 6th Ed. Sec.* 1013 *et seq.*; 1 *Bishop Cr. Pro. 3d Ed. Sec.* 960–1; *Lee v. State*, 26 *Ark.*, 260; *McKenzie v. State Ib.*, 334; *Williams v. State* 42 *Id.*, 35.

Sec. 8, in the Declaration of Rights, Constitution of 1874, authorizes the court in its discretion, to discharge a jury, in case of their inability to agree upon a verdict after a reasonable time for deliberation. And cases of overruling necessity for their discharge without verdict may sometimes arise, such as the illness or death of the presiding judge or of a juror. *Atkins v. State*, 16 *Ark.*, 568. But the general rule is, that the discharge of a jury, after the machinery of the court is fully organized for trial and judgment, without the consent of the defendant expressed or implied, operates as an acquittal.

The service of Blevins on the Grand Jury which preferred the bill did not render him incompetent to sit on the petit jury which tried the case. It was only cause of challenge for implied bias. *Gantt's Dig.*, *Sec.* 1911. The trial, then, might well have gone forward with the jury as originally constituted. And since it does not appear that any objection was taken by the defendant on account of the fact disclosed by Blevins, it must be presumed that he was insisting on his Constitutional right to a trial before that jury, of which Blevins was a member.

O'Brian v. Commonwealth, 9 *Bush*, 333; *S. C.* 15 *Amer. Rep.*, 715, was a prosecution for murder. On the trial,

after the jury had been sworn and while the evidence was being heard, a juror announced that he was one of the Grand Jury that found the indictment. Thereupon, the court of its own motion and against the objection of the defendant, discharged the juror and had another summoned in his stead. And it was held that the discharge of the juror without sufficient cause amounted to an acquittal.

But while there is no right of challenge for cause after the jury is sworn, the court might, upon the demand of the prisoner, have stopped the trial and called another jury, without its having the legal effect of an acquittal. Thus in *Stewart v. State*, 15 *Ohio State*, 155, after a jury had been impaneled and sworn, a juror arose in open court and stated that he had been one of the Grand Jurors by whom the indictment was found. The defendant's counsel, in answer to an inquiry by the court, objected to proceeding in the trial with the jury then impaneled, at the same time declining to waive any of the defendant's rights. The jury was then discharged and another jury impaneled, and the trial proceeded, the defendant objecting thereto. It was held that the discharge of the jury first impaneled was the necessary result of sustaining the objection interposed by defendant himself, and so did not take place without his consent, nor bar a further prosecution.

The action of the court below was dictated by an anxious desire to give the accused a fair and impartial trial. Still it is necessary to protect parties charged with crime in their Constitutional rights. This court has, heretofore, drawn the line where jeopardy begins at the swearing in of the jury to try the issue. And this is in accordance with the overwhelming weight of authority and with the best considered cases. If, after that, the jury is discharged

without an obvious necessity and without the defendant's consent, express or implied, he cannot be again placed upon trial for the same offense, where life or liberty is involved.

The judgment is reversed and the court below is directed to discharge Whitmore from custody.

Iron Mountain & Helena Rail Road v. Stansell.

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1. Change Tickets: *Evidence*

In an action for money due on a contract, change tickets issued by the defendant in violation of the statute and delivered in payment of the debt, though illegal, may be used as evidence of the amount due on the contract. They are a written admission that the maker has received the value expressed in them.

2. Contracts: *Entire and Separable*: *Change Tickets*: *Statute Limitations*: *Interest.*

In 1873 the I. M. & H. Ry. Co. contracted with A. for the construction of the road from Helena to Forest City for a specified compensation, payable in instalments, which being unable to pay, they in 1874, issued to A. change tickets in the sum of five dollars, in a form prohibited by statute and payable to bearer in freight or passage six months after the completion of the road. A. with the knowledge and consent of the company delivered a part of the tickets to a sub-contractor, B. for work done by him in 1875. Six months after the completion of the road the company refused to honor the tickets held by B. and he sued them for the amount of work represented by the tickets: Held: 1. That B. was the equitable assignee of the demand which the tickets professed to represent and could recover so much of the claim of A against the company as was represented by the tickets, and they, though illegal, were evidence of the amount. 2. The contract with A. being entire and indivisible the statute of limitations did

not run against any part of the demand until the whole road was completed. 3. But as the work was payable in instalments B's demand bore interest from the time he received the tickets.

APPEAL from *Phillips* Circuit Court.

Hon. J. C. PALMER Special Judge.

L. H. McGill for appellant.

The certificates being issued on bank note paper, in the similtude of bank notes, and intended to circulate as money were void. *Gantt's Dig. Sec's.* 748-752; *Bishop on Cont. Sec.* 458; 5 *Ark.*, 358; 32 *Id.*, 631; 17 *Mass.* * *p.* 259; 21 *Iowa*, 565; 9 *Paige*, 470; 12 *Wall.*, 342: 4 *Id.*, 447; 3 *McLean C. C.*, 102; *Ib.*, 265. If appellee had any right it was against the individuals who signed them. *Gantt's Dig., supra*; 32 *Ark.*, 640-2-3. Appellee was not an innocent holder for value, as he received them knowing them to have been illegally issued. 5 *Ark.*, 358; 9 *Paige*, 470; 2 *Hill*, 241. Not being promissory notes, but non-negotiable contracts, as assignee, appellee acquired no greater rights than the Construction Co. and the certificates were subject to all the defences that might have been set up against the assignor. 1 *Daniel Neg. Instr.*, 2d *Ed.* 46 *&c.*; 4 *Ark.*, 441; 3 *Id.*, 541; 16 *Cal.*, 285; 2 *Gall. C. C.*, 564; 11 *Otto*, 572.

There was no privity of contract, because there was no assignment of any of the claim against the railroad or any part of the contract—a mere delivery of the certificates, which carried only the right to collect the certificates, and not the right to sue upon the original contract. 16 *Cal.*, 255; *Ib.*, 285; 1 *Daniel on Neg. Inst.*, 2d *Ed. p.*, 684. Receiving only as collateral security, unless they were negotiable instruments, appellee was not a *bona fide* pur-

chaser. *Jones on Pledges, Sec.* 134. The resolution of the Board of Directors was *ultra vires.*

Appellee's right of action accrued in 1875 and was barred by limitation.

If the suit was brought on the certificates interest did not begin until they were due, if on the contract for labor performed, the amount was unliquidated and uncertain, and no interest accrued until the amount was ascertained, 20 *Ark.*, 410; 21 *Id.*, 349; 102 *U. S.* 294.

Reviews 102 *U. S.* 294; 21 *N. Y.* 490; 12 *Wall.*, 349, distinguishing this case from those.

Our statute makes it unlawful not only to *issue* but to *receive* such paper. *Gantt's Dig. Sec.* 751–2.

Stephenson & Trieber for appellee.

Appellee does not sue upon the certificates, but for money due on the original contract, using them as evidence of the debt due.

While the certificates may be void, (5 *Ark.*, 684; 25 *Id.* 301; 32 *Id.* 619;), yet the original contract was valid, and appellee had the right to sue as the assignee of so much of the debt due the original contractors for work and labor done, and which the railroad received the benefit of, treating the payment in illegal paper, as no payment at all. 6 *Hill*, 340; 5 *Cranch C. C.*, 285; 10 *Wall.*, 676; 102 *U. S.* 299; 4 *Cent. L. J.* 247; 14 *N. Y.* 162; 15 *Id.* 9; 16 *Cal.*, 255; 16 *Id.*, 285; 96 *U. S.* 341; 39 *Ark.*, 139; 21 *N. Y.* 490.

Appellant is estopped by its own act. It cannot plead its own wrong. 16 *Cal.*, 255.

The contract is an entire one, and consequently unapportionable. It was for the whole work at a gross sum, and the statute did not commence to run until the work was completed. 10 *Ark.*, 326; 4 *Id.*, 199.

Appellee is entitled to interest as damages from the time payment was due in 1875. *Gantt's Dig. Sec.*, 4277; 20 *Ark.*, 419.

SMITH, J. The Iron Mountain & Helena Rail Road Company made a contract in 1873 with the Southern Construction Company for the building of its road. For work done and materials furnished the Construction Company was to receive all subscriptions voted by counties, cities and towns along the line of the road, as well as all subscriptions by individuals and all unsold stock of the railroad company. Being unable to collect these subscriptions promptly, so as to pay for the work as it proceeded, the board of railroad directors in 1874, by resolution, authorized the issue of certain "Freight and Transportation Certificates" to the amount of $50,000 and in the following form:

"Six months after the completion of the Iron Mountain & Helena Railroad from the City of Helena to Forrest City, or the crossing of the Memphis & Little Rock Rail Road, the Iron Mountain & Helena Rail Road Company will pay to bearer five dollars in freight, or passage, or other dues of the Iron Mountain and Helena Rail Road Company.

WM. H. CATE, President.

T. M. JACKS, Treasurer."

These certificates were engraved, with vignette, on bank-note paper and in form and appearance closely resembled ordinary bank bills. It was directed that they should be paid to the Construction Company and its subcontractors in lieu of the consideration named in the contract.

On the first of August, 1882, Stansell brought an action against the rail road company before a Justice of the

Peace for the indebtedness represented by thirty-six of these certificates and recovered judgment. An appeal was taken to the Circuit Court, where the plaintiff again prevailed, obtaining judgment for the debt and interest from the date when he received the certificates.

The defences seem to have been (1). That the certificates were intended by the rail road company to circulate as money, being in the similitude of bank-notes and were in violation of the statute, which prohibits unauthorized persons to issue notes and bills designed to be used as a circulating medium; (2) the statute of limitations, the certificates having been delivered in 1875 as part payment for money then due; and (3) if the plaintiff should be found entitled to recover any sum, no interest should be allowed for the time prior to the completion of the road to Forrest City in the month of December, 1881.

The testimony showed that Stansell had furnished cross-ties to the Construction Company to be used in building defendant's rail road. His contract was that, within twenty days after delivery of ties, he was to receive the acceptance of the Construction Company with the indorsement of some solvent party in St. Louis, and in the meantime was to hold the transportation certificates as collateral security. But the acceptance had never in fact been substituted for the certificates. Six months after the completion of the road to Forrest City, the plaintiff had tendered the certificates to the defendant in payment of freight and passage but they had been refused.

The court at the instance of the plaintiff, and against the objection of the defendant, instructed the jury, in substance as follows: 1st. That if the certificates were issued to be used as a circulating medium, or if the defendant promised to receive them in payment of debts

due it in lieu of money, they were void; but, nevertheless, if defendant delivered them to the S. W. Construction Company in payment of a just debt, and the S. W. Construction Company delivered them to plaintiff in payment of a just debt due by it to plaintiff, plaintiff was subrogated to the rights of the Construction Company and its assignee to the amount of certificates so held, and entitled to a verdict for that amount if defendant in no way participated in the issue of the illegal paper. 2nd. That if not issued for the purposes above stated, they were valid; and if plaintiff, after six months from the completion of the road to crossing of M. & L. R. R., tendered them to the defendant in payment of freight dues and they were refused, the finding should be for the plaintiff.

The court, on its own motion, and against the objection of the defendant instructed the jury in substance: 1st. That if the finding was for plaintiff interest should be computed at six per cent. per annum, from the day the bills were delivered to plaintiff.

2nd. That the statute of limitation did not begin to run till the completion of the rail road, admitted to be in December, 1881; the contract between the Rail Road Company and the Construction Company being a single contract for construction, although certain sums were due the Construction Company on estimates of work done and from which time the jury will award interest as damages.

The court refused to give the instructions asked by the defendant which were, in substance, as follows:

1st. That the certificates sued on were void; that their delivery to the construction Company by the I. M. & H. R. R. Co. was no payment of its indebtedness to the Construction Co.; that the Construction Co. might have disregarded such payment, and at once brought an action against the

R. R. Co. for the amount; that having a complete cause of action at the date of such delivery, the Construction Co. was required to assert it within 3 years or be barred by limitation; the plaintiff having only such rights as the Construction Company had and might assign, was compelled to enforce his rights under the assignment within three years; that if the certificates sued on were delivered to the Construction Company by the I. M. & H. R. R. Co. on the 5th day of June, 1875, and this action was not commenced until August, 1882, the finding should be for defendant.

2nd. That the certificates sued on were issued in lieu of sums of money subscribed by individuals in aid of I. M. & H. R. R. Co. and were in no event to impose upon the R. R. Co. a personal liability in excess of such subscriptions, and that plaintiff can only recover by showing that such subscriptions have been collected by the R. R. Co. and not properly applied to the redemption of its certificates; that if no such collections have been made, or, if made, and properly applied to redemption of other certificates of the same issue, the finding should be for defendant.

3d. That if the finding should be for plaintiff, interest should be computed at 6 per cent. per annum, from Dec, 1st, 1881, the date upon which the I. M. & H. R. R. was completed to Forrest City.

4th. That the cause of action accrued 5th day of June, 1875, and if action was not brought in five years from date, finding should be for defendant.

5th. That the cause of action accrued June 5th, 1875, and if the action was not brought within three years from that date, the finding should be for defendant.

The result of the present controversy does not depend on the validity or invalidity of these transportation certificates; nor upon the question whether, if they were issued in con-

travention of a statute, a private corporation is obliged by law to redeem them.

Upon these points the curious may compar *Gantt's Digest Ch. XIX*, entitled *Change Tickets*; *Van Horn v. State*, 5 *Ark.* 349; *Anthony ex-parte Ib.*, 358; *Yeatts v. Williams Ib.*, 684; *Smith v. State* 21 *Id.*, 294; *Jones v. Little Rock*, 25 *Id.*, 301; *Lindsey v. Rottaken*, 32 *Id.*, 619.

The plaintiff does not sue on the paper, but for money due on the original contract, the certificates being used as evidence of the amount due. The main question is therefore whether the corporation defendant owes the plaintiff money on a contract, which it refuses to pay.

1. Contracts. The railroad company had an undoubted right to contract for the construction of its road. It did enter into a contract for that purpose with the construction company. A portion of that contract has been assigned, with the knowledge and consent of the rail road Company, to the plaintiff. And he has a legal right to demand pay for materials furnished under that contract, unless something has since occurred which closes the doors of justice against him. The defendant contends that its contract relations with the plaintiff have been satisfied by the delivery to him of illegal paper. But if there was an intentional fraud in issuing the certificates, Stansell does not appear to have participated in it.

The only party that has done any wrong is the defendant. The obligation to do justice rests upon all persons, natural or artificial, and if a corporation obtains the money or property of others without authority, the law will compel restitution or compensation. *Mansh v. Fulton County*, 10 *Wall.*, 676. No party is allowed to set up his own illegality or wrong to the prejudice of an innocent person, unless the legislatie power has not only forbidden the making of the con-

Change Tickets. tract, but has also declared it to be void. Now, although these certificates, being in a form prohibited by law, may be

worthless, so that no action can be maintained upon them, yet they are still capable of being used in evidence. They are a written confession that the maker has received the value expressed in them. And the plaintiff is the equitable assignee of the demand which the certificates professed to represent and is entitled to recover so much of the claim of the construction company against the rail road company as is equal to the amount of shin-plasters held by him. *Oneida Bank v. Ontario Bank*, 21 *N. Y.* 490; *Tracy v, Talmage*, 14 *Id.*, 162; *Curtis v. Leavitt*, 15 *Id.*, 9; *Shink v. Pulaski County* 4 *Dillom*, 209; *Merchants National Bank v. Little Rock*, 5 *Id.* 299, *affirmed*, 98 *U. S.* 308; *Wood v. Louisiana*, 5 *Dillon*, 122, *affirmed*, 102 *U. S.* 294; *School District v. Lombard*, 2 *Dillon* 493; *Kinsey v. Little River County*, 4 *Cent. Law Jour.*, 247; *Hitchcock v. Galveston*, 96 *U. S.* 341; *Argenti v. San Francisco*, 16 *Cal.*, 255; *Martin v. San Francisco*, *Ib.*, 285. Evidence

By the resolution of the directory, the original contractor was authorized to pay out the certificates, which were directed to be made transferrable by delivery and payable to the holder. Thus by its own act, the rail road company split up the original consideration, agreeing to become paymaster for the work to as many creditors as there might be holders of the certificates. And having received all the benefit to be derived from the transaction, it is estopped to deny this.

But it is insisted that, if the money was due when the certificates were issued, the plaintiff had a present cause of action and consequently is now barred by the statute of limitations. As the contract between the Construction company and the rail road company was for the construction of the whole line of defendant's road from Helena to Forrest City and was a single and indivisible contract, the statute did not begin to run in favor of the rail road company against any part of the sum due the construction company until the work was done and the road completed according to contract. Statute Limitation.

When a demand certain is payable by instalments, upon maturity and non-payment of one or more instalments, covenant will lie. Nevertheless the obligee may wait until all the instalments become due and then bring debt. *Inglish v. Watkins*, 4 *Ark*, 199; *State v. Scogin*, 10 *Id.*, 326.

INTEREST. This leaves only the question of interest. The resolution provided for advances to be made from time to time, as the work progressed, but forty per cent. of the amount earned was to be withheld—doubtless to cover future possible failures on the part of the contractor. Now, when, under the contract, payments or estimates became due to the construction company, which were not paid, they drew lawful interest from the time payment was due, which was in 1875. *Gantt's Dig. Sec.* 4277; *Watkins v. Wassell*, 20 *Ark.* 419.

The judgment is affirmed.

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BEARD V. STATE.

1. SELLING MORTGAGED PROPERTY: *Mortgage; Interest in crop.*
   A cropper on shares has such an interest in the crop as is the subject of mortgage, and for the sale of which, when mortgaged, and the mortgage recorded, he will be guilty of a felony.
2. SAME: *Intent.*
   In order to find one guilty of selling mortgaged property, it is not necessary that the jury find that he sold it with the felonious intent to deprive the mortgagee of his debt.

EAKIN, J., dissenting.

NOTE.—The mortgage in this case was duly recorded.—*Reporter.*

APPEAL from *Baxter* Circuit Court.

Hon. R. H. POWELL Circuit Judge.

J. L. Abernethy for appellant.

C. B. Moore, Att'y Gen'l, *contra*.

The indictment is in almost the exact words of the statute, and the motion in arrest was properly overruled. *Acts* 1874–5 *p.*, 129–130. The mortgage was duly *filed* and "abstracted under the Act of 1877, and the evidence clearly shows that defendant both sold and bartered personal property upon which there was a duly recorded mortgage. The Act makes it a crime, and no intent to defraud need be proved.

1. Selling Mortgaged Property.

COCKRILL, C. J. Appellant was tried and convicted under an indictment in two counts, charging him in one, with selling, and in the other, with bartering, parts of a crop of cotton which he had previously mortgaged. The indictment contained all the averments necessary under the statute to a full description of the offence, and the proof was sufficient to every point. The court instructed the jury fairly and almost in the language of the statute.

The apellant asked two instructions, however, which the court refused. The first was upon the theory that if appellant planted the crop in question as "a cropper on shares," he had no interest in it which he could mortgage, and he should be acquitted. This was properly refused.

Interest in crop subject of mortgage.

By the common law a mortgage of chattels not in *esse* or thereafter to be acquired by the mortgagor was void. This rule has, however, been practically anulled in this and some other States by the incorporation of the principle of the Civil Law on this subject into our equity jurisprudence. Such a mortgage can be recorded with like effect as other chattel mortgages and equity will enforce it without question whenever there is anything for the

mortgage to take hold of. *Apperson v. Moore* 30 *Ark.*, 57; *Hendrick v. Britain*, 63 *Ind.*, 438.

This was true of a mortgage by a "cropper on shares" of his crop prior to the Act of Feb. 11th, 1875. *McGee v. Fitzer*, 37 *Texas*, 27; *Potts v. Newell*, 22 *Minn.*, 561; 1 *Wash., R. P.*, *365. This Act put an end, in this State, to the unseemly conflict between law and equity in respect to mortgages of unplanted or immature crops, by making them good at law as well as in equity. *Jarrett v. McDaniel*, 34 *Ark.*, 598.

2 CRIMINAL INTENT.

The second instruction was to the effect that the jury must find that appellant disposed of the mortgaged property, with the felonious intent of depriving the mortgagee of his debt, before they could find a verdict of guilty.

The legislature "have the unquestioned right, so long as they keep themselves within the pale of the Constitution, to command the performance of such acts as are right, and to prohibit such as they may conceive to be wrong, and their right is equally indisputable to say whether the intention shall be presumed from the mere act probibited, or whether in addition to that act the State shall also show the intent which prompted its commission." *Shover v. State*, 10 *Ark.*, 264.

The statute upon which the indictment in this case is based, makes it a crime to dispose of personal property, under particular circumstances. When a party voluntarily does the act prohibited, he is charged with the criminal intent of doing it, and no other or further intent need be shown. *Seelig v. State ante* 96; *U. S. v. Ulrice*, 3 *Dillon*, 532; *Com. v. Mash*, 7 *Met.*, (*Mass.*) 472.

It was not error to refuse to instruct the jury as asked.

Affirmed.

Dissenting opinion by

EAKIN, J. The defendant was a cropper, making a crop upon the land of another, for an aliquot portion, and using the team and tools of the land-owner for the purpose.

I concur with the court in the view that our statute, on the subject of removing, selling, bartering or disposing of mortgaged property, includes equitable as well as purely legal liens. Both are within the letter, as well as the spirit and mischief of the Act. There was no error in refusing the instruction on that point.

I think, however, that the jury should have been left free to consider of the intention to defraud the mortgagee, and that, therefore, the court erred in refusing to instruct the jury that they must believe from the evidence that defendant had such felonious intent.

It is true the statute is silent as to the intent, but the mischief aimed at, indeed the only conceivable mischief which could result from the sale of mortgaged property, is the fraud upon the creditor in depriving him of his debt. Criminal statutes, according to well-settled principles are to be construed strictly in favor of defendants, under indictments to punish. The construction should be, says Mr. BISHOP, "as far as possible, in harmony with *their policy*, and the common law." *Statutory Crimes, Sec.* 141. Moreover, "a statute will not generally make an act criminal, *however broad may be its language*, unless the offender's intent concurred with the Act." *Ib., Sec.* 132. This intent does not refer to the doing of the act, but to the evil motive, as illustrated by the case of an act making it capital to draw blood in the streets. This was held not to apply to a surgeon who bled a man who had fallen in a fit, although he intentionally did the very act which the statute prohibited. But he had no felonious intent

to perpetrate the crime, which the statute aimed at which was to draw blood by assault.

The statute in judgment is in derogation of the common law, and in some respects peculiar. It makes it felony to sell, what it would only be a misdemeanor to steal, as to all things within the limits of value governing petit larceny. If, in this case, the defendant had stolen from the mortgagee, all that the proof shows he sold, he would not be guilty of felony.

It may be well apprehended that if strictly construed without reference to evil intent, it may reach consequences which would shock the sense of Justice and confuse all ideas of distinction between crime and innocence. If the doing of the prohibited act, with intent to do it, be, alone, conclusive of guilt, and the jury be precluded from all consideration of intent to defraud, then the most overwhelming necessity, with ample provision for meeting the debt from other sources, can never be shown. One who had given a large mortgage of personal property to secure a debt and then paid the debt to the smallest estimable balance, could not sell the smallest portion of it under any emergency, for the mortgage would cover all for the balance.

Upon the other hand I see no evil to arise from entrusting juries with the consideration, in each case, of the evil intent. Generally they are astute enough, with their knowledge of human motives and experience of human conduct, to detect an intent to defraud, or to recognize an innocent intent. Laws are to be reasonably interpreted, so as not to reach absurd results. I think it reasonable to apply to this statute the common law doctrine that no acts are felonious not done with felonious intent.

My opinions as to the proper construction of the statute, are strengthened by the circumstances of this case.

As I view the evidence, it shows that the defendant was a very poor man, dependent wholly, for daily bread, on daily labor, with a wife who had been sick for most of the year. He paid the mortgagee the greater part of the debt, and sold a very small portion of the crop, in the seed, to procure a little beef, some other necessaries, and a cheap door shutter. He then agreed with the mortgagee to work out the balance of the debt, which was less than twenty dollars, with the mortgagee's father. The mortgagee, knowing the facts, agreed to be satisfied with that, and, from anything that appears, the labor may have been performed. For this, he is to bear the brand, through life, of a convicted felon, besides serving a year in the penitentiary.

Notwithstanding the hardship to himself and the invalid wife, it must be concluded that if he acted with intent to defraud his creditor, the conviction is legal and proper. But I am not sure the jury would have thought that he did, and I believe on a fair and reasonable construction of the law, by its manifest policy, and with a view to the mischief it was intended to suppress, it ought to have been left with them to say.

I think there ought to be a new trial, and that the jury should have the instruction asked.

Flynn v. State.

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1. Criminal Evidence: *Res gestæ: Declarations.*

In prosecutions for assault words uttered during the continuance of the main transaction or so soon thereafter as to preclude the hypothesis of concoction or premeditation, whether by the act-

ive or passive party, become a part of the transaction itself; and if relevant, may be proved as any other fact, without calling the party who uttered them; but declarations are not admissible until it is shown that the declarant was a participant in the transaction which the declaration is intended to explain or enlarge.

2. CRIMINAL PRACTICE: *Admissions of attorney at the trial, effect of.*
A prisoner is not bound by the waiver or admission of his attorney at the trial unless it be distinct and formal and made for the purpose of binding the prisoner.

3. CRIMINAL PRACTICE: *Instructions.*
A declaration by the judge in instructing the jury in a case of assault with intent to kill "that the prisoner is guilty of an assault with intent to kill or he is guilty of nothing," is error.

APPEAL from *Faulkner* Circuit Court.

Hon. F. T. VAUGHAN Circuit Judge.

Jas. M. Pomeroy and *R. A. Howard*, for appellant.

1. In criminal cases counsel cannot bind a defendant by admissions, nor can he weaken nor impair the all-embracing force of the plea of not guilty. He cannot waive any of defendant's rights. 16 *Ark.*, 601; 17 *Id.*, 290; 20 *Id.*, 106; 21 *Id.*, 198 *Ib*, 228; 22 *Id.*, 214. No admission at the trial can be of any validity which is not made directly and with full attentive consent as a part of the record. An express relinquishment of a right should appear before the party can be deprived of it. 16 *Ark.*, 605; 3 *Mass.*, 152; 18 *Johns.*, 218.

2. Boicourt's testimony as to what Pruitt said was inadmissible as part of the *res gestæ*. It was mere *hearsay*. 25 *Ark.*, 89.

3. The court erred in instructing the jury that defendant was guilty of assault with intent to kill, &c., or nothing. Under our practice defendant may be found guilty of different degrees of an offense. *Gantt's Dig.*, *Sec.* 1961–2–3;

Lacefield v. State, 34 *Ark.*, 275.

4. A party has a right to insist that a proper charge should be given in the terms in which it is asked, and if it is not, but the substance only given, it is error. 13 *Ala.*, 222, 231; 11 *Ala.*, 1059.

C. B. Moore, Att'y Gen'l, *contra.*

1. Boicourt's testimony was admissible as part of the *res gestæ*. *Greenl. on Ev., Vol I. Sec.* 108; 12 *Ark.*, 782; 34 *Id.*, 720. Especially in view of the *admissions of counsel* that the *fact of the shooting was not denied* and "*that defendant planted himself on the right of self defense.*

2. It is competent for counsel to bind a client by admissions, when made distinctly and formally, and they have the effect of dispensing with formal proof. *Greenl. on Ev., Vol. I, Sec.* 186.

3. Some rights *cannot* be waived either by counsel or defendant, *i. e.* the right of trial by jury in felonies, and the cases cited for appellant are of that character.

4. The prayers of defendant refused were *cumulative* and are fairly covered by the general charge of the court. *Johnson v. Brock*, 23 *Ark.*, 283.

5. The *statement* by the court that in *this cause* the defendant was guilty of an assault with intent to kill, &c., or nothing, while perhaps unnecessary, is not seriously objectionable. Defendant had *planted himself on the right of self defense*, admitted the shooting, and there was nothing to indicate a *simple* or an *aggravated* assault. It was such an assault or nothing.

COCKRILL, C. J. Appellant was indicted in Pulaski County for an assault with intent to murder one Robert Pruitt. He was convicted in Faulkner County on change of venue and his punishment assessed at three years in the

1. CRIMINAL EVIDENCE. *Res gestæ.* Declarations.

penitentiary. On the trial it was proved that in March, 1884, without provocation he fired three shots with a pistol from a point diagonally across the street from the front door of a hotel in Little Rock into the said door, while a number of men were standing in and about it. To sustain the issue that the shots were fired at Pruitt, for that was the charge in the indictment, the State introduced John Boicourt, who testified as follows:

"I was at Little Rock the Sunday morning of the shooting. I was in the lobby of the Capital Hotel. I was standing facing the door leading from the lobby of the hotel into the billiard room, talking with some gentlemen and we were just finishing the conversation when this crack came. I thought at first that some one had slammed the door very hard and broke the glass. Before I got to see the door something else sounded, and I distinguished the sound of a pistol, and ran back through the billiard room to a little alley way, to keep out of the line of the shots, and several other gentlemen ran back with me. It was so thick I could not get through. A little small man came running up on my right and said, 'He is shooting at me. Wm. Flynn is shooting at me.' He looked scared and I said 'Gaddy you, I am going to get out of your way.'"

Witness further stated that the little small man referred to was Robert Pruitt; and also that after the prisoner was arrested he informed Pruitt of that fact and saw him go off up stairs with his attorney.

There was no other testimony about Pruitt excepting that a *subpœna* for him had been returned not found, and there was nothing else tending to show upon whom the asasult was made. Appellant in apt time objected to the testimony about Pruitt's statements, and the question of its admissibility is presented by the bill of exceptions.

It often becomes difficult to determine when declarations

shall be received as part of the *res gestæ*. In cases like this words uttered during the continuance of the main action, or so soon thereafter as to preclude the hypothesis of concoction or premeditation, whether by the active or passive party, become a part of the transaction itself, and if they are relevant, may be proved as any other fact without calling the party who uttered them. And if the assaulted party should flee, as it is argued that Pruitt did here, what he says in his flight under the apprehension of immediate danger is admissible for the same reason. All declarations, however, must come from a participant in the transaction which the declarations are intended to explain or enlarge, to come within the rule. 1 *Greenl. Ev. Sec.* 108 *and note; Whart. Ev. Secs.* 262 *et seq.; Eveson v. Kinnaird*, 6 *East.*, 188; *State v. Davidson*, 30 *Verm't*, 377; *State v. Wagner*, 61 *Me.*, 193; *Com. v. Hackett*, 2 *Allen* 136; *Insurance Co. v. Moseley*, 8 *Wall.*, 397. The declarations of a by-stander are not admissible in evidence. Authorities, *Sup.*; *Bradshaw v. Com.* 10 *Bush.*, 576.

It is not necessary here to consider the exceptions to the rule. In this case there was nothing to show that Pruitt was a party passive or otherwise to the assault. All we know of him is that he was a good deal excited in the back part of the hotel billiard saloon where others had fled for safety. Whether he came there from the scene of action or was there from the first, we are not informed. It would not be safe to establish the rule that his declarations under such circumstances could be heard to establish his connection with the affair, and we have found no case going so far. In all the cases so far as we are advised there are circumstances or proof connecting the declarant with the passing events. The case is not unlike that of an agent with reference to the proof of his agency. The agent's declarations made in conducting his agency, are part of the *res gestæ*. But his bare declara-

tions cannot be proved to show the agency. That must be shown *aliunde*. *Grim v. Bonnell*, 78 *Penn. St.* 152.

And so if Pruitt were first connected with the main fact of the assault by testimony tending to show a participation n or connection with it, his statements made in conformity with the above rules should be received to explain or strengthen that testimony, as well as to supply new and otherwise unproved elements of the *res gestæ*. Until he is linked with the affair in some way he is only a bystander and what he said is hearsay.

2. Admissions by Counsel at trial.

In his opening statement to the jury, appellant's counsel said something about the prisoner planting himself on the right of self-defence. There is some doubt as to what was said, but it is insisted that the statement was a confession or admission of the shooting at Pruitt by the prisoner. We cannot so view it. Without determining what rights an attorney can waive for a prisoner on trial for a felony, we feel assured that the fact of the waiver or admission should be distinct and formal, and made for that purpose in order to bind the prisoner. 1 *Greenl. Ev. Sec.* 186.

3. Criminal Practice. Instructions.

Various instructions to the jury were given and refused by the court, and the giving and refusing of all these, except those given at appellant's instance, were objected to by him, and urged as grounds for a new trial. It would serve no useful purpose to discuss these in detail. It is sufficient to say that the law applicable to the case was clearly defined to the jury without prejudice to the appellant, unless it was in this, viz: In concluding the charge the court instructed the jury that if they found the appellant guilty they should assess his punishment at not less than three nor more than 21 years in the penitentiary, and "that in this case the defendant was guilty of an assault with intent to kill or that he was guilty of nothing."

In the case of Hopt v. Utah, on a trial for murder in the

first degree, the court made this statement to the jury:

"That an atrocious and dastardly murder has been committed by some person is apparent, but in your deliberations you should be careful not to be influenced by any feeling." The Supreme Court of the U. S., in 110 U. S., 582, had this to say of it: "It is clear that the observation by the court, that 'an atrocious and dastardly murder had been committed by some one,' was naturally regarded by them (the jury) as an instruction that the offence, by whomsoever committed, was murder in the first degree, whereas it was for the jury, having been informed as to what was murder by the laws of Utah, to say whether the facts made a case of murder in the first or second degree. * * * . It is expressly declared by the Code of Criminal Procedure that while he may 'state the testimony,' and 'declare the law,' he 'must not charge the jury in respect to matters of fact.' The error committed was not cured by the previous observation of the judge that by the laws of Utah the jury are the sole judges of the credibility of the witnesses and of the weight of the evidence, and of the facts. It is rather more correct to say, that the effect of that observation was destroyed by the statement at the conclusion of the charge, that the murder, by whomsoever committed, was an attrocious and dastardly one and therefore was, as the jury might infer, murder in the first degree."

The charge, in the case at bar, left the jury no room to "infer" anything in regard to the degree of the offence or the nature of the penalty, but cut them off from finding the prisoner guilty of any of the lower grades of assault, as they might have otherwise done. Under an indictment such as we have here, a prisoner may be convicted of any one of several very grave offences, an assault with intent to murder being the highest in degree, and he has the right to have the judgment of the jury upon the facts uninfluenced by any direction from the court as to the weight of evidence. The

people of this State have jealously guarded the right of the jury in this respect by declaring in the Constitution that judges shall not charge juries with regard to matters of fact, and while in this particular case the charge of the court was morally right, under the law it was error.

Reversed and remanded for a new trial.

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KEITH v. FREEMAN, ET AL.

1. PRACTICE IN SUPREME COURT. *Erroneous declarations of law by Circuit Court.*

When there is no error in the finding of the facts, nor in the judgment of the Circuit Court, in a case tried by the court, the judgment will be affirmed though the declarations of law by the court be erroneous.

2. TAXES: *Warrant to collect directed to Sheriff.*

A warrant attached to the tax book for collecting the taxes is not illegal for being addressed to the Sheriff instead of to the collector of revenue, unless the Sheriff and collector of the county are different persons.

3. TAX SALES: *Certificate of purchase by the State: What sufficient.*

A list of lands showing in separate columns, the sections, township, range, acres, year of the taxes, valuation, different kinds of taxes, with their respective amounts, the total taxes, penalty, costs, and aggregate of the whole, headed "List of Lands forfeited or sold to the State in Benton county, Ark., May 13th, 1872, for non-payment of taxes for the years 1870–1871, and which remained unredeemed on the 21st day of March 1875," and signed at the end "John Black, Clerk," and recorded in the Recorder's office of the county, is a sufficient certificate of purchase by the State under the revenue Act of 1874.

4. PLEADING: *Ejectment: Answer, pleading conclusions of law.*

An answer in ejectment denying that the plaintiff is the legal owner of the land—that the defendant holds unlawfully and

without right, and that he unlawfully keeps plaintiff out of possession, sets up only conclusions of law and is demurrable.

5. TAX SALE: *Redemption by infant after sale by the State.*

When land of an infant has been forfeited to the State and been sold by the State before his time for redemption has expired, he may redeem from the purchaser from the State, and the redemption money will belong to the purchaser and not to the State.

APPEAL from *Benton* Circuit Court.

Hon. J. M. PITTMAN Circuit Judge.

E. P. Watson for appellant.

Appellees are barred by limitation, Sec. 4117 Gantt's Digest, also by two years limitation curing all defects in the manner of assessing, levying of taxes or any other irregularity of any officer. *Sec.* 5217 *Gantt's Digest.*

Having established a *prima facie* title in appellant by the certificate of the clerk duly recorded, and chain of title from the State, the burden to disprove was on appellees. *Sec* 5206 *Gantt's Dig.*; 19 *Ark.*, 611; 15 *Id.*, 331.

As to the minors; if they have a right to redeem they must pursue the remedy provided by the statute; if there is no statutory remedy, they must go into chancery. *Carroll v. Johnson* 41 *Ark.*

The Legislature had the right to cure all irregularities in tax sales, either by a healing act, or by an act providing that certain irregularities shall not invalidate a tax sale. See on the subject of limitation, constructive possession of wild lands, and the power to cure, &c. *Lawrence v. Kennedy*, 32 *Wis.*; 18 *Id.*, 268; 38 *Iowa*, 456; 26 *Wis.*, 614; 29 *Id.*, 152; *Parks v. C. & F. R. R.*, 32 *Ark.*; 29 *Iowa*, 389; *Cooley Const. Lim.*, 3d *Ed. p.* 379, *note* 1 *p.* 381; *Cooley on Taxation p.* 230-1; *Acts* 1871, *Sec.* 125, *p.* 169, *Sec* 123; *Oconto County v. Jerrard*, 46 *Wis*; *Cooley on*

Taxation p. 376, 383; *Burroughs on Tax. p.* 345–6 *and notes*; *Blackwell on Tax Titles, p.* 661–2–3, 672–3–4–5; 22 *Ark.*, 178; 20 *Id.*, 508; 37 *Id.*, 107.

The warrant addressed to *the Sheriff* was sufficient, he being *ex-officio collector*. He was at any rate *de facto* collector and all his acts as such are valid and binding. *Cooley on Taxation*, 189; 9 *Mass.*, 231; 41 *Mich.*, 615; 46 *N. Y.*, 375; 38 *Conn.*, 449; 1 *Johns.*, 549; 25 *Wend.*, 536 *&c.* But the statute was what gave him authority to sell and not the warrant. *Acts* 1871, *p.* 169 *Sec.* 100; *Burroughs on Taxation p.* 295.

The certificate of the clerk contains all that is required by law. *Acts* 1884–5 *p.* 227, *Sec.* 19. A certificate is a written statement of a fact signed by the officer officially. *Bowvier Law Dict.*; *Webster Dict. in verbum.*

The law does not require a seal. 53 *Miss.*, 259. Ministerial acts of clerks are not always required to be attested by seal. 1 *Greenl., Evidence.*

L. Gregg for appellees.

The offices of Sheriff and Collector are different—separately bonded for &c., the duties and responsibilities are distinct and separate, and a warrant directed to the Sheriff did not authorize the collector to sell. The warrant is his authority to sell, and a pretended sale without authority is void and conferred no rights. *Burroughs on Taxation*, 34; 23 *Ark.*, 370; 19 *Id.*; 602.

A proper assessment and levy, and warrant to *the collector* are jurisdictional questions, and not mere irregularities—there was no authority to sell, and the sale a nullity and could not be cured or rendered valid. *Sec.* 5217 *Gantt's Dig.*; *Burroughs an Taxation*, 84; *Blackwell on Tax Titles*, 445; 57 *Penn. St.*, 13; 19 *La. Ann.*, 184; 27 *Iowa*, 356.

The County Clerk neither made nor recorded a certifi-

cate of the sale to the State, as required by law, nor is the *list* made by him attested by his seal. *Sec.* 19 *Acts* 1875 *p.* 227; *Morton v. Reeds* 9 *Mo.*, 878.

Sec. 5206 of Gantt's was never intended to, and the Legislature could not, make a deed absolutely void absolutely valid, or make a valid title out of a nullity.

The right of the minors to redeem is certainly clear. Any one legally interested in lands or owning any part thereof has the right to redeem. *Burroughs on Taxation*, 366–7 *and notes*; 30 *Me.*, 529; *Blackwell on Tax Titles*, 426 *and* 430–1.

A tender of the taxes, penalty and costs &c. is equivalent to a redemption. *Cooley on Tax. par.* 6, *p.* 367 *and note* 3, *p.* 368; 3 *W. Va.*, 522; 5 *La. Ann.*, 675.

EAKIN, J. This is an action of ejectment brought by the heirs of Jackson S. Freeman, who died in 1861, the recognized owner. The *prima facie* title of plaintiffs was thus established.

The defendant Keith defended upon a tax title, alleging in his answer, that the tract of land in controversy was sold by the Collector on — day of May 1872 for the taxes of 1870 and 1871, was bid in by the State and not redeemed, and in 1845 was certified to the Commissioner of State Lands, and that on the 8th of March 1879, it was purchased of the Commissioner by parties who obtained a deed and had the same recorded, under and through whom defendant claims and holds possession. This defence was presented in the first two paragraphs, together with the statute of limitations of two years.

The 3d, 4th and 5th paragraphs denied, respectively, that plaintiffs were the legal owners of the land, that defendant held unlawfully and without right, and that he unlawfully kept plaintiffs out of possession.

The 6th reiterated the facts as to the purchase, and set

up further, that defendant and those under whom he claimed had paid the taxes of 1870 and '71, and had prior to the commencement of this suit made valuable improvements. Wherefore he prayed, if dispossessed, to have repaid to him the amount originally advanced with 100 per cent. interest, and 25 per cent. per annum, upon all taxes and costs since paid, together with the full value of improvements, and that a lien be declared.

An amended answer, as a 7th paragraph, sets up that by virtue of said purchase from the State in 1879, and of the deed from the purchasers to defendant, he went into and now holds possession, and that more than two years had elapsed between the commencement of the suit and the making and recording of the certificate to the State of Arkansas; and more than two years between the begining of the suit and the date of the deed from the State. Wherefore he insists upon the bar of the statute of limitations.

To all these paragraphs, separately, the plaintiff demurred, and was sustained by the court as to the 3d, 4th and 5th. As to the others the demurrer was overruled. The plaintiff excepted also to the evidence of title exhibited by the defendant, and was sustained as to what purported to be the Clerk's list and certificate of lands bid off by the State, but overruled as to the deed of the Commissioner and other mesne conveyances.

The cause was submitted, then, to the court, which found that the land was duly assessed, the taxes duly levied thereon, and the same duly returned delinquent for the year 1871. That they were sold, as such, by the collector, in May 1872, and bid in for the State, for said taxes of 1871. Further, that a list of said lands was made out by the County Clerk and recorded in the Record Book of the county, showing the lands sold to the

State, with amount of taxes, penalty and costs. That this record was made in June 1875, but there was no certificate of the clerk with the list, nor any record of such certificate; That the Clerk did certify to the Commissioner that said lands were sold to the State for said taxes, and had not been redeemed, showing the amount of taxes, penalty and costs, but the certificate was never recorded in the Recorder's office of the county; wherefore no title vested in the State, and the deed of the Commissioner was void. Judgment for possession was given for plaintiffs, and a lien declared in favor of defendant for the original purchase money with 100 per cent., subsequent taxes with 25 per cent. per annum and the value of the improvements. There was a motion for a new trial, bill of exceptions, and appeal by defendant.

1. PRACTICE IN SUPREME COURT. Erroneous declarations of law.

The Court made and refused divers declarations of law asked by the parties. Opinions would be interminable if it were necessary to discuss and determine these in detail. They are not like instructions to a jury, which may mislead them in their special duty of finding facts, and applying the law to the facts. It is proper that the court in trying a case should declare separately its finding of facts and its views of the law, because any error in the finding of facts is as much subject to correction as the verdict of a jury. But a judgment may be correct though based on mistaken reasoning, and if there be no error in the finding of facts, such a judgment may well stand. Concerning the foundation facts in this case there is no dispute, and the principal questions for us are; was the list of lands, delinquent for 1871 and sold to the State, certified and recorded in the county as required by law? and if not, did it so prevent the investiture of title in the State as to make its deed invalid? If void there would arise the subsequent consideration of the statute of limitations.

2. Warrant to collect taxes, to whom directed.

Preliminary to this, however, it may be useful to notice an irregularity which appellee contends will sustain the judgment. The warrant attached to the tax-books was addressed to the Sheriff instead of the Collector, from which it is contended, in effect, that the collector never had any authority to collect, and could return no delinquent list to be sold. Upon the other hand the appellant says that the sales are made by command of the law and not by virtue of the warrant, which is true. Still there must be some subject matter upon which the law can operate, and there can be no sale without previous delinquency, and no delinquency without some one authorized to collect. Hence the question remains, was it a good warrant?

In this State, the Sheriff was then *ex-officio* Collector. There may have been exceptional cases of separation of the offices, as there may be now. But it was rare. The popular mind apprehended no distinction, and it has always been the habit and is yet, not only in common parlance, but frequently in formal proceedings, to designate the Collector as Sheriff. It is not precise to do so, and official proceedings had better be precise; but the inadvertence has been so common that we fear it would unsettle large amounts of property to hold the proceedings vitiated, wherever it has occurred. Upon the other hand the subject matter so plainly shows that the Sheriff, *as collector*, is intended, that no harm can result from holding the warrant valid. It would be criticising too nicely to declare the warrant a nullity, unless it were shown affirmatively that the Sheriff and Collector were, indeed, different persons. The act of 1871 itself speaks of the Sheriff and Collector in the same clause as the same person, and says that "he" shall proceed to collect the taxes, &c. *See Rev. Act of* 1871 *p.* 155, *sec.* 78.

3. What sufficient certificate of sale to State.

The defect mainly relied upon is this. By the act of 1871 lands sold to the State, were required to be conveyed by deed to the State after the time of redemption had expired. (Sec. 127 p. 170, Pamph. Acts). Before that was done, it was enacted "that all lands forfeited to the State for the taxes due thereon, and not sold by the State, may be redeemed by the payment of the taxes assessed against said lands with the cost of sale, without any penalty," and the Auditor was prohibited from offering any delinquent lands for sale until the time provided by law for advertising and selling delinquent lands in the year 1875. (*Acts of May* 1874 *pages* 1 *and* 2). This would have been on the 3d Monday of May.

On the 5th of March 1875, (*Phamph. Acts of* '74–5 *p.* 227), another revenue act was passed repealing the section of the act of 1871, being Sec. 5208 of Gantt's Digest, which required a deed to be made by the Clerk, and providing that after the two years allowed to redeem, "the Clerk "shall make out a *certificate of sale to the State* for all lands "purchased by the State as shown by the records of such "tax sale in his office, which have not been redeemed, and "shall state therein the amount of the taxes, penalty and "costs thereon; and cause the same to be recorded in the "Recorder's office of the County; and thereupon the title "to all lands embraced in such certificate shall vest in the "State; and the Clerk shall immediately transmit such "certificate to the Commissioner of State Lands, and "thereupon the said lands shall be subject to disposal as "other forfeited lands."

It is plain that the Legislature meant to substitute the *certificate of purchase* by the State, and its record, in place of the former more formal deed, and to make it the essential and substantial act for the passage of title into the State. The certificate to be sent to the Commissioner

was only to advise him, and to make the lands, already passed to the State, subject to disposal as other land,.

The Clerk in this case, is not shown to have made any formal certificate to the State, but made and caused to be recorded a list of lands, embracing the tract in question, and showing in separate columns, the Section, Township, Range, acres, year of the taxes, valuation, different kind of tax with thir respective amounts, the total tax, the penalty, costs, and aggregate of the whole. The caption of the list was as follows:

"List of lands forfeited or sold to the State in Benton County, Ark., May 13th, 1872, for non-payment of taxes for 1871-70, and which remained unredeemed on the 21st day of April 1875." At the end the list is signed, "John Black, Clerk." The court below held that this did not meet the requirements of the act, and that the title had never vested in the State, so that defendant could derive title through it.

A certificate in its most general and widest sense is a writing to give evidence that a fact has, or has not taken place. Official certificates must be duly authenticated, or they cannot serve that purpose. It is important to the efficacy of a certificate that it should speak directly and positively to the fact to be certified; not in any set form of words, unless it be so prescribed by the statute, but with such certainty as to leave no doubt that it means to assert the required fact or facts existing, or that the required act or acts have been done.

The Clerk commences his certificate with the words, "List of lands forfeited, &c." There is no difference in meaning between this and saying; This is a list of lands forfeited, &c., which would be the same as to say, "The following lands were forfeited, &c." This is a sufficiently clear and certain assertion, with what follows, that all the

lands in the list were in fact purchased by the State, on the day named, and that they had not been redeemed. The statements in the tabular columns sufficiently showed the amounts of the taxes, penalty and costs thereon. It was the duty of the County Clerk to keep the record of all the lands sold to the State, to note the redemptions, to report quarterly to the Auditor the amounts due the State on such redemptions, and after the time allowed for redemption, to make the certificate in question and cause it to be recorded in the Recorder's office. The certificate was required to be made from the record of the tax sales in his office, of which he had the control. No one else had the authority to make the certificate, and the Recorder could not lawfully record one, upon the instance of any one else. The word "clerk" appended to his name is to be understood with reference to the subject matter of the document signed, and the duties of the County Clerk and Recorder with regard thereto. The presumption, moreover, is, that these officers rightfully performed their duty. Or, rather, we may not presume that the Recorder received and recorded the certificate and list, presented by any other than the County Clerk. It would have been better that the Clerk had given his office in full, but we are nevertheless satisfied that the word "clerk" is to be understood as Clerk of the County Court, and that is sufficient. The Statute did not require the certificate to be authenticated by his seal of office.

The Circuit Court erred in holding that no certificate was appended to the list or recorded with it, and in holding also that the law was with the plaintiff.

The question of the Statute of Limitations, in this view is not important. The adult plaintiffs fail on the merits.

Demurrers were sustained to the 3d. 4th and 5th paragraphs of defendants answer. This was proper, as those paragraphs set up only conclusions of law.

4. Pleading. Conclusions of law.

5. TAX SALE: Redemption by infant after sale by the State.

It is disclosed in evidence that one of the plaintiffs, entitled to a share of the lands, to-wit: Minnie Jackson Freeman, whom we take to be a female, was born on the 3d of October 1862. A due tender for taxes, improvements, &c., with the penalties and per centage on each required by law, was made in her behalf, together with that of the other plaintiffs, about a month before the commencement of the suit. She did not come of age untill the 3d of October 1880, which was less than two years before the beginning of this suit. She still had the right to redeem, but was not able to do so in the precise mode prescribed by the Act of 1871, because the lands had passed to the State out of the hands of the County Clerk, and from the control of the State by the deed of the Commissioner, all before she became of age. Both the State and the State's vendee took the legal title subject to her interst therein, which was a right of redemption by paying to the County Treasurer within two years after disabilities removed, for the benefit of the purchaser, an amount of money "equal to that for which such land or lot was sold for taxes, penalty and costs of advertising, and the taxes subsequently paid thereon by such purchaser, or those claiming under him, together with interest at the rate of ten per cent. per annum, and one hundred per cent. on the whole amount so paid, and the amount paid by purchaser for certificate of purchase, and the expense of advertising" required by the Act. (Acts of 1871 pp. 166 and 167). Nothing is said of improvements.

This right has not been cut off by the sale from the State. It is a fair construction, however, of the act that the State being satisfied the right to the redemption money has passed to the purchaser. *Carroll v. Johnson*, 41 *Ark.* We have deemed it proper to say this much,

that the Circuit Court, and the parties may take such course in the further progress of the cause, as they may be advised to be proper and lawful concerning the interest of this particular plaintiff. To say more would be perhaps an unwise anticipation, or direction of the proceedings of a court of original jurisdiction.

For error in holding that the lands were not properly certified and recorded in the Recorder's office by the County Clerk, reverse the judgment and remand the cause for a new trial, and for further proceedings consistent with the law and this opinion.

NOLEN ET AL v. HARDEN ET AL.

1. WITNESSES: *Husband and wife.*
The public policy which forbids a husband or wife from testifying for or against each other, does not extend to collateral suits between third parties. In these a wife may testify as to transactions of her husband where she can do so without breach of matrimonial confidence. But even after coverture she cannot disclose facts obtained through matrimonial confidence.

2. SAME: *For and against administrators or guardians.*
The parties excluded by the proviso to Sec. second of the schedule to Constitution of 1874, from testifying as to transactions or statements of testators, intestates and wards, are the executors, administrators and guardians on one hand and their opponents in the suit on the other, and do not include their co-defendants or other parties not pursuing nor pursued by the fiduciaries.

3. PRACTICE IN SUPREME COURT: *As to the facts in Chancery causes.*
In Chancery causes the Supreme Court will, on appeal, sift the whole evidence and determine what the finding of the Chancellor should have been upon such of the evidence as was compe-

tent and proper; with due deference, however, to the decision of the Chancellor where the preponderance is nice.

4. GIFTS *inter vivos*: *Defined.*

Where a gift is intended *in presenti* and is accompanied with such delivery as the nature of the property will admit, and the circumstances and situation of the parties render reasonably possible, it operates at once, and as to the parties is irrevocable; and the delivery may be to a bailee as well as to the donee in person; but if there be only an intention to give and no delivery, it will be inchoate and imperfect and the property will not pass.

APPEAL from *Clark* Circuit Court in Chancery.

Hon. H. B. STUART Circuit Judge.

Compton, Battle & Compton, for appellants.

So much of the testimony of C. S. Hill, J. C. Pettus and C. A. Hightower as relates to transactions with or statements of M. O. Hill deceased should have been excluded. *Sec. 2 of Schedule to Const.* 1874. So much of the testimony of Mrs. C. A. Hightower as relates to the statements made by M. O. Hill in her presence and hearing, while she was his wife, should have been excluded. 1 *Greenl. on Ev. Sec.* 337–8; *Gantt's Dig., Sec.* 2482; *Acts* 1883, *page* 8.

In gifts *inter vivos* and *causa mortis*, there must be an actual delivery. The delivery must be according to the nature of the thing, and must be the true and effective way of obtaining the command and dominion of the subject of the gift.

The donor must deliver the property and part with all present and future dominion over it. There must be a substantial, tangible and visible change of possession to the donee. *Gantt's Dig., Sec.* 2956; 2 *Kent. Com., Marg. p.* 438–9; 1 *Nott & McCon'l* (*S. C.*) 239; *Cutting v. Gilman*, 41 *N. H.*, 150; 31 *Me.*, 422; 9 *Vesey*, 1; 7 *Taunt.*, 224; 2 *Vesey, Sr.*, 431; 109 *Mass.*, 541; 2 *B. & Ald.*, 551. See also 35 *Barb.*, 33.

The testimony shows that Hill never parted with his dominion over the money, and the gift was never consummated.

Smoote & McRae for appellee, C. S. Hill.

1. Whether C. S. Hill was a competent witness as to conversations and transactions with M. O. Hill deceased, he certainly was as to all other facts. *Const.* 1874, *Sch. Sec.* 2.

2. Mrs. Hightower was competent as to all facts not coming to her knowledge by reason of her relation as wife. 1 *Greenl. Ev., Sec.* 383 *and note.*

3. Pettus is not within the exception. He is merely a nominal party. No judgment can be rendered against him. He is clearly competent. 37 *Ark.*, 195; 8 *Conn.*, 254; 5 *Dana*, 499; 2 *A. K. Marsh.*, 566.

4. The evidence clearly shows a gift *inter vivos*, and the money never became part of the estate. 11 *Ark.*, 249; 14 *Id.*, 304; 35 *Id.*, 304; 37 *Id.*, 483; 8 *Id.*, 83; 10 *Id.*, 211; 17 *Am. Law Reg.*, 7 & 73.

R. H. Baugh, pro se.

Notwithstanding the provisions of *Section Two* (2) *of the Schedule to the Constitution of* 1874, and the decisions of this court reported in the 26 *Ark.*, 476; 30 *Ark.*, 285 and 32 *Ark.*, 337, the defendant, J. C. Pettus, is unquestionably a competent witness in this cause, and his deposition was properly considered by the Chancellor in the court below. 37 *Ark.*, 195; *Bird et al v. Jones et al; Bonnett v. Stowell*, 37 *Vermont*; *Ford v. Sproule*, 2 *A. K. Marshall*, 528; 8 *Conn.*, 254; 11 *Conn.*, 522; 20 *American Decisions*, 100 *and note on p.* 109; 12 *Pickering*, 307; 30 *American Dec.*, 689; *see also Sec.*, 22, *Art.* 7, *Constitution* 1868.

The right to dispose of property honestly acquired, conformably with law, is before and higher than any Constitu-

tional sanction. *Constitution* 1874, *Declaration of Rights; Parsons on Contracts, Vol. I, p.* 234.

And the grantor's clear intention in an effort to exercise this right while living, ought to be, after his decease, if not largely aided and abetted by Courts of Chancery, at least regarded by them with marked favor. *Bond v. Bunting*, 78 *Pennsylvania; Digest American Decisions, Vol.* 1 *to* 30, *p.* 103, *Sections* 109, 115, 117; 6 *Conn.*, 111; 2 *Gill and Johnson*, 36.

There was a perfect technical delivery from the donor to Pettus as the trustee of his infant daughter, the donee. 11 *Ark.*, 265, 266; 14 *Ark.*, 304; 35 *Ark.*, 195, 304, 315; *Cooper v. Burr*, 45 *Barb.;* 4 *Leigh*, 333.

Such delivery to and the acceptance by Pettus of the fund in question, perfects a title thereto in the infant donee, even though its subsequent possession was in the parent of the donee. 8 *Ark.*, 83, 107; 10 *Ark.* 211, 224; 1 *Nott & McCord*, 237, 592; 41 *Iowa*, 334; 15 *Wend.*, 548; *Roberts Appeal*, 85 *Penna. St.;* 2 *Kent* 445.

And title once vesting in donee, if a gift *inter vivos*, the donation was irrevocable, and title yet remains in donee. 2 *Kent*, 440; 17 *American Law Register, pp.* 7 *and* 73, *where authorities on this point are collated.*

The gift was *inter vivos:* 1 *Parsons Contract*, 234, *et seq.;* 17 *American Law Register, p.* 1, *et seq.; Gardner v. Meritt*, 32 *Md.* And was not, *causa mortis: Rhodes v. Childs*, 64 *Pennsylvania;* 14 *Cent. Law Journal*, 362; 23 *American Decisions*, 191.

But viewed as being either one or the other, the transaction constitutes a perfect gift. 1 *Parsons Contract, p.* 236; 5 *American Decisions*, 593; 9 *American Decisions*, 593; 23 *American Decisions*, 191, 597, 604; 11 *Cent. Law Journal*, 414.

If substantial justice has been done in this cause the judg-

ment of the court below will stand. 34 *Ark.*, 94.

EAKIN, J. On the 2nd day of January 1882, Dora O. Baugh, with her husband, R. H. Baugh, sued J. C. Pettus and C. S. Hill on a bill of exchange for $1,875, drawn by them in favor of plaintiffs, on the 10th, of August, 1881, upon Wolf, Bro. & Bath, of St. Louis, payable by the 1st of December following, and which had been protested for non-acceptance.

They answered, showing, that Milton A. Hill had died intestate in Clark county, about the 2nd of July, 1876, leaving a widow, *Cynthia A.* Hill, who had since intermarried with Wm. H. Hightower; also children, to-wit: *Laura A.* (wife of Washington Harden); *Adella* Nolen (a widow) *Loretta H.* (wife of A. C. Rhodes); *Josephine A.* (wife of A. W. Cagle); *Sevra Ann A.* (wife of Oliver G. Cagle); and the plaintiff, *Dora O.* (wife of R. H. Baugh).

Further, that about four or five months before his death, said Milton had given to defendant Pettus, to be held and used, for his daughter Dora, about $2000 in gold pieces of $20, tied up in a bag, saying that he desired her to have that gold extra, to be estimated as no part of the estate, but with the intention that said Dora should share equally with the others, in whatever estate he might leave at his death. That Pettus left the sack of gold with Milton O.'s wife, Cynthia, for safe-keeping, and that she sent it to him after Milton's death. That afterwards Dora intermarried with Baugh, and defendant Pettus paid to Baugh a portion of said money, the balance being then lent out. For this balance, the draft in suit was given, but before it came due, the other distributees made a claim on him for the money, and threatened suit, whereupon he stopped the payment.

They assert that the other heirs of Milton O., to-wit: the said Laura, Adella, Loretta, Josephine, and Sevra Ann, with their husbands are about to bring suit for an equal share of

this money against defendant Pettus, and perhaps, defendant C. S. Hill also. Defendants are uncertain of the issue of such a suit, upon the law, and such evidence as might be adduced, and say that if this suit should proceed to judgment at law, the defendant Pettus would stand in danger of double payment. They show, further, that defendant C. S. Hill and Wash. Harden had, in 1876, been appointed administrators of the estate of said Milton, and had fully closed the same, and that said Hill had afterwards been appointed guardian of said Dora.

They pray that this their answer may be taken as a bill of interpleader against the plaintiffs and the other heirs, and the widow; that their equities may be adjusted amongst themselves and those not entitled be enjoined from suing further.

This answer was filed on the 30th day of January, 1882, and was accompanied with a tender and payment into court, of the money in controversy, and a motion to transfer to the equity docket.

On the 8th of May, 1882, the court sustained a general demurrer to the answer, and overruled the motion to transfer. Leave to amend the answer and cross complaint was granted till the next term.

It appears that before the next term a suit in equity had been already begun, by Adella, Josephine, Loretta, and Sevra Ann, against Laura and her husband, Wash Harden, Dora, Pettus, C. S. Hill and Wash Harden as administrators, and the widow Mrs. Hightower. The object of the bill is to set aside the settlement made by Hill and Harden as administrators, charging fraud in not including the sum in controversy as part of the estate of Milton O. The prayer was that the administrators be compelled to divide the sum amongst all the distributees and for general relief.

The defendants in the suit at law, in amending their an-

swer, set forth these proceedings by way of supplement, reiterated the facts going to show that the sum of money belonged to Dora, and prayed that the law suit might be transferred to the equity docket, and consolidated with the suit there pending regarding the same sum, in order that all parties in interest might be bound by one decree, and for general relief.

A demurrer to this supplemental answer and cross complaint was overruled, and the prayer to transfer to equity and consolidate, was granted. The cause then proceeded on the equity docket as consolidated.

It may be noticed, in passing, that in the equity bill, although C. S. Hill and Wash Harden are described as late administrators of the estate of Milton O. Hill, and fraud is alleged against them in that character, and the prayer is that they be compelled to pay over to the distributees their respective shares of the disputed sum, yet no relief is sought against their sureties on their bond, and the process of summons was directed against them individually. No relief is sought against the estate of Milton O. Hill, which is conceded to have been fully administered and, in all other respects, closed; nor is it sought to make them any further chargeable in the Probate Court, with the sum in question, upon a new and reformed settlement, nor to compel them to any further action in their character as administrators. It is a suit to hold them personally chargeable to the several distributees, on account of past misfeasance as administrators.

C. S. Hill and Pettus answered the bill in equity, reiterating the matter formerly pleaded. Cynthia Hightower and Dora O. Baugh also filed a joint answer to the same effect. All these set up and rely upon the gift to Dora as valid, and take grounds that it was not part of the estate, and there had been no fraud in the administration.

Upon hearing of the consolidated suits, upon the pleadings,

record entries and depositions, the Chancellor found that the gift of the money to Dora O. Baugh, from her father Milton O. Hill, was a complete and executed gift, *inter vivos*, and that it did not remain as a part of his estate. The complaint in equity was therefore dismissed at the cost of the complainants, who prayed, and were granted, an appeal.

Further, he found that the draft upon which the suit at law had been brought was given for the unpaid residue of money placed in the hands of Pettus for Dora, and that there had been since paid upon it the sum of $153.30, leaving a balance of $1734.80 which had been tendered and paid into court, in full, by Pettus and Hill. They were ordered to pay the costs of the action at law, and the costs of transferring it to the equity side. It was agreed in open court by all the parties that the sum of $578.25 be paid out to Cynthia A. Hightower (who had been divorced from her last husband) to be received for, and paid to, Dora Baugh, but to go in satisfaction *pro tanto* of said Cynthia's right of dower in the sum, in the event that the decree should be reversed in this court, and the fund adjudged to belong to the estate, or in case of affirmance, to go in discharge of so much of the claim of Dora on the fund. By like consent, a decree was entered to that effect, and it was further provided that pending the suit the remainder of the fund should be loaned at interest by the clerk.

The appeal, besides some question of the competency of witnesses, presents to us only the single point, whether or not, under the circumstances, the intended gift to Dora by her father was actually accomplished, or exisisted only in intention up to the time of his death. In the latter case the complainants should have succeeded in their suit.

1. WITNESSES. Husband and Wife.

Mrs. Cynthia A. Hightower, the mother of Dora, called by the defendants, was objected to by complainants, before her examination, because she had been the wife of Milton O.

at the time of the transactions in question, which objection was noted in the deposition, and she proceded. The objection was premature and altogether too sweeping. Her husband was not a party to the suit, and she was not called to testify for or against him, or his interests. The issue was solely between Dora and her five sisters, with regard to money which had once been the property of her husband. The public policy which precludes a husband or wife from testifying for or against each other, does not extend to collateral suits between third parties. In such suits she may testify as to transactions in which her husband bore a part, in cases where she may do so without breach of matrimonial confidence. There is, indeed, an objection which may be made, not to her competency as a witness in the suit, but to the subject matter of particular evidence. She may not, even after coverture, disclose matters which come to her knowledge through matrimonial confidence, but this does not preclude her from testifying between third parties, as to matters not peculiarly o matrimonial confidence, but which others may have learned as readily as herself. We observe in her testimony some communications regarding the intentions of Milton O. towards Dora, made before the assumed gift, which seems of a confidential nature, but they were not specially excepted to, and were not of much weight. The essential part of her testimony regarded the circumstances of the gift, which took place in the presence of a third party made bailee for Dora; and her own conduct in procuring the bag of gold, putting it in her husband's hands, witnessing its delivery to the bailee, and her receiving it herself from the bailee for safekeeping; her keeping it in her own possession, and finally delivering it to Pettus. There was nothing of matrimonial confidence in this. It was all in the presence of Pettus also, and was such service and attention as might as naturally have been rendered by a sick nurse, or any other female relative. It was testimony of facts witnessed and conversations over-

heard *inter alios*, without any indication of an intention to repose in her any such special confidence, as might not be extended to any trusted friend of the family who might have been present. Indeed, Mrs. Pettus, as elsewhere appears, insisted that he should make the facts known to others, not of his family, and he did make them known to his brother, C. S. Hill. In all important matters, her testimony was competent, and we may well presume the Chancellor gave no weight to what was not strictly so. It was not necessary that he should do so, to determine the nature of the transaction. No declarations of intention amount to anything in themselves unless carried out in act.

As to wife's competency, see *Greenleaf on Ev. Vol. I, Secs.* 254, 338 *and* 342. Mr. Greenleaf says the policy is analogous to that which excludes confidential communications made by a client to his attorney. This policy does not render an attorney incompetent to testify with regard to communications or actions of the client, of which any other person, if there, would have been equally cognizant, or "where the matter communicated is not, in its nature, private, and could, in no sense, be termed the subject of confidential disclosure." *Ib., Sec.* 244. The present tendency of courts is to enlarge rather than restrict the admissibility of evidence, especially in equity cases, where the Chancellor may sift the chaff from the wheat.

2. SAME: For and against testators, intestated &c.

Objections were made to her testimony, together with that of C. S. Hill and J. C. Pettus, because it related to transactions with the deceased, Milton O. Hill, and the said C. S. Hill together with Wash Harden were parties defendant as his administrators.

The second section of the schedule to the Constitution of 1874, after declaring generally that no person shall be incompetent to testify because he may be a party to or interested in, a suit, provides that "in actions by or against

executors, administrators or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transactions with or statements of the testator, intestate or ward, unless called to testify thereto by the opposite party."

The *parties* here referred to must mean the executors, administrators and guardians on one hand, and persons in antagonism with them on the other, claiming adverse rights against the fiduciary, or defending against claims made by him. Neither its reason, nor its policy can be extended to co-defendants, or other parties, not pursuing nor pursued by the fiduciary. It is not true that a decree in favor of complainants would necessarily be followed by a decree in favor of the administrators against Pettus. They make no such prayer, and courts of equity do not grant relief unasked. There is no antagonism between Mrs. Hightower and the administrators. She can not on the pleadings have any judgment against them nor they against her. Her conditional acceptance of dower was by agreement and wholly for her daughter's benefit. It is outside the pleadings, and could not have been decreed without consent. Her answer prayed no cross relief against her co-defendants who were administrators, or had been.

The case of C. S. Hill is not so clear. He had been administrator, and is described, but not sued, as such. But the suit is not against the estate which he represented. It is in form against him and his co-administrator to hold them personally responsible for a specific sum of money. The real contest was between Dora and her sisters, concerning a particular fund already in court to be distributed. Judgment for or against him would not affect the estate which he had represented, nor would it effect him personally beyond costs, which could be but trifling, since the money had been brought early into court, and was there for the court to distribute in

any case. It is very doubtful whether the spirit of the law would preclude him from testifying for either side of the real contestants, by disclosing conversations and transactions with the deceased. It is quite obvious that the Constitutional provision was primarily directed to suits by or against the estate of deceased persons, &c., as between the estate and strangers, whereby the estate itself might be augmented or diminished in the hands of the representative. Its policy would not extend to contests between distributees about the division of a fund. *Bird v. Jones* 38 *Ark.*

3. Practice in Supreme Court: As to findings of Chancellor.

It is not, here, necessary to decide this point. In Chancery cases the admissibility or incompetency of evidence is not so strictly scrutinized as in cases tried by jury. For this court can itself sift the whole evidence and determine what the finding of the Chancellor *should* have been, upon such evidence as was competent and proper. The Chancellor below, and this court on appeal, are judges of law *and* fact. We can never say what the verdict of a jury should have been upon proper evidence, for that would be to assume the determination of facts. They might in any case, but for improper evidence, have brought in a different verdict, and this court cannot say for the jury that the verdict must stand on account of the sufficiency of proper evidence. We cannot know that a jury would have so concluded, and their province to find facts is exclusive. In Chancery cases we review both law and fact, with a due deference to the decision of the Chancellor where the balance is nice. We may, here, purge the mass of evidence, and reach conclusions supported only by that which is competent and credible.

4. Gifts: *Inter vivos* defined.

Adopting the safest course, and discarding wholly the evidence of C. S. Hill and so much of Mrs. Hightower's as may savor of matrimonial confidence the proof is ample to show: That Milton O. Hill, had collected and kept apart in a sack over $2000 in gold pieces; that he solemnly and earnestly gave it into the hands of a neighbor and friend to be held

and used for his daughter Dora, a girl of 7 or 8 years of age unfit to receive it for herself; that he endeavored to retain no further control of it, expressing the gift in absolute terms, as intending it to operate *in presenti*; that the friend recieved it into his hands, *bona fide*, with the intention of accepting the trust; that he found it inconvenient to carry away, and asked the wife of the donor to keep it for him until he should call, or send for it; that the donor observed the transaction and cautioned his wife to deliver it before his death; that she kept it separate under her own control; that the donor died afterwards away from home, and his wife sent the same sack to the bailee after his death.

All the adjudications concerning the validity or invalidity of gifts *inter vivos*, depend upon a single principle clear enough in itself, but sometimes difficult in its application. Apparent discrepancies have resulted, in most cases, from attempts to make gifts *in presenti* of choses in action by making formal delivery of the evidences and still retaining some sort of control; which in some cases have been held valid, and in others not—each acording to the views which the courts have taken as to the nature of the transaction, whether it be inchoate only and expressive of future intention, or whether it be complete *in presenti*—and so intended. Where the thing given has been substantial property the cases are clearer.

The principle is this: that if the gift be *intended in presenti* and be accompanied with such delivery as the nature of the property will admit, and the circumstances and situation of the parties render reasonably possible, it operates at once, and as between the parties becomes irrevocable. Such delivery may be made to a bailee, as effectually as to the donee in person. Upon the other hand, if there be only an intention to give and no delivery, it will be inchoate and incomplete, however strong the expression of intention may be; and the

property does not pass. One is bound by his acts, but without consideration, he is not bound to carry out his voluntary intentions, however firmly or earnestly he may express them.

In this case the subject matter of the gift was a bag of coin, inconvenient to be carried; the donee was a young girl incompetent from age to receive and take care of it; the donor, an invalid, incapable of active business. He selects a trusted friend and neighbor and delivers the sack to him for his daughter, requesting him to keep it for her benefit, and declaring it a gift, absolutely, without condition or reservation. It is difficult to conceive a mode of doing it more effectually under all the surroundings. We may not question his motives, nor criticise his conduct. He had a right to do what he would with his own. The gift was complete when the sack was delivered and accepted as the property of Dora. What happened afterwards was of no consequence. It was irrevocable The bailee had the right to request the mother to keep it for him. It is not a matter of any significance, if it were clearly shown that the donor resumed the control of it at any time afterwards. He had no right to do so. Neither the donee, who could not act *sui juris*, nor the bailee, nor the mother could give him that right. It was no longer his property, and did not become part of his estate, because it was under his roof when he died.

There was no error in the decree. Let it be affirmed and the case be remanded for final adjustment according to its terms.

SMITH v. HAMLET.

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1. TITLE: *Not impeached by declarations of vendor after sale.* The title of a purchaser of personal property cannot be impeached

by the statement of his vendor made in his absence after the sale.

2. EVIDENCE: *Record of Administrator's sale.*

The Probate Court record of an Administrator's sale of property of his intestate and confirmation of the sale by the court is evidence to support the title of a purchaser from the vendee and can not be disputed by the testimony of the Administrator to defeat the title.

APPEAL from *Bradley* Circuit Court.

Hon. J. M. BRADLEY Circuit Judge.

McCain & Crawford for appellant.

1. No judgment was rendered by the justice, not even a verdict, and the Circuit Court had no jurisdiction. 12 *Ark.*, 670.

2. The letter of Jno. A. Smith was written after the sale, and falls within the rule of declarations made by a vendor after the sale when the vendee is not present. 17 *Ark.*, 9; 33 *Id.*, 207.

3. The report and sales-bill made to the Probate Court by Hamlet as Administrator, was a solemn admission of record that John A. Smith purchased the mare, and the *very best evidence* of the fact. 9 *Ark.*, 392. It was error to exclude it, and allow proof of its contents. *Wells on Replevin, Sec.* 689.

4. Hamlet is estopped to deny the truth of his report and sale-bill. The 5th instruction should have been given. *Sec.* 4 *Ark.*, 94; 16 *Id.*, 257.

5. If Smith actually bought the horse at the sale, Hamlet cannot recover. If he merely acted as Hamlet's agent, *there was no sale.* If the sale-bill is true, the mare is Smith's, if false she still belongs to the estate of Wimberly, and Hamlet, being no longer Administrator, cannot recover. If

Smith is a mere bailee, he must account to Hamlet's successor as Administrator of the estate. Now if Smith bought for Hamlet in his individual capacity this was a fraud on the estate, and both were *particeps criminis*. *In pari delecto potior conditio defendentis est.* 10 *Ark.*, 53.

T. B. Martin for appellee.

While, as a proposition of law, a purchase by Hamlet at his own sale was irregular and improper, and as to heir or creditor would be held fraudulent and set aside, yet that is not this case, and a purchaser from him would be estopped to deny his title. Smith was a bailee and could not dispute his bailor's title. *Schonler Pers. Prop. p.* 595; 15 *Abb.* 254; 1 *McCord* 392; *Herman on Estoppel p.* 389–90 *and* 383; *Schonler Pers. Prop.* 2 *vol, p.* 702 *and cases cited.* R. S. Smith claims title through Jno. A. and being privy in estate, is also estopped. *Herman on Estoppel* p. 317–18.

Two juries, whose province it was to pass upon the issues of fact have found for appellee, and their finding should not be disturbed. *Ark. Rep. passim*

SMITH, J. This was replevin for a mare. The plaintiff, Hamlet, recovered a verdict in the Court of the Justice of the Peace, where the cause originated; but no formal judgment was entered. On appeal to the Circuit Court there was a trial *de novo* upon the merits and the plaintiff again prevailed.

In *Turner v. Harrison ante*, 233, we discussed the legal effect of the absence of a judgment by the Justice upon the jurisdiction of the Circuit Court, holding that it was not fatal and that the verdict of the jury was in that court equivalent to a judgment.

On the trial the plaintiff testified that the mare had once belonged to the estate of Van Wimberly, of which he had been Administrator, but had since made final settlement and

been discharged; that the Probate Court had ordered the sale of all the personal property of the estate for cash; that in pursuance of said order, he had exposed the property on the 9th of April, 1881, and the mare being about to be sacrificed, he had caused her to be bid off in the name of John A. Smith for $35., and had reported her to the Probate Court as sold to the said John A., at that price; that plaintiff had turned over the mare to said John A. to make a crop with, and said bailee had, in October or November 1881, sold and delivered her to R. S. Smith, the defendant in this action. The plaintiff also read a letter written by John A. Smith, after this last mentioned sale, in which the writer acknowledged that he was a mere bailee and expressed surprise that his father, R. S. Smith, had set up a claim to the mare.

The defendant proved his purchase from John A. Smith for a valuable consideration, and offered to read a transcript of the record of the Probate Court, showing the same state of facts to which the plaintiff had already deposed, viz: the order of sale, the sales-bill returned into court by the Administrator, in which John A. Smith is mentioned as the purchaser of the property in controversy, and the confirmation of the sale by the Probate Court. But the transcript was excluded from the jury. The court also refused the following prayer of the defendant:

"If the jury believe from the evidence that said Hamlet, as Administrator, sold the mare in controversy as the property of Van Wimberly, deceased, and at such sale caused the mare to be bid off and set down to John A. Smith as the purchaser thereof, and that Hamlet as such Administrator reported said sale to the Probate Court, and said sale was examined and confirmed by said court, said Hamlet is now estopped from denying the truth of said record, and he cannot recover in this action."

The verdict and judgment were for the plaintiff and a new trial was refused.

1 EVIDENCE: Declaration of vendor after sale.

The letter of John A. Smith, being in the nature of declarations of a vendor, made subsequent to the sale and in the absence of his vendee, was certainly incompetent evidence to invalidate the sale. *Gullett v. Lamberton*, 6 *Ark*., 109; *Brown v. Wright*, 17 *Id.*, 95; *Clinton v. Estes*, 20 *Id.*, 216; *Finn v. Hempstead*, 24 *Id.*, 111. But the introduction of it was not objected to below.

The record tendered to show that John A. Smith purchased at the Administrator's sale, was the best evidence of that fact; and as the defendant derived title from him, it was pertinent to the issue. The transcript seems to have been properly authenticated.

2. SAME: Probate Record of administrator's sale.

The instruction above copied should have been given to the jury. The administrator's report of sale is a solemn admission that he had sold the mare to John A Smith for the price therein stated. And the plaintiff is precluded from denying the truth of the record. He cannot show in this action that the transaction was merely colorable; that the purchase was in reality for his own benefit, or that Smith has never paid his bid. The defendant bought from one who was in possession and who, the record showed, was the legal owner.

Reversed and remanded for a new trial.

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FOREMAN ET AL. V. TOWN OF MARIANNA.

1. MUNICIPAL CORPORATIONS. *Jurisdiction of County Judge*

The organization of municipal corporations does not depend upon the citizens, whether or not they may be subject to their restrictions and burdens, any further than the Legislature may allow the exercise of that will. The whole public is concerned, and

the Legislature may prescribe the terms or conditions upon which they may be formed or extended, and may vest in the County Court the power to determine when they may or may not be necessary or useful.

2. MUNICIPAL CORPORATIONS: *Annexation of Territory: Amending petition:*

The petition for annexation of territory to a town or city may be amended during the progress of the cause in the County Court by diminishing the area of the proposed annexation but not by enlarging it.

3. SAME: *Same: Disqualification of County Judge.*

A Judge of the County Court is not disqualified to act upon an application to annex territory to a municipal corporation by reason of being a resident of the corporation and having voted for or against the annexation.

4. JUDGE: *Interest that disqualifies.*

The interest that disqualifies a Judge under the Constitution, is not the interest which one feels in public proceedings or public measures, but a pecuniary or property interest; one affecting his individual rights, and the liability of pecuniary gain or relief to the Judge must occur upon the event of the suit, not result remotely, in the future, from the general operation of laws and government upon the status fixed by the decision.

APPEAL from *Lee* Circuit Court.

Hon. M. T. SANDERS Circuit Judge.

The appellants pro se.

It was error to allow the petition to be amended. The whole territory, as far as the inhabitants of the town were concerned, became part of the town upon the vote being taken, unless a remonstrance should be sustained, and the County Court had no authority to exclude any part of it. *Corporation Act* 1875, *Sec's.* 84, 35, 36, 37 *and* 90; 33 *Ark.*, 508; 1 *Dillon on Mun. Corp. Sec.* 40.

The growth of the town does not require the extension, and the annexation was unnecessarily large. There is more open ground than there was in the case, 33 *Ark.*, 517, and that was a weak case.

The Judge was disqualified by reason of interest. *Art.* 7 *Sec.* 20 *Const.* 1874; *Cooley Const. Lim.* 297 *to* 302, *Ed. of* 1883; 16 *Conn.* 375; 1 *Hopkins Ch'y.* (*N. Y.*) 1; 1 *Spencer* 471; 1 *Zab.* 656; 4 *Oh. St.* 275; 21 *Iowa* 565; 2 *Allen* 397; 49 *N. H.* 328; 12 *Id.* 425; 22 *Mich.* 350; 13 *Mass.* * *p.* 340; 4 *Gray*, 427; 11 *Cush.* 106; 6 *Pick.* 104; 28 *Am. Rep.* 93; 72 *N. Y.* 1; 58 *Tex.* 23, 141. The County Judge was a citizen and tax payer of the town, *but he voted for the annexation.*

The remonstrants had a right to appeal. *Gantt's Dig. Sec.*, 1195; 33 *Ark.*, 508.

The act is unconstitutional, as it attempts to give the County Court additional *judicial* powers. *Const. Art.* 7, *Sec.* 28; 26 *Ark.*, 432.

J. M. Hewitt and *B. C. Brown* for appellees.

The amendment was proper. *Sec.* 34 *Acts* 1875, *p.* 35, for no new territory was *added.* 33 *Ark.*, 508, 515, 516.

This is a political question that concerns the State and County as well as the owners of lots in the annexed territory. The vote of the people made a *prima facie* case for annexation, and the preponderance of the testimony shows that it was for the best interests of the majority of the inhabitants, in fact all except perhaps a few dram-shop keepers, that the territory should be annexed. This issue was addressed to the sound discretion of the County and Circuit Courts of the County and town where the town is situate, courts which have a better knowledge of local affairs and are better qualified than this court or even the Legislature would be to adjudge upon the propriety of an-

nexation. Both courts having found for the appellee, this court will not reverse, unless it appears that the town has grossly abused its discretion to the injury of owners of the greater part of the annexed territory.

EAKIN, J. After a vote of the citizens, and other proceedings of a preliminary character, had been duly taken as required by statute, the town of Marianna applied to the County Court, to annex and include within its corporate limits and jurisdiction, certain territory lying to the West and North of its old boundaries. Against this application there was a remonstrance by appellants. The matter was heard upon evidence, and the court declared, that, in its judgment, it was right and proper that the petition for annexation should be granted. It ordered that the annexation be confirmed, and that the petition with accompanying map &c., be endorsed by the clerk and delivered to the Recorder. During the progress of the cause in the County Court the attorney authorized by the town to manage the case, amended the boundaries as they had been originally proposed and voted upon by the citizens. The amendment included no new territory, but materially diminished the area originally proposed, by cutting off from the external parts on the North and West, some portions most distant from the old corporation.

Upon appeal to the Circuit Court, and a hearing *de novo*, a like judgment was rendered. The remonstrants now prosecute this appeal here.

1. Jurisdiction of county judge

The organization of municipal corporations, and the extension of those already existing, is ancillary to the government in sustaining the peace, the convenience, and the good order of those communities which are formed by dense collections of citizens in particular localities. With regard to them rules and regulations are required for

conduct, and the use and enjoyment of property and the preservation of health, which are not applicable to rural districts. It does not depend upon the will of the citizens, whether or not they may be subject to the restrictions and burdens of these municipal *quasi* corporations, any further than the legislature may allow the exercise of that will. The whole public is concerned and the legislature may prescribe the terms and conditions under which they may be formed or extended; and may vest in the County Courts the power of determining when they may or may not be necessary or useful. Indeed the County Courts are the best depositories of that power, inasmuch as, under the Constitution of the State, they have original exclusive jurisdiction in all cases which concern the internal improvement and local concerns of their counties. In such cases no such issues are presented as arise in suits between individuals. The County Court is not to consider whether the establishment of a municipal corporation, or the extension of an old one, would put money in the pocket of A., diminish the business of B., or enhance the real estate of C. Individuals must take their chances, and all these personal and individual interests disappear before the overruling consideration, whether the matter proposed, would or would not facilitate good government and promote the general interests of the community. The real question is rather of a political than juridical nature.

So this Court held in the case of *Dodson et als, v. Mayor &c., of Ft. Smith*, which case covers many of the points presented by this. *See* 33. *Ark.*, 509.

So far as the exercise of discretion is concerned, we are satisfied from the proof that it was very proper to make the annexation. The convenience of the citizens as well as the more effective police of the town required it.

There is no error, unless, in some respect, the directions of the Statute have been omitted, or violated, in some material point.

2. MUNICIPAL CORPORATIONS: Annexation of territory. Amending petition.

It is contended that the amendment of the petition, after it had been voted upon, was such an error. It certainly would be fatal, if the Statute, on that point, had been silent; for *non constat* that any one voting for a certain proposed annexation, would have been willing to vote for a less one, which might leave out the very spot the voter hoped to have included. But the legislature may prescribe the whole mode of annexation, and it has authorized just such an amendment as this, pending the petition. *Acts of* 1874-5, *on pp.* 35 *and* 16, *Sections* 84 *and* 36. Citizens, now, vote upon a proposition to annex territory with the understanding that the proposed area may be diminished by the court, but may not be extended.

3 SAME: Disqualification of County judge.

It is objected here that the County Judge was disqualified, being a citizen and a tax-payer of the town. It does not appear that his authority was challenged by any proper motion in the County Court, and we are free to say, that if it had been the objection ought not to have prevailed. It may be hoped that every good Judge in the State is deeply interested in everything that may help or hurt the community; and that he will favor the former and oppose the latter in all legitimate ways. Here the question is not one of taxes and burdens, but one of police. It does not even appear that, on the whole, the result of annexation, would be to increase or diminish taxes. But that is of no importance. This is not a suit of a personal nature, concerning property or rights of persons. A general interest in a public proceeding, which a Judge feels in common with a mass of citizens, does not disqualify. If it did, we might chance to have to go out of the State, at times, for a Judge. The "interest" Disqualifying

Interest of Judge.

which disqualifies a Judge, under the Constitution, is not the kind of interest which one feels in public proceedings, or public measures. It must be a pecuniary or property interest, or one affecting his individual rights; and the liability or pecuniary gain or relief to the Judge must occur upon the event of the suit, not result remotely, in the future, from the general operation of laws and government upon the *status* fixed by the decision.

At the May Term, 1881, of this court, in the case of *Rogers v. Cypert, Judge*, not reported, there was an application for a *mandamus* to compel a Circuit Judge to entertain and act upon a petition for a writ of *certiorari* to the County Court, to bring up the record of proceedings had in the County Court, under the local option liquor law. The Judge answered the petition setting up, not that he had refused the *certiorari* in the exercise of his sound discretion, but that he had refused to take any cognizance at all of the application for a *certiorari*, upon the ground that his wife and children had signed the original petition to the County Court for the prohibition, and that he supposed he was thereby disqualified from acting in the case, under that clause of the Constitution, which forbids a Judge from presiding where "either of the parties shall be connected with him by consanguinity or affinity, within such degree as may be prescribed by law." The *mandamus* was nevertheless ordered. No written opinion was delivered, but I remember the view of it taken by the court which then consisted of the late lamented Cheif Justice ENGLISH, Mr. Justice HARRISON and myself. We all concurred in the opinion that although the wife and children of the Judge were technically parties, as being amongst the petitioners, yet inasmuch as the proceeding was not a personal one, and their interest was only a common interest with other citizens

in the establishment of a wholesome police regulation, affecting the whole community, they were not parties in the sense, or within the spirit of the Constitution. The same considerations apply in this case to the County Judge, regarding his participation in the proceeding to have the town of Marianna apply to the County Court for the annexation of the proposed territory. He had, as alleged, voted for the annexation.

The judicial ermine does not absolve the individual from the duty, nor deprive him of the right, to participate with other citizens in public movements for the public good, which do not in any peculiar manner affect his private interests, more than those of other citizens. How far he may do so, in anticipation of the probability or chance, that he may be called to decide upon the legality of such proceedings, is with him a consideration of prudence or good taste, to be determined in his own breast. If he were thereby disqualified, he would be required to renounce all civic privileges. He could not even try a contested election case, where he had voted for one of the contestants.

Affirm.

Cavaness v. The State.

1. Criminal Evidence: *Homicide. Corpus delicti.*
For evidence held sufficient of the *corpus delicti* in this case, see the opinion.

2. Same: *Sanity of prisoner: Burden of proof.*
Evidence on the trial of a homicide sufficient to raise a doubt of the prisoner's sanity does not put upon the State the burden to prove his sanity beyond a reasonable doubt.

Cavaness v. The State.

APPEAL from *Monroe* Circuit Court.

Hon. M. T. SAUNDERS, Circuit Judge.

The appellant pro se.

It was error to refuse instructions No's. 6, 8, and 10, asked for defendant in regard to the effect of drunkeness upon the mind.

The State totally failed to prove the *corpus delicti*, and this is fatal. No witness swore that the party alleged to have been killed was dead, or killed, or that he had seen the dead body, or that even he had disappeared. 2 *Greenl. on Ev. Sec.* 278; 4 *Id., Sec's.* 131, 132; *Bishop on Cr. Pro., Sec.* 5010 *note.* The presumption is that he is still alive, until proof is furnished that he is dead.

C. B. Moore. Att'y Gen'l, *contra.*

The charge of the court was one of the fullest and fairest we have seen, and embodies the law as expounded by text writers and our own decisions, and the evidence fully justified the verdict. The 6th instruction refused was covered by the general charge of the court. The 8th *is not law. Sec.* 1252 *Gantt's Dig.*; 26 *Ark.*, 334; 40 *Ark.*, 511 *and cases cited.*

The 10th is a reiteration of the 6th.

There is not one particle of evidence to extenuate or excuse the crime. Defendant was not "in such a besotted condition as not to know what he was doing or that it was wrong." 40 *Ark.*, 521. Plenty of time had elapsed for his blood to cool. He deliberately prepared himself and sought his victim, renewed the quarrel, or rather brought on a fresh one, cursed and struck deceased and then killed him. *This is murder in the first degree.*

SMITH, J. Cavaness was indicted by the grand jury of Monroe County for the murder of William Barlow; was regularly tried upon the plea of "not guilty;" was convicted of murder in the first degree and was condemned to be hanged.

The motion for a new trial set up that the verdict was against law and evidence, that the court had misdirected the jury and had refused the prayers of the defendant for instructions numbered 6, 8, 10 and 11.

The following is a fair summmary of the testimony:

1. The facts.

The defendant, when sober, is a peaceable, well-disposed citizen; but when in liquor is quarrelsome and dangerous. The deceased, who was a bar-tender by occupation, bore the reputation of a desperate man. The defendant had been drinking heavily for several days, and on the morning of Sunday, August 5th, 1883, was drunk in the saloon kept by deceased in the town of Indian Bay. An altercation occurred between the two about 9 or 10 A. M., but did not proceed to actual blows, owing to the interference of by-standers. The defendant then left the house and the witnesses neither saw, nor heard of him any more until 3 P. M. of the same day, when he came back to the saloon. He boasted that he was the best man in the county and could whip any man in the town. He went into the room where Barlow was lying on a cott, swore at him and told him to get up, that they must settle their difficulty now, that he was fixed for him and that he was going to whip him. Barlow told him to go away, that he desired no difficulty and remarked to the defendant "you have a pistol." Upon this the defendant struck Barlow with his left hand, at the same time drawing his pistol with his right. Barlow jumped up and called on the by-standers for help, and the parties grappled with each other. Both were armed and each at-

tempted to shoot the other; but Barlow's pistol missed fire, while the defendant succeeded in shooting his antagonist.

This was murder in the first degree, provided Barlow died from the effects of the wound within a year and a day. Five or six hours had elapsed between the quarrel in the morning and the shooting. There had been ample time for passion to subside and for the blood to cool. In this interval, the defendant had prepared a deadly weapon, and then sought his victim, picked a fresh quarrel with him, thrust the combat upon an unwilling man by cursing and striking him, and finally shot him. All the ingredients of willfulness, malice, deliberation and premeditation are present here.

Corpus delicti.

But it is insisted that there is no sufficient proof that Barlow is dead. In cases of homicide, the *corpus delicti*, by which is meant the fact that the crime has been actually perpetrated, involves two distinct propositions; namely, that the person is dead and that he died in consequence of the injury received at the hands of the accused. "The most positive and satisfactory evidence of the fact of death is the testimony of those who were present when it happened, or who, having been personally acquainted with the deceased in his lifetime, have seen and recognized his body after life was extinct." 3 *Gr. Ev. Sec's.* 131–2; *Starkie on Ev. 9th Am. Ed.*, [* 862].

All of the witnesses speak of Barlow as deceased; and one of defendant's own witnesses mentions the killing of Barlow. We concede that these expressions standing alone, would not warrant the jury in inferring his death and that it was produced by the criminal agency of the prisoner. But this is not all. It is proved that a physician was immediately summoned, who gave it as his opinion that Barlow could not long survive. The same phy-

sician also testified on the trial of this case that he was acquainted with the deceased (meaning Barlow) and that on the 6th of August, 1883, he examined the body and found that the ball had passed through the right lobe of the liver, and through the right kidney, and had lodged against the skin about one inch to the right of the back bone; and that the wound was sufficient to cause death in any case. We conclude that the Doctor, when he speaks of "the body," intended as no doubt the jury and the court below understood, the dead body—the cadaver or corpse—of Barlow, and that his examination was *post mortem*. If the patient had been alive when he probed the wounds, he would have spoken of Barlow as a person—not of the body of Barlow.

The court gave an elaborate charge to the jury, and in addition ten special directions at the defendant's request. The general charge was not excepted to. The prayers that were denied were as follows:

6. "If the jury believe from the evidence that, at the time the fatal shot is alleged to have been fired, the defendant was so far affected in his mind and memory that he was not able to distinguish right and wrong, and had not knowledge and understanding of the character and consequences of his act, and power of will to abstain from it, then he was not a legally responsible being, and the jury should find him not guilty."

2. Sanity of defendant: Burden of proof.

8. "While it is true that the law presumes every man to be sane and responsible for his acts, until the contrary appears, still if there is evidence tending to rebut this presumption sufficient to raise a reasonable doubt upon the issue of sanity, then the burden of proof is upon the State to show beyond a reasonable doubt, that the defendant was sane at the time the alleged offense was committed."

10. "If the jury believe from the evidence, beyond a reasonable doubt, that the defendant committed the act in manner and form as charged in the indictment, still if they further believe from the evidence that the defendant was in such a state of mental insanity as not to be conscious of what he was doing, or that the act itself was wrong, then they should find the accused not guilty."

11. "Although drunkeness in itself is no excuse or palliation for crime committed while under its influence, yet mental unsoundness superinduced by excessive drunkenness may be an excuse, if such mental derangement be sufficient to deprive the accused of the ability to distinguish between right and wrong."

All of these rejected requests are predicated upon the existence of a state of facts of which there is no proof in the billl of exceptions. There is no evidence that the defendant labored under any mental unsoundness or infirmity, nor even that he was drunk when he shot Barlow. He had been drunk in the morning; but no witness stated that he was under the influence of liquor when he returned to the saloon in the afternoon. There is no reason to think that his indulgence in strong drink had proceeded so far as to impair his mind or memory or produce any derangement of his faculties. On the contrary, it is apparent that he knew perfectly what he was about.

The 8th prayer, above copied, is not the law of this State under any circumstances. *Gantt's Dij. Sec.* 1252; *McKenzie v. State*, 26 *Ark.*, 334; *Casat v. State*, 40 *Id.*, 511.

Finding no error the judgment must be affirmed.

AMIS V. CONNER ET AL.

1. REWARDS: *What claimants must prove.*
The claimant of a reward for the apprehension of a felon must prove not only that the reward was offered as alleged in his complaint, but also that the person arrested was the guilty party, if the answer denies both these facts.

2. SAME: *What is.*
The offer of a reward is a promise conditional upon the rendition of some proposed service. The offerer may prescribe any terms he sees fit, and these terms must be complied with before any contract arises between him and a claimant.

APPEAL from *Bradley* Circuit Court.

Hon. J. M. BRADLEY Circuit Judge.

Compton, Battle & Compton for appellant.

There was no evidence of a legitimate character showing that the defendant ever personally offered a reward, but on the contrary the testimony shows that but one reward was offered and that by the firm, nor was there any evidence to show that the men arrested were the ones who committed the burglary.

Plaintiff failed to show that the conditions of the reward were complied with. There was no evidence upon which to base the verdict and in such case this court will reverse.

R. C. Fuller and *T. B. Martin* for appellees.

The evidence was sufficient to prove that the parties arrested were the ones for whom the reward was offered. This was a question of fact for the jury, and their finding will not be disturbed. *Ark. Reports passim.* Where

there is any evidence to support the verdict this court will not reverse. 31 *Ark.*, 164. Upon the *whole case* the judgment is right and should be affirmed.

SMITH, J. The iron safe of Amies & Brother in Princeton, Dallas County, was broken open on the night of April 4th, 1880, by some unknown person or persons, and several thousand dollars in currency and State and County scrips were abstracted therefrom. This action was brought to recover a reward offered for the capture of the felons. The complaint alleged that Lewis Amis, the defendant, and a member of said firm, had offered a reward of $500 for the arrest of the theives, and that the plaintiffs, relying upon this promise, had caused to be arrested and delivered to the proper authorities the two men who had perpetrated the felony. The answer denied that the defendant had ever, as an individual offered any reward, but stated that his firm had advertised a reward of the sum mentioned for the apprehension of the offenders and the recovery of the stolen moneys. And it was denied that the plaintiffs had complied with the conditions of the offer, or with either of them. The plaintiffs recovered a verdict and judgment. And the motion for a new trial set up among other causes, insufficiency of the evidence to support the verdict.

1. REWARDS: Proof by claimant.

Under the issues raised by the pleadings, it was incumbent on the plaintiffs to prove, 1. That the defendants had, severally or jointly with others, offered a reward for the apprehension of the guilty parties, without the return of the moneys and securities, and 2. That the two men whom the plaintiffs arrested were the same persons who had committed the crime.

2. What is a reward.

The offer of a reward is a promise conditional upon the rendition of some proposed service. He who offers it has

the right to prescribe any terms he may see fit and these terms must be complied with before any contract arises between him and a claimant. *Sherry v. United States*, 92 *U. S.*, 73; *Jones v. Phoenix Bank*, 4 *Seld.*, 228.

The decided preponderance of the testimony is, that but one reward was offered in this case; that the offer was made in the name of the injured firm, and not in the name of the defendant individually, and that it stipulated for the restoration of the money, as well as for the arrest of the criminals. The terms of this offer were published in the Little Rock Democrat, a public newspaper, and in various other modes, one of which was by a writing sent to the town of Toledo, in wich the plaintiffs resided. Of this notice of reward the plaintiff Conner had knowledge; for he had copied and distributed it to various points. But shortly after the loss, the defendant went in person to Toledo, and there some persons understood him to say in conversation that he would pay $500. for the simple arrest of the burglars and communicated their information to the plaintiffs, who acted upon it.

Upon the first proposition, then, which it was necessary for the plaintiffs to establish, there was a conflict of testimony. And this court has always been reluctant to disturb the verdicts of juries, however unsatisfactory they may be, where there is any evidence to sustain them. But upon the second proposition, which it was equally necessary for the plaintiffs to prove before they could succeed, there is a total failure of evidence. The persons arrested never confessed the crime; they were never convicted of it; there is no proof that they were ever in Dallas County until they were carried there by the Sheriff after their arrest; and from no fact that was in evidence could the jury reasonably infer that they had any connection with the affair. They were strangers passing

through Dorsey County afoot, several weeks after the crime had been committed; they did not come from the direction of Princeton, but from the opposite direction of Pine Bluff; and they were arrested simply because it was supposed they corresponded with the personal description of two men who were suspected of being implicated in the plundering of the safe. When informed of the cause of their arrest, they said they had never heard that the safe had been robbed: and being informed that one of the party of arrest was the Sheriff of the county, they claimed his protection. In their valise were found some queer tools, such as the witnessess had never seen before, and did not know the use of, but which they evidently took to be the tools of a safe burglar. And on their persons were found $400. in money; but it was not proved to be the money that was stolen, nor did Amis & Brother claim it as such, The defendant was sent for and on his arrival, according to some of the witnesses, expressed his belief that they had got hold of the right parties. But this was only a matter of opinion. He did not himself know who were the authors of the crime, nor did any other witness. The men were confined in jail; but soon after made their escape. The evidence also tended to prove that the safe was opened by means of a punch and sledge-hammer, which belonged to the village blacksmith and which were left on the spot.

This was the substance of the testimony as to the identity of the men that were arrested [with the men who plundered the safe. And it wholly fails to show that the plaintiffs had earned the reward, even if the sole condition of that reward was, as is stated in the complaint, the apprehension of the persons who committed the offence.

Reversed and remanded for a new trial.

HICKEY v. MATTHEWS.

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1. CERTIORARI: *None to correct errors.*
Mere errors and irregularities in a judgment can be corrected only by appeal.

2. CERTIORARI: *Practice in.*
Since the passage of the act of 1873 regulating the practice on *certiorari*, (Gantt's Dig. Sec's 1196–7), a Justices' return to the writ is not conclusive as before then. The court may look beyond the transcript certified by the Justice, to the orignal record itself, and hear evidence as to any subsequent alterations and amendments of that record.

APPEAL from *Dorsey* Circuit Court.

Hon. J. M. Bradley, Circuit Judge.

W. P. Stephens for appellant.

The transcript from the Justice returned on *certiorari*, shows that there was service, though informal, that the defendant appeared by attorney, and that the Justice had jurisdiction of the subject matter.

Certiorari, at common law was a writ issuing out of Chancery or King's Bench. *Bacon's Abs. Title, Certiorari.* It is in the nature of a writ of error. 112 *Mass.*, 206. Except when ancillary to other process, its office is to bring up the *record* of an inferior tribunal to enable the court to determine whether the former has proceeded within its jurisdiction. 55 *N. Y.*, (*Sick.*) 600; 21 *Barb.* 656. Unless there is a want or excess of jurisdiction, the Circuit Court should not have quashed the judgment, 29 Ark., 173, and Gantt's Dig. Sec. 1196 does not so enlarge the writ as to make it operate for the correction of mere errors or irregularities, 35 *Ark.*, 99., The want of or ex-

cess of jurisdiction can only be tried upon inspection of the record, 21 *Ark.*, 426. The Circuit Court could not have considered matters *dehors* the transcript. 23 *Ark.*, 107; 22 *Ind.*, 73; 49 *Me.*, 417; 17 *Ark.*, 440. *Any* evidence for the purpose of showing want of jurisdiction or excess would have been *inadmissible, Supra*; 66 *Ill.*, 256; 30 *Iowa*, 531. As no evidence *dehors* the record could be admitted, no bill of exceptions was necessary. As to the office of a bill of exceptions *see* 40 *Ark.*, 173.

The writ was improperly granted in the first case, as no proper case was disclosed by the petition and transcript, 17 *Mass.*, 351; 17 *Ill.*, 31; *Wright* (*Ohio*) 130.

Compton & Fuller for appellee.

The writ was properly issued *Gantt's Dig.* 1196-7. The transcript of the Justice shows that he failed to comply with the provisions of *Sec.* 3723 *Gantt's Dig.*, and his proceedings were void for want of jurisdiction, and should be quashed. 30 *Ark.*, 20. A magistrate's court is one of limited jurisdiction, and all the statutory requirements must *affirmatively* appear. No presumption can be in its favor. 36 *Ark.* 272; 5 *Johns.*, 282; 5 *Ark.*, 367; 34 *Id.*, 105; 2 *Gray*, 120. Jurisdiction must be shown. *Cooley on Torts.*, 416. None can be presumed. *Freeman on Judg.* 3*d. Ed. Sec.* 517.

The Magistrate was examined in open court with his docket. There is no bill of exceptions, showing the evidence, and this court will presume that the Circuit Court acted advisedly, and that the facts shown were sufficient to justify the quashing of the judgment. *Ark. Reports passim.*

SMITH, J. This was *certiorari* to quash the judgment of a Justice of the Peace. The transcript of the Justice's proceedings, filed with the petition and authenticated by

the certificate of the Justice, shows an action begun, before him, by Hickey against Matthews on an account, the amount of which is not stated, December 18, 1877; the issue of a summons for the defendant, the placing of it in the hands of a special constable, and the noting on the docket, of service of the same by reading on the 19th; the failure of the defendant, to appear on the 22d of December, the day set for trial, and a judgment by default for — dollars and costs.

On the other hand, the transcript returned by the Justice in obedience to the writ of *certiorari*, shows the following state of facts; Action begun December 15, 1877, on a promissory note, purporting to have been made by the defendant for a sum under $50; the appearance of the defendant by attorney on the 22nd and trial before a jury, with verdict and judgment for the plaintiff for $45.53.

At the instance of the petitioner for the writ the Justice was required to bring his docket into court; and upon inspection of the same, and examination of the Justice, his judgment was quashed by the Circuit Court.

1. CERTIORARI: No substitute for appeal.

The only points that are open to contestation in this proceeding are, whether a judgment valid on its face was in fact rendered; and whether the court which rendered it had jurisdiction of the subject matter and of the defendant's person. Mere errors and irregularities could be corrected only on appeal.

The judgment that was set out in the exhibit attached to the petition was void for several reasons. No specific sum was found to be due the plaintiff. Nor is there any paper or memorandum in the record from which the amount could be ascertained by computation, as might be the case with a promissory note. But according to this exhibit, the action was upon an open account, the

amount of which is not specified, nor does it appear to have been sworn to. Further, it does not appear that the sum in controversy was within the jurisdiction of a Justice of the Peace, nor that the defendant had legal notice of the pendency of the cause, the service being by reading when it should have been by copy (*Gantt's Dig. Secs.*, 3730, 4512) and the judgment itself distinctly negativing the voluntary appearance of the defendant to the action.

2. CERTIORARI: Practice in

However, the transcript returned by the Justice is of higher authority than that exhibited with the petition. And that discloses a regular judgment upon a cause of of action over which he had jurisdiction and in a case wherein the defendant had appeared by attorney. Under the old law the return made to the writ of *certiorari* was conclusive as to the facts stated in it, and the facts stated in the petition could not be regarded. *Redmond v. Anderson*, 18 *Ark.*, 449; *McCoy v. County Court*, 21 *Id.*, 475; *Dicus v. Bright*, 23 *Id.* 107.

If the return was false the remedy was an action against the magistrate. *People v. Ontario*, 15 *Barb.*, 286; *Haines v. Judges*, 20 Wend., 625. But in the year 1873 the Legislature passed an act, which enlarges the scope and office of this writ.

Affidavits may now be read on such applications and evidence *dehors* the record may be introduced by either party on the hearing. The record of the inferior judicial tribunal is, however, still conclusive so far as it goes. *Gantt's Dig. Sec's.* 1196–7.

The effect of this Statute is to take away the conclusiveness of the return and to enable the court to look beyond the record certified to the original record itself, and to hear evidence as to any subsequent alterations and amendments of that record. This was done in the pres-

ent case. What was developed upon an inspection of the original docket entries and the examination of the Justice is not disclosed. There is no bill of exceptions preserving the evidence upon which the court acted. And in the absence of any showing to the contrary, we are bound to presume in favor of the correctness of the judgment below, that the record, when produced, did not agree with that set out in the return.

Affirmed.

SHOTWELL v. THE STATE.

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1. BURGLARY: *Indictment for.*

An indictment for burglary charging that the defendant "feloniously, willfully and burglariously did break and enter," is equivalent to charging in the language of the statute that he "willfully and maliciously and with force did break and enter." The word "maliciously" in the statute does not mean malice towards the owner of the house entered, but the intent from which follows the unlawful act; and the words "did break" imply force.

2. INDICTMENT: *When crime is the same by statute and common law.*

When the elements of a crime are the same by the common law and by statute, the indictment may follow either, as a general rule

3. SAME: *Burglary: Specifications of intent.*

An indictment for burglary charging that the defendant entered "with the felonious intent then and there to commit arson," sufficiently specifies the felony intended to be committed.

4. BURGLARY: *Out house.*

Any house under our statute comes within the prohibition against burglary and arson. An out-house is not necessarily within the curtilage. A house contiguous to and used in connection with a hotel, both belonging to and controlled by the same person is an out-house.

Shotwell v. The State.

APPEAL from *Carroll* Circuit Court.

Hon. J. M. PETTIGREW, Circuit Judge.

W. F. Pace for appellant.

The indictment is bad because it does not set out with certainty the crime defendant is alleged to have intended to commit when entering the house. 21 *Ges.* 24; 12 *Tex. Ct. of App.*, 395; *Gantt's Dig. Sec.* 1796. Nor does it contain the word "maliciously." *Gantt's Dig. Sec.*, 1348; *Waterman's U. S. Cr. Dig. p.* 343, *Sec.*, 230; 34 *N. H.* 510; 1 *Chand.* 166.

As to what is an *out house* see *Bowvier p.* 147; *Bishop Cr. Law vol.* 3 *Sec.* 104; *Roscoe Cr. Ev. p.* 278; *Gantt's Dig. Sec.* 1795.

Malice is a necessary ingredient in the crime of burglary. *Gantt's Dig. Sec.* 1348.

Moore, Att'y Gen'l, *contra.*

The indictment is almost in the exact words—*mutatis mutandis*—of the indictment in *Bradley v. State*, 32 *Ark.*, 704; see also *Dodd v. State*, 33 *Ark.*, 517.

Our statute makes the breaking *or* entering "*any* house, tenement," &c. in the night time, with intent to commit a felony &c. burglary. *Gantt's Dig. Sec.* 1348; 33 *Ark.*, 517.

By *Sec.* 1349 *Gantt's Dig.* a party may be adjudged guilty of *burglary* and of the other felony intended to be committed, and if the State saw fit to indict for the *burglary* as in *Bradley v. State*, defendant cannot complain.

COCKRILL, C. J. The appellant was indicted for burglary under section 1348 of Gantt's Digest. The offense is charged to have been committed by breaking and enter-

ing into "an out house commonly known as a sample room." It is urged that the indictment is insufficient because:

1. It does not charge the offence in the language of the statute, but in place of the statutory words "willfully and maliciously and with force break and enter" it substitutes the words "feloniously, willfully and burglariously did break and enter."

The offence alleged in the indictment is created by the statute and it is required that the charge should be laid in the exact words of the statute or in others that convey an equivalent idea. It is sufficient if every particular element that enters into the crime is covered by the words of the indictment.

1. BURGLARY: Indictment for.

In the use of the word "maliciously" in the statute we cannot presume that the legislature intended that malice towards the owner of the house entered, or toward any one else should become an element in the intent with which the breaking is done. The word must be understood from its *context* to be intended in its restricted legal significance which implies "the intent from which follows any unlawful or injurious act, committed without legal justification," 1 *Bishop Cr. Law Sec.* 429. It means doing a wrongful act without just cause or excuse. 2 *Bouvier L. Dict.* MALICE.

Bishop says that "maliciously" in an indictment has been adjudicated an equivalent to "willfully" in the statute. "Maliciously" is of somewhat larger meaning than "willfully," which in an indictment would not therefore supply the place, it is presumed, of maliciously in the Statute." 2 *Bish. Cr. Pr. Sec.* 43.

2. SAME: Under common law or statute.

The intention to do the wrongful or unlawful acts of breaking and entering willfully and without legal justification, entered into the common law offence of burglary,

and we are of opinion that no new element has been added to the offence by the use of the word "maliciously" in the section referred to. When the elements of a crime at common law and under the Statute are the same, the indictment may follow either as a general rule. 1 *Bishop Cr. Pr. Sec.*, 612; *Tully v. Commonwealth*, 4 *Met.* 357; *Lyons v. People*, 68 *Ill.*, 271.

The terms used in this indictment would be sufficient for the common law offence, and we think they adequately describe the statutory crime.

"Force" implied.

The effect of the ommission of the statutory words "with force" in this connection is immaterial. The verb "to break" which is used in the indictment implies force, and its common law meaning is well understood. In Ohio the word "forcibly" is used in the Statute where "with force" occurs in ours, and the court held that this was not intended to change the settled definition of burglary. *Ducher v. State*, 18 *Ohio*, 308.

The word "maliciously" was used in the Ohio Statute as in ours, but we are not aware that it was ever held to change any of the settled rules of burglary, though it was there very properly incorporated into their precedents for indictments.

3. Allegation of intent.

2. It is insisted that the indictment is defective, because the felony, which the accused is alleged to have intended to commit when he entered the house is not specifically described. It is alleged that the entry was made "with the felonious intent then and there to commit arson." It is well settled that the specification in such case need not be so minute as in an indictment for the actual commission of the offence. Thus in *Bradley v. State in* 32 *Ark.*, 704, where the indictment was for burglary with intent to commit rape, the court say: "It would have been sufficient to charge the defendant with

entering the house of E. Sled with intent to commit a felony, to-wit, rape on the body of Mrs. Mary J. Sled."

Where larceny is the crime intended, it is generally held that something more specific than the mere name of the felony must be given, though some courts have held that no more is required. *People v. Shater*, 32 *Cal.*, 36; *Wicks v. State*, 44 *Ala.*, 398.

In case of arson there is obviously less necessity to particularize, and it is apparent that any person of common understanding would be apprised by the allegation quoted of what was intended thereby.

Exceptions were taken to the court's charge to the jury, but they are not urged here and we are unable to discover errror therein.

Appellant asked the court to instruct the jury as follows, which was refused, viz: Out-house.

"One of the material allegations in the indictment is that the house described therein is an out house, and I further charge you that in contemplation of law an out house is one of a cluster of buildings connected with a building, and not separated from it by a highway, and unless you find that both have been proven beyond a reasonable doubt, you will acquit the defendant."

Any house under our Statute comes within the prohibition against burglary and arson, and it was not proper to define an out house as one within the curtilage as the appellant's prayer for instruction implies. The proof showed that the house was contigous to and used in connection with a hotel, the two belonging to and being controlled by the same person. This was enough to make it an out house. *Bishop St. Cr. Sec.*, 291.

Finding no error in the record the judgment is affirmed

KRONE & CO vs. PHELPS ET AL.

1. MORTGAGE: *Description of porperty.*

A mortgage of "all of a crop of ten acres of cotton to be grown" by the mortgagor upon a field containing forty acres in cotton, is, as to strangers to the mortgage, void for uncertainty; and parol evidence to designate the particular ten acres intended is not admissible.

APPEAL from *Lawrence* Circuit Court.

Hon. R. H. POWELL, Circuit Judge.

W. R. Coody, for appellant.

The mortgages were properly acknowledged and recorded, long before the rent contract was written, were regular, and certainly admissible for what they were worth. 38 *Ark.*, 190.

Parol evidence to fix the particular 10 acres, clearly admissible. 39 *Ark.*, 394.

Replevin does not lie to enforce a landlord's lien, only attachment. 24 *Ark.*, 549; 36 *Id.*, 572; 39 *Id.*, 575. Here there was no delivery to the landlord or agreement to deliver at a *particular place*, or *to a third person for the landlord. Story on Sales, Sec.* 305, 310; *Benj. on Sales*, 210 *to* 240; 9 *Ark.*, 365; 25 *Id.*; 545; 23 *Id.*, 244; 24 *Id.*, 545; 21 *Id.*, 563; 30 *Id.*, 505; 4 *Id.*, 450; 35 *Id.*, 304. When a party has only a lien he must have actual possession before he can bring *Replevin. Wells on Replevin, Sec.* 121–3; 38 *Ark.*, 416. Plaintiff must have title coupled with right of possession. 37 *Ark.*, 66; 16 *Id.*, 90.

W. F. Henderson, for appellee.

The jury found that the title to the cotton was in Phelps. The verdict was supported by a preponderance of evidence

and this court will not disturb the verdict. This is a stronger case than *Knox v. Hellenus*, 38 *Ark.*, 418; see also, 37 *Ark.*, 483; *Story on Sales, Sec.* 305 *to* 310; *Benjamin on Sales*, 221 *to* 240.

By the terms of the rent contract, written and oral, Scott as ginner was the agent of the parties to receive the cotton for Phelps. 9 *Ark.*, 371.

Appellees could not bring attachment, as none of the grounds of attachment existed, no removal or attempt to remove &c,. the crop. Replevin was his only remedy, or a suit in equity.

The mortgages do not *locate* the particular five and ten acres on which the lien was created. They were void as against strangers for uncertainty; and there is no proof that the three bales were gathered from the part intended to be covered by the mortgages. The cotton was picked generally, from the whole place, but the whole of it was liable for rent, and appellants were bound to take notice of Phelps' lien.

COCKRILL, C. J. Appellees recovered three bales of cotton of appellants before a Justice of the Peace in an action of replevin, and on appeal to the Circuit Court the verdict and judgment were in their favor again. It is submitted here that the appellees did not show title to the property sufficient to entitle them to recover in this action. It appears that they were the landlords of the parties who raised the cotton and so had a lien for their rent. This, of itself, would not entitle them to recover, but there was testimony tending to show that the cotton had been delivered to them, or at least to a third person for them in payment of the rent, before appellants got possession of it. The question of delivery and also of appellees right to recover was fairly submitted to the jury, and the verdict was for them. Ther

was evidence to sustain it and we are unwilling to disturb it on that account.

1. MORTGAGE: Description of property.

The tenants who raised the crop had each executed a mortgage to secure appellants in the payment of a debt they owed them, describing the property intended to be mortgaged as "all of a crop of ten acres of cotton to be grown" by the mortgagors on the appellee's land. Appellants undertook to show upon the trial that the landlord's lien had been paid off and discharged, and that if appellees had any interest in the three bales of cotton in suit, their rights accrued by virtue of an agreement between landlord and tenant, after the mortgage lien had attached; and to meet this phase of the case they offered their mortgage in evidence and also offered to show that a particular ten acres of cotton in the field had been designated by the parties to the mortgage as the mortgaged crop. But it was in evidence that the mortgagors had cultivated forty-five or fifty acres of appellees' land in cotton, and that the three bales in question had been gathered from all parts of the field, and the court rejected the proffered testimony.

It is apparent that the subject matter of these mortgages was not described with sufficient certainty to identify the property intended to be assigned. In order to affect purchasers or others acquiring rights in the crop, with notice of the mortgage lien, there must be a description in the mortgage by which it can be identified. *Dodds v. Neal*, 41 *Ark.*, 70. In this case it is said: "When creditors of the mortgagors or others dealing with the property, have acquired adverse rights, a mortgage of a specific number of articles out of a larger number will not be allowed to prevail unless it furnishes the data for separating the property intended to be mortgaged from the mass."

The mortgages in question furnished no data by which the particular ten acres could be laid off or distinguished

from the other thirty or thirty-five acres. The parol evidence offered might have been admissible in a contest between the parties to the mortgages, but as against strangers it could not be heard to piece out a description so defective as this. That would be to prove notice of the mortgage lien by other means than the record, and this, under the settled rule of this court, cannot be done.

Objections are urged to some of the court's instructions to the jury, but we are satisfied that substantial justice has been done upon the whole case and the judgment is affirmed.

STATE vs. CARL & TOBEY.

1. LIQUOR: *Sale on order. Place of Sale.*
Davidson, at Ozark, sent a written order to Carl & Tobey, merchants at Little Rock, to send him one gallon of whisky by the L. R. & Ft. S. Ry. Express company, C. O. D. Carl & Tobey delivered the whisky to the company C. O. D., as directed, and agreed that in case the whisky was not called for and charges paid within thirty days, the company might, at their option. return the same to Carl & Tobey and they would pay the freight both ways. Davidson received and paid for the whisky at Ozark, and Carl & Tobey were indicted for selling it at Ozark. HELD, that the sale was at Little Rock, and the defendants were not guilty.

APPEAL from *Franklin* Circuit Court.

Hon. G. S. CUNNINGHAM, Circuit Judge.

C. B. Moore, Attorney General, for the State.

It was a sale at Ozark. See *Benjamin on Sales, 4th Am.*
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Ed., *Vol.* 1, *Sec.* 309; *Ib.*, *Chap. VI*; *Ib.*, *p.* 52 *to* 64, *and p.* 469, *Sec.* 523, *p.* 501, *Sec.* 566, *Sec.* 587, *and p.* 472, *Sec.* 528; 2 *Kent Com.*, 477, 500; 78 *N. C.*, 313; 28 *Ark*, 550.

Ratcliffe & Fletcher, Contra.

The sale was at Little Rock. The express company was the agent of the vendee to receive and deliver the goods, and the agent of the vendor to collect the purchase price. A delivery to the carrier was a delivery to the vendee, and the sale was complete, the carrier being merely the agent to collect the price for the vendor, &c., &c. See 2 *Kent Com.*, (11*th Ed.*) *p.* 658, *et seq. and note* (*marg. p.* 492); 35 *Ark.*, 190, 305; 37 *Id.*, 483; 2 *Blackstone* (*Sharswood*), 446, (448), *note* 10; 24 *Maine*, 89; *Ib.*, 366; *Benjamin on Sales*, 315–16-22, 181 *and note*; 362-72, *et seq.*, 399, 693; *Huichinson on Carriers*, 389, *et. seg.*; 9 *Ark.*, 365; 26 *N. H.*, 418; 27 *Id.*, 217; 28 *Id.*, 379; 38 *Id.*, 1883; 97 *Mass.*, 89; 22 *W. Va.*, 743; 9 *R. I.*, 578; 11 *Reporter*, 278; 96 *Pa.*, *St.*; *Benj. on Sales*, *Secs.* 322, 372, *et seq.*, 388; 73 *Maine*, 278; 71 *Ala.*, 368.

SMITH, J.—The indictment in this case charged that Carl & Toby, on the 15th day of November, 1883, sold intoxicating liquors within three miles of the Presbyterian Church in the town of Ozark, Franklin County, after the County Court of said County had made an order prohibiting the sale or giving away thereof, in accordance with the act of the Legislature, approved March 21, 1881, known as the "local option" statute.

At the trial the following was agreed upon as the facts in case:

"That Carl & Toby are, and had been for more than one year before the finding of the indictment in this case, merchants, doing business in the city of Little Rock,

Pulaski County, Arkansas, as partners, under the style of Carl & Toby, and had paid all the licenses required by law to carry on the business of wholesale and retail liquor dealers in said city and county, and at the time of the alleged sale, charged in the indictment, were in said city of Little Rock. That during the month of October, 1883, John Davidson, who then lived in Ozark, Franklin county, Arkansas, wrote a letter from Osark to Carl & Tobey, at Little Rock, which he forwarded to them by mail, to send one gallon of whisky by the Little Rock and Fort Smith Railway Express Company, a common carrier, doing business between Little Rock and Ozark,, 'C. O, D.' to him, the said Davidson, at Ozark. That in accordance with the directions of said Davidson, in said letter, Carl & Tobey, in the usual course of business at Little Rock, delivered to said express company, for said Davidson, one gallon of whisky, directed to said Davidson at Ozark, and took from the company a receipt, a copy of which is attached as part of the agreed statement of fact,—the purport of which was that Carl & Tobey were named as consignors, and Davidson as consignee, and after other stipulations, unnecessary to be mentioned, it contains a provision "that in case the goods were not called for and charges paid within thirty days, the company may, *at their option*, return the same to the consignors, who agreed to pay the freight both ways.' That the letters 'C. O. D.' mean collect on the delivery of the whisky by the express company at Ozark. That within a few days thereafter Davidson called at the office of the said company, at Ozark, and paid the agent of the company $2.50, which he supposed to be the price of the whisky due Carl & Tobey, and also all charges for carrying the whisky by the express company, and for returning the money to Carl & Tobey, and thereupon the whiskey was delivered to him by said agent. This was within three miles of the Presby-

terian Church at Ozark, and after the county court of Franklin County had made an order in accordance with the statute, prohibiting the sale of intoxicating liquors within three miles of said church. That Carl & Tobey in what they did had no intention to violate the law. That the receipt taken by Carl & Tobey from the express company, and made a part of this agreed statement, was never forwarded by them to Davidson, but was kept by them, and that they never notified Davidson that they had forwarded the whisky, and as a matter of fact Davidson did not know that that the whisky had been forwarded until he called for it at the express office at Ozark."

1. LIQUOR: Place of sale

Several declarations of law were asked by the State and refused; the purport of which was that the sale was a sale at Ozark; and several were asked by Carl & Tobey, and given by the court, the purport of which was that the sale was at Little Rock. The defendants were acquitted and the State appealed. The leading question now before this court is as to the place of sale.

In determining this question the most material inquiries are, when and where was it that the minds of these parties met and assented to the same thing; and at what point was it that the goods ordered were set apart and delivered to the purchaser.

"When the terms of sale are agreed on, and the bargain is struck, and everything that the seller has to do with the goods is complete, the contract of sale becomes absolute, as between the parties, without actual payment or delivery, and the property and the risk of accident to the goods vests in the buyer. He is entitled to the goods on the payment or tender of the price, and not otherwise, when nothing is said at the sale as to the time of delivery, or time of payment. The payment or tender of the price is in such cases a condition precedent, implied in the contract of sale, and the

buyer cannot take the goods or sue for them without payment; for though the vendee acquires a right *of property* by the contract of sale, he does not acquire a right *of possession* of the goods until he pays or tenders the price." 2 *Kent's Comm.*, 12 *Ed.*, * 492.

It is plain that the only agreement to sell, or act of sale, was at Little Rock. It was there that Davidson's order, transmitted through the mail, reached the defendants, and it was there that they consented to fill his order. Hence the first existence of the contract would be when the defendants at Little Rock assented to his proposal. *Fuich vs. Mansfield*, 97 *Mass.*, 89; *Shriver v. Pittsburgh*, 16 *P. F. Smith*, 446.

In *Taylor vs. Shipman*, 33 *Iowa*, 194, *S. C.*, 11 *Am. Rep.*, 118, a salesman for an Illinois house, while in Iowa, took an order for liquors, which his house filled by shipping the liquors to the purchaser in Iowa, he to pay charges and take risks. This was held to be an Illinois contract. And the court said: "It is well settled that to constitute a contract requires both the making and the acceptance of a proposition; that is, there must be a concurrence of two minds upon the same thing. Where an order or offer is made by letter, it does not constitute a contract until it is accepted. When it is accepted, and the letter containing the acceptance is placed in the mail, the contract as specified in the order or offer, is complete; and it is very plain, upon principle, that the contract is made where it is accepted, and not where the offer was made; for it is there that the two minds meet upon the same thing and the contract is consummated. This has been so adjudicated. *McIntyre vs. Parks*, 3 *Metcalf*, 207; *Whiston vs. Stodder*, 8 *Mart.* (*La.*), 132. The same principle is illustrated by the cases of *Hill vs. Spear*, 50 *N. H.*, 253; *S. C.*, 9 *Am. Rep.*, 205; *Boothby vs. Plaisted*, 51 *N. H.*, 436; *S. C.*, 12 *Am. Rep.*, 140; *Lynch vs. O'Donnell*, 12

Mass., 311; *Ely vs. Webster*, 102 *Mass.*, 304; *Brockaway vs. Maloney, Ib.*, 308.

It remains to be considered where the liquor was set apart and delivered to the purchaser. In *Alberger v. Marrison*, 102 *Mass.*, 70, a New York dealer, while in Massachusetts, took an order for liquors to be shipped to a citizen of Massachusetts, and the dealer selected the goods and placed them on board of the cars in New York, directed to the buyer in Massachusetts, who paid the freight. This was held to be a New York contract, because the title would not pass so long as anything remained to be done to identify the goods sold and there was no appropriation of particular property under the contract until the dealer's return to New York. To the same effect is *Dolan v. Green*, 110 *Mass.*, 322.

In *Garbracht v. Commonwealth*, 96 *Pa., State*, 449, a travelling agent for a licensed liquor dealer in Erie solicited and received orders for whisky in Mercer county. The orders were transmitted to his employer in Erie, and by him the whisky was shipped, by freight or express, consigned to the respective parties from whom the orders were received. The agent was indicted and convicted in Mercer county for selling liquor without a license. And it was held that he was improperly convicted, as Erie, and not Mercer county, was the place where the sales were made and the place of delivery. This is upon the principle that the place of sale is the point at which goods ordered or purchased are appropriated and delivered to the purchaser, or to a common carrier, who, for the purpose of delivery, represents him.

"It is well settled that the delivery of goods to a common carrier, *a fortiori*, to one specially designated by the purchaser, for conveyance to him or a place designated by him, constitutes an actual receipt by the purchaser. In such cases, the carrier is, in contemplation of the law, the bailee

of the person *to* whom, not *by* whom the goods are sent, the latter in employing the carrier being considered as an agent of the former for that purpose."—*Benjamin on Sales, First Am. Ed., pp,,* 130, 514.

This is certainly the general rule and controls this case, unless the fact that Davidson was to pay for the whiskey when it was delivered to him at Ozark, varies its operation.

The only case to which we have been referred which is precisely in point is *Pilgreen v. State*, 71 *Ala.*, 368. There the conviction was had ander a statute rendering it unlawful to sell intoxicatiog liquors within five miles of certain churches in Columbiana. The defendant was a licensed liquor dealer, doing business at Calera, twelve miles distant. He received by mail an order from one Dollar, requesting him to send to Columbiana a half gallon of whisky by the Southern Express Company, marked C. O. D. The defendant filled the order at Calera, delivered the whisky to the express company, and by the company it was delivered to Dollar at Columbiana, where he paid the price and all charges to the company, from whom the defendant received the price at Calera. And the decision was that Calera was the place of sale. Brickell, C. J., delivering the opinion of the court, said: "All the dealings between buyer and seller were at Calera. There the offer of the buyer was received, accepted and acted upon, and there every act was done which it was intended the seller should do. The general property in the thing sold there passed to the buyer by the delivery to the carrier of his own appointment, though he could not entitle himself to possession until he paid the price to the carrier. The carrier was his agent to receive the thing sold at Calera, and was the agent of the seller to receive the price. It would have been a neglect of duty as a collecting agent, rendering the express company liable to the seller, if there had been a delivery of the whisky with-

out payment of the price; and if possession had been wrongfully obtained, it may be, the seller could have reclaimed it. The general property, however, passed to the buyer by the delivery to the express company at Calera; the risk of loss then passed to him; though there may have remained in the seller a special property, and though the buyer could not, without payment of the price, entitle himself to the absolute property and to the actual possession. * * * * * The seller has a lien on the property for the price and the right of possession until it is paid."

In *State v. Intoxicating Liquors*, 73 *Me.*, 278, the claimant had sent an order to a firm in Boston for whiskey to be forwarded by Express, C. O. D., to him at Winthrop, in Maine. The whiskey was sent as ordered. Immediately upon its arrival, the package was seized as liable to confiscation under the Maine liquor law. The claimant tendered the charges to the express company, and intervened in the legal proceedings, claiming the package. The court said:

"Undoubtedly the initials, C. O. D., meant collect on delivery; or, more fully stated, deliver upon payment of the charges due the seller for the price, and the carrier for the carriage of the goods. These initials have acquired a fixed and determinate meaning, which courts and juries may recognize from general information. * * * Here, then, was a sale of the property to the claimant, the price payable on delivery. * * * The title passed to the vendee when the bargain was struck. Any loss of the property by accident would have been his loss. The vendor had a lien on the goods for his price. * * * In this case both the seller and purchaser had a qualified right of possession; the seller upon the purchaser's neglect or refusal to pay for the goods, and the buyer by paying for the same."

Judgment affirmed.

CHEW v. STATE.

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1. LIQUOR: *No one can sell without license.*
In this State no one, not even a druggist upon the prescription of a physician, can sell liquor without license from the County Court.

2. SAME: *License: None in three mile limit.*
Where the local option law has been put in force in a given territory, the County Court is powerless for two years to license the sale of liquor within the same territory.

3. SAME: *Indictment for sale in prohibited district.*
A party who sells liquor within a local option district may, since the passage of the act of March 26, 1883, be indicted either for selling without license, or for violation of the local option law.

APPEAL from *Union* Circuit Court.

Barker & Johnson for appellant.

The Legislature can't delegate the power to make laws, but it can make a law to delegate the power to determine some fact or state of things, upon which the law makes or intends to make its own future action depend. *Boyd v. Bryant*, 35 *Ark.*, 69. and authorities cited.

In the rightful exercise of this delegated power, (see sec. 1, Acts 1883, page 54) the court by its order determined the "fact" that intoxicating liquors should not be sold within three miles of the churches of El Dorado, for a period of two years.

The information was drawn under the act of 26th March, 1883, which, the admitted fact shows, was not in force at the time the alleged offense was committed, within the area mentioned in the order of the County Court, where the offense was committed. The order of the County Court suspended and displaced that act, for two years from the date of the

order, and put into operation within that area of territory the Act of 21st March 1881, page 140, as amended 20th February, 1883, page 54, under which the information should have been drawn. The appellant can be held to answer, only under the latter acts, and has been improperly convicted of the offense charged in the information, as held by this court, in *State v. Orton*, 41*st Ark.*, 305; *State v. Cathey, Ib.*, 308; also in *Wilder v. State*, and *Carter v. State, MS opinions of May Term* 1884; see also *State v. Dubois*, 34 *Ark.*, 381.

Under the proof in this case, the appellant is not guilty of any offense in selling the whisky to Armstrong upon the prescription and certificate of Dr. Goodwin. Sec. 3, Act 21st March 1881, page 140, fully authorizes the sale as made in this case—This section is in full force, and was not repealed by the amended act of 20th February, 1883; *page* 54, 6*th Ark.* 9, *Higginbotham v. Watts, et al*, 23*d Ark.*, 304.

In Flower v. State, MS. opinion, May Term 1884, this court is credited with saying, "under the act of March 8th 1884, druggists cannot sell ardent spirits except upon the prescription of a physician." In this case is not the exception the law?"

C. B. Moore Att'y Gen'l, *contra.*

All the cases cited by counsel were decided upon the law as it was prior to *Act M'ch.* 28*th* 1883, *p.* 192, *Sec.* 2.

The *drag net proviso* to Sec 2 of this act, is "*cumulative merely*" and provides that a party may be convicted of violating either the three mile or theLicense Law. No whisky can be lawfully sold without a license, 35 *Ark.*, 631. A physician may prescribe and administer it as he would chloroform and other strong poisons, *Sec.* 3 *p.* 140 *Acts* 1881, but his prescription will not sheild a druggist or any one else from the penalty of the law.

SMITH, J. The appellant was charged with retailing

whisky without a license. The prosecution was begun by information filed by the Prosecuting Attorney before a Justice of the Peace, under the Act of March 1, 1883. He was convicted there, and again on appeal to the Circuit Court, and was fined $200. The case was tried upon an agreed statement of facts, in substance as follows:

The County had, on the 10th of December, 1883, prohibited the sale of intoxicating liquors within three miles of the Presbyterian Church at El Dorado, in accordance with the prayer of a petition signed by a majority of the adult inhabitants residing within said limits. At the January Term, 1884, the defendant, who is a druggist in the town of El Dorado, applied to the County Court for a license to sell whisky in said town, exhibiting the collector's receipt for the State and County taxes; and his petition was rejected. The defendant after this did sell one Armstrong in said town a pint of whiskey upon the certificate of Dr. Goodwin, a practising physician, that it was necessary for Armstrong. Dr. Goodwin is a partner of the defendant in the drug business and he had previously filed with the County Clerk the affidavit required by law to authorize him to prescribe alcoholic liquors in cases of sickness.

The jury were instructed in effect that if Chew sold the liquor without license, he was guilty and that the law made no reservation in favor of druggists. And the court rejected prayers for directions based upon the ideas that he was protected by the physician's certificate and upon the absence of any intention on his part to violate the law.

In this State no one can lawfully sell intoxicating liquors without first procuring a license from the County Court of his County. A druggist cannot sell them without license as medicine upon the prescription of a physician. *Wards v. State*, 36 *Ark.*, 36; *Flower v. State*, 39 *Id.*, 209; *State v. Butcher*, 40 *Id.*, 362.

1. LIQUOR: No sale with out license.

No license in local option district

And where the local option law has once been put in force within a given territory, the County Court is powerless for the space of two years to grant a license to any one to sell liquors within the same territory. *Act of Feb.* 20, 1883, amendatory of the Three Mile law, sec. 1; *Wilson v. State*, 35 *Ark.*, 414; *Blackwell v. State*, 36 *Id.*, 178.

A regular practising physician may, however, under the third section of the *Act of March* 21, 1881, prescribe and administer alcoholic stimulants to his patients, as he would chloroform or morphine.

3. Indictment may be under license or local option act.

It is contended, however, that the prosecution should have been for a violation of the provisions of the Three Mile law and not for selling without a license which it was impossible to obtain. Such was the view taken by this court in *Debois v. State*, 34 *Ark.*, 381; *State v. Orton*, 41 *Id.*, 305; *State v. Cathey*, *Ib.*, 308 and perhaps other cases. But the third section of the *Act of March* 26, 1883, amendatory of the License Law, contains a drag net proviso that the penalties imposed by any special Act forbidding the sale of liquors in particular localities shall be merely cumulative of the penalties imposed by the License Act, and that the License Act shall apply to the territory embraced in the Three Mile law and all special Acts and that a party may be proceeded against under either Act.

Affirmed.

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Drew County v. Bennett.

1. Liquor. *Traffic in controlled by the Legislature.*

In the absence of Constitutional restraints the regulation of the traffic in liquors is wholly within Legislative control. The Leg-

islature may entirely prohibit it, or empower municipal corporations to do so within their limits. But neither counties, cities or towns can impose a tax upon the privilege not authorized by the Legislature.

2. SAME: *License*: *Excess recoverable from County.*

The Revenue Act of March 31, 1883, fixes the amount of license for the sale of liquor, and deprives the county court of discretion as to the amount; and any excess exacted by the county court above the amount fixed by the statute may be recovered from the county.

APPEAL from *Drew* Circuit Court.

Hon. J. M. BRADLEY, Circuit Judge.

Wells & Williamson for appellant.

The only effect of par. 5 Sec. 4, or of the 5th division of Sec. 5. Rev. Act 1883, was to practically amend Sec's. 2 & 4 of Act March 8th 1879, so that dealers as referred to in these sections could sell in any quantity. There is nothing that expressly or impliedly abrogates the proviso in Sec. 2, "that it shall not be lawful to allow the same drank in the house or place of business of the vendor." Hence an applicant for license must pay the amount specified in Sec, 4 Act 1879, as amended by Act 1883, and such additional sum as shall be determined by the County Court, not less than $50. *Sec.* 11, *Act March* 8, 1879.

W. F. Slemmons, for appellee.

Sec. 6 *Rev. Law,* 1883, fixes the price for all privileges intended to be taxed, and repealed all the law of March 8, 1879, except the machinery for obtaining the privileges. The Act of 1883 fixes a different and larger amount on *all dealers in any quantity.* Sec. 4 enumerates all privileges

taxable for State, and Sec. 6 all for county purposes. The 5th division fixes the sum for the privilege of vending liquors in any quantity, at another and larger amount than the Act of 1879, and was intended to repeal that act and cover all taxes on the privilege. Sec. 226 repeals all laws in conflict with the same, except those expressly saved by proviso.

SMITH, J. The Drew County Court required Bennett to pay a County tax of $450 before it would grant him a license to keep a dram-shop for the year 1884. He paid it under protest and sued the County for $50, alleging that no more than $400 could be legally demanded of him for this purpose. The County Court dismissed his petition upon demurrer; but in the Circuit Court on appeal, it was ordered that the $50 be refunded.

1. Liquor traffic controlled by legislation.

In the absence of Constitutional restraints, the regulation of the traffic in liquors is wholly within legislative control. The General Assembly may prohibit it altogether, or may empower municipal corporations to do so within their limits; it may leave the traffic open to all who choose to engage in it, without any restrictions; or it may provide that the business shall be carried on only under specified conditions and upon the payment of certain license fees. And the counties, cities and towns derive their power to impose a tax for the exercise of the privilege solely from the statutes upon the subject.

2. Excess for license recoverable from county

Under the Act of March 8, 1879, vendors of liquors in quantities not less than one quart, where the same was not to be drunk on the premises, were required to pay for a license, besides certain commissions to the Collector and certain fees to the Clerk, $200, one-half of which was for the use of the County and the remainder for the State. For the privilege of keeping a drinking saloon,

they had to pay, in addition to the aforementioned amounts, such further sum for the use of the County, as the County Court in its discretion might determine, not less than $50, nor more than $200. (*Sec's.* 2, 4 *and* 11 *of the Act*).

The *Revenue Act of March* 31, 1883, *Sec's.* 4 *and* 6, directs the levy and collection of an annual State tax of $300 and County tax of $400 upon all liquor-dealers.

This supersedes so much of the former Act as fixes the price of license and invests the County Court with any discretion in the matter and establishes a new rule, which is to be uniform throughout the State. The machinery for obtaining the privilege is left intact.

It follows that the excess over $400 which Bennett was made to pay as a County tax was an illegal exaction and he was entitled to recover it.

Affirmed.

Melton v. The State.

1. Criminal Evidence: *Confession, when sufficient for conviction.*
The confession of a prisoner accompanied with proof that the offence was actually committed by some one, will warrant his conviction.

2. Same: *Accomplice: Corroboration.*
A defendant can not be convicted of a crime upon the testimony of a partaker in the crime, whether his guilt be in the same degree or not, unless corroborated by evidence tending to connect the defendant with the commission of the offense; the corroboration is not sufficient if it merely prove the *corpus delicti* and the circumstances thereof, and one accomplice can not corroborate the testimony of another.

3. ACCOMPLICE: *Verdict of jury conclusive.*

When the question whether one was an accomplice in a crime is submitted to a jury as a mixed question of law and fact, under proper instructions from the court, their verdict is final.

4. EVIDENCE: *Of one offense to prove another.*

The general rule that upon a trial for a particular crime the State can not aid the proof against the prisoner by showing that he has committed another and destinct offense does not apply to cases where the evidence shows a series of connected wrongs growing out of and illustrating one another and culminating in homicide; but even in cases where the crimes have no apparent connection, evidence of a previous offense is competent where it discloses a motive for the act under prosecution.

APPEAL from *Clay* Circuit Court.

Hon. H. H. CATE, Circuit Judge.

C. B. Moore, Att'y Gen'l., for the State.

The evidence of the whipping of Hale was admissible to show malice.

The instructions were as favorable to defendant as the law would allow, and on the subject of *accomplices* were almost in the language of the Statute. *Gantt's Dig. Sec.* 1237.

A conspirator may repent and abandon the conspiracy before the crime is executed, and is not then chargeable as an accessory or conspirator, 3 *Greenl. Ev. Sec.* 40., and if not an accessory is clearly a competent witness.

SMITH, J. The appellant was charged with the murder of Franklin Hale, was found guilty of murder in the first degree and was sentenced to suffer the penalty of death.

The conviction was had mainly upon the testimony of one Lawrence. This witness swore that, in the Spring of 1881, when Hale was killed, the defendant, himself and several

others, whose names were mentioned, were members of a secret organization, called by themselves the Southern Brotherhood and by others Ku-Klux; that this band was bound by oath to keep seceret the doings and works of their order; that they had officers, of whom the defendant was the captain; that the deceased had rendered himself obnoxious to the order by talking about them and that, at one of their regular monthly meetings, it was determined that he must be whipped; that accordingly a party of masked men, among whom were the defendant and the witness, went to Hale's house at night, took him out and flogged him. Witness was present and saw the whipping administered, but did not actively participate in it. About a week after this, the society held a called meeting to take some further steps concerning Hale, as he continued to talk about them. Defendant, witness and others were present. After discussion it was resolved that Hale should be put to death. Witness says he opposed this resolution and never did assent to it. Defendant and one Rich volunteered to do the act. In the course of the following week defendant and Rich came to witness' house and after night picked up their guns and left, telling the wife of witness to set the clock back, as they were going to kill Hale, but returned after a while and stated that the night was too dark to accomplish their purpose. Some time after that Hale was killed and the defendant soon afterwards confessed to witness that he and Rich had done it, describing the guns they had used and saying that they took off their shoes and went through the corn-field in the rear of Hale's house in their socks and there shot him. Witness had kept the secret until about one year before the trial when he divulged it. His reason was that he was afraid of personal violence at the hands of the band. He had been examined as a witness before the Coroner's jury that held the inquest over Hale's dead body and also before a Grand Jury and had denied any knowledge of the authors of the crime.

Charles McNabb, another member of the secret society, also testified. He attended the two meetings above mentioned and was present at the beating of Hale. He was also present at Lawrence's house when defendant and Rich set out on their expedition to kill Hale, but were prevented by the darkness of the night. He confirmed the account given by Lawrence as to what was said on that occasion about setting back the clock. This witness had never spoken to any one about these matters before the commencement of the trial.

By other witnesses who had no connection with the order, it was proved that Hale was shot about 11 or 11:30 A. M. The report of a gun was heard about that hour and about noon the defendant with his gun arrived at a certain house, distant two miles. Hale was mortally wounded, but lived until one of his neighbors, who had been sent for, came up. He did not know who it was that had shot him. The field near the house was examined and the tracks of two persons, apparently with socks on their feet, were discovered.

1. CRIMINAL EVIDENCE. Confession: When sufficient for conviction.

The confession of defendant, accompanied with proof that the offense was actually committed by some one, warrants a conviction, provided Lawrence was not himself an accomplice. If he was a partaker in the crime for which Milton was indicted, whether his guilt was in the same degree or not, the accused could not be lawfully convicted upon Lawrence's uncorroborated evidence. And the corroboration must have tended to connect Milton with the commission of the offense. It would not be sufficient if it merely proved the *corpus delicti* and the circumstances thereof, Gantt's Dig. Sec's. 1932–3. Of corroborating testimony there is but little in the record. Of course Lawrence's story is but slightly strengthened by the fact that it accords with McNabb's story; for one ac-

2. ACCOMPLICE: Corroboration.

complice cannot corroborate another within the meaning of the statute.

But we incline to the opinion that Lawrence was not, in the eye of the law, an accomplice in the murder. The guilt of an accomplice must be legal guilt, not merely a participation reprehensible in morals. 1 *Bish. Cr. Pro.* 3*d Ed. Sec.* 1159. No indictment could have been sustained against him for the murder of Hale. He was not present when the crime was committed, nor does it appear that he encouraged its perpetration. His sole connection with the affair, was membership in the same unlawful association, assisting at the castigation of Hale sometime before, and participation in a meeting at which Hale's death was resolved upon. But it seems he dissented from the conclusion which was reached and did nothing to further the execution of the plot. His subsequent concealment of the crime was the result of anxiety for his own safety and not of a design to shield the guilty parties. No doubt he was a participant in the flogging of Hale and equally guilty with those who inflicted the strokes. But Milton was not on trial for that offense.

3. *Same:* Verdict of jury conclusive:

At all events the question whether he was an accomplice in the murder was submitted to the jury, as a mixed question of law and fact, under appropriate instructions from the court. And their determination of it is final.

4. EVIDENCE: Of a different offense.

One of the exceptions reserved at the trial was on account of the admission of evidence relating to the previous assault and battery of Hale. The general rule is that on a trial for a particular crime, the State cannot aid the proofs against the prisoner by showing that he has committed another and distinct offense. The rule has no application to cases where the evidence shows a series of connected wrongs, growing out of and illustrating one another and culminating in homicide. But even

in cases where the crimes have no apparent connection, evidence of the previous offense is competent where it discloses a motive for the act which is the subject of investigation. 1 *Bish. Cr. Pro. See.* 1120; 2 *Id. Sec.* 628; *Dunn v. State,* 2 *Ark.,* 229.

Here the evidence was admissible to show malice of the defendant and the state of his feelings towards the deceased. It is a characteristic of human nature to hate those whom we have injured.

The charge of the Court was as favorable to the defendant as the law authorized. No substantial error to his prejudice is preceived and the judgment is affirmed.

Emerson v. State.

1. Criminal Law: *Defense—Former conviction: Plea: Proof.*
To maintain the defense of former conviction for selling liquor to the same person, the defendant must both plead and prove that the offence charged in the last indictment was the same of which he was convicted under the first; and the record of the former conviction is not of itself evidence of the identity of the offence. Nor does the fact that the evidence on the last indictment would support a conviction on the first necessarily sustain the plea.

2. Liquor: *Indictment for selling: Proof of sale of alcohol.*
Proof of sale of alcohol to a minor since the passage of the act of March 26, 1883, will support an indictment for selling liquor to him.

APPEAL from *Hot Spring* Circuit Court.

Hon. J. B. Wood, Circuit Judge.

Curl & Hughes, for appellant.

C. B. Moore, Att'y Gen'l., for appellee.

The indictment charges, and the evidence shows, a sale in *Dec.*, 1883, while the record of a former conviction shows a sale to the same minor in *Sept.*, 1883. The burthen was on the defendant to show the identity of the two offences.

It was not necessary for the State to prove that the minor did not have the written consent of parent or guardian. This was a matter of defense and the *onus* was on him to show it, if true. *Edgar v. State* 37 *Ark.*, 219. He sold at his peril. 36 *Ark.*, 58; 37 *Id.*, 108.

By the acts of 1883, p. 193, selling *alcohol* is put on the same footing as other intoxicating liquors.

COCKRILL, C. J. To a prosecution for a violation of the statute against selling liquor to a minor without the necessary consent, appellant interposed a plea of former conviction. He did not allege in it that the offence for which he was to be tried was the same as that for which he had been convicted. No objection was made to the plea, and by consent the issue under it was submitted to the jury with his plea of not guilty. To sustain the issue on the first plea, appellant put in evidence the record of a former conviction, showing an indictment, the counterpart of the one under which the trial was progressing, excepting that it charged that the party therein accused made the prohibited sale in the month of September, 1883, whereas the second indictment charged that the appellant was "interested in" a sale made in December of the same year. It was shown by parol that the minor named in each indictment was the same person. Both sales were made within a year of the finding of the last indictment, the State proving the December sale as charged. Upon this the appellant asked the court to instruct the jury that if they

found that the minor named in each indictment was the same person, and that appellant had been convicted under the first, they should acquit him. This the court properly refused to do.

1. CRIMINAL LAW: Defense: Former conviction.

If the appellant desired to take the benefit of a former conviction, he should have alleged in his plea and proved on the trial the identity of the parties and of the offences in the two indictments. The burden of proof was on him to establish both. 1 *Bishop Cr. Pr., Sec.* 816; *Nunnally v. State, ante,* 68.

It was probably taken for granted on the trial that the appellant was the accused in the first indictment, and his plea of former conviction may have been treated as good, but a presumption of the identity of the offences was not raised by the record of the former conviction. This has been held where the indictments were in point of fact alike. *Commonwealth v. Sutherland.* 109 *Mass.*, 342.

The *State v. Andrews*, 27 *Mo.*, 267, is a liquor case in point. The court there say: "To sustain the plea in this case it was incumbent on the defendant not only to produce the record of the former conviction, but to show by testimony that he had been previously tried for identically the same offence as the one for which he was then prosecuted; and it was not sufficient to show that the evidence offered on the last trial would have supported the first indictment, because it would have been supported by any act of selling within twelve months before the finding thereof." See *State v. Small,* 31 *Mo.*, 197.

It is sometimes said that the true test to ascertain whether a plea of *autre fois convict* be a good bar is whether the evidence necessary to sustain the second indictment would have been sufficient to procure a legal conviction on the first. Several of the text books have so stated it. An examination of the cases, however, upon which this rule is based, will

show that the identity of the offence or of the main facts that constitute it is proved or admitted in perhaps every instance, and the second indictment having varied in some form of allegation from the first, the enquiry is have the indictments alleged the same offence, and the test is said to be the rule stated. This rule can have no proper application to a case in which no connection is shown between the offences charged in the two indictments.

The objection made by the appellant to the indictment in this case were settled against him in *Waller v. State*, 38 *Ark.*, 656.

Sec. 2. of the act of March 26, 1883, amended the statute under which the indictment was found, and extends the inhibition of sale of liquor to minors, to alcohol, and the court did not err in instructing the jury that appellaht might be convicted on proof of a sale of alcohol. 2. Selling alcohol.

Affirmed.

Bagley v. Shoppach.

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1. Fees: *Collector's, on certificate of tax sales.*
The revenue act of 1883 does not require the sheriff to include more than one tract in a certificate of purchase at a tax sale, and if he includes more he can charge only the single fee of twenty-five cents for one certificate.

2. Jurisdiction: *For exacting excessive fees.*
An action for exacting excessive fees is *ex delicto* and within the original jurisdiction of the Circuit Court without regard to the amount exacted.

APPEAL from *Saline* Circuit Court.

Hon. J. B. WOOD, Circuit Judge.

Paul Bagley, pro se.

Circuit Courts have exclusive original jurisdiction in all cases where the jurisdiction is not given to any other court. *Const., Art.* 7, *Sec.* 11. Justices of the Peace have exclusive jurisdiction in all matters of contract, and concurrent jurisdiction in all matters of damage to personal property when the amount does not exceed $100. *Art.* 7, *Sec.* 40, *Const.* Damage to personal property includes all injuries which one may sustain in respect to his ownership of personal estate 41 *Ark.*, 478.

The charging, demanding and receiving illegal and extortionate fees, is not a matter of contract, nor damage to personal property, but is a tort and in the nature of a fraud, and the Circuit Court clearly had jurisdiction. *Gantt's Dig., Sec.* 1470.

The collector could only charge 25 cents for the certificate, no matter how many tracts he embraced therein. *Acts* 1883, *Sec.* 134, *p.* 268. An officer can only collect a fee when the law makes provision to pay him. 25 *Ark.*, 236. Constructive fees are not allowed. *Gantt's Dig., Sec.* 604.

John F. Shoppach, pro se.

Const., Art. 7, *Sec.* 40, gives Justice's exclusive jurisdiction in all matters of contract where the amount in controversy, does not exceed $100.

COCKRILL, C. J. Bagley sued Shoppach as sheriff and *ex officio* collector of taxes in the Saline circuit court for twenty dollars. The complaint is not framed upon the most approved precedent for such cases, but it is apparent that plaintiff has declared against an officer for receiving more fees for his services than the law allows him, together with the penalty awarded, under *Section* 1740, *Gantt's Dig.*

It is alleged that Bagley became the purchaser of sixty-one tracts of land at a sale made by defendant for the non-payment of taxes due for the year 1883, and received from him a certificate of purchase embracing all the tracts, for which defendant collected and received of Bagley the sum of fifteen dollars and twenty-five cents, as his fee therefor, when, it is alleged, the statute gives him but twenty-five cents. He sues for the overcharge and a penalty of five dollars.

A demurrer to the complaint was sustained and the suit dismissed.

1. Collector's fee on tax certificate.

The Revenue Act of 1883 contemplates the execution of a certificate of purchase by the collector whenever there is a sale of a tract of land under its provisions, and allows the collector twenty-five cents for each certificate. It nowhere requires him to include a large number of tracts in one certificate, but if he elects to do so he can charge for but one certificate. An officer is entitled only to such fees as the law expressly provides for his services.

2. JURISDICTION: For exacting excessive fees.

It is urged that the circuit court could not entertain original jurisdiction of the suit because the amount involved is less than $100. This would be true if the suit were based on contract, or if it were for an injury to personal property. Appellant has not declared upon an implied promise of the appellee to repay what he had no right to receive, but he sues for the official tort and goes for the forfeiture and penalty which are the damages awarded by the statute for the tort. *Prior v. Craig*, 5 *Sergt. & R.*, 43.

When forms of action were observed it was common to declare in debt for a statutory penalty, but this was because the sum demanded was certain, and the action was in such cases merely in form *ex contractu*. *Chaffee v. U. S.*, 13 *Wall.*, 516; *Stockwell v. U. S.*, 13 *Ib.*, 531.

The exaction of excessive fees for legal services is a

species of fraud, and the same remedies are applicable as in other cases of fraud. *Cooley on Torts, p.* 607.

The court erred in sustaining the demurrer, and judgment is reversed with directions to overrule the same.

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STATE V. HARBERSON.

1. INDICTMENT: *For selling mortgaged property*:
An indictment for selling mortgaged property must show not only that the mortgage was recorded or filed with the clerk as a record, but also that it was acknowleged; and it would be better to state the name of the purchaser or that his name was unknown?

APPEAL from *Montgomery* Circuit Court.

Hon. H. B. STUART, Circuit Judge.

C. B. Moore, Att'y Gen'l for appellant.

The indictment is under *Acts* 1874-5 *pp.* 129-130, and the mortgage was duly *filed and recorded* under *Acts* 1877 *pp.* 80-82.

The act makes it a felony to sell &c, any mortgaged property "*without the consent of the person or persons in whose favor such lien shall have been created, or exists by law.*" The indictment charges that the sale was made without the consent of either the mortgagee or his assignees, and was sufficiently certain to advise defendant of the offense with which he was charged.

EAKIN, J. On the 21st day of February, 1884, the

grand jury indicted Harberson for the offense of selling property subject to a mortgage. A demurrer was made to the indictment on the grounds that it was vague, indefinite, uncertain and insufficient, and because the facts did not constitute a public offense. It was sustained, and the State appeals.

The indictment charges that "the said Harberson on the 1st day of October A. D. 1883 in the County and State aforesaid, unlawfully and feloniously did sell one horse, without the consent of Cunningham & Cubage, a firm composed of J. B. Cunningham and J. D. Cubage in whose favor a lien then and there existed on the said horse, by virtue of a mortgage, executed and delivered on the 14th day of March, 1883, by said Harberson to J. T. Swindle, which mortgage was on the 5th day of April, 1883, filed with the clerk of said county to be there kept as a public record, endorsed as follows, to-wit; "This instrument is to be filed but not recorded, J. T. Swindle", which mortgage was on the 8th day of September, 1883, assigned and transferred by said Swindle to said Cunningham & Cubage, and the said horse was sold without the consent of said J. T. Swindle."

The act of February, 3d, 1875, makes it a felony in any one to "sell, barter or exchange, or otherwise dispose of" any property "upon which a lien shall exist, by virtue of a mortgage, deed of trust, or by contract of parties, or by operation of law."

It has been held from the force of other words in the Statute, that this penal provision applies only to such liens as are recorded.

A filing with an indorsement that it is only to be filed but not recorded is for the purposes of this act equivalent to recording. But no mortgage can be either recorded or filed, unless it be duly acknowledged.

1. Indictment for selling mortgaged property.

Construing all the historical allusions and descriptions of the indictment as direct allegations, they amount to this. That on the 14th day of March, 1883, defendant executed and delivered to J. T. Swindle a mortgage, which was on the 5th day of April, 1883, filed with the clerk and endorsed as stated. That on the 8th day of September, 1883, said Swindle assigned and transferred said mortgage to Cunningham & Cubage. That there was a firm so called composed of J. B. Cunningham and J. D. Cubage; that by virtue of said mortgage there existed a lien on a horse, and that on a named day defendant "did sell" that horse without the consent of Cunningham & Cubage, and also without the consent of said Swindle.

2. Must be recorded lien.

Whether or not the allegation that there was an "existing lien" upon the horse at the time of the sale would have been, of itslf, sufficient, is not now necessary to be determined. It is the allegation, in the language of the Statute, of a condition of things, and the question would depend upon whether this was a case coming under the general rule that it is sufficient to allege an offence in the language of the Statute, or whether it fell within some of the numerous exceptions classified by Mr. Bishop in his work on statutory crimes. But in this case the allegation goes further and describes the lien as existing "by virtue of" a certain mortgage which, as described, does not show such a lien as comes within the purpose and purview of the law as heretofore construed. It does not allege that the mortgage was acknowledged, nor is there any equivalent allegation to show that it was such an instrument as might be lawfully recorded. A mortgage unacknowledged is no more than so much blotting of a record. The mortgage is described as explaining what is meant by the words existing lien, or to show how it arose,

and does not show it. For this cause we think it defective on demurrer, and that the Circuit Court did not err in its ruling.

The court moreover is not thoroughly satisfied with the allegation as to the sale. It does not state the vendee, or that it was to a person unknown. This court has held that not to be necessary in the case of a sale of liquor, and it might not be considered a fatal defect to have omitted it in this case if that were all. Nevertheless this is a felony and not a misdemeanor, and it would be better to be more definite, and to advise the defendant more certainly of the specific transaction upon which the charge is founded. The court however rests its decision on the grounds first above stated.

Affirm.

STATE v. WALLER.

1. SLANDER: *Is a felony under act of 1869.*
   Under the slander act of 1869, slander is a felony and not a misdemeanor, and it is not left to the court or jury to say which it is.

2. FELONIES: *Alternative punishments; Power of Legislature.*
   The Legislature has the right to provide in felony cases, alternative punishments, to be left at the discretion of the court, of such nature as belong to misdemeanors; and this discretion to mitigate the punishment, does not alter the nature of the crime.

APPEAL from *Lafayette* Circuit Court.

Hon. C. E. MITCHELL, Circuit Judge.

C. B. Moore, Att'y Gen'l., and *O. D. Scott*, for plaintiff in error.

This was an indictment for slander under *Secs.* 1544 * * 1551; *Gantt's Digest.* Sec. 1551 makes slander *a crime*, and if, because the punishment prescribed by *Sec.* 1551 does not make the offense definitely either a felony or a misdemeanor, but leaves it to a jury to determine, the penal parts of said section are void, yet the other sections are valid, and the crime could be punished under *Secs.* 1995-6.

No regard need be paid to the punishment in framing the indictment. *Bishop Cr. Law, Secs.* 203-4, *3d Ed.*

While it is admitted that the same act cannot be at once a misdemeanor and a felony, yet the same may be altered by express statute. *Ib., Sec.* 823. There are offenses punishable either as felonies or misdemeanors. *People v. Cornell,* 16 *Cal.,* 197. We have more than one such statute. *Sec.* 1317 *Gantt's Dig.* The power left to the jury is no greater than that exercised upon indictments for assault with intent to kill, when the jury may convict for felony or misdemeanor.

EAKIN, J. Waller was indicted by the grand jury for slander, under the act of March 19th, 1869. They charge him with the use of certain opprobrious words, regarding a married woman, which in their common acceptation convey an imputation of adultery. A demurrer to the indictment was sustained by the court, upon the express grounds, that the law was unconstitutional and void. The State sues a writ of error.

1. SLANDER: is a felony under Act of 1869.

The law is, perhaps, unparalleled in civilized legislation, and finds its explanation in the fierce passions and civil commotions of the period which succeeded the late civil war. It provides that any one shall be deemed guilty of slander, and punished by indictment, who shall falsely utter or publish words, which in their ordinary acceptation shall amount to charge any one with having

been guilty of fornication or adultery; or to charge any one with having sworn falsely, whether with reference to a judicial proceeding or not; or to charge any person with having been guilty of any other crime or misdemeanor whatever; or with having been guilty of any other dishonest business, or official conduct or transaction, the effects of which would be to injure the credit business standing, or to bring into disrepute the good name or character of such person so slandered. All such slander was expressly made civilly actionable, and it was further declared that it should be a crime, to be punished, on conviction, by imprisonment "in the penitentiary house of this State, at hard labor, for a term of not less than six months, nor more than three years," or that the offender should be "fined not less than fifty nor more than three thousand dollars, or both fine and imprisonment may be imposed, at the discretion of the court; and any person so convicted and punished by fine only, if such fine be not paid at once, be confined in the penitentiary house of this State, at hard labor, until such fine be paid, at the rate of two dollars a day."

This statute, in its criminal aspect, has lain dead in our statute book for more than fifteen years since its passage; and is now first challenged regarding its right to be there, under our constitution, It was once alluded to, *arguendo*, by Mr. Chief Justice English in the civil case of *Roe and wife v. Chitwood*, 36 *Ark.*, 210, but it was not at all necessary to do so, as the question in that case was whether the words used were actionable, and they had been made so by an act of 1837. (*Gould's Digest, Chap.* 161, *Sec.* 1). The validity of the statute now in judgment made no point and had no importance in that case.

A "felony" under our law is defined to be "an offense

of which the punishment is death, or confinement in the penitentiary." All other crimes are misdemeanors. They are of a distinct grade and nature, and their boundaries must be defined by law. The same acts cannot at the same time constitute a felony and a misdemeanor. They cannot co-exist as the result of one and the same transaction. The crime must be one or the other, not both, or either. It results from the different natures of these classes of crime, under common law rules, and from their different punishments, and the divers modes of proceeding against offenders, says Mr. Bishop, that the same act cannot be both one and the other. (*Statutory Crimes, Sec.* 174). If the construction and effect of the act be, as held by the Circuit Judge, "that it leaves to the discretion of the jury, the designation of the crime of the defendant, whether the same should be a felony, or a misdemeanor," then it would be of questionable validity, as no such powers can be entrusted to juries. It will be seen however, that the power of determining whether the crime shall be punished as a felony, or a misdemeaner, is attempted to be vested in the court. The same objection may be made to that view of the act, and the same question arises. Does it define the nature and grade of the crime?

In Maine, a statute defined a "felony" to include every offense punishable with death or by imprisonment in the State prison." Another act provided that whoever should use any instrument with intent to destroy a child of which a woman might be pregnant, whether quick or not, and should destroy the child before its birth, should be punished by imprisonment in the state prison not more than five years, *or* by fine, &c. One Smith was indicted and convicted of murder, for having caused the death of a woman, unintentionally, in an effort to procure

such an abortion. It was contended for him and conceded by the court, on common law principles, that if he had intended only to commit a misdemeanor, the crime would be only manslaughter. It was further contended that the offense which he had intended to commit was only a misdemeanor, inasmuch as it was not, of course, punishable by imprisonment in the state prison, but might be punished by fine. To this view the court did not assent, holding that he might be properly convicted of murder, on the ground that every offense was felony which was *liable* to the higher punishment. 32 *Maine*, 369 The case was reversed upon other grounds upon a writ of error, but the Supreme Court in doing so reaffirmed the doctrine above announced, as sound, holding that the conviction for the murder of the mother would have been proper, if the indictment had properly charged the intent to commit the statutory crime. *Smith v State*, 33 *Maine*, *p.* 48.

The same question, in a slightly changed aspect, was again presented in that State, in the case of *State v. Mayberry*, 48 *Maine*, 218. A statute had declared it a conspiracy for two or more persons to conspire and agree wrongfully and wickedly to commit any crime punishable by *imprisonment in the state prison*. Another act had provided that whoever should obtain goods, &c., by false pretenses, should be punished by imprisonment (in the state prison being understood) not more than seven years, *or* by fine not exceeding five hundred dollars. It was held that the crimes referred to in the act first above quoted meant such as were *liable* to be thus punished, and that defendant came within its range by a combination to cheat and defraud against the provisions of the second, although the crime which they intended, *might* have been punished by fine alone.

A similar doctrine has obtained in Missouri, although their statutory definition of a felony seems from the reported cases, to include all offences which "may" be punished by imprisonment in the penitentiary. They are not authorities, therefore, on the point under discussion, but may be noticed, *en passant*, somewhat digressively, as bearing on this case in another way. It is held there not only that offences which *may* be punished by the penitentiary are felonies, but that the Legislature had wisely "left it to the discretion of the jury, in many offences, to inflict the punishment of imprisonment in the penitentiary, or fine, or imprisonment in the county jail," but that though this discretion is given to the juries they are still felonies. See Cases in *7th Missouri of Johnson v. State p.* 183 *and Ingram v. State p.* 293.

Returning to the construction of our definition of "felony." A ruling was made in Georgia in the civil case of *Chandler v. Johnson et al*, 39 *Ga. p.* 85, to the effect that "stabbing" *might* be a felony, inasmuch as it was in the discretion of the court to punish it with imprisonment in the penitentiary, and that therefore a note executed to prevent a prosecution for stabbing was within the *reason and spirit* of the law against compounding a felony—that the higher law was in that case the criterion for determining the grade of the offence. The line of reasoning seems to be that stabbing, by reason of its liability to the higher punishment, is *prima facie* a felony, and to be so considered in all collateral matters, unless the court had acted and, by inflicting the lower grade of punishment, determined that the particular offense was only a misdemeanor.

The particular question before us has been directly adjudicated in California. In the case of the *People v. Cornell*, 16 *Cal.*, 187, it was held, in seeming accord with the

Georgia view, Mr. Chief Justice Field dissenting, that in all these cases which might be punished either as felonies or misdemeanors, it was the *punishment really inflicted* which determined the grade of the offence. That, however, was made with reference to the right of appeal, which was allowed in felonies and not in misdemeanors; the court holding that as to this, it would best serve the intent of the act to deny the right of appeal where only the punishment of a misdemeanor had been inflicted. The appeal was dismissed.

The question arose again in *The People v. War*, precisely as it is presented now here, 20 *Cal.*, 117. The statute of that State provided, as ours does here, that "a felony is a public offense punishable by death or by imprisonment in a state prison. Every other public offence is a misdemeanor." War was indicted for an assault with a deadly weapon, with intent, &c., a crime for which the prescribed punishment was *either* imprisonment in the state prison, or a fine. A demurrer was sustained, and the People appealed.

It was contended by counsel for the respondent that an appeal would not lie because the offense charged was not of the grade of felony and could not be determined to be so before conviction. It was further contended that the act violated the constitutional provision as to the right of trial by jury in allowing the court to determine the most important question in the case, that is, whether the defendant was guilty of a felony or only a misdemeanor. It must be confessed that the argument is very persuasive, if indeed it be the punishment actually inflicted which determines the grade of the offense.

The court held, however, Mr. Chief Justice Field this time concurring, that the discretion given as to the punishment did not make two offenses, and that it would

be a singular consequence if the fixing of alternate punishments belonging to different classes of crimes should prevent a crininal act from being indictable as any crime. The doctrine was broadly announced that any offense which was *liable* to be punished by imprisonment in the state prison, was by reason of that liability made a felony, irrespective of lighter punishment, and must be so taken, and considered, and prosecuted with the forms and solemnities of a crime of that grade.

We do not feel at liberty to run counter to the weight of authority upon this question, however obnoxious in other respects the law may seem to be. That is matter for the Geueral Assembly. We must hold as the better established doctrine of strict law, that in this State, slander is a felony by force of the statute, and that it is none the less so because the Judge may mitigate the punishment by inflicting such as is appropriate to misdemeanors.

Whether or not a fine enforceable on default by imprisonment at hard labor in the penitentiary be an unusual or cruel punishment, in the sense of the constitution, is a question which does not affect the right to impose the fine, but the mode of its collection. The power to impose the fine may be conceded, without necessarily conceding the power to enforce the payment by any mode unduly severe, and unusual in other cases of fines for misdemeanors. This question can be determined when it may arise. At present it is sufficient to say, slander is made a felony by the statute of 1869, and not a misdemeanor, and it is not left to the court or jury to determine which it may be. This is the positive result of the decisions in Maine and California, and of the statute in Missouri defining a felony, which only expresses that, which, our statute, in other states has been held to imply. Also that the Legislature has the right to pro-

vide in cases of felony, alternative punishments, to be left to the discretion of the court, of such nature as belongs to misdemeanors, and that this discretion to mitigate the punishment does not alter the nature of the crime. The determination of this question under our statutes and constitution, in so far as it may affect those only punishable as for a misdemeanor, is not of great importance. Slander, at common law, was no felony, not even an indictable crime. It is made so by statute and a conviction upon it does not disfranchise one or deprive him of any of the rights of citizenship.

CONVICTION: Does not disfranchise.

We think the court erred in sustaining the demurrer, and the judgment must be reversed and the case remanded.

LOONEY V. THE STATE.

1. LIQUOR: *Evasion of the liquor law.*

No trick, device, subterfuge, or pretense can be allowed to evade the operation or defeat the policy of the liquor laws, if liquor be thereby procured where it is unlawful to sell or to give it away. (This was a purchase of whisky under pretense of buying turpentine. Rep.)

APPEAL from *Benton* Circuit Court.

C. B. Moore, Att'y Gen'l., for appellee.

Under the three mile law as first enacted, there was no limitation as to the time it should remain in operation. This order was made in 1881. By acts 1883, pp., 54 &

55, all orders before that date expired on 1st January, 1884. The indictment was found 13th April, 1883, when the prohibitory order was in full force.

The pretence of a sale of turpentine was a mere subterfuge to evade the law.

EAKIN, J. Appellant was indicted in April, 1883, for selling ardent liquor within three miles of a certain church in Bentonville, the county court having previously made an order prohibing it. He was convicted and fined. After motion for a new trial which was overruled he appealed.

We are not aided by any brief of appellant, and the grounds of the motion for a new trial do not suggest any error.

LIQUOR LAW: Not to be evaded.

The proof is that about a month before indictment found, a party went into the drug store of appellant with a flask in his hand and called for turpentine. Defendant was waiting on ladies and told him to lay his bottle down and he would attend to it shortly. The customer went out and afterwards, returning, was told by the defendant that there was his bottle of turpentine lying on the counter. He took it, paid for it, went out and found he had whiskey. He had not said he wanted whiskey, nor had he given the druggist any nod or wink. He does not say that he was astonished, or in any wise discomfitted by finding whiskey; but says, in his testimony, that whiskey was what he was after.

No trick, device, subterfuge, or pretense, can be allowed to evade the operation, or defeat the policy of the liquor laws, if liquor be thereby procured, where it is unlawful to sell or give it away. The jury were authorized to determine, under the evidence, what the parties meant. No druggist would be apt to mistake turpentine for whiskey, in handling it.

The clerk of the county court was introduced, and read the three mile order from his records. It is copied in the bill of exceptions, and appears to have been made on the 4th of July, 1881. It conforms with the statute and is valid.

Under the act of March 21st, 1881, these local option orders of the County Court were unlimited in duration An amendatory act of Feb. 20, 1883, limited those thereafter to be made to two years, but provided that all theretofore made should expire on the 1st of January, 1884. The order now in question was in force when the liquor was sold. We find no error.

Affirm.

JOHNSON v. THE STATE

1. PRACTICE: *Motion for new trial waives exceptions.*
The filing of a motion for new trial waives all previous exceptions not expressly embodied in it.

2. PRACTICE IN SUPREME COURT: *Motion for New Trial: Bill of Exceptions.*
The cases of *Farquharson v, Johnson*, 35 *Ark.*, 536. *Gaines v. Summers*, 39 *Ark.*, 482, and all others holding that the bill of exceptions must embody or refer to and identify the motion for a new trial, are, on this point, overruled: and hereafter this court will consider the merits whenever the record contains a motion for new trial and shows that it was filed and overruled, and the bill of exceptions shows that the overruling was excepted to.

3. CRIMINAL PRACTICE: *Serving copy of indictment on defendant.*
Where a defendant pleads to an indictment, declares himself ready for trial, and a jury is empannelled, and the trial commenced, it is too late for him then to object that he has not been furnished with a copy of the indictment.

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APPEAL from *Pulaski* Circuit Court.

Hon. F. T. VAUGHAN Circuit Judge.

J. C. Barrow, for appellant.

Appellant was not furnished with a copy of the indictment 48 hours before trial, *Const.* 1874, *Art.* 2 *Sec.* 10; *Gantt's Digest, Sec.* 1825, and he refused to waive this right.

The evidence was not sufficient to sustain the verdict, reviews the decisions of this court on the subject of new trials, and contends that in criminal cases, especially where life is involved, that the verdict should be sustained by a preponderance of testimony, such as to admit of no reasonable doubt that the defendant was the guilty party. 7 *Hum.*, 483; 4 *Caldwell*, 175; 3 *Heiskell.*, 86; 5 *Ark.*, 640; *Ib.*, 407; 2 *Id.*, 360.

C. B. Moore, Att'y Gen'l, for the State.

By pleading not guilty, and proceeding to trial, without objecting that he had not been furnished with a copy of the indictment &c., appellant waived his right thereto. 29 *Ark.*, 118; 42 *Id.*, 94; 1 *Bishop Cr. Law*, 6*th Ed.*, *Sec.* 997; 1 *Bishop Cr. Pr.*, 3*d Ed. Sec's.* 126, 959 *a and cases cited*; 8 *Ohio St.*, 98; 8 *Ohio*,,297; *Walker, Miss.*, 396; 6 *Mo.*, 428; 3 *How. Miss.*, 420.

The evidence fully sustains the verdict. The instructions of the court were admitted to be correct and so were not set out in the bill of exceptions.

SMITH, J. Rush and Carrie Johnson were jointly indicted for the murder of John Wall. After the conclusion of the testimony for the State, a *nolle prosequi* was entered as to Carrie. Rush was found guilty of the highest degree of that crime and after the denial of motions for a new trial and in

arrest of judgment, was condemned to suffer the extreme penalty of the law.

The motion for a new trial is not incorporated in the bill of exceptions, nor referred to as contained in some other part of the transcript. But the record notes the filing and overruling of such a motion; the motion itself is copied in the transcript; and the bill of exceptions shows that the prisoner excepted to the ruling of the court in that particular. According to several decisions of this court no question is before us as to anything that occurred at the trial, unless a certain matter, hereafter to be noticed, preliminary to the trial, can be raised by the motion in arrest.

1. MOTION FOR NEW TRIAL. Waives exceptions.

The filing of the motion for a new trial waived all exceptions previously taken and not expressly embodied in it. And the assignment of errors specified in that motion not being preserved in the manner prescribed by the practice of the court, the defendant would have nothing to stand upon except his motion in arrest, which ordinarily brings up only the sufficiency of the indictment.

As this is a case of life and death, we feel constrained to review our previous decisions on this subject and either justify them, or recede from them. We are aware that those decisions have not given unbounded satisfaction to the profession.

2. PRACTICE IN SUPREME COURT: Motion for new trial: Bill of exceptions.

The first case in our reports that directly decided that a motion for a new trial does not become a part of the record merely by being filed, as do pleadings, was *White v. Prigmore*, 28 *Ark.*, 450. In that case there was no bill of exceptions whatever; and it was impossible for the court to say whether the inferior court had committed any error or not. This was followed by *Nisbett v. Brown*, 30 *Id.*, 585, in which there was a bill of exceptions, but it made no reference at all to the motion for a new trial. And it was held that, under those circumstances, the motion was no part of the record.

These cases we adhere to. But in *Farquharson v. Johnson*, 35 *Ark.*, 536, the court went a step further. There the record entries showed the filing and denial of a motion for a new trial, which was copied in the transcript. The bill of exceptions also stated that the losing party had filed such a motion, that it was denied and that he excepted; but it did not set out the grounds of the motion, nor identify the one to which it referred as the one that appeared in the transcript. This last case was approved in *Carroll v. Sanders*, 38 *Id.*, 216, though it was not necessary to the disposition of the case, there being in reality no bill of exceptions. But it was followed in *Gaines v. Summers*, 39 *Id.*, 482, and has been frequently acted on since.

The cases of *Farquharson v. Johnson, of Gaines v. Summers, supra*, and all others decided upon the same considerations are now overruled. We will consider the merits whenever it appears from the record proper, that a motion for new trial was made and denied, and from the bill of exceptions that the appellant excepted to the action of the court in that respect, provided such a motion is contained in the transcript. In other words we will presume that the motion sent up by the clerk in his certified transcript is the same motion that was filed, overruled and excepted to in the court below.

3. CRIMINAL PRACTICE: Serving copy of indictment on defendant.

It was alleged in the motion for a new trial, that no copy of the indictment had been served on the prisoner or his counsel forty-eight hours before his arraignment, as required by Sec. 1825 of Gantt's Digest. The case coming on for trial upon the plea of "not guilty" and a jury having been selected and sworn, while the counsel of the State was in the act of opening the case to the jury, it occurred to the court to ask if this statute had been complied with. By inquiries addressed to the Clerk, Sheriff and Attorneys engaged in the cause, it was ascertained that the defendant had not been served with a copy. The court then asked if defendant's

counsel would waive this right, and they declined to do so. The court ordered the trial to proceed, remarking that by pleading to the indictment and announcing himself as ready for trial, the defendant had already indirectly waived the privilege.

It was intimated in *Dawson v. State*, 29 *Ark.*, 118, and in *Wright v. State* 42 *Id.*, 94, that rights of this nature being merely a provision for the convenience of the prisoner—may be waived either directly or indirectly by not applying for the thing. Mr. Bishop (1 *Cr. Law*, 6*th Ed. Sec.* 997) says: "If a defendant suffers himself to go to trial without having received a copy of the indictment, even where the law expressly directs such a copy to be furnished him, he can not afterwards take the objection that it was not furnished." Compare also 1 *Bishop Cr. Pro.* 3*d. Ed. Sec's.* 126, 959*a*, where other cases are collated in support of the same proposition.

In *Fouts v. State*, 8 *Ohio St.*, 98, the Constitutional and statutory provisions on this subject being the same in substance as ours, the court says: "If a defendant in a criminal prosecution wishes to avail himself of such omission of duty on the part of the State, he must do it on motion before trial, or interpose it as an objection to being put on his trial. * * * * It being of such a nature as to be a subject of waiver, if the party accused proceed to trial without making the objection, it is a waiver of the omission and he cannot after trial, interpose the objection to affect the validity of the proceedings."

In *Smith v. State*, 8*th Ohio*, 297, the court say: "In any respect except in relation to jurisdiction, a party may waive provisions in the law intended for his benefit, or make any agreement for the disposition of his case whether civil or criminal as a rule."

"If the accused insist upon such a copy, or rather if he do

not waive his right in this respect, and is forced to trial without it and against his own consent, it would most clearly lay the foundation for a motion for a new trial; and if the facts appear on the record, a motion in arrest of judgment or a writ of error might be sustained. Such is not the case here. For aught that appears the plaintiff in error was placed on his trial with his own consent. There was no objection for the want of a copy of the indictment. Such copy must then be considered as waived, and it does not lie in his mouth to say that it was not furnished. To suppose the Legislature intended a copy to be delivered when it was not required, but waived, would be to suppose that they intended to compel the performance of an act without any definite object, use or benefit, and to deprive the accused of the right to agree when his trial should take place.

In *The State v. Johnson, Walker, Miss.*, 396, the court say: "Although this is a privilege which the law, in its benignity, extends to criminals in capital cases, yet it is a privilege which the prisoner may waive, and his pleading not guilty and not having claimed the privilege amounts to a tacit waiver, and he cannot afterwards take advantage of it, for his pleading has caused the objection."

In *Lisle v. The State*, 6 *Mo.*, 426, arising under a statute precisely similar to ours, the court say: "The duty is imposed upon the clerk by our statute, and is obviously for the purpose of enabling the defendant to prepare his defense. If the clerk neglects his duty in this particular the defendant has undoubtedly a right to delay his trial until the statute is complied with; but if he pleads without such copy of the indictment and makes no objection for want of such copy, can he, after verdict, claim a new trial for such cause? I think not." See also *Loper v. The State*, 3 *Howard, Miss.*, 429.

It was also alleged that the verdict was contrary to the

evidence. The deceased was an overseer or manager of a plantation. The defendant was living in adultery with Carrie Johnson. The deceased had had a quarrel or difficulty with Carrie about 2 or 3 P. M., of the same day he was killed, and it is probable that he had struck her. Carrie was greatly enraged thereat, swore at him and followed him about from place to place on the premises, abusing him. The deceased paid no attention to her, but went on with his work. Rush also was highly incensed at the treatment Carrie had received and made threats freely against Wall—said he would kill him if he struck her again. Rush saddled a mule, stated that he was going to the house of one Ross after a pistol, and rode off in that direction. After night, it being Saturday, the deceased went to the store-room for the purpose of issuing rations to the laborers on the plantation. Carrie had no business in the store-room at the time. She was the cook for the white persons on the place and was fed from the same table. But she intruded and was attempting to raise a disturbance with Wall. She was ordered out and the door locked. There were several laborers locked in with Wall and at the time he was shot, he was in the act of stooping down to draw molasses from a barrel, which stood about three feet from a window. This window had a missing pane of glass. The shot was fired from the outside by a person standing at the window. Robert Davis, who had drawn his supplies, was leaving the store-room. He was within six feet of the assassin, and it being a star-light night, recognized Rush with a bright pistol. This witness saw Rush when he fired and saw him run away in the direction of the cow-pen. Presently he returned in company with others, who were attracted by the firing, and inquired what had happened. Davis remarked, "Listen to the fellow, asking what is the matter, when he shot Mr. Wall himself."

Jane Wilkes was in the cow-pen milking when the pis-

tol fired. She started to the house and met Rush, who had apparently just leaped over the fence and over a wood-pile near at hand. One of the defendant's witnesses, who was also at the cow-pen when the shot was fired, did not know where Rush was at that time, but saw him directly afterwards near the gate of the cow-pen. Rush stated to a deputy-sheriff next day that he was milking the cows when the report of the pistol was heard. This statement was unquestionably false in the light of all the testimony. The women were milking and Rush was not present.

Wall died in a day or two from the effects of the wound.

These are the salient features of the evidence, and they point unmistakably to the guilt of the defendant.

The motion for new trial further alleged that the verdict was contrary to law. This assignment requires no notice. It must mean either that the Court misdirected the jury, or that they disregarded instructions. But the bill of exceptions shows that the charge of the court was admitted to be correct and for that reason it is not set forth at all,

Judgment affirmed.

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DOUGLASS v. FLYNN.

1. PRACTICE: *Jury trial.*

When all the facts of a case are agreed on there is no necessity for a trial by jury.

2. MOTION FOR NEW TRIAL: *When necessary.*

Error of law in giving or refusing instructions to a jury, or announced by a judge in trying law and fact which *bears upon the finding of the facts*, is good ground for a motion for new trial; but error of law announced as the basis of a judgment or decree, upon given facts, found or admitted, cannot be remedied by a new trial, but may be directly appealed to the Supreme Court without motion for a new trial, orfor re-consideration.

Douglass v. Flynn.

3. TAX SALES: *Donatee's claim: Act of Jan. 10th, 1857.*

No one claiming as assignee or vendee of a donation claim, on which the donee has made no improvements at the time of his sale, can be sued to be holding under it in-as-much as the statute re-vests the land in the state upon such attempt to sell; and therefore the act of Jan'y 10, 1857, "to quiet land titles," has no application, either as to the tender of taxes, or limitation of the action, expressed in the act.

ADDITIONAL OPINION BY JUSTICE EAKIN.

TAX TITLES: *Act of Jan'y 10, 1857.*

The act of Jan'y 10, 1857, "to quiet land titles," (Secs. 2649—2651 Mansfield's Digest) is penal in its nature and to be strictly construed. It does not prevent persons from asserting their just rights, who were under no obligations to pay the taxes for which the lands were sold, and have committed no default in failing to do so. It has no applicaton where the state has no power in itself, nor its officers by any warrant of law, to collect any taxes on the land, and when the sale was absolutely void on that account, and not for irregularities merely: Nor in any case when the suit is not directly for the recovery of possession of land, nor when the tax title is repelled by defense or cross-claim. And so much of the decision in *Haney v. Cole*, 28 *Ark.*, 299, as holds that the statute gives any holder of a void tax or donation deed a lien, in any case, not only for the taxes discharged and cost (which is right), but also for the highly penal percentage expressed in the act, is erroneou

APPEAL from *Franklin* Circuit Court.

Hon. G. S. CUNNINGHAM, Circuit Judge.

The appellant, *pro se.*

The deed being in proper form is *prima face* evidence of the legality of the sale, 20 *Ark.*, 114, and its recitals sufficient to make it evidence, 12 *Id.*, 882; 21 *Id.*, 582. Burden of proof upon party assailing title. 18 *Id.*, 423; 15 *Id.*, 301; 20 *Id.*, 277, 114; 7 *Id.*, 424.

The statute requires suit to be brought within two years, 30 *Ark.*, 44, and the statute begins to run from time of sale. 22 *Id.*, 178; *Gantt's Dig., Sec.*, 3899, 4117.

No tender of taxes, penalty, &c., and 100 per cent. made, or affidavit filed, as required by law. *Gantt's Dig., Secs.* 2267, 2269, and foot note, 21 *Ark.*, 319.

Tenant cannot dispute landlord's title. 7 *Ark.*, 310; 8 *Id.*, 353; 9 *Id.*, 328; 13 *Id.*, 385; 20 *Id.*, 547; 27 *Id.*, 50; 28 *Id.*, 153; 30 *Id.*, 156; 31 *Id.*, 470.

A court of law could not set aside the deed.

U. M. & G. B. Rose, for appellee.

1. No tender or affidavit was necessary. There was no assessment of the land and the sale was a nullity. The donation was a fraud upon the State. No improvements were made, nor were the improvements on the land when donated paid for. The donation was a nullity and no title passed. *Gaither v. Lawson*, 31 *Ark.*, 279, 289. No taxes were due as there was no assessment. The statute was adopted for protection of those who purchased at tax sale in good faith, but whose title was invalid for some irregularity, though the taxes were justly due. 38 *Ark.*, 440.

2. Fraudulent conveyances can be set aside at law as well as in equity. 26 *Ark.*, 41.

3. Appellee not barred by two years adverse possession. Appellant did not hold under the donation deed of his grantor. His grantor sold before making the required improvements, and his title was immediately forfeited. *Gantt's Dig., Sec.* 3896. Appellant had only naked possession, and the limitation was seven years.

The pleading.

EAKIN, J. This is an action in ejectment against Douglas by Flynn, who alleges that he claims title

by virtue of a deed from a former owner, executed on the 2nd of May, 1878, and recorded on the 8th of April, 1879. It is not exhibited, nor made part of the complaint. It is alleged that defendant is wrongfully in possession.

The answer denies the ownership of plaintiff by virtue of the deed of 1878, saying that said deed is void; that the title was then in the State, having been forfeited for the taxes of 1870 and 1871, and standing unredeemed; that Nathan J. Tompkins on the 7th of July, 1879, "donated" the tract "from the State;" and having filed in the Land Commissioner's office the proper proof of improvements, received a deed from the Commissioner on the 21st day of August, 1879, and afterwards conveyed the tract to defendant an the 2nd day of January, 1881, since which time he has been in quiet possession. He offers to exhibit said deeds, but neither of them appears in the transcript as actually filed. Defendant further says that the plaintiff failed to file with the clerk of the court an affidavit showing that he had tendered defendant the amount of taxes, costs, penalty and improvements, as required by law. Further, he pleaded the statute of limitations of two years.

Afterwards defendant moved to dismiss the complaint, which motion was overruled.

Agreed facts.

There was then filed an agreed statement of facts, in substance as follows: That the plaintiff had bought the tract, and was in possession of it at the time of the alleged forfeiture; that in Franklin county, for the year 1870, there was neither an "*assessment of taxes*" on real estate, nor levy by the County Court, nor warrant to the collector, on the tax books, authorizing him to collect; nor was there, on the tax books of 1871, any extension of the taxes for 1870, showing their non-payment for that

year; that Tompkins, the State's donee, had made no improvements on the tract, nor paid the owner the double value of his improvements, nor had he obtained the donation for actual settlement; but that he was a non-resident, taking the land up on speculation; that defendant had paid the taxes on the tract since the date of the commissioner's deed, after which time the plaintiff had rented the land from defendant and paid the rent, but never paid or offered to pay taxes; that the plaintiff had filed no affidavit as required by law; that the donation deed was regular on its face, and that defendant had been in possession under it since its date in 1881.

The whole matter was submitted to the court, which recited the agreed facts, and also found that Thompkins had paid a donation fee of five dollars, and the defendant had paid taxes amounting, with interest, to twenty dollars.

The court, holding that the plaintiff was not obliged to tender, before suit, the taxes, penalty and costs; and that he was not bound by the statute of two years' limitation, rendered judgment in his favor for the land, subject, however, to a lien of twenty-five dollars, in favor of defendant, which was declared on the ground that he was entitled to it for the amount of donation fee and taxes. From this, defendant appeals.

A bill of exceptions shows: That a jury had been, at first, empaneled to try the cause, when the defendant's counsel moved to dismiss the action, on the ground that it appeared from the pleadings that the defendant was in possession under a donation deed, regular on its face; and that the complaint did not state that, before suing, plaintiff had filed in the clerk's office the affidavit required by section 2267 of Gantt's Digest. After argu-

ment of this matter, the court suggested to counsel, the propriety of taking the case from the jury and submitting it to the court on the law and agreed facts; this was done, by consent.

The points of law insisted on by defendant, which he asked the court to declare, and which the court refused to adopt, were two: 1st. That in order to maintain the action it must appear that plaintiff had filed in the clerk's office an affidavit that he had tendered the "taxes, penalty, and costs, and for the value of all im-"provements with the per centum thereon"; 2d. "That the validity of the Auditor's donation deed could not be attacked in a court of law, only by direct proceedings in equity."

1. PRACTICE: Jury trial.

The first two grounds of the motion for a new trial embraced these points. It was, as to these, unnecessary. There never was, indeed, any need of a trial of facts, and the suggestion of the court was a timely one. No facts were disputed.

2. MOTION FOR NEW TRIAL: When; necessary.

Error of law in giving or refusing instructions to a jury is good ground for a motion for a new trial. So, also, any error of law announced by a judge in trying law and fact, which *bears upon the finding of the facts*, would be. But error of law announced as the basis of a judgment, or decree, upon given facts, found or admitted, would not be remedied by a new trial. Parties are not required in such cases to importune judges for a re-consideration. If the error appears in the record it is sufficiently questioned by appeal.

The first ground of the motion is that defendant was taken by surprise in the matter of taking the case from the jury, saying that defendant's counsel understood the court, in making the suggestion, to intimate that the matters of law above set forth as the first and second

grounds in the motion, were fatal to the action; and therefore his counsel admitted agreed statements which were not true, and omitted to make proof of valuable improvements. If this means anything it means that the counsel of defendant put the matter in the hands of of the court, with the assurance, based on the intimation of the judge, that the judgment would be in defendant's favor; and, in that view they made no effort to make proper proof, and were careless in making admissions. The bill of exceptions does not disclose any such intimation as made by the judge, and the motion cannot of itself speak to a fact.

The fourth ground is a reiteration of the plea of two years' limitation.

The first question presented by the record is: Was it it necessary, under the circumstances, to tender before suit, any amount to defendant for taxes, penalties, costs and per centage?

An *Act of January* 10, 1857, (see *Pamph't Acts, p.* 80; *Gould's Digest, p.* 750, *Sec.* 7; *Gantt's Digest. Sec.* 2267) prohibited any action to be brought for the recovery or possession of lands against any one holding the same *by virtue* of certain tax sales, redemptions, &c., including donation deeds, unless, before the issuance of the writ, the plaintiff should file in the clerk's office an affidavit, showing that he had tendered the defendant the full amount of all taxes and costs paid on account of the land, with 100 per cent. interest on the amount first paid, and 25 per cent. per annum upon those paid subsequently, together with the full value of all improvements of whatever nature. In case such action should be brought, it was made the duty of the court, upon being satisfied that no such affidavit had been filed in advance of the suit, to dismiss it at the cost of the plaintiff.

In *Craig v. Flanagin et als.*, 21 *Ark.*, 319, which was a bill by a former owner of land, to review and set aside a decree confirming a tax title, without any affidavit having been made by Craig of a previous tender, it was strongly urged by counsel that the law was unconstitutional. In an opinion by Mr. Justice Fairchild, the law was sustained, in its application to that particular case, upon the ground that the land had been taxed, and the payment of the taxes rightfully enforced after Craig's neglect to pay them. The theory of the opinion is, that the legal title to the lands had passed from Craig to the purchasers by virtue of the tax sales; that the right to sue for them was given as a matter of grace, and the Legislature might impose such conditions as it saw fit, upon its exercise. It is fairly deducible from the reasoning, that the law would *not* have been held constitutional, in its application to a case where the tax sale had been utterly void so as to have passed no title. Such was plainly Mr. Justice Fairchild's view as expressed in an *obiter*. He says: "If the act in question * * was "* * * introductory of a new rule, which entirely "destroyed an owner's right to sue for his own lands "except upon paying for improvements made without "his consent and without default upon his part, * * "* * * * or if it transferred Craig's property to "Flanagin and Duncan without the judgment of Craig's "peers, or *without warrant of the law of the land*, * * * "* this court might not differ from counsel in his esti- "mation of the law. * * * * But the compulsory "transfer of the appellant's land to the appellees has not "been made, without, or against, the law of the land."

Constitutionality of the act.

The effect of this decision is, that there must be a previous tender, and affidavit showing it, before any suit could be brought by a former owner to cancel or set

aside a title derived from the State, in one of the named methods, where the title had actually passed by force of law, and it might be attacked on some ground of irregularity, or upon some legal or equitable grounds, sufficient for relief. The correlative proposition, intimated in the opinion, is, that there need be no tender nor affidavit in cases where the sale from the State had been wholly void and without any warrant of law. The whole opinion in this case was adopted, and the principles reaffirmed by express reference, in the case of *Pope et als., v. Macon et als.*, 23 *Ark.*, 644. The next step in the construction of the statute was taken in the case of *Chaplin v. Holmes* 27 *Ark., p.* 414, which was a bill to remove a cloud, created by tax titles, and set aside the conveyances, the tender and affidavit were held unnecessary, upon the ground that the act applied strictly to actions the direct object of which was to gain *possession* of the land.

At the December term, 1873, in the case of *Hainey v. Cole et als*, 28 *Ark.*, 299, the court gave to the law in question a construction which seems to go far beyond its intention. Haney had made application to the Chancery Court for confirmation of a tax title which was resisted by the former owners. The court found the sale void, and dismissed the bill for want of equity. The complainant appealed. This court affirmed so much of the decree as declared the purchase at the tax sale void, but held that, under the act in question, the complainant had a vested right, by his void purchase, to the payment of all which the defendants would have been obliged to tender if they had first moved the court; that is, the amounts paid with the 100 per ct. on original amount, and 25 per ct. per annum on subsequent payments, with full value of improvements. There was a decree accordingly, declaring

a lien. The decision in that case does not touch the point of tender. The defendants did not make any tender or affidavit prescribed by statute. The court in giving complainant his lien for taxes, &c., adopted as the measure of it, the severe interest of 100 per ct., and 25 per ct. per annum, prescribed to be tendered, or shown by affidavit, in a proper case for the application of the statute, where those who attack the tax deed might be plaintiffs. In this regard, I think the doctrine of that case erroneous. The statute is special, and does not give this lien in cases where the affidavit is unnecessary.

In *Pettus & Glenn v. Wallace et als.*, 29 *Ark.*, 476, this court silently ignored the case of *Haney v. Cole, supra,* re-affirming the doctrine in *Chaplin v. Holmes,* and refusing to apply the provisions of the statute to certain defendants who set up a cross-claim for a lien, in antagonism to a tax purchaser, under which the original complainant made claim. The tax sale in that case was held void for what was only an irregularity, several tracts having been sold *en masse.* The court, then composed of Mr. Chief Justice English, and Justices Walker and Harrison, all of whom were thoroughly versed in the policy of our revenue legislation, assigned, as one of the reasons why the statute of 1857, regarding the affidavit of tender, did not apply, that the persons attacking the tax sale had never been in default with regard to payment of taxes, as it had not been their duty to pay, them; this is in line with the views of Mr. Justice Fairchild expressed in *Craig v. Flanagin* (*supra*),

In *Gaither et als v. Lawson,* 31 *Ark.*, 279, the appellee brought ejectment upon an entry of the land, made in the United States land office in 1873. The defendant pleaded amongst other things, that he had bought the lands at tax sale in 1869, and made val-

uable improvements to the extent of $3,000, and that plaintiff before suit had not filed the affidavit of tender required by statute. This court was then indisposed to give any other construction to the statute than the case extorted, and contented itself with saying that "whatever else the statute may mean, it certainly does not mean, that where public lands are assessed and sold for taxes, which are not subject to taxation at all, and afterwards entered, the person entering them must tender to the tax sale purchaser, the money paid by him" &c., and "the value of improvements &c., before he can maintain an action for the lands." The citation in that opinion of the case of *Haney v. Cole* seems a clerical *lapsus*, as the case has no bearing on the point. The opinion in *Gaither v. Lawson* is, in effect, that where there was no right nor authority to sell, whatever, the whole thing being a complete nullity, then any one entitled may sue without tender, or affidavit.

In *Hickman et als v. Kempner*, 35 *Ark.*, 305., defendants, who were sued in ejectment, upon a tax title, were allowed by cross bill to attack the tax title, and have it set aside, upon doing equity—that is, by reimbursing the tax purchaser his actual outlay in discharging taxes, with interest, but without penalty or costs. There is no shadow of reason in making any distinction in eqnity, on this point, between a bill and cross bill—or at least the distinction must be very technical. In the case last cited the tax deed was void not because the lands were not liable to taxation, or because the taxes were improper, but because the delinquent list had not been filed in time. In that case, however, there had been no motion to dismiss the cross complaint for want of an affidavit. But this court announced its opinion of what sort of tender the cross complainant was required to make to be entitled to

relief in equity; taking no notice of the statute, as applicable.

In *Hare et als v. Carnell et als*, 39 *Ark.*, 196, this court, following *Chaplin v. Holmes*, refused to apply the statute to a suit in equity to cancel and set aside a purchase at a tax sale, as it was not an action for the recovery or possession of land.

Effect was given to the statute, however, in *Coates v. Hill*, 41 *Ark.*, 149, in which it was held that it had been modified as to time of tender and amount of sum to be tendered, by the Revenue Acts of 1868 and 1869, but was still otherwise in force; and consisted with the constitution. The action of the court below, in dismissing an action in ejectment, against a purchaser at tax sale, for want of such tender, was affirmed. It does not appear from the opinion whether the tax sale appeared to be void or good.

Upon this review of our decisions upon this statute, it must be confessed that they leave its true meaning and bearing somewhat vague and undefined.

Since Mr. Justice Fairchild's attempt to shadow forth its policy, and mark its limitations by great constitutional rights, it has been rather clipped and hemmed in by special regulations, than expounded with reference to its whole policy, and the legislative intent. In each varying phase of circumstances, the bar and bench encounter in it a new problem. The ghost rises, ever and anon, to haunt us; and doubtless will continue to do so, until it may be effectually exorcised by legislative action.

Enough has already been decided upon it, however, to enable me to say with some degree of assurance that the peculiar statute of January 10, 1857, is penal in its nature and to be strictly construed; that it was not intended to repel from the assertion of their just rights persons who had

By Eakin J. Tax titles: Act of January 10, 1857.

never been under any obligation to pay the taxes for for which the lands were sold, and had committed no default in failing to do so; that it has no application where the State had no power in itself, nor its officers by any warrant of law, to collect any taxes on the land, and where the sale is absolutely void on that account, and not for irregularities merely; and that, in no case, can it apply where the suit is not directly for the recovery or possession of land, nor where the tax title is repelled by a defence or cross claim. So much of the decision in *Haney v. Cole, supra,* as holds that the statute gives any holder of a void tax, or donation deed an absolute lien in any case, not only for taxes discharged and costs, (which is right) but also for the highly penal percentage, is, I think, ill-advised and erroneous.

The statute is a short one in four connected sections, referring to each other and all applying to the same class of cases. This connection may have been lost sight of, in the distribution of the sections in the general digests. The two years' limitation, the requirement of the affidavit before suit, the directions to the court to dismiss the action if no affidavit be filed; and where one has been, and judgment be for plaintiff, to declare a lien upon the land for the amounts sworn to have been tendered, comprise the whole subject matter of the act. The sections are interlocked not only by express cross references, but by the constant use of the word "such." In no case where no affidavit need be made, does the limitation apply, nor has the court power, under the act, to dismiss the suit, nor declare a lien upon the land, in case of judgment for plaintiff. The general power of courts of equity to fix and declare all proper liens, is irrespective of the statute.

It is apparent, from the agreed facts, that there never

was any forfeiture to the State, no title in it at any time, no authority in any of its officers to make a donation deed, and if there had been any inchoate title in the donee, it had reverted to the State from his failure to make the improvements required by the statute. *Gantt's Dig. Sec.* 3894. Much less was there any show of title in defendant, to whom the lands had been sold by the donee, without any improvements first made. In that event all title he might have had reverted to the State, (*Ib.* 3896).

The original title of plaintiff is admitted, and the defendant, divested by his own admissions, of all show or color of title, cannot be said to have been *holding* the land under or *by virtue* of a donation deed. He was the vendee of the State's donee, under circumstances which did not entitle him to any recognition as a holder of the title, which was claimed to have been denied from the State. By express provisions of the statute the land would, by the attempted sale, have passed back to the State, if it or its original donee had ever had any title at all. The defendant stood towards the real owner, in the attitude of a trespasser, and could only plead the general statute of limitations of seven years.

We can see no reason why the want of title in the defendant, cannot be shown in an action at law, where the claim to title is set up as a defence. The complaint does not attack it. It is interposed as a shield, and the defendant himself tenders the issue of its validity. It would be strange if the plaintiff could not show that it is utterly worthless and invalid. It is so *in law*, by force of the donation statutes. No title could pass from a State's donee who had not made improvements, and vest in an individual. The law gave effect to the attempt, so far as to carry the title out of the grantor, but diverted its course from the vendee back to the State. Also it is

void from defect of power under the revenue laws. There never was any forfeiture to the State, nor anything which the commissioner of the State was authorized to donate. This leaves out of view the confessed fraud upon the State by the donee who entered the land on speculation, made no improvements, and attempted to sell. This made it void in equity also, if the suit had been there.

That this opinion may not, in one point, be misleading, from silence, I desire to remark that the judgment is too favorable for appellant. Proceedings at law and in equity are kept distinct by our code of civil practice and, generally, the courts of law have no power to mould their judgments after the fashion of decrees in equity, so as to protect all parties. So, generally, in actions of ejectment, they have no power, in a proper course of practice, to render judgment for the plaintiff; and at the same time fix and declare liens upon the land in favor of defendants. To do this in ordinary cases requires equitable proceedings upon the equity side of the court. The exceptions are statutory. The Act of January 10, 1857, as I have shown, gives this power in all that class of cases in which it is necessary to file an affidavit of tender before suit, but it is expressly confined to them.

The court below held properly, that this case as to the affidavit, and the section as to limitations, did not come within the purview of the statute. The power then to give a lien and declare it, did not attach. It is a doctrine of equity, recognized in equitable proceedings, that whoever, in good faith, and not as a mere intermeddler discharges the lien of the government for taxes and other burdens, is entitled to a fair compensation, and a lien for reimbursement. But this judgment outside of the statute is not a competent one, in kind to be rendered at law.

Our State, unlike most others adopting the Reformed

practice, has thought proper expressly to preserve the distinction between proceedings at law, and in equity. They remain as distinct under the code as if administered by separate courts and judges. Remedies and relief, peculiar to equity, should be administered by equitable proceedings. If they are imported into actions at law, great confusion will ensue.

The plaintiff below does not appeal, however, and the judgment cannot be reversed in his favor.

It remains to add, that the majority of the court rest their concurrence in the result of this opinion solely upon the ground that no one claiming as assignee or vendee of a donation claim, upon which the donee had made no improvements at the time of the attempted alienation, can be said to hold under it, inasmuch as the statute declares, that upon such attempt, the land reverts to the State, and that therefore the statute of January 10, 1857, has no application, either as to the tender, or limitation. So far, and also as to matters of practice, the court is in full accord. My associates have not thought it necessary to discuss other matters, and all beyond that must be taken as the expression of my individual views.

Affirm.

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Stout v. State.

1. Liquor. *Selling or giving on election day.*

The provision of the general election law of Jan'y 23, 1875, against giving away or selling intoxicating liquor on election day does not apply to an election for a school director at an annual school meeting provided for by the common schools act of 1875.

APPEAL from *Conway* Circuit Court.

Hon. G. S. CUNNINGHAM, Circuit Judge.

Robert J. Howard, for appellant.

The "annual school meeting of the district" is not an election within the meaning of the law. Statutes in declaring what acts shall constitute an offense and in prescribing the punishment to be inflicted, are to be construed rigorously. 6 *Hill*, 616.

School districts are bodies corporate, *quasi* municipal corporations. In selecting directors, the electors hold a "public meeting," choose a chairman and vote for directors, as citizens choose deacons, vestrymen, bank directors, &c., which being completed, they adjourn. The 22d section of the General Election Law does not opply to these "meetings," but only to *elections* held under the act Jan'y 22d, 1875. *Acts*, *p.* 92, *Secs.* 1 *to* 45.

C. B. Moore, Att'y Gen'l, *contra.*

The election for school directors under Act Dec., 7, 1875, Secs. 54–58, pp. 72-3, is such an election as is contemplated by *Sec.* 22, *Act Jan.* 23, 1875, *Acts*, 1874 5, *p.* 97. The language is "*any* election".

The school election is held with judges and clerks, returns made, &c., and *Sec.* 56 school law provides that the *election* shall be held according to the general election law. I see no good reason why the provision in relation to dram shops, &c., should not apply.

1. Selling liquor on election day

SMITH, J. Stout was charged with giving away intoxicating liquors in his school district on the day of the annual school meeting, at which a director was to be chosen. After a demurrer to the indictment was overruled, he was convicted

and fined $200. The testimony showed that on said day he gave a man, at his request, a drink of whisky, after the polls were closed. He was not the owner or keeper of a drinking saloon. A motion in arrest of judgment was also denied.

The statute that was supposed to be violated is the 22d section of the general election law of January 23, 1875, This provides that "all dram-shops or drinking-houses in any county, city, town, or township shall be closed during the day of any election held therein, and the succeeding night, and any person selling or giving away any intoxicating liquors during said day or night, in any county, city, town or township in which any such election may be held, shall be punished by fine, &c."

Penal statutes, in declaring what acts shall constitute an offence, and in prescribing the punishment to be inflicted, are to be construed rigorously. "The general words shall be restrained for the benefit of him against whom the penalty is inflicted." The case of an offender must fall both within the words and the mischiefs to be remedied. *Potter's Dwarris on Statutes*, 245; *Grace v. State*, 40 *Ark.*, 97.

Law not applicable to school elections.

The annual school meeting which is provided for by *sections* 54–5–6 of the *Common School's Act* of *Deeember* 9, 1875, is not an election within the meaning of the above quoted act. Each school district is by law a *quasi* corporation. The corporators, who are the qualified electors residing within the district, meet at 2 P. M., of the day fixed for meeting, five constituting a quorum, elect a director, vote a tax, transact other school business, and then adjourn. Ballots are used in determining the choice of a director and the rate of taxation to be voted. But it is no more an election within the contemplation of the statute than the appointment of a city clerk or attorney by the council of a city, or the election of presiding and other officers by the two Houses of the General Assembly.

Reversed and remanded with directions to arrest the judgment.

Bush v. Sproat.

1. Evidence: *On plea of payment.*

The plea of payment admits evidence of payment in cash or in any other mode agreed upon by the parties, e. g., by the delivery of chattels received by the creditor in satisfaction of his demand, or by the giving and acceptance of anything in lieu of money and in discharge of the debt Payment may be made in any thing that the creditor will receive in payment.

APPEAL from *Miller* Circuit Court.

Hon. C. E. Mitchell, Circuit Judge.

Scott & Jones, for appellant.

The evidence as to the oral contract to take interest in the land in discharge of appellant's note was inadmissible under the issue raised by the answer. Appellee pleaded *payment* and the evidence tends to show, if anything, *accord aud satisfaction.* Our code has not abrogated all the old landmarks, nor gone to the extent of abolishing the rule that the allegations and proof must agree. Under the plea of payment evidence of accord and satisfaction is inadmissible. 15 *Ark.,* 651. This is not changed by *Sec.* 4611, *Gantt's Dig.*; See *sec.* 4613, *Gantt's Dig.*; *Newman on Code Pleading, p.* 732.

Here there was a total failure to prove payment. See also *Pomeroy on Remedies*, *Sec.* 719; 12 *Ark.*, 148.

The satisfaction did not move from appellee, for Byrne had purchased his interest. An accord moving from a stranger cannot be pleaded. 6 *Johns.*, 37; 19 *Wend.*, 408; 3 *I. B. Mon.*, 302.

L. A. Byrne, for appellee.

The jury found that appellant took an interest in the land in payment and satisfaction of the note. There was evidence to support that finding and this court will not reverse.

The objection as to variance between the answer and proof is settled by *Sec.* 4611 *Gantt's Dig.*

If the answer is not good and plaintiff was misled by the proof, he should have shown how. The objection is too late when all the evidence has gone to the jury. *L. R. & F. S. Ry. v. Perry*, 37 *Ark.*, 193, (body of the opinion).

Under the code under the plea of payment and satisfaction, evidence of payment in cash, or other mode agreed on, in property, or the giving and acceptance of anything in lieu of money &c, may be shown. 33 *N. Y.*, 69; 41 *Ind.*, 197; *Pom. on Rem.*, *Sec.* 701.

SMITH, J. Bush declared upon a promissory note; Sproat pleaded payment.

The undisputed facts were, that the plaintiff had sold the defendant a tract of land for $500. Three notes were taken for the purchase money: No. 1, for $200, due at six months and which had been transferred to one Deutschman; No. 2, for $200, due at twelve months and which is the note now in suit; No. 3, for $100, due at eighteen months and which had been transferred to Bramble. Sproat also owed an account to Byrne, and had agreed in writing to convey to him his interest in the land in satisfaction of the demand. This interest was a mere equity of redemption or right to go

forward and pay the land out; all of the above described notes being out-standing and liens upon the land. Deutschman had obtained judgment on note No. 1, had sued out execution and had caused it to be levied on the land. On the day fixed for the execution sale, the plaintiff, Bramble and Byrne, entered into a written agreement, the substance of which was, that Byrne was to bid off the land and hold the title for the benefit of the three, who were to be interested in the purchase in proportion to their respective claims against Sproat, Byrne's debt being estimated as equal to Bramble's, say each $100, with interest, and the plaintiff's being $200, with interest. The land was accordingly stricken off to Byrne for the aggregate sum of Deutschman's judgment, interest and costs of suit; and the sale being upon credit, the three parties jointly interested executed their purchase-bond. Before this bond matured, the purchasers re-sold the land for $600. Out of the proceeds, they paid off their purchase-bond, $266, leaving $334 for distribution. Of this Bramble and Byrne each received $100, and the plaintiff the remainder. This last sale was negotiated by the plaintiff, he being unable to raise his *pro rata* of the amount due on the purchase bond and was assented to by the other two parties only upon condition that they should each receive $100 net. The controversy is as to an oral agreement made at the same time as the written one, between the plaintiff, Bramble and Byrne, acting as attorney for Sproat, to the effect that the plaintiff and Bramble were to take the interests they did acquire in the land by said purchase in full satisfaction of the notes they held against Sproat. These notes were not surrendered, nor was any demand made fo them at that time. Bryne had agreed with Sproat to make such an arrangement that the notes would never come against Sproat, but had not assumed payment of them. When they re-sold the land, the purchaser desired to get in the note held by the plaintiff, who refused to give it up, but con-

sented to waive any lien on the land. The witness who attested the written agreement and who had heard the whole conversation on the subject, understood the transaction to be a settlement of all claims against Sproat. This was also the understanding of Bramble, whose note was of the same series as that of the plaintiff and of equal dignity. He regarded his note as paid.

The testimony fairly preponderates in favor of the defendant, that it was the intention of the parties, if they succeeded in acquiring the title to the land, to consider their debts against Sproat as satisfied. But even if there was merely a conflict of testimony, we should not disturb the verdict of the jury, which was for the defendant, provided the evidence as to taking an interest in the land in discharge of the plaintiff's note was admissible under the issues raised by the pleadings. The plaintiff objected to the introduction of this evidence as irrelevant and incompetent to prove the allegation of the defendant's answer, having do tendency to prove payment, but accord and satisfaction.

Evidence on plea of payment.

An allegation of payment admits evidence of payment in cash or in any other mode agreed upon by the parties, e. g., by delivery of chattels received by the creditor in satisfaction of his demand or by the giving and acceptance of anything in lieu of money and in discharge of the debt. Payment may be made in anything that the creditor will receive in payment. 2 *Gr. Ev., Sec.* 526; *Abbott's Trial Ev.*, 799; *Pomeroy's Remedies, Sec.* 701; *Morehouse v. Northrap*, 33 *Conn.*, 380; *Hart v. Crawford*, 41 *Ind.*, 197; *Tindsley v. Ryon* 9 *Texas* 405.

Thus *Farmer's Bank v. Sherman* 33 *N. Y.*, 69 was an action upon a promissory note, held by the plaintiffs as collateral security. The defendant pleaded payment. On the trial evidence was admitted, under exception, that the note had been paid to the plaintiffs by the payee thereof, by the de

livery of lumber, which was accepted by the plaintiffs in pursuance of an agreement that the payee might withdraw any of the collaterals held by the plaintiffs to the amount of lumber delivered to them and he had designated the note in suit to be withdrawn. And it was held that under this issue the defendant might give evidence of such agreement and the transactions under it, and that the plea of payment was sustained by proof of any facts which in law amount to a satisfaction of the note.

So if a creditor accept a deed of land in payment of his debt, it is a bar to an action for the debt. *Miller v. Young* 2 *Cranch, C. C.*, 53. *Sec.* 4611 of *Gantt's Digest* enacts that "no variance between the allegation in a pleading and the proof is to be deemed material unless it has actually misled the adverse party to his prejudice;" and "whenever it is alleged that a party has been so misled, that fact must be shown to the satisfaction of the court, and it must also be shown in what respect he has been misled." There is no reason to suppose that the plaintiff was misled by the plea, or surprised by the testimony that was adduced in support of it.

Affirmed.

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GREEN v. ABRAHAM.

1. ACKNOWLEDGMENT: *Party to deed can not take.*

An acknowledgment of the execution of a deed taken by a party to it does not authorize it to be recorded, and the record of it imparts no notice to subsequent purchasers or incumbrancers. But such acknowledgment taken before the curing act of March 8, 1883, was validated by that act, except in cases where it affected vested rights, or the conveyances of minors or insane persons.

Green v. Abraham.

2. LEGISLATURE: *Power to pass healing acts.*

The Legislature has power to pass healing acts which do not impair the obligation of contracts nor interfere with vested rights.

3. SAME: *Same.*

The rule in regard to healing acts is this; if the thing omitted or failed to be done, and which constitutes the defect in the proceedings, is something which the Legislature might have dispensed with by a previous statute, it may do so by a subsequent one. And if the irregularity consists in *doing* some act, or in the *mode* or *manner* of doing it, which the Legislature might have made immaterial by a prior law, it may do so by a subsequent one.

4. STATUTES:: *Healing, affect pending suits.*

The bringing of a suit vests in a party no right to a particular decision. His case must be determined on the law as it stands at the time of the judgment—not at the bringing of the suit; and if pending an appeal the law is changed, the appellate court must determine the case under the law in force at the time of its decision.

5. SAME: *Same.*

McReynolds executed a mortgage to Green in 1882, which was acknowledged before Green as a notary public and recorded. Afterwards a constable levied on the property an execution against McReynolds, and Green brought replevin for it. HELD: That the acknowledgment could not be taken by Green and the record was no notice; but both were validated by the curing act of March 8, 1883, except as against purchasers, and that the constable was not a purchaser, but succeeded only to the rights of the mortgagor, and neither of them had a vested right to a defense based upon an informality which did not affect their substantial equities.

APPEAL from *Clark* Circuit Court.

Hon. H. B. STUART, Circuit Judge.

A. S. B. Green, pro se.

The acknowledgment, if void, was cured by the *Act of March* 8, 1883, *p.* 107, and the trust deed bound the

property to the exclusion of the execution. *Act Feb.* 11, 1875, *p.* 149.

The deed of trust was good as between the parties there being no subsequent intervening rights. 25 *Ark.*, 152.

J. H. Abraham, pro se.

The acknowledgment having been taken before a party to the deed, was void. 46 *Ga.*, 253; 61 *Ill.*, 307; 20 *Iowa*, 231; 20 *Mo.*, 413; 83 *Ill.*, 136; *Jones Ch. Mort.*, *Sec.* 249; 12 *Cent. Law J.*, 502, and the execution lien prevails.

SMITH, J. Green brought replevin against Abraham for thirty bushels of corn. The plaintiff's title was derived from a deed of trust upon an unplanted crop, executed March 1, 1882, by one McReynolds to the plaintiff as trustee for Porter & Reeves. The deed was acknowledged before the plaintiff himself as a notary public and was spread upon the record of the county of the maker's residence. The defendant as constable of Caddo township had, in October, 1882, seized the corn, part of said crop, under an execution to him directed against the goods and chattels of said McReynolds. The cause was tried in August, 1883, upon an agreed statement of facts, a jury being waived, and the Circuit Court was of the opinion that the deed of trust was void as against the defendant by reason of its defective acknowledgment and gave judgment accordingly.

1. ACKNOWLEDGMENT. Party to deed cannot take.

The acknowledgment, having been taken and certified by an officer, who was a party to the deed, did not entitle the instrument to record and the record of it imparted no notice to subsequent purchasers or incumbrancers. *Wilson v. Traer*, 20 *Iowa*, 231; *Beaman v. Whitney*, 20 *Me.*,

413; *Withers v. Baird*, 7 *Watts*, 227; *Brown v. Moore*, 38 *Texas*, 645; *Stevens v. Hampton*, 46 *Mo.*, 404; *Hammers v. Dole*, 61 *Ill.*, 307. But on the 8th of March 1883, the Legislature passed "an Act for the better quieting of titles," the sixth section of which enacts "that all deeds and other conveyances recorded prior to January 1, 1883, purporting to have been acknowledged before any officer, and which have not heretofore been invalidated by any judicial proceeding shall be held valid to pass the estate which such conveyance purports to transfer, although such acknowledgment may have been on any account defective" (excepting conveyances by minors or insane persons). And the proviso declares "that the record of all such instruments shall be as valid as if they had been acknowledged and recorded according to law.

2. HEALING ACT. Power of legislature to pass.

This is a retrospective law; that is, it was made to operate on past transactions, and conveyances. But our constitution contains no inhibition against legislation of this kind, provided the obligation of the contract be not thereby impaired. And in the absence of such restraint, the constitutionality and effect of curative statutes are thoroughly well settled. *Cooley's Const. Lim's. 4th Ed.*, 460–79; *Article on this subject by Judge Cooley in* 12 *Cent. Law Jour.*, 2; *Freeman on Void Jud. Sales Ch. VI*; *State v. Squires* 26 *Iowa*, 340.

3. SAME: Rule as to legislative power.

"The rule applicable to cases of this description is substantially the following: If the thing wanting, or failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the Legislature might have dispensed with by prior statute, then it is not beyond the power of the Legislature to dispense with it by subsequent statute. And if the irregularity consists in doing some act, or in the mode or manner of doing some act which the Legislature might have made immaterial by prior law, it is equally competent

to make the same immaterial by a subsequent law." *Cooley's Const. Lim's.*, 463.

Hence deeds not executed in the mode prescribed by statute may be made valid by a statute passed after their execution. *Watson v. Mercer*, 8 *Pet.*, 88; *Chestnut v. Sham's Lessee*, 16 *Ohio*, 599; *Newman v. Samuels*, 17 *Iowa*, 528; *Journeay v. Gibson*, 56 *Pa. St.*, 57; *Shonk v. Brown*, 61 *Id.*, 327; *Dulany v. Tilgman*, 6 *G. and J.*, 461; *Deutzel v. Maldie*, 30 *Cal.*, 138.

4. Healing Acts pending suits.

"Nor is it important * * * * that the legislative act which cures the irregularity, defect or want of original authority was passed after suit brought, in which such irregularity or defect became a matter of importance. The bringing of suit vests in a party no right to a particular decision; and his case must be determined on the law as it stands, not when the suit was brought but when the judgment is rendered. * * * * And if a case is appealed, and pending the appeal the law is changed, the appellate court must dispose of the case under the law in force when their decision is rendered." *Cooley's Const. Lim's.* 476.

This doctrine has been approved and applied by this court in *Vaughan v. Bowie* 29 *Ark.*, 278. A bill was filed on the 18th of April, 1873, to enjoin an illegal tax. According to previous decisions a court of equity had not at that time jurisdiction to entertain such a suit. But before the cause was heard, an act was passed giving the circuit court power to grant injunctions in all cases of illegal and unauthorized taxes and assessments. *Gantt's Dig. Sec.*, 3451. And it was held that the effect of the statute was retroactive upon all undetermined cases and invested the court with jurisdiction as soon as it was passed, although it had none at the inception of the case.

5. SAME. But such healing acts are not permitted to interfere

with or disturb vested rights. A purchaser from McReynolds of this crop between the recording of the trust deed and the passage of the law, could not be deprived of his property by an act which retrospectively deprived Reynolds of the title he had when the purchase was made. But the constable, levying his execution upon the corn as the property of McReynolds, is not a purchaser. He has indeed succeeded to the rights of McReynolds, so far as this action is concerned; but his equities are no greater than those of McReynolds. And neither he, nor McReynolds, can have a vested right to a defence based upon an informality which does not affect his substantial equities.

"Laws, curing defects which would otherwise operate to frustrate what must be presumed to be the desire of the party affected, can not be considered as taking away vested rights. Courts do not regard rights as vested contrary to the justice and equity of the case." *State v. Newark*, 25 *N. J.*, 197.

The Circuit Court erred in not giving effect to the law. Its judgment is reversed and a new trial is ordered.

DAVIES v. HOLLAND.

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1. COMMON SCHOOLS LAW: *Act of Dec. 7, 1875.*

The Common Schools Act of December 7, 1875, revises the whole subject matter of the school law, and was intended as a substitute for all former enactments on that subject; and the notice of the annual meetings of the school directors for levying the school tax must, since its passage, be given by the school directors only instead of by them and the sheriff as before then.

APPEAL from *Chicot* Circuit Court.

Hon. T. F. SORRELLS, Circuit Judge,

D. H. Reynolds, for appellant.

It was essential to the validity of the proceedings of the school meeting that notice of the time and place of the meeting should have been given by the sheriff as provided by the Act December 1, 1875. *Acts* 1875, *p.* 43; *Hodgkin v. Fry*, 33 *Ark.*, 716.

Notices required in relation to steps to be taken in assessing and levying taxes must be strictly complied with. *Cooley on Taxation, pp.* 218 and 335. Every essential proceeding in the course of a levy of taxes must appear in some written or permanent form in the records of the bodies authorized to act upon them. *Hodgkins v. Fry, Supra.* Any disregard of the requirements of the statute render the levy invalid. *Worthen v. Badgett*, 32 *Ark.*, 503-4; *Cooley on Taxation, pp.* 216, 260.

COCKRILL, C. J. This is a continuation of the case reported in 36 Ark., 446. It is an effort to restrain the collection of a school tax. After the cause was remanded, Davis amended his complaint by inserting an allegation to the effect that the sheriff did not give notice of the time and place of holding the annual meeting at which the tax was voted. A demurrer to the complaint was sustained and the suit dismissed.

The school directors gave notice of the time and place of holding the meeting, and the sole question now presented is, whether an additional notice by the sheriff was necessary.

The act of December, 1st, 1875, which required the sheriff to give notice of school meetings by proclamation, was an amendment to the school law as found in Gantt's Digest and

became a part of it. The act of December, 7th, of the same year revises the whole subject matter of the school law, and was evidently intended as a substitute for all former enactments on that subject, and must be held to prescribe the only rules for cases arising under it. *Davis v. Fairbairn*, 3 *Hun.*, 636; *Bartlett v. King*, 12 *Mass.*, 537; *Coats v. Hill*, 41 *Ark.*, 149.

In case of *Hodgkins v. Fry*, 33 *Ark.*, 716, there was no notice of the meeting by the directors, and we think the court rightly held that there was no legal meeting; and if it was necessary to pass upon the question of notice by the sheriff at all, the statute of December first should have been declared repealed.

There is no provision in the present law for any notice save that by the directors, and the judgment must be affirmed.

MORRIS V. EDMONDS, ET AL.

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1. INFANTS: *Practice: Pleading cunter claim.*
A counter claim to the suit of an infant prosecuted by next friend can not be taken as confessed for want of a reply. A guardian *ad litem* must be appointed for him, and a reply filed, denying every material allegation in the counter claim; and the circuit court should see that this is done.

2. HUSBAND AND WIFE: *Curtesy: Husband's deed of wife's land.*
Land conveyed to a wife in 1872, in usual form, became the husband's for life as tenant by courtesy upon the birth of a child alive, and death of the wife; and his deed of it conveyed to his grantee the right of possession for the husband's life.

APPEAL from *Lincoln* Circuit Court in Chancery.

Hon. J. A. Williams, Circuit Judge.

J. M. Cunningham, for appellant.

Cockrill, C. J. Appellees, who are infants, sued by their next friend for the possession of lands which they claimed as heir at law of their deceased mother. Appellant answered denying the allegations of title as to one forty acre tract and asserted title to it in himself. He admitted that the other lands had been conveyed by the party having the paper title to appellees' mother, but undertook to set up an equitable title or right in himself. The answer was made a counter claim, the case transferred to the equity side of the docket and submitted, without a reply to the counter claim, on the complaint, answer and counter claim together with the exhibits, and a deposition tending to prove some of the allegations of the counter claim. The court decreed for the appellees as to all the lands.

1. Practice: Counter-claim against infant.

Upon appellant's showing he was clearly entitled to no affirmative relief. It is true that his counter claim was not denied, but it could not be taken as confessed against the infant plaintiffs, and it is useless to enquire what relief, if any, he might otherwise have had. There should have been a guardian *ad litem* for the infant plaintiffs, who became defendants to the counter-claim, and a reply by him for them. The court is the custodian of the rights of minor litigants and it is its duty to see that every material allegation against them is denied and at issue. *Evans v. Davis* 39 *Ark.*, 235; *Pillno v. Suttell, Ib.*, 61.

A decree for the appellant on his counter-claim without a guardian *ad litem* and reply for the infants could not have been sustained. *Smith v. Ferguson*, 3 *Met.* (*Ky.*), 424.

2. HUSBAND AND WIFE: Curtesy: Husband's and wife's land.

The cause was not at issue and was improvidently submitted. It is not necessary to determine whether in such case there could be a binding decree in favor of appellees, inasmuch as we find it was error to decree for them on the facts disclosed. The most favorable aspect that we can put on the facts for appellees is, that their mother acquired the lands by deed in the usual form in 1872; that in 1878 their father, who had intermarried with their mother before the acquisition of the lands, conveyed them to appellant. The mother died before the institution of the suit. The father thereupon became tenant by curtesy of the lands and his deed to appellant confers upon him the right of possession during the father's lifetime. There is no allegation or showing of the father's death, and as we find him exercising acts of ownership over the land as late as 1878, and his children are still minors. there is no presumption that he is dead.

As to the forty acre tract alluded to, there is no showing of title in appellees. It does not appear in any of the exhibits and is not mentioned anywhere except in the pleadings.

Reversed and remanded for further proceedings in accordance with this opinion.

STANLEY ET AL V. SNYDER ET AL.

1. HOMESTEAD: *Not lost by death of wife and children.*

A homestead estate when once acquired and still occupied by the owner is not lost by the death of his wife and arrival of his children at the age of maturity, or their removal from the premises. (Cockrill, C. J., dissenting.)

2. SAME: *Fraudulent conveyance of, no prejudice to creditors.*
Creditors cannot complain that a conveyance of a homestead was fraudulent to defeat the collection of their debts. They could not reach it if not conveyed, and the motives for the conveyance do not concern them.

APPEAL from *Drew* Circuit Court in Chancery.

Hon. J. M. BRADLEY, Circuit Judge.

J. G. Williamson, for appellant.

A voluntary conveyance, made to hinder, delay or defraud creditors, is void, as to creditors, the grantor being insolvent. *1 Conn.*, 525; 8 *Ark.*, 745; *Bouvier Law D., Vol.* 2. *p.* 636; *Bump Fraud. Conv., p.* 296; *Gantt's Dig., Sec.* 2954.

The conveyance being fraudulent, the title never passed from H. D. Snyder, and the land was subject to execution. Even if Snyder was entitled to a homestead, by his attempted conveyance, abandonment of possession, and failure to select as such, he waived and relinquished it. 25 *Ark.*, 101; 2 *B. R.*, 174; 28 *Ark.*, 494; 39 *Miss.*, 468; 29 *Ib.*, 407.

J. G. Taylor, for appellee.

To make a voluntary conveyance void as to creditors, either existing or subsequent, it is indispensable that it should transfer property which would be liable to be taken in execution for the payment of debts. 1*st Story Eq. Jur., Sec.* 367. The statute 13 Eliza did not enlarge the remedies of creditors. *Id.*, nor does our statute. *Gantt's Dig., Sec.* 2954.

The owner of exempt property may voluntarily dispose of it, or transfer it even if it be with intent to hinder or delay creditors, without subjecting it the claims of creditors. 11

Wis., 118; 23 *Id.*, 164; 33 *Id.*, 319; 45 *Id.*, 340; 27 *Minn.*, 116; 28 *Id.*, 544; 17 *Ill.*, 78; 21 *Id.*, 104; 88 *Id.*, 229; 96 *Id.*, 217; 90 *Id.*, 474; 44 *Iowa*, 613; 60 *Id.*, 539.

The holder of a homestead is as free to dispose of same as though he was not a debtor. As to the exempt property a debtor is considered as without creditors. 33 *Mich.*, 183; 46 *Id.*, 243; 39 *Miss.*, 469; 50 *Id.*, 34. See also 6 *Bush*, 515; 10 *Me.*, 161; 68 *N. C.*, 494; 70 *Id.*, 218; 8 *Neb.*, 174; 18 *Kans.*, 253; 4 *Ala.*, 521; 43 *Vt.*, 138; 14 *Ohio, St.*, 298; 11 *Allen*, 582.

One entitled to a homestead does not lose the right by the death of his wife and the departure of his children. *Thompson on Homesteads*, Sec. 72, and cases cited.

SMITH, J. Two actions were prosecuted to judgment in the year 1881, before a Justice of the Peace, by the appellant, Harrell, against H. D. Snyder, the father of the appellees. Executions were sued out and returned "*nulla bona*;" whereupon transcripts were filed in the office of the Clerk of the Circuit Court, whence executions were issued and levied on the tract of land in controversy. After due advertisement, sale was made of the land against the protest of the appellees, who claimed title under a conveyance executed to them by H. D. Snyder, after the contraction of the debt, but before the institution of the suits. At this sale the appellant Stanley purchased, and received from the sheriff a certificate of purchase. The present bill was filed by the children and grantees of H. D. Snyder against Harrel and Stanley for the purpose of having such certificate of purchase cancelled as an incipient cloud upon the title, and to enjoin further proceedings by execution against the property. The bill alleged, *inter alia*, that the tract contained only 140 acres, situate in the country and remote from any town and was worth not exceding $1,000; that H. D. Snyder was an old citizen, a married man and the head of a family, and resided upon

the land both at the date of said conveyance and afterwards; that while the consideration expressed in said deed was nominal merely, yet the real consideration was that the grantees should furnish the grantor with a home and maintenance for the remainder of his life, and that said judgments were not rendered for the purchase-money of said land, nor for specific liens, laborers or mechanics liens for improving the same, nor for taxes, nor for monies due by the debtor as an attorney, executor, administrator, guardian, receiver, or trustee of an express trust.

Harrell filed an answer and cross-bill, to which H. D. Snyder was made a party defendant. The material facts were admitted to be as stated in the original bill, except that H. D. Snyder was the head of a family within the meaning of the Homestead Law. On the contrary it was alleged that he had ceased to be such by reason of the death of his wife and the coming of age of his children. And it was claimed that his deed to his children was made to hinder, defraud and defeat his creditors, and particularly Harrell, of their just debts, he being at the time in embarassed circumstances. And the prayer was, that this deed be declared fraudulent.

To the answer and cross-bill demurrers were sustained and Harrell declining to plead further, a final decree was was entered for the plaintiffs.

1. HOMESTEAD: Not lost by loss of family.

The appeal raises this question: The existence of a family being necessary to the acquisition of a homestead, does a continuation of the right depend on a continuation of the family relation? The decided weight of authority is, that a homestead estate, when once acquired and still occupied by the owner is not defeated or lost by the death of his wife or the arrival of his children at years of maturity. Thus, the Massachusetts statute of 1855, limited the homestead exemption to a "householder having a family" and con-

tinued it to the widow and children after his death, but contained no provision as to its continuance in the husband after the death of the wife and departure of the children. Nevertheless, where the owner of certain premises lived upon them with his wife and son at the time of the passage of the act, it was held that he acquired under the statute a homestead estate therein which was not affected by the subsequent death of his wife and the coming of age and departure of his son, so long as the father continued to occupy the premises as his home. Said the court, per Gray, J.: "Any other construction would render a husband who had been deprived of his family by accident or disease, or by their desertion without any fault of his, liable to be instantly turned out of his homestead by his creditors." *Silloway v. Brown*, 12 *Allen*, 34; following *Doyle v. Coburn*, 6 *Id.*, 71.

The reason assigned is not very satisfactory, or at most, is one to be addressed to the political departments of the government. So that the decision seems to savor of what Jeremy Bentham calls judge-made law. Yet it has been generally followed. See *Thompson on Homesteads and Exemptions, Sec.* 70 *et seq.* and cases there cited; *Barney v. Lude*, 51 *N. H.*, 253; *Webb v. Cowley*, 5 *Lea* (*Tenn.*) 722, *per Cooper, J.*, *Beckman v. Meyer*, 75 *Mo.*, 333; *Taylor v. Boalware*, 17 *Tex.*, 74; *Kessler v. Draub*, 52 *Id.*, 575; *Blum vs. Gaines*, 57 *Id.*, 119; *Kimbrell Willis*, 97 *Ill.*, 494.

A contrary view was taken in *Cooper v. Cooper*, 24 *Ohio State*, 488; *Santa Cruz v. Cooper*, 56 *Cal.*, 339; and *Galligan v. Payne*, 34 *La. An.*, 1057, upon the maxim that *cessante ratione, cessat et ipsa lex.* Compare also *Calhoun v. Williams*, 32 *Gratt.*, 18.

The constitution, which contains our homestead statute, has not in express terms anticipated and provided for every possible phase of the question. It therefore devolves upon

the courts to construe and apply the law to new cases as they arise. Interpreting the law according to its spirit and following the current adjudications, we hold, though with some hesitation, that when the association of persons, which constitute the family, is broken up, whether by separation or the death of some of the members, the right of homestead continues in the former head of the family, provided he still resides at his old home.

Creditor can not complain of fraudulent conveyance of debtor's homestead.

It is incumbent on a creditor, who complains of a fraudulent conveyance, to show that his debtor has disposed of property that might otherwise have been subjected to the satisfaction of his debt. Until this is done no injury appears. *Story's Eq. Jur.*, 367; *Meux v. Anthony*, 11 *Ark.*, 411; *Hempstead v. Johnson*, 18 *Id.*, 123; *Clinton v. Estes*, 20 *Id.*, 216; *Sale v. McLean*, 29 *Id.*, 612; *Clark v. Anthony*, 31 *Id.*, 546; *Erb v. Cole*, *Ib.*, 554.

Section 3 of Article IX, constitution of 1874, provides that the homestead of a resident married man, or head of a family, shall not be subject to the lien of any judgment, or decree of any court, or to sale under execution or other process thereon, except for certain privileged debts. The legal effect of this provision is, that fraud cannot be predicated of a conveyance of the homestead, for the creditor could not have reached that with his execution if the debtor had retained it. The law excludes the homestead from all remedies of ordinary creditors in all courts. It resolves itself into this: that as to exempt property there are, within the meaning of the statute of frauds, no creditors. And as there is no restraint upon the debtor against selling or conveying such property, the motives with which such transfers are made do not concern the creditor. The debtor may sell, exchange or give it away and his creditor has no just cause of complaint; for being exempt, it is no more beyond his reach after transfer than it was before. In such alienations

there may be a bad motive but no illegal act. *Thomps. on Homest.*, *Section* 411 *et seq.*, *Wait on Fraud. Conv.*, *Sec.* 46 *and* 50; *Bump on Do.*, *pp.* 45–6; *Freeman on Executions*, *Sec.* 138; *Smith v. Allen*, 39 *Miss.*, 469; *O'Conner v. Ward*, 60 *Id.*, 1037; *Duval v. Rollins*, 71 *N. C.*, 221; *Smith v. Ramsey*, 33 *Mich.*, 191; *Legro v. Lord*, 10 *Me.*, 165; *Pike v. Miles*, 23 *Wis.*, 168.

The cases of *Norris v. Kidd*, 28 *Ark.*, 485; *Chambers v. Sallie*, 29 *Id.*, 407; and *Jackson v. Allen*, 30 *Id.*, 110, arose and were decided under constitutional and statutory provisions which made a judgment a lien upon all the debtor's lands situate within the county, including his homestead, and which protected the homestead occupant in the use of the land only during the time of such occupancy: The right of the judgment creditor to make the property contribute to the satisfaction of his debt being restored by abandonment, removal or death of the debtor without leaving wife or infant children to succeed to his rights.

Decree affirmed.

COCKRILL, C. J., dissenting: The debtor in this case was once the head of a family, and the lands in question were his homestead; but this relation ceased, and when he was no longer the head of a family but was still living on the lands as a home, he sold them. The conveyance was attacked by his judgment creditors as a fraud upon their rights, and it is admitted that this is true unless the debtor had a homestead in the lands at the time he conveyd them. If there was a homestead right in the debtor at that time, his creditors were not prejudiced by the conveyance, and, as is held in this case, cannot be heard to complain. The main question to be determined is, had the debtor a homestead under the law at the time of the conveyance complained of?

No one can look into the previous decisions of this court

and fail to see, that by its settled policy of construction, the primary object of the homestead laws has always been to provide for the family, and that the protection which enures to to the benefit of the debtor himself is merely incidental. As long ago as *McKenzie v. Murphy*, 24 *Ark.*, 155, Mr. Justice Fairchild for the court said, of a statute not materially varying from our present constitutional provision in this respect, that it intended no individual benefit for the head of the family, that "disconnected from the family, the head of it was entitled to no consideration." As late as *Harbison v. Vaughn*, 42 *Ark.*, 539, the policy was re-affirmed in almost the same language. Without awaiting a change in the law, the court now awards the debtor a homestead, not to protect his family against the vicissitudes of fortune, as was said in *Ward v. Mayfield* in 41 *Ark.*, 94, but as a solace in his loneliness for their loss. What has heretofore been termed as a mere privilege by the court, dependent on conditions imposed by the written law, is now erected into an estate, not to be forfeited or defeated by the absence of the condition which inspired the law, and without which the privilege could not be created, *i. e.*, the marital relation or a dependent family.

Upon the question as to whether the privilege of the homestead continues when the debtor ceases to be the head of a family, the Supreme Court of California, in *Revalk v. Kramer*, 8 Cal., 66, said: "The leading idea upon which the constitution and statute are both predicated, is the protection of the family. To carry out this intent, the homestead of the head of the family is protected from forced sale. * * * But unless the person is the head of a family, the right of homestead cannot exist. And cannot the same person at one time be the head of a family, and not at another? And if the privilege is an incident to a certain state, and that state itself ceases, why should not the incident fall with it?

As the primary object of the law was the protection of the family, when the family ceases to exist the reason for the privilege is gone; and why should not the privilege itself also cease? As the end contemplated by the law can no longer be attained, why should the means be preserved when they are no longer wanted? As the law will not allow an individual the right of homestead before he becomes the head of a family, why should it allow him the right after he ceases to be such? The only reason why the law will not allow it in the one case is equally applicable to the other. When an individual has not been, or has ceased to be, the head of a family, the law cannot anticipate that he will thereafter become such in either case. When he does in fact become the head of a family the law protects him for their benefit. He is the representative of the family. But when there is no family to protect will the law defeat the just claims of creditors for the purpose of accomplishing no beneficial end?

It is true the party once had a family, and he also once had protection for that family; but since the family has ceased to exist the protection is not needed. The law is intended to protect individuals while bearing certain relations to each other. When that relation ceases, the cause for the protection is gone. The reason ceasing, the rule ceases. The privilege and responsibility must go together—one is rightly dependent upon the other. When the individual no longer has the care of a family, the law should not still protect him as if he had; he should only be protected as others are who are at present in the same state. The law does not look to his past or future, but to his present condition."

To the same effect are the cases of *Cooper v. Cooper*, 24 *Ohio St.* 488; *Gallighan v. Payne*, 34 *La. An.*, 1057; *Blackwell v. Broughton*, 56 *Ga.*, 392-3; *Heard v. Downer*, 47 *Ib.*, 631; *Jackson v. Parrott*, 68 *Ib.*, 490; *Green v. Marks*, 25 *Ill.*, 221.

In Calhoun v. Williams, 32 *Gratt.*, 18, the facts were that the aged father and mother of the debtor lived with him at his home and were dependent upon him. After their death, and while the debtor was still occupying his old home, he was proceeded against by a creditor and the court refused to allow the exemption, saying it was not the design of the statute to enable a man, who had neither wife nor child nor others dependent on him, to withhold his property from the payment of his debts; that the statute was intended for the benefit of the family.

The cases cited by the court from Illinois, Texas and Tennessee seem to be determined on the peculiar wording of statutes which differ from our constitutional provisions, and are not therefore authority to sustain the general principle announced by the court in this case.

In Texas the statute provides that the right of homestead shall remain if a constituent of the family remains, and the court held that the language included a surviving husband as well as a surviving wife.

At the time of the rendition of the decision in the 97*th Ill.*, *supra*, the statute of that state extended the exemption to the widower just as to the widow, and the decision turned on the phraseology of the statute.

It is said in *Barney v. Leeds*, 51 *N. H.*, *supra*, that that case as well as the Massachusetts cases, are "predicated upon the idea that the homestead exemption is for the benefit of the debtor as well as the family, and that the California cases above cited went upon the theory that the design of those laws was to protect the family; that the protection of the family from dependence and want is the object of all homestead laws."

We have the authority of this court to sustain the latter view from its earliest declaration upon that subject to *Harbison v. Vaughn*, *sup.*, determined in 1884.

The Iowa statute puts the question to rest by declaring that "a widow or widower, though without children, shall be deemed the head of the family while continuing to occupy the house used as such at the time of the death of the husband or wife." The court in this case, under the asserted right to apply the law to new cases which the framers of the constitution did not anticipate or provide for, virtually interpolate this provision into that instrument. A liberal construction should be given to exemption laws to aid them in their humane policy, that is, the protection of the family, but the courts cannot, by construction extend their protecttion to those not named in the terms. Believing that both the better reason and the weightof authority sustain this view, I think the judgment of the court below should be reversed.

CARVILL, AD. v. JACKS, AD.

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1. DECREE: *Parties to, bound by finding of facts.*

A party to a suit in equity is bound by the finding and decree of the court, and is estopped to deny in a subsequent suit a material fact charged in the pleading and found by the court.

2. DAMAGES: *Fraudulent representations in sale of lands.*

The measure of damages for breach of the usual covenants of a deed is the purchase money and interest. Nothing can be allowed for improvements and the increased value of the lands. But where the vendee is induced to purchase by the fraudulent representations of the vendor as to his title, he may, upon eviction by a better title, recover of his vendor all the damages naturally resulting from the fraud, although the land was conveyed by deed with warranty. The action is upon the fraud, not upon the covenants of the deed; and the rule of damages for breach of the covenants does not apply.

ERROR to *Phillips* Circuit Court.

Hon. J. N. CYPERT, Circuit Judge.

James P. Clarke, for Plaintiff.

The *fact* of the redemption by the Ewart heirs, being prior to the sale to appellant's intestate, is *conclusively* established by the record in the Ewart v. Carville suit, to which appellee's intestate Jacks was a party duly served with process but made default, and Jacks was conclusively bound by the determination of that suit, since he had an opportunity of controverting plaintiff's cause of action and refused to do so. *Abbott's Trial Evidence, pp.* 829-832.

It was an error to exclude evidence of the value of improvements as an element of damages, on the ground that *Sec.* 2267, etc., *Gantt's Dig.* applied only to adults. *Haney v. Cole*, 28 *Ark.*, 299. The statute makes no exception in favor of infants or others, and the courts can make none. 6 *Ark.*, 14; 13 *Id.*, 291; 16 *Id.*, 694; 20 *Id.*, 18.

Tappan & Horner, for Defendant.

The declaration of law made by the court was proper and legal. *Pitcher v. Livingstone*, 4 *J. R., page* 1.

The finding was for the appellee, and this court will not disturb, where there is not a total want of evidence. 19 *Ark.*, 117; *Ib.* 559; 21 *Id.* 306.

Appellant's intestate was not an ignorant stranger, dealing with appellee's intestate for the land, nor was he in a position to be imposed on, for he knew all about the title, and the claim of the Ewarts. Review the evidence and contend that the finding was sustained by it.

DUVAL, SPECIAL JUDGE. On 2d day of November,

1881, the appellant sued the appellee for damages arising out of the sale of a certain tract of land by the appellee to appellant's intestate.

The material allegations of the complaint are that George A. Carvill, appellant's intestate, on 22d day of May, 1879, purchased from appellee a tract of land in Phillips county, Arkansas, describing the same as the Ewart place, and also by the sub-division of section, township, and range. That he paid the consideration of five hundred and fifty dollars, and went into possession under the purchase.

That appellee executed to the defendant a deed of conveyance with covenants of warranty against the claims of all persons except the Ewart heirs, who were to have a reasonable time to redeem. That appellee represented that he held the land by purchase at a tax sale, May 13, 1872, and had a deed therefor; that his claims were in full force, and that his vendee would be entitled to a compensation in the event of redemption, according to the provisions of the statute in force at the time of the sale for taxes.

That relying upon these representations appellant's intestate paid the consideration, went into possession of the place, paid taxes and made improvements of the value of $1,800.

That suit was instituted against plaintiff's intestate by Helen Ewart and others, heirs at law of A. B. Ewart, the former owner of the place, for possession; claiming that the amount due the appellee had subsequent to the sale for taxes, and long prior to the institution of said suit, been paid, and thereby the claims of said Jacks and all other persons claiming under him were extinguished; to which suit the said appellee was a party duly served with process and failed to answer, or in anywise deny allegations of the complaint; and that a decree was rendered in favor of the plaintiffs in said suit against the appellant's intestate for the possession of the land.

That the appellee knew that the place had been redeemed before selling to the deceased, and that all of his representations in respect to his right and title to the place and what would pass to his vendee were false and fraudulent, and that his intestate was induced thereby to buy said land and erect valuable improvements thereon, whereby he had sustained damage in the sum of two thousand and two hundred dollars.

On 21st day of November, 1881, the appellee appeared and filed his answer, in which he admits the sale of the land as stated; that the consideration was nominally $550, but was really a lot of lumber and a debt due from another person; admits the consideration was paid and defendant went into possession; that appellee executed and delivered a deed containing covenants of warranty as stated in the complaint, but denies that the word redeem meant what it was alleged in the complaint to mean; denies that he represented that he had a tax title in full force, or that his vendee would be entitled to compensation according to the statute in the event of a redemption by the heirs of Ewart, or that he made any representations in regard to his title, or the compensation his vendee would be entitled to in the event of a redemption; that before and at the time of the sale the decedent was entirely familiar with his title, and only purchased of appellee the bare possession of the land; "and he said" he could purchase the interest of the heirs for $250, and "agreed if defendant would convey to him he would purchase from the said heirs, and the exception in favor of said heirs was intended to prevent said Carvill from in any manner claiming the land to their exclusion;" that he did purchase said land at a tax sale, under an agreement with the widow of the former owner that he was to hold same until "he was paid all sums she might owe him; that she sold a part of the land to S. S. Dawson, who agreed to pay the

defendant the amount then due, and defendant executed a receipt to Dawson for the amount; but said Dawson did not pay the same when due, and returned the receipt to be held until he should pay appellee all sums he should owe him; that the heirs of Ewart, after the death of the widow, abandoned the land and he took possession; that the said George A. Carvill desired the land, and believing if he could obtain possession he could for a small sum buy the title of the heirs, proposed to purchase, being at the time fully advised as to appellee's claim, and knew that he was only buying from appellee the possession; and appellee made no representations to him that he claimed or would sell anything more than the possession; and refused to sell until said George A. Carvill agreed to buy from said heirs; and subsequently told defendant that one of them offered to sell for fifty dollars, but that he would get it for twenty-five dollars; and that George A. Carvill lost possession by his refusing or neglecting to purchase from the heirs as he agreed with the defendant to do.

Admits that the decedent went into possession and made some improvements, but denies that the same were worth more than four hundred dollars.

An analysis of the prolix pleadings shows, when stripped of their superfluous and redundant words and phrases:

That the action is for damages occasioned by the fraudulent representations made by appellee in respect to his title to the property, in this, that the purchaser would be entitled to the value of improvements made on the land, and the purchase money paid for the purchase at the tax sale accordings to the statute, and that the tax purchase was in full force, and he, the appellee, had done nothing to impair his rights under it.

The appellant, plaintiff in the court below, alleged in the 1. Parties to decree

bound by finding of facts.

complaint that the land had been redeemed long before, and the appellee's rights under his purchase had been extinguished; and that appellant's intestate had been evicted by a decree in favor of the Ewart heirs in a suit in which appellee was a party duly served and failed to answer; that he was damaged in the sum of $2,200.

The answer admits the sale, the execution of the deed and payment of the consideration; denies making any of the representions alleged in respect to redemptions; denies that the land had been redeemed; says he only sold the possession, which he took after the widow died and the heirs moved off.

The decree of the court in the suit of the Ewart heirs against appellant's intestate, appellee and others, decided that the land had been redeemed by Dawson for the widow and heirs, and upon that finding evicted the defendants therein, who held under appellee, without allowing them anything for taxes or improvements.

The appellee being a party to the suit is bound by the finding and decree of the court, and is estopped from denying that Dawson paid him the money for the redemption of the land as stated in his receipt.

The only issue therefore is, whether the appellee made the representations alleged; whether they were false and whether the appellant's intestate was induced to purchase the land by them, and was damaged.

The cause was submitted by consent to the court sitting as a jury, who having heard the testimony, and argument of counsel, found for appellee, and rendered judgment that the appellant as administrator take nothing by his suit and the appellee recover against him all the costs, for which execution might issue, to which finding and judgment of the court the plaintiff excepted.

The appellant filed a motion for a new trial on the grounds:

1. That the declarations of law made by the court are incorrect.

2. The findings of facts by the court are contrary to the evidence.

3. The court erred in excluding evidence as to value of improvements.

Which the court overruled, to which judgment the appellant excepted and prayed an appeal to this court, which was granted, time being allowed to prepare his bill of exceptions; it was subsequently signed by the judge and filed.

The court below declared the law as follows: "That to entitle plaintiff to recover in the action it was necessary for him to show by the testimony, that the defendant, at the time of the sale, made to the said George A. Carvill, some representations in regard to the title under which he held the land sold, which were false and fraudulent; that the same were made to induce the purchase by Carvill, and which did induce the said Carvill to make said purchase, and that by means of said false and fraudulent representations he suffered damages."

The court finds the facts to be that at the time of the sale of the Evart tract of land by T. M. Jacks, the defendant, to George A. Carvill, now deceased, the said defendant held the same by a tax deed, and that there was due him for taxes paid on the land the sum of about two hundred dollars, and that there were no fraudulent or deceitful representations made by defendant to said Carvill to induce the purchase.

It appears from the testimony that appellee first leased the land to appellant's intestate in the year, 1877, for five years; and in May, 1878, he entered into a contract in writing for the sale of land to said Carvill at a certain stip-

ulated price. In this contract it is recited that the appellee held the land by virtue of a purchase at tax sale and that he had agreed with Mrs. Ewart that she might redeem it under the law as it existed at the time of the purchase.

The appellant, who was plaintiff in the court below, testifies that he was present on two or three occasions while the appellee and decedent were negotiating the sale and purchase of the Ewart place; on these occasions the appellee represented that he held the land by a tax title, and that all his rights as purchaser at a tax sale would pass to any person to whom he might sell; that the heirs of A. P. Ewart, who formerly owned the place, were entitled to redeem, but to do so they would have to pay the amount originally paid and costs and all taxes subsequently paid thereon, and one hundred per cent.; that he was present when the sale was finally made and knew it was made with this understanding by his intestate; that he and his intestate sometime after the purchase went to appellee and told him that Dawson and Clint Ewart claimed that the land had been redeemed years before; that appellee stated that the assertions of Dawson and Ewart were untrue, and reiterated that he held the land by virtue of a tax title, which the Ewart heirs could only defeat by redemption according to law; he also told George A. Carvill to let the Ewarts do and say what they pleased, they could get posession only by redemption, and that it would be better for him if they would redeem, because he would then get more than the place was worth. Upon this assurance George A. proceeded with his improvements and remained in possession until he was evicted by the judgment of the court at the said suit of the Ewart heirs.

Croher, another witness, says that he heard appellee tell appellant's intestate, that the heirs of Ewart could only defeat the tax title which he proposed to convey to him by paying up all charges with one hundred per cent. and the value of the improvements.

Appellee asserts in the contract of sale of May, 1878, that "Mrs. Evarts and her heirs had had possession and use of the place until last year, so there is no reduction on account of rent."

In the deed is inserted a condition. "The Ewart heirs are to have a reasonable time to redeem." The appellee, although not a competent witness in this action to testify as to transactions between him and decedent, if he had been objected to, did testify as a witness that there was due him from Mrs. Ewart when he made the trade with George A. Carvill, over two hundred dollars, for taxes paid after redemption which she never paid; that he supposed there was due him all he sold the land for, at the time of sale; says he gave Dawson the receipt but it was afterward given up and destroyed; there was due over two hundred dollars for "subseqent taxes." This testimony was overcome by the finding and decree of the court in the case of the Ewart heirs against the Carvills and appellee, which were that the land had been redeemed by Mrs. Ewart long prior to the sale by him to decedent, and for that reason cancelled the tax deed to him and his deed to the Carvills.

If he had made the defense in that action and established to the satisfaction of the court that the land had not been redeemed, the suit of the Ewart heirs would have been dismissed, because of their failure to tender the taxes and value of improvements which had been made and paid by him and his vendees; and if not dismissed, his co-defendants, who were his vendees, would have been allowed the full value of their improvements, taxes and penalties and costs according to the statute. In our opinion appellee's testimony ought not to be considered, and without it there is not a scintilla of evidence to sustain the finding of thec ourt, that there were due him two hundred dollars for taxes paid on the land by him before he sold to the Carvills.

There can be no dispute that the appelle made the representations alleged in the complaint, for they are testified to by the witnesses; are repeated in the contract for the sale of the land in May, 1878. The decree of the court in the case of the Ewart heirs shows them to be false. In his answer he says he took possession of the land after the Ewart heirs left it; if it had been redeemed he was only a tresspasser. His theory that George A. Carvill paid or agreed to pay him five hundred and fifty dollars for bare possession of land which he expected to buy from the rightful owner for a small sum is not reasonable.

It is clearly shown by the testimony that the representations of appellee were not only false but were intended to deceive and the appellant's intestate was induced thereby to purchase from him what title he had, with the belief that in any event he would be protected under the law for the taxes with penalty and costs and interest, and the full value of his improvements before he could be deprived of the land.

It is contended that he is bound by the provisions of the deed which he accepted.

2. DAMAGES: For fraudulent representation in sale of land.

If a person be induced by fraudulent statements to enter into a written contract, it is competent for him to prove fraud by evidence *aliunde*, although the written contract or deed of conveyance is silent on the subject to which the fraudulent representation refers. *Hotson v. Brown*, 9 *C. B.* (*N. S.*) *Doball v. Stevens*, 3 *B. & C.*, 623; *Holbrook v. Burt*, 22 *Pick.*, 546; *Kerr on Fraud and Mis.*, 388.

A purchaser may after conveyance bring an action on the case for a fraudulent misrepresentation of the property or title. *Gerhard v. Bates*, 2 *E. & Bl.*, 476; *Pillmore v. Hood*, 5 *Bing, N. C.*, 97; *Love v. Oldham*, 22 *Ind.*; *Shackleford v. Handy*, 1 *A. K. Marsh*, 370; *White v. Seaver*, 25 *Barb.*, 235; *Pearsall v. Chapin*, 44 *Penn., St.* 9; *Kerr on Fraud and Mistake*, 327.

Fraudulent representations or deceit accompanied by damage constitute a good ground of action in respect to a sale of land as much as in respect to personal property, and that too where the land had been conveyed by deed with covenants of warranty. 1 *Comstock*, 308; *Waddell v. Fordiek & Davis*, 13 *Johnson*, 325; *Culver v. Avery*, 7 *Wendell*, 386; *Beach v. King*, 17 *Wendell*, 197; *Haight v. Hoyt*, 19 *N. Y.*, 464.

Damages are defined to be: "The indemnity recoverable by a person who has sustained an injury either in his person, property or relative rights through the act or default of another." 1 *Bouvier Dict.*, 420.

Generally the court is not particularly careful to weigh "*in golden scales*" the damages recoverable in tort. *Browne's Dict'y*, 102.

The general rule is that damages are, or ought to be, compensatory. *Yates v. Joyce*, 11 *Johns.*, 136; *Allison v. McClure*, 15 *Ohio*, 726; 16 *American R.*, 270.

In *Pitcher v. Livingston*, 4 *Johns. R.*, 11, the court say: "If any imposition is practiced by the grantor by the fraudulent suppression of truth or suggestion of falsehood in relation to his title, the grantor may have an action on the case in the nature of a writ of deceit, and in such action he would recover to the full extent of his loss."

In an action for fraudulent misrepresentation the plaintiff may recover damages for any injury which is the direct and natural consequence of his acting on the faith of defendant's representations. *Crater v. Bruniage*, 33 *N. Y. Law*, 513.

The intestate of the appellant was not required to exercise more than ordinary diligence in examining the title of the appellee. The latter had the deed of the Clerk of Phillips county conveying to him the land as having been purchased by him at a collector's sale for taxes, and this was on record, and he was in possession or exercising control over it.

He had in 1877 leased it to decedent for five years, and then sold it to him in 1878, and finally conveyed it to him in 1879, asserting all the time, verbally and in his written contract and deed, that he held the land by a tax title which had not been redeemed.

It would be unreasonable to hold that George A. Carvill did not believe these assertions as to the terms by which appellee held the land, and that he was not induced thereby to make the purchase from the appellee.

There was nothing upon the record to show that the land was redeemed, and when the Carvills went and told him that Dawson and Clint Ewart had notified them that the land had been redeemed, he indignantly denounced their statements to be false, and reiterated that the only way "the Ewart heirs could get possession was by redemption according to law."

The measure of damages in an action for the breach of the usual covenants in a deed, is the purchase money with interest. Nothing can be allowed for improvements and the increased value of the land. *Pitcher v. Livingston, ubi supra, Logan vs. Moulder,* 1 *Ark.*, 313.

This is now the universal rule in actions upon the breach of the covenants in the deed, but it is different in an action upon the fraudulent representations as to title or other material matters in respect to the land. In such cases the damage must be compensatory. The land in this case was purchased by the decedent for immediate use, and believing that he should be entitled to hold it until he should be paid the value of all improvements he might make, he had the right under the circumstances to recover them in this action; and his right derives additional force from the negligence or laches of the appellee, in failing to show if he could, in the suit of Ewart's heirs, that the land had not been redeemed. In that event the Carvills, as we have before stated, would

have been protected under sections 2267 *et seq.*, Gantt's Digest, which apply with equal force to the lands owned by infants and adults, which may be sold for non-payment of taxes due thereon.

The appellant therefore was entitled to show in the court below the damages which his intestate sustained which resulted naturally from the fraud of the appellee. This would have been but a fair compensation for the injury inflicted upon him by the fraud of the appellee, whose conduct gave him no claim to have "the damages weighed in golden scales."

Sorrels v. Self, Adm'r.

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1. Pleading and Practice: *Amending to correspond with proof: Presumption.*

If a plaintiff fails to demur to an answer defectively stating a good defence, and the testimony which is admitted without objection, shows a good defence, the answer will be regarded as amended to correspond with it. And where there is no bill of exceptions this court will, in support of a judgment below, presume that the defects in the answer were cured by the proof at the trial.

2. Homestead: *U. S. not subject to debts before patent.*

A homestead on land of the United States is not liable to any debt contracted prior to the issuance of the patent therefor.

APPEAL from *Lincoln* Circuit Court.

Hon. X. J. Pindall, Circuit Judge.

M. L. Jones for appellant.

Sorrels v. Self, Adm'r.

1. Amendment to correspond with proof.

COCKRILL, C. J. Sorrels petitioned the Probate Court for an order to sell the lands of his deceased debtor under the act of February 15th 1877. On appeal to the Circuit Court, the case was submitted to the court, sitting as a jury, on the petition and the answer of the administrator; and the court being advised as to the *facts*, as the record states, gave judgment for the administrator. There was no motion for a new trial and no bill of exceptions. We infer from the record entry that the case was heard upon proof of the issues made by the pleadings, and we must presume that the judgment below is right if the answer states a defence to the petition. It is not necessary, however, in such case that the answer should state a defence perfect in every particular, for if it contains the substance of a defence imperfectly stated, the presumption would be that the defects in the answer were cured by the proof at the trial. If the plaintiff desires to take advantage of such defects, he can do it by demurrer, but if he fails to do so, and on the trial testimony which pieces out a good defence is admitted without objection, the answer will be regarded as amended to correspond with it. *Hawks v. Harris*, 29 *Ark.*, 323; *Healy v. Conner*, 40 *Ib.*, 352.

Presumption.

The answer here states that the land described in the petition, was entered by the decedent in the U. S. land office under an Act of Congress entitled "An Act to provide homesteads on the public domain to actual settlers;" and that after the debt due petitioner was contracted the patent to the lands had been issued to decedent's heirs.

The Constitution of the U. S. invests congress with the power to dispose of and make rules and regulations in regard to the public domain. State and federal courts have concurred in holding that the power of congress under this provision is almost without limit. Congress

are the sole judges of what rules and regulations are necessary, and when established their rules in this connection are the supreme law of the land.

In *Gibson v. Choteau*, 13 *Wal.*, 92, the Supreme Court of the U. S. say: Congress has the absolute right to prescribe the times, the conditions and the mode of transferring the property, or any part of it, and to designate the persons to whom the transfer shall be made. No state legislature can interfere with the right or embarrass its exercise. See *U. S. v. Gratiot*, 14 *Pet.*, 526.

2. HOMESTEAD from U. S. not subject to debts contracted before patent.

Under this authority congress declared that a homestead should be given to an actual settler on certain conditions, and it was provided in case he should die without receiving a patent therefor, that it should issue to his widow or heirs. This, as we have seen, congress had the unquestioned right to direct. The heirs of the deceased homesteader, in this case, availed themselves of the provision and took the title to themselves. It is not necessary to enquire whether congress intended by this provision to invest them with the title free from the claims of the creditors of their ancestor, for in section 2296 of the same chapter of the Rev. Statutes, it is declared "that no lands acquired under the provisions of this chapter shall in any court become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor."

Effect has been given to this provision of the statute by the courts whenever the question has arisen. *Seymour v. Jourdan*, 3 *Dill.*, 437; *Gill v. Hallock*, 33 *Wis.*, 523; *Nycum v. Allister*, 33 *Iowa*, 374.

It is held that a judgment obtained on a debt contracted before the patent issued is not a lien on land acquired under the act, and that the land cannot be sold

under execution from such judgment, whether it belongs to the original settler, or a purchaser from him. *Miller v. Little*, 47 *Cal.*, 348; *Russel v. Loth*, 21 *Minn.*, 167.

No attempt is made by congress to control these lands, or put any condition on the state in reference to them, for any act done or debt contracted after title has passed from the U. S. They simply assure the settler who enters on the land, in any event—whether the patent shall thereafter issue to him, his widow or his heirs—that the land and the fruits of his labor thereon shall not be subject to be taken for debts contracted while the title to the same was in the government.

To deny to congress the power to make a valid and effective contract of this sort with the homestead claimant would materially abridge its power of disposal and seriously interfere with a favorite policy of government which fosters measures tending to a distribution of the lands to actual settlers at a nominal price. *Miller v. Little*, *supra*.

Affirmed.

CARVILL V. JACKS ADM'R.

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1. DAMAGES: *For fraud.*

Fraud and injury must concur to furnish ground for judicial action. Fraud without damage or damage without fraud is not sufficient.

2. SAME: *Fraudulent representations: Who may sue for.*

It is not necessary to support and action for false representation, that the representation be addressed directly to the plaintiff. If it be made with the intent to influence every person to whom

it may be communicated, or who may read or hear of it, it is sufficient. Nor is it essential to the right of action that the misrepresentation be the sole inducement to a purchase.

3. SAME: *Same: Measure of damages.*

In an action for breach of the covenants of seizin and quiet enjoyment in a deed, the measure of damages is the purchase monev and interest; but where the purchase is induced by the vendor's false and fraudulent representations of his title, the purchaser may, upon eviction by a better title, sue upon the fraud and recover the purchase money and interest and also the value of such improvements made upon the land as were consistent with the use for which he purchased it.

ERROR to *Phillips* Circuit Court.

Hon. J. N. CYPERT, Judge.

James P. Clark for plaintiff.

Where a vendor during a negotiation for a sale makes a false and fraudulent representation that induces another to purchase, he is responsible for the damage sustained by the purchaser, although the fraudulent representations were not made directly to him, but to another. *Alexander v. Beresford*, 5 *Cushman*, (*Miss.*), 747. In civil as well as criminal matters, a person is responsible for all consequences that reasonably result from his acts.

A warranty knowingly false, may be waived as a contract and an action for fraud maintained. *Lewis v. Talliafero, Sup. Ct. Ga., Dec.* 5, 1876, 3 *Reporter* 349.

The falsity of Jacks' representations, and the eviction of plaintiff is sufficiently shown by the record in Ewart v. Carville by which he is bound.

Tappan & Hornor for defendant.

The declaration of law made by the court was correct. *Pritchard v. Livingston* 4 *J. R.., page* 1; *Sedgwick on damages, p.* 207.

The trade was made with Geo. A. Carville, and he sold the land to appellant, who agreed to take a deed direct from Jacks; there were no representations made to appellant, and no transaction with her.

DuVal, S. J. Prior to the 2nd day of December A. D. 1881, the appellant instituted an action in the Circuit Court of Phillips county against the appellee for damages for the loss of the land she was induced to buy from him by his false and fraudulent representations as to his title, and for improvements made thereon. She laid her damages at the sum of twelve hundred and fifty dollars.

The facts set forth in her complaint are substantially: That appellee represented to her that he held the land mentioned and described in her complaint under a deed executed to him under a purchase at a sale of lands for non-payment of taxes on the 13th day of May 1872.

That the same had never been redeemed. That the owners of the land were minors at the time of the sale, and were still entitled by law to redeem, but before this vendee could be evicted the owners would be required to tender and pay the full value in money of all improvements made thereon, and all the taxes and costs first paid by him upon said lands, and interest at one hundred per cent. and twenty-five per cent per annum upon all costs and taxes paid thereafter from the time the same were paid, and that such right would pass and vest in her by her deed. The land was free from incumbrances made or suffered by him. That he was possessed of full right to convey and transfer said land, and her title could only be defeated by the Ewart heirs, who were the owners of the land, and who were minors at the time of the sale, and could redeem at any time within two years after they came of age, but only upon the terms as already

stated. That he, as purchaser of the said lands, had done or suffered no act which in any way impaired her right to claim the redemption money allowed as aforesaid by law, and that the said right remained in full force, and his assignee would take it free from incumbrance or set-off. That said representations were false, and the said land had long before been redeemed and said Jacks had received payment in full for all that was due him by reason of his said purchase. That plaintiff, reposing faith and confidence in the truth of these representations purchased the land, paid the purchase money, and the said defendant conveyed it to her and she entered into possession thereof and made permanent and valuable improvements thereon to the value o $1,000.

That afterwards the said heirs at law of A. P. Ewart sued her for possession of said land and recovered the same from her and she was evicted therefrom; that said Jacks (appellee) was a party to the said suit and made no defence.

That all and singular the statements and representations made by the appellee were false and fraudulent and the said appellee well knew them to be false at the time; and that the plaintiff was induced thereby to purchase said land and sustained damages as above stated.

The appellee answered, admitting the selling of the land described in the complaint to the appellant, that she paid him the purchase money agreed upon and he executed and delivered to her a deed for the same. Denies that he made representations about what it would take to redeem; that the purchase was made by George Carvill, who was entirely familiar with his title, and that he purchased at the same time a tract of land from the

appellee of about 148 acres (out of which one acre conveyed to appellant was taken) for the purpose of getting possession and buying in the title of the heirs of Ewart, which he expected to get at a small price; admits the eviction of the plaintiff in the suit of the Ewart heirs, of which he was a party. The complaint and answer are unnecessarily long and the pleadings evidently ignored the requirements of the code that the complaint and answer should contain a statement in ordinary and concise language, without repetition of the facts constituting the plaintiff's cause of action or the defendant's defence. Many of the statements in both are merely matters of evidence.

The case was submitted by consent to the court sitting as a jury, who after hearing the evidence and argument of counsel found as follows:

"That there was no sale of the property described in the complaint, by the defendant to the plaintiff, but that the same was purchased by plaintiff, from George A. Carvill, and the deed was made by defendant, to plaintiff at the request of the said George A. Carvill." And declared the law of the case to be, "That to entitle plaintiff to recover in this action there must have been a sale by the defendant to plaintiff; that the defendant, to induce plaintiff to make the purchase, made false and fraudulent representations to her in regard to his title, or the right which she acquired, which did induce the purchase, and by which she was damaged."

The court below rendered judgment against the plaintiff, that she take nothing by her suit and that defendant recover against her all of his costs.

The plaintiff filed a motion for a new trial because: 1st, the declarations of law made by the court are incorrect; 2nd, the finding of facts by the court is contrary to the

evidence, and 3rd, the court erred in excluding evidence as to the value of improvements."

The court below overruled the motion to which the plaintiff excepted and appealed to this court.

The defendant admitted in his answer "the selling of the land to the plaintiff, that she paid the purchase price agreed upon, that he executed and delivered to her a deed for the same, and that he represented he held a tax deed for the land;" but he denied that he represented that before the title could be divested the parties entitled to redeem would have to pay his vendee the full value of all improvements and the taxes paid, with interest at the rate of one hundred per cent on the amount first paid and twenty-five per cent on all costs and taxes afterwards, and then proceeds to explain the transaction by statements more in the nature of evidence than pleadings; set up that the receipt for the redemption money given to Dawson, exhibited in the complaint, was surrendered by Dawson to him and in fact no money was paid him by Dawson.

The only issue raised by the pleading is as to whether the defendant made the false and fraudulent representations which induced the plaintiff to purchase the land, and make valuable and permanent improvements; the sale to her, the payment of the purchase money and conveyance being as before stated by the defendant in his answer, admitted.

The testimony as set out in the bill of exceptions also clearly establishes the fact of the sale and conveyance by defendant to the plaintiff, of the land.

The plaintiff read in evidence a deed executed by the defendant on 22d day of May, A. D., 1879, by which he conveyed to her and her heirs and assignees, one acre of land more or less in consideration of the sum of one hun-

dred and fifty dollars to him in hand paid, with a covenant to ever warrant and defend the same against all persons claiming under him *"except the Ewart heirs, who are to have a reasonable time to redeem."*

On the first day of May, 1878, the defendant had entered into a contract in writing with George A. Carvill, who was the son of the plaintiff, by which he sold to him all the unsold portion in *"one*, south, range, five, east, known as the Mrs. Ewart place, and after setting out the various sales made out of said tract, states the amount then sold to be about one hundred and forty-eight acres; recites that he conveyed to Carvill all the interest he has in these lands, subject to the agreement made by him, T. M. Jacks and Mrs. Ewart, in her lifetime, which agreement required T. M. Jacks to let Mrs. Ewart redeem the place in a reasonable time by paying back to T. M. Jacks the money he had paid out for taxes up to the time of redemption, with the premiums on tax sales that the law then allowed; that is to say, one hundred per cent and ten per cent on the whole. This agreement was made some six or eight or more years ago; Mrs. Ewart and her heirs had the possession and use of the place till last year; so there is no reduction from the amount on account of rents, and binding himself upon payment of the note for balance of purchase money, to make said Carvill or his assigns a quit claim deed to said lands, guaranteeing against all persons claiming by, through or under him except the heirs of Mrs. Ewart, whose right to redeem must be respected a reasonable time longer."

The plaintiff also proved by Herman Carvill, that defendant represented that before any person holding possession under the tax title could be evicted, the heirs of Mrs. Ewart would be compelled to pay the taxes, pen-

alties and cost, with the rate of interest prescribed by law, and the value of all improvements placed thereon; and the amount already due was greatly in excess of the real value of the land; and that plaintiff was familiar with the terms of the written contract between appellee and George Carvill above referred to.

That the plaintiff and George A. purchased on the faith of the representations of defendant and entered upon the land and made valuable improvements thereon. That while they were making the improvements one of the heirs and Dawson, to whom the receipt was given, informed them that defendant had no title to the land, because it had been redeemed, and thereupon witness and George informed the defendant of what they had heard and he insisted that the statements were false.

It is abundantly proven by the receipt from Jacks to Dawson and complaint and answer and decree of the Circuit Court of Phillips county in the case of *Helen Ewart et al v. George A. Carvill, T. M. Jacks and others*, that the land had long prior to the sale to the plaintiff been redeemed, and the plaintiff was evicted from the same without compensation for improvements or purchase money. Defendant was estopped by the decree from denying that the land had been redeemed before his sale to plaintiff.

From the testimony as well as the admission in the answer, it is evident that the court below erred in its findings as to the facts in the case.

It is apparent that the plaintiff in the court below was induced to purchase the land by the false and fraudulent representations of the defendant, that she paid him the price mentioned in her complaint and was damaged by the transaction.

The declaration of law made by the court is substan-

tially correct and according to our finding of the facts under it, the plaintiff was entitled to judgment.

Fraud and injury must concur to furnish ground for judicial action.

1. DAMAGES for fraud. Fraud without damage or damage without fraud will not do. *Freeman v. McDaniel*, 23 *Ga.*, 354; *Taylor v. Green*, 58 *N. Y.*, 262–266; *Nye v. Merrian*, 35 *Vermont*, 438; *Harrison v. Edgerly*, 29 *N. H.*, 343; *Clark v. White*, 12 *Pelin*, 178.

2. Fraudulent representations: Who may sue for. It is not necessary to the support of the action for false representation that the representation should have been addressed directly to the plaintiff. If it were made with the intent to influence every person to whom it might be communicated, or who might read or hear of it, it is sufficient.

The latter class of persons would be in the same position as those to whom it was directly communicated. *Cazeux v. Mati* 25 *Barber*, 573; *Zabriskin v. Smith*, 13 *N. Y.*, 322; *Smithee v. Calvert*, 44 *Indiana*, 242.

Nor is it essential to a right of action that the misrepresentations were the sole inducements to a purchase. *Barrett v. Western*, 66 *Barb.*, 205; *Safford v. Grout*, 120 *Mass.*, 20.

It is a principal of natural justice long recognized in the law, that fraud or deceit, accompanied with damages is a good cause of action to a sale of land as well as in respect to personal property. 1 *Comstock*, 308; 13 *Johns.*, 395; 7 *Wendell*, 386; 17 *Wend*, 193; *Haight v. Haight*, 19 *N. Y.*, 464.

3. Measure of damages. What the measure of damages should be in a case like this is a question of some difficulty.

An action for deceit will lie for fraudulently selling land which has no real existence, notwithstanding any covenants in the deed, which the plaintiff may treat as

nullities. *Waddell v. Fordyck*, 13 *Johns.* 324; *Ward v. Winan*, 17 *Wend.*, 192.

Damages are defined to be the indemnity recoverable by a person who has sustained an injury either in his person, property or relative rights through the act or default of another. 1 *Bouvier's Dict.*, 420.

Generally the court is not particularly careful to weigh "in golden scales" the damages recoverable in tort. *Browne's Dict.*, 102.

The general rule is that damages are or ought to be compensatory. *Rockwood v. Allen*, 7 *Mass.*; *Yates v. Joyce*, 11 *Johns.*, 136; *Ailerson v. McClure*, 18 *Ohio*, 726; *Fry v. Parker*, 53 *N. Y.*; 16 *American Reports*, 270.

The case of *Pitcher v. Livingston*, 4 *Johns.*, 1, cited by counsel for appellee announces the measure of damages in a suit for breach of covenant of seizure and quiet enjoyment in a deed to be the purchase money with interest. That no allowance for the improvements nor for the increased value of the land can be made in such action.

But the corut say "if any imposition be practiced by the grantor, by the fraudulent suppression of the truth or suggestion of falsehood in relation to his title, the grantee may bring an action on the case in the nature of deceit; and in such action he would recover to the full extent of his loss."

From the authorities herein cited it would follow that the plaintiff was entitled to the value of such improvements made by her upon the land as were consistent with the use for which she purchased it as well as the money paid by her to the defendant for the land with lawful interest.

This would only be a fair compensation for the injury resulting from the defendant's fraud.

He is not entitled to have the damages "weighed in golden scales" and we think the above measure is nothing more than equal and exact justice.

The court therefore erred in excluding evidence as to the value of the improvements made by the plaintiff.

The judgment of the Circuit Court in overruling the plaintiff's motion for a new trial should be reversed, and the case remanded to the Circuit Court of Phillips county with instructions to grant the plaintiff a new trial and to proceed with the cause according to the opinion of this court.

STEPHENS v. SHANNON.

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1. VENDOR AND VENDEE: *Lien for purchase money—Notice to subvendee.*

A vendor of land who has parted with the legal title, has, in equity, a lien on the land for the unpaid purchase money, as against the vendee and his privies, including subsequent purchasers with notice; and a subsequent purchaser is affected with notice of all recitals in the title deeds of his vendor, whether recorded or not.

2. VENDOR'S LIEN: *Its nature and inception.*

A vendor's lien upon land is not an estate in the land, but is a charge or right which has its inception only on bill filed.

3. STATUTE OF LIMITATIONS: *On vendor's lien.*

The statute bar to the enforcement of a vendor's equitable lien, depends, not upon the length of time of adverse possession of the land, but on the fact whether the debt is barred at the institution of the suit: after that it cannot be enforced.

Stephens v. Shannon.

4 STATUTE OF LIMITATIONS: *On sealed instruments.*

The statute of limitations of ten years applies to sealed instruments concerning contracts between individuals executed while the constitution of 1868 was in force.

APPEAL from *Arkansas* Circuit Court in Chancery.

Hon. R. H. CROCKETT, Special Judge.

Gibson & Primell, for appellant.

The appellant was an innocent purchaser for value without notice; he went into possession at once, occupied and cultivated the land all the time from the date of his purchase to the commencement of the suit, *more than eight years*, and the statutes of limitations, which he pleads, was a good defence. *Gantt's Digest*, *Sec.* 4113; 34 *Ark.*, 534; 38 *Id.*, 181–193. The deed from Shannon to Winfrey was not on record. The appellant stated that he had no knowledge of any lien, and there is no evidence to show that he had any such knowledge.

E. L. Johnson and *Robert P. Holt, contra.*

1. Argue from the testimony that there was collusion in the matter of the alleged deed from Ivey to appellant concocted and schemed at and before the time the same was acknowledged, to defeat the suit of Drake v. Ivey & Ferguson, and Shannon, and that the fraud vitiated the sale from Fry to Stephens, and operates as a complete estoppel of the plea of limitation of seven years adverse possession, &c. 3 *Greenl. Ev.*, *Sec.* 254; 35 *Ark.*, 483; 34 *Id.*, 63; 32 *Id.*, 251; 3 *Wash. R. P.*, *p.* 147, *Sec.* 30.

2. Appellant was bound to take notice of what title his vendor and his vendor's vendor had. The lien was reserved in the face of the deed, and had the effect of a mortgage, and

it matters not whether the deed was recorded or not: the purchase money had not been paid and the lien existed. Appellee stands in no better attitude than Ivey, who *was not* an innocent purchaser. The answer fails to set up statements sufficient to avail in his plea of seven years adverse, continuous and uninterrupted possession. 35 *Ark.*, 100; 31 *Id.*, 85; 37 *Id.*, 571; 29 *Id.*, 568.

Seven years is not the period of limitation between a mortgagor and his mortgagee or his vendee. 34 *Ark.*, 312. This is an action *in rem* and seven years limitation is no defence. 3 *Wash. on Real Est., p.* 147, *Sec.* 30; 34 *Ark.*, 312.

SMITH, J. Shannon, on the first of January, 1870, sold and conveyed to Winfrey three hundred and twenty acres of land in Arkansas county for $5,000, of which $4,000 were paid, and for the remainder Winfrey made his promissory note under seal, payable on the first of April, 1870, and secured by a lien reserved on the face of his deed. Several payments were made on this note, the last being on the 6th of November, 1871. Winfrey afterward sold and conveyed the land to Ivey, and Ivey on the 20th of January, 1872, sold and conveyed one hundred and sixty acres of it to Stephens.

Shannon, on the 23d day of May, 1881, filed his bill against Winfrey, Ivey and Stephens, to subject the land to the payment of the balance due on the note.

We need not notice the proceedings relating to other defendants, as they have not appealed. But Stephens' defence was that all remedy against the land in his hands was barred by the statute of limitations, he having held possession under a deed for more than seven years without any recognition of the alleged lien.

The decree was for the plaintiff.

1. Vendor's Lien for purchase money.

A vendor of land, who has parted with the legal title, has, nevertheless, in equity, a lien for the purchase money as against the vendee and his privies, including subsequent purchasers with notice. *Shall. v. Biscoe*, 18 *Ark.*, 142; *Chapman v. Liggett*, 41 *Id.*, 292, and cases therein cited.

Notice to sub-vendee.

The deed of Shannon, which contains the reservation of the lien, was not placed on record. But Stephens was affected with notice of all recitals in the title-deeds of his vendor, whether they were of record or not. *Stidham v. Matthews*, 29 *Ark.*, 650; *Stephens v. Anthony*, 37 *Id.*, 571.

2. Nature and inception of lien.

This equitable lien of the vendor is not, however, an estate in the land itself, but is a charge, or right which has its inception only on bill filed. *Bispham's Principles of Eq.*, 3*rd Ed.*, *Sec.* 354; *Gillmore v. Brown*, 1 *Mason*, 191.

From the fact that it is a mere remedy or security, and not a right of property, it results that the lien cannot be enforced after the bar of the statute of limitations has attached to the debt. *Linthicum v. Tapscott*, 28 *Ark.*, 267; *Waddell v. Carlock*, 41 *Id.*, 523; *Boust v. Covey*, 15 *N. Y.*, 505; *Trotter v. Erwin*, 27 *Miss.*, 772.

We are aware that a different view has been taken by the courts of Maryland and Alabama. See the cases collected in a note in 31 *Am. Rep.*, 41 to the case of *Bizzell v. Nix*, 60 *Ala.*, 281. But this seems to be a mistake. For, undoubtedly, the debt is in such cases the principal thing and the lien an incident; and the accessary necessarily falls along with its principal.

That the barring of the debt bars also a foreclosure of the mortgage intended to secure it, is a logical sequence in those states where a mortgage is regarded merely as a pledge, the title remaining in the mortgagor until foreclosure, and the rights and remedies of the mortgagee being equally equitable. *Ewell v. Daggs*, 108 *U. S.*, 143; *Schmucker v. Sibert*, 18 *Kans.*, 104; *S. C.*, 26 *Am. Rep.*, 765; *Day v. Baldwin*, 34

Iowa, 380; *Lord v. Morris*, 18 *Cal.*, 482; *McCarthy v. White*, 21 *Id.*, 495; *Eborn v. Cannon's Ad.*, 32 *Tex.*, 231.

The solution of this controversy then, depends not on the length of time that Stephens has had adverse possession; for, Shannon having no right to the possession, nor any interest in the land, the character of that possession becomes unimportant; but it depends on the fact whether the note was barred at the institution of the suit.

4. Statute of limitation. On sealed instruments

The instrument having been executed while the constitution of 1868, which abolished private seals, was in force, the scroll affixed to the maker's name added nothing to its dignity, and did not raise its grade. And no payment having been made later than November 6th, 1871, the bar would have become complete on November 5th, 1876, had that constitution remained in force. But in 1874, another constitution was adopted. And section 1, of the schedule to it, contains this extraordinary provision: "Until otherwise provided by law, no distinction shall exist between sealed and unsealed instruments, concerning contracts between individuals, executed since the adoption of the constitution of 1868. Provided that the statutes of limitation concerning sealed and unsealed contracts in force at the time, continue to apply to all instruments afterwards executed, until altered or repealed."

In *Dyer v. Gill*, 32 *Ark.*, 410, it was decided that the Constitutional Convention had the power, and it was their intention to restore the limitation of ten years to actions upon writings obligatory executed after the adoption of the constitution of 1878, leaving it to the Legislature to alter or repeal the provision. The Legislature has never taken any action in the matter, so far as we are advised: and the case above quoted governs this. The suit was not barred and the decree below is affirmed.

RINGO, EX'R v. WOODRUFF.

1. STATUTE OF LIMITATIONS: *Mortgages*: *Adverse Possession, what is.*

Seven years continuous adverse possession against the mortgagee will bar his action for the recovery of the mortgaged premises, or for foreclosure of the mortgage; but to constitute adverse possession against a mortgagee it is not sufficient that the mortgagor or those holding under him, occupy, use, improve and pay taxes on the premises, as their own absolute property, but the possession must be in open denial of the mortgagee's title, and accompanied with such acts or declarations of the holders as are sufficient to put the mortagee on notice that they claim and hold in hostility to his rights, and adversely to him. Until then the possession is consistent with his rights and not adverse, and the statute does not begin to run.

2. CHANCERY PRACTICE: *Cross-Relief.*

A defendant can not get cross-relief against a co-defendant upon any statements in his answer to the plaintiff's complaint. He must make his answer a cross-complaint against the co-defendant, and pray relief, and serve process on him, unless he enters his appearance.

3. MORTGAGE: *Junior mortgagee has lien for taxes.*

A junior mortgagee has a lien on the mortgaged premises for money paid for taxes, or to redeem them from forfeiture, and cost, and interest from the time of payment; and is entitled to be reimbursed for these items out of the proceeds of the sale of the premises under the senior mortgage.

APPEAL from *Pulaski* Chancery Court.

Hon. JOHN R. EAKIN, Chancellor.

S. R. Cockrill, for appellant.

At common law, in the English and Federal courts and a majority of the States including Arkansas, a mortgage is regarded as a conveyance in fee, the legal title vesting in the

mortgagee while the equity of redemption remains in the mortgagor. In many States, this has been changed by statute or judicial construction until *no title or estate passes to the mortgagee* either at law or equity. 2 *Wash. R. P., p.* 104; 108 *n* 8. Where no title passes the doctrine of adverse possession has no application as to foreclosure of a mortgage. 33 *Iowa*, 303; 18 *Cal.*, 488–9. The cases holding this doctrine are not authority here. Here every limitation affecting the recovery of real estate requires an *adverse possession* to support it. Whether the debt is barred or not is immaterial. There is no propriety in confounding the statute of limitations with the presumption of payments arising from lapse of twenty years. This presumption does not arise from a statutory bar. 8 *Met.* (*Mass.*) 90; 7 *How.* (*U. S.*) 258. In those States where the time fixed is twenty years, courts of equity have taken the same as the presumption of right in a mortgagee. But where the statute of limitations is shorter, we know of no case where the courts of equity have reduced the time within which a mortgage may be redeemed to that period. 10 *Yerg.* (*Tenn*) 380–1. The same rule would govern the mortgagees right to foreclosure.

Hall v. Denckla, 28 Ark., and others of the same kind, have been cited to sustain the position that the lapse of seven years without recognition of the mortgage, bars the right to foreclose. But it has been repeatedly held that the possession of a mortgagor, or one standing in that relation, is not hostile or adverse to the right of the mortgagee. 29 *Ark.*, 594; 27 *Id.* 91; 25 *Id.* 274; 16 *Id.* 122; *Hempst.* 527; 27 *Ark.* 63; 34 *Ark.* 312. The effect of a title bond is the same as a sale and mortgage back, and the same rule governs. *Meigs* (*Tenn.*,) 56; 23 *Wall.* 119; 3 *Fed. Reporter*, 612; *Butler v. Douglas*, 1 *McCrary*. The possession of the mortgagor is consistent with and not adverse to the rights of the mortgagee. 2 *Wash. R. P.*, 158, *et Seq.* 171–2; *Bal-*

lentine on Lein, 360–1; 18 *N. H.*, 247; 30 *Me.*, 333; 23 *Minn.*, 328; 38 *Iowa*, 112; 5 *Cow.*, 174; 14 *Pick* (*Mass.*) 90; 4 *Heisk.* (*Tenn.*) 580; 3 *Yerg.*, 513; *Meigs*, 56; 2 *Rand.* (*Va.*) 93; 1 *McCord* (*S. C.*,) 395; 5 *B. & Ald.*, 233; 5 *Ad. & El.*, 291; 1 *Lord Raym.*, 746.

Wherever this doctrine prevails the rule is universal that one who purchases from the mortgagor a part of the mortgaged premises with notice, by record of the mortgage, succeeds only to his rights and stands in no better attitude than he can. *Jones on Mortg., Secs.* 676, 1202, 1211, *and cases cited*; 34 *Ark.*, 312; 16 *Id.*, 122; 29 *Ala.*, 714; 62 *Ill.*, 534–5; 61 *Id.*, 260; 79 *N.* C., 480; 27 *Penn. St.*, 510; 9 *Wheat.*, 489; *Butler v. Douglas*, 1 *McCrary*; 5 *B. & Ald.*, 604; 4 *M. & W.*, 409; 39 *Eng., C. L.* 100; 9 *Wheat*, 489; 29 *Ark., top of p.* 593; 4 *Heisk.* (*Tenn,*) 580.

The party owning the equity of redemption *may* throw off his allegiance to the mortgage and set the statute to running in his favor; but he must do some act *hostile* to the mortgagee's right and bring the fact home to his knowledge. 2 *Wash. R. P.*, 171–2; *Angell Lim., Sec.* 451; 4 *How. U. S.*, 294; 27 *Penn. St.*, 510; 62 *Ill.*, 534 *and cases sup.*

In the absence of proof that the possessicn has become hostile, the seisin of the mortgagee is presumed to continue and be preserved by the permissive occupancy of the owner of the equity of redemption. 18 *N. H.*, 247; 2 *Wash. K. P.* 230, (*493); *Ib.* 127; *Lewis v. Hawkins*, 23 *Wall.* The statute can never be a bar until the mortgagee has been disseized. 8 *Met.* (*Mass.*) 90. The cases cited all agree that a sale by the mortgagor and exclusive possession by his grantee do not alone work a disseisen. 4 *Kent Com.* *157; 2 *Wash. R. P.*, *501, *Sec.* 9; 2 *Merivalv*, 359.

The record of the deeds from a mortgagor is not notice to the mortgagee, as he holds under a mortgage prior in date to the conveyances. 29 *Ark.*, 595; 6 *Abb. Pr.* (*N. S.*)

171; 14 *Peck. Mass.*, 225; 3 *Wash. R. P.*, 283. Nor can payment of taxes avail for it is their duty to pay them. *Jones on Mort.*, *Sec.* 1200; 62 *Ill.*, 534; *Byers v. Danley*, 27 *Ark.*

The mortgagee has the right to suppose that improvements were intended to enhance the value of the equity of redemption, in the absence of other proof. The evidence does not show their character, whether they were such as to put Ringo on his guard.

There is no evidence of a hostile or adverse possession. Woodruff's continued acknowledgment of the mortgage rebuts the presumption of payment. Any acknowledgment, even to a stranger, is sufficient. Twenty years had not elapsed since the purchase of any of the mortgagee's vendees. 28 *Ark.*, 32. Considering the payments made by Woodruff, and the mutual open account current kept between him and Ringo, even the *statutory* period has never been allowed to elapse at any time without recognition of the mortgage by payment on the debt. The fact that Woodruff had conveyed a part of the mortgaged premises when some of the payments were made is immaterial. *Jones on Mortg.*, *Secs.* 1199, 1202; 6 *Abb. Pr. N. S.*, 154; *Hughes v. Edwards*, 9 *Wheaton*; 17 *Kans.*, 14; *Chinnery v. Evans*, 11 *H. of L. cases*, 115.

Appellees purchased from Woodruff with full knowledge from the record, and for aught that we know here, with actual knowledge of the incumbrance, and being apprised, they were bound to ascertain the facts. 54 *Barb.*, 467.

The Federal Courts hold a different rule from our State Courts, and "It would be injurious to the community that different rules should prevail in different courts on the same subject." *Broom Leg. Max.*, *152.

U. M. Rose for appellee, Whittington.

The statute began to run in favor of Woodruff and against

foreclosure from the breach of the condition of the mortgage by the failure to pay the debt, in other words from the 6th Dec. 1843. 37 *Miss.*, 579; 21 *Ark.*, 379; *Jones on Mortg., Sec.* 1211.

The only question in this case is whether the payments made by Woodruff on the Ringo mortgage, after he had conveyed the property to Whittington, could have the effect of taking the Ringo mortgage out of the statute of limitations as against Whittington. It was expressly decided in *Mayo, &c., v. Cartwright*, 30 *Ark.*, 407, that part payment of a mortgage debt would not take the mortgage out of the statute as against the intermediate vendee. That decision having stood for six years, and having become a fixed rule of property in this State should not now be overruled. It was the necessary result of several previous decisions of this court. A part payment operates to take a debt out of the statute of limitations merely on the ground that it is an acknowledgment that the debt is due. It is merely an admission of indebtedness, and this court has repeatedly held that an admission of the vendor after he has conveyed his property to another cannot operate to the prejudice of the vendee. 11 *Ark.*, 249; 24 *Id.*, 111; 6 *Id.*, 109.

The appellant insists that Mayo v. Cartwright should be reversed, because this court cited N. Y. Life Ins. Co. v. Covert, 29 Barb., 435, which was reversed on appeal. In that case the mortgagor continued to make payments at intervals of about one year, until the foreclosure suit was instituted, so that the bar never attached. But in this case as in Mayo v. Cartwright, the bar of the statute became complete, no payment being made during the long interval between July 13th, 1855, and Feb'y 9th 1870. When the statute bar once attached, the rights of Whittington became fixed and vested and could not be altered by any subseqnent act of Woodruff.

In *Hughes v. Edwards*, 9 *Wheaton*, 489, relied on by appellant, the payment made was before the conveyance to the intermediate vendee. Of course the grantee took the estate burdened with the admissions of his grantor.

C. B. Moore, for Adams, adm'r, and the Heirs of George, adopts the brief of U. M. Rose, Esq.

B. B. BATTLE, SPECIAL JUDGE. This is an appeal from a decree of the Pulaski Chancery Court.

Joel Ringo, as executor of the last will and testament of Daniel Ringo, deceased, the plaintiff in the court below, filed his complaint in that court, on the first day of August, 1877, in which he charges that William E. Woodruff, sen., executed to Daniel Ringo, in his life time, on the 20th day of January, 1843, a mortgage upon the following lands in Pulaski county, in this State, to-wit: The south-east quarter of section eleven (11) and the north-west quarter of section thirteen (13) in township one (1) north, and in range twelve (12) west, and upon the following lots and blocks in the city of Little Rock, to-wit: Lot seven (7) in block thirty-six (36) west of the Quapaw line, and lot seven (7) in block ten (10) in Pope's addition to the city of Little Rock, and fractional block one hundred and forty-five (145), to secure the payment of a writing obligatory executed by him, Woodruff, to Daniel Ringo for the sum of two thousand and nine hundred and eighty-five dollars and twenty-five cents, and ten per cent. per annum interest thereon from date until paid, bearing date the 3d day of December, 1842, and due twelve months thereafter. He further charges, that defendant, Woodruff, paid on the writing obligatory as follows:

On January 1st, 1846, $918.47.

On July 13th, 1855, $3123.26.

On February 19th, 1870, $2862.07.

On August 22d, 1876, $150.00.

That the mortgage was filed for record with the Recorder of Pulaski county, on the 26th day of January, 1843, and was by him recorded. That Daniel Ringo died in the year 1873, testate: and plaintiff, Joel Ringo, is the acting and duly qualified executor of his last will and testament. He concluded the complaint with the usual prayer for foreclosure, and a certified copy of the mortgage and of the certificates of acknowledgment and record thereof was filed with and made a part of the complaint, from which it appears that the mortgage was acknowledged and recorded in the manner prescribed by law.

The defendants, city of Little Rock, John D. Adams, as administrator of Alexander George, deceased, James Brodie and F. Henley, severally answered and admitted the allegations of the complaint to be true, and set up their respective claims to different tracts, blocks and lots described in the mortgage, and the facts on which they, severally, rely to sustain the same; and in their several answers, state that no payments were made on the writing obligatory aforementioned, after the 13th day of July, 1855, and before the 19th day of January, 1870, and that the payments made thereon, on and after the 19th day of February, 1870, were made without their knowledge or consent; and plead the seven years statute of limitation, in bar and preclusion of plaintiff's right to maintain his action to foreclose his mortgage upon the tract, lot or block respectively claimed by them. None of the deeds on which they severally rely as evidence of title or copies thereof are filed.

The defendants, Louisa Adams and her husband, John Dudley Adams, Frank P. George, Carrie P. George, and Sallie G. George, by leave of the court and with the consent of the plaintiff, adopted the answer of John D. Adams, as administrator as aforesaid, as their own.

Defendant, Henley, in his answer, further states, that at the

time of the execution of the writing obgatory, Woodruff occupied block ten (10) in Woodruff's addition to the city of LittleRock, as a residence, and was and still is the owner thereof; that plaintiff, on the 21st day of June, 1877, recovered a judgment against Woodruff on the aforedescribed writing obligatory in the Pulaski Circuit Court, for the sum of four thousand, nine hundred and ninety-one dollars and forty cents, and on the 14th day of January, 1878, sued out an execution upon this judgment, and caused the same to be levied on block ten in Woodruff's addition, but no sale thereof has been made; and insists that such levy should be first exhausted before fractional block one hundred and forty-five, claimed by him should be sold to pay the mortgage debt held by plaintiff; and that in the event, the levy should not be exhausted as insisted, he and his co-defendants should be subrogated to the rights of plaintiff under such levy, to the extent of any amount he or they may have to pay in order to protect their property against the foreclosure of plaintiff's mortgage. No copy of the judgment, execution, or return thereon was filed. Adams, as administrator, and Brodie adopted this part of Henley's answer.

Hiram A. Whittington, on his own application, was made defendant, and thereupon filed his answer and cross complaint, making plaintiff, Woodruff, Adams, as administrator, Henley, and James Brodie, defendants to his cross-complaint, and therein states as follows: That on the 9th day of December, 1853, Woodruff executed to him his promissory note, of that date, for five thousand dollars and ten per cent. per annum interest thereon from date until paid, payable on the 9th day of December, 1855, and on the same day mortgaged to him the northwest quarter of section thirteen (13) in township one (1) north, and in range twelve (12) west, fractional block one hundred and forty-five, lot seven in block thirty-six, lot seven in block ten in Pope's addition to

the city of Little Rock, and other lands and lots not described in plaintiff's mortgage, to secure the payment of the note; which mortgage was filed for record on the tenth day of December, 1853, with the recorder of Pulaski county; that various payments were made on the note at different times in the years 1858, 1871–2–3–4–5 and 1876; that on the 23d day of June, 1877, he commenced an action against the defendant, Woodruff and William E. Woodruff, jr., John Kumpe, and Kate B. Ashley, to foreclose his mortgage, and recovered thereon a decree foreclosing his mortgage, under which was sold and conveyed to him, Whittington, the afore described northwest quarter of section thirteen, fractional block one hundred and forty-five, lot seven in block thirty-six, and lot seven in block ten in Pope's addition: that at the time of the sale under the decree, which was on the 26th day of December, 1877, fractional block one hundred and forty-five had been forfeited for the taxes of 1873, 1874 and 1875, and he, Whittington, redeemed the same, on the 9th day of April, 1878, by paying the sum of six hundred and seven dollars and ten cents, the amount of the taxes, penalty and costs due on the same; that the claims of the defendant to his cross complaint to the property purchased by him as before stated, are clouds upon his title thereto and injure the sale thereof; and prays that his title to the same be forever quieted as against the defendants to his cross complaint; and that if the mortgage executed to the plaintiff in the original complaint is a valid security for any sum, that plaintiff be required to exhaust all his other securities before having recourse upon the lands purchased by him, and that in case of any decree adverse to his title to the lands purchased by him, that the taxes, penalty and costs paid by him be declared a lien on fractional block one hundred and forty-five; and that the same be sold to satisfy his lien. And by way of answer to the original complaint, he says that plaintiff's cause of action did not accrue within

seven years next before the commencement of this action; and that plaintiff's action is old and stale, and ought not to be enforced in a court of equity. He filed with his cross complaint and answer, as an exhibit thereto, a certified copy of his deed to the lands purchased at the sale under the decree, and the certificates thereto, from which it appears that the same was properly acknowledged on the 9th day of January, 1878, and approved by the court on the 12th day January, 1878, and was filed for record with the Recorder of Pulaski county, on the 17th day of January, 1878, and was recorded; and also filed and made an exhibit to his cross complaint, a certificate of the Clerk of the County Court of Pulaski county, showing the taxes, penalty, costs and interest due on fractional block one hundred and forty-five on the 22d day of March, 1878, to be six hundred and seven dollars and ten cents, for which is appended to said certificate a receipt of the Treasurer of Pulaski county, bearing date the 9th day of April, 1878.

Defendant, Henley, filed an answer to the cross complaint, in which he adopts his answer to the original complaint, and says: That between the payment which was made on the note on the 1st day of May, 1858, and the next payment thereafter made, which was on the 24th day of May, 1871, more than seven years had elapsed; that in the redemption of fractional block one hundred and forty-five, Whittington was a mere volunteer; that prior to the redemption by Whittington there was pending in the court an action commenced by him, Henley, to test the validity of the taxes of 1873, 1874 and 1875, and it was held and adjudged in that action by this court that a portion of these taxes amounting to one hundred and three dollars and forty-eight cents was illegal and void; that the levy of the taxes of 1873 was void because the assessment for that year was not sworn to, and was not filed until the 17th day of October, 1873, and he was thereby deprived of an appeal to the

county board of equalization for relief from an excessive valuation of block one hundred and forty-five, the same being assessed too high; that the amounts paid by Whittington in redemption as stated, were paid in depreciated scrips of the State, Pulaski county and the city of Little Rock; and sets up and pleads the seven years statute of limitation in bar of Whittington's right to maintain his cross complaint, and says he was barred at the time he undertook to redeem, and had no right to redeem on account of such bar.

The cause appears to have been heard and submitted on the pleadings and exhibits filed therewith, the written statement of Woodruff, and the account therto annexed, and the agreed statement of facts on file herein and hereinafter mentioned.

It was agreed in writing by and between plaintiff and defendants, Adams, as administrator, James Brodie, Henley, Laura Adams, Frank P. George, Carrie P. George, and Sallie G. George, that the statement of William E. Woodruff, sen'r, on file herein, and the account thereto annexed should be received and considered as evidence in the hearing of this action, which statement is to the following effect: The account annexed is correct; that he, Woodruff, does not remember any understanding between Daniel Ringo and himself to the effect that the items of the account should be credited on the writing obligatory, as of their respective dates; but he has no recollection of any indebtedness of himself to Ringo other than that evidenced by the aforementioned writing obligatory, and he would not have paid Ringo's taxes "from 1855 to date of final settlement in 1870" as he did, unless he "had expected that the credits would be so allowed;" that he never disputed the validity of the mortgage to Ringo, but always acknowledged it was valid and binding on him. The account referred to in Woodruff's statement is a statement of the amounts due

Woodruff from Ringo for taxes paid by Woodruff for Ringo at various times in the years 1855–6–7–8–9, 1860–1–2–3–6–7 and 1868, commissions for paying same, and for acceptance of an order of Ringo in favor of Woodruff & Blocher on Woodruff for $101.67, dated the 19th day of February, 1870, amounting in the aggregate to the sum of $2,862.07; and is also a statement of an account between Ringo and Woodruff, in which Woodruff is charged with his indebtedness to Ringo, and is credited, as if of different dates in the years 1855–6–7–8–9, 1860–1–2–6–7–8 and 1870, with the taxes paid by him as aforesaid, and said commissions and acceptance, and the balance on said indebtedness due Ringo on the 19th day of February, 1870, was ascertained.

In the agreed statement of facts by plaintiff and the city of Little Rock, filed herein, it is admitted that the city of Little Rock became the purchaser of the southeast quarter of section eleven, in township one north, and in range twelve west, from William E. Woodruff, sen'r, and that the same was conveyed by a warranty deed to the city of Little Rock by Woodruff, on the 31st day of December, 1862, in consideration of the sum of five thousand dollars paid Woodruff by the city of Little Rock; that the deed was recorded on the 26th day of February, 1863; that Woodruff first sold the land to Paul B. Starbuck, on the first day of March, 1850, and executed to Starbuck a bond for title; that Mary Starbuck, as administratrix of Paul B. Starbuck, deceased, on the 4th day of November, 1862, sold and conveyed the same to the city of Little Rock, by a warranty deed, which was duly recorded; that the city of Little Rock took possession thereof on the 4th day of November, 1862, and she and her vendees have held actual, continuous, notorious and adverse possession of the same at all times since; and have converted the same into a cemetery, and it is now used as a public burial ground, where many thousands of dead are buried; and that such adverse possession was well known to Daniel Ringo in his life time.

In the agreed statement of facts by plaintiff and the defendant, John D. Adams, as administrator of Alexander George, deceased, filed herein, it is admitted that Woodruff, on the 18th of May, 1866, sold and conveyed lot seven in block thirty-six, to Anthony Catharina; that Catharina, on the 25th day of October, 1870, sold and conveyed the same to Alexander George; that Alexander George died in 1871, and John D. Adams is his duly qualified and acting administrator. That Catharina from the time of the conveyance to him and until he conveyed the same, and Alexander George, from the time the same was conveyed to him until he died, and Adams as such administrator, from George's death and at all times since, have been in actual and continuous possession and occupancy thereof, and during all that time have openly controlled the same, and paid taxes thereon "as their absolute property."

In the agreed statement of facts by plaintiff and defendant Brodie, it is admitted that Woodruff, on the 28th day of April, 1862, sold and conveyed lot seven in block ten, in Pope's Addition to Bogart Laughlin; that Bogart Laughlin, on the 24th day of October, 1862, sold and conveyed the same to Benjamin Peyton Brodie; that Benjamin Peyton Brodie died in the year 1863, intestate, leaving Robert Brodie his only heir and distributee at law; that on the 22d day of February, 1871, Robert Brodie sold and conveyed the same to defendant Brodie; that immediately after the conveyance to Laughlin, Laughlin took possession thereof, and he, Laughlin, Benjamin Peyton Brodie, and James Brodie have, severally, each one from the time it was conveyed to or inherited by him until he conveyed the same or died, been in actual and continuous possesion and occupancy thereof since the date of the conveyance from Woodruff to Laughlin to the present time, and during all that time have openly controlled and improved the same and paid taxes thereon as their "own absolute property."

In the agreed statement of facts by plaintiff, and the defendants, Adams, as administrator, Brodie and Henley, it is admitted that plaintiff recovered a judgment against Woodruff, in the Pulaski Circuit Court, on said writing obligatory in the month of June, 1877, for $4,495, and ten per cent. per annum interest theron from the date of the judgment until paid; that in the month of January, 1878, plaintiff caused an execution to be issued on said judgment and levied on block ten in Woodruff's addition to the city of Little Rock, and to be held up without sale, and to be returned accordingly; that this block ten is the homestead of Woodruff; that no part of this judgment has been paid; and the aforesaid levy still remains in full force and effect.

In the agreed statement of facts by plaintiff and defendant, Henley, it is admitted, that on the first day of October, 1869, Woodruff sold and conveyed fractional block one hundred and forty-five, to Josiah Caldwell, by deed which was duly recorded; that thereafter this block was listed for taxation in the name of Caldwell, who paid taxes thereon; that the same was forfeited for the taxes of 1873-4, and 1875, and redeemed as set forth in Whittington's answer and cross-complaint; that Caldwell caused many soundings and surveys of the Arkansas River to be made in 1870, with the view of building a bridge across the river at this block, which fronted on the river, and Daniel Ringo was informed of Caldwell's intention as to the building of such bridge; that sometime after this a company was formed for the purpose of building the bridge, and for three months in the year 1872, Caldwell had three men blasting rock on this block with a view of constructing this bridge, which Ringo knew, and that he never intimated to Caldwell or Henley, that he had any claim on this block, and they never knew he had until the commencement of this action.

On the hearing a final decree was rendered by the court

below, in which the cross-complaint as to Adams, as administrator, and James Brodie, and the original complaint as to all the defendants were dismissed, and the title of Whittington to the northwest quarter of of section thirteen was quieted as to all the defendants; and the claims of Whittington to fractional block one hundred and forty-five, except as to a lien thereon for the taxes, penalty, costs and interest paid by him in redemption thereof, was held for naught, and a master was appointed and directed to ascertain and report what taxes were properly levied on fractional block one hundred and forty-five for the years 1873–4, and 1875; and such taxes were declared a lien on same, and defendant Henley was allowed sixty days after the confirmation of the master's report to pay the taxes and interest thereon from the time they were paid by Whittington; and it was ordered, that in default of payment within the sixty days, fractional block one hundred and forty-five should be sold to pay the same and interest thereon; and it was adjudged that each party should recover of plaintiff all his costs, except Whittington, and that he pay all the costs incurred on account and because of his cross-complaint.

Plaintiff filed a motion for reconsideration, which was overruled, and he appealed.

Courts of Equity have never favored stale claims and demands, but on the contrary, from the commencement of their jurisdiction, and before the enactment of any positive statute by any legislative body for the limitation of actions at law, have invariably and decidedly discountenanced laches and neglect. Until Parliament fixed the time in which actions at law should be commenced, they maintained no definite period of limitation, but refused relief to those who slept on their own rights an unreasonable length of time, and in determining what lapse of time was a bar in such cases, were governed by the peculiar circumstances of each case.

But when and as often as Parliament limited the time of actions and remedies to a certain period in legal proceedings, they adopted the same rule and applied it in similar cases in equity. "For," as Lord Camden observed in *Smith v. Clay* (3 Bro., 639, note,) "when the legislature fixed the time at law, it would have been preposterous for equity, (which by its own proper authority always maintained a limitation,) to countenance laches beyond the period that they had been confined to by Parliament. And, therefore, in all cases, when the legal right has been barred by Parliament, the equitable right to the same thing has been concluded by the same bar." "This," says Chancellor Kent in *Kane v. Bloodgood*, 7 *Johns. Ch.*, 112, "has been the uniformly acknowledged doctrine ever since the statute of Jas. I. was enacted. A demand for 200 pounds was held barred by the statute as early as 9 Chas. I. in *Kennedy v. Vanlove*, (1 *Ch. Rep.*, 38,) and again in *Pearson v. Pulley*, (1 *Ch. Cas.*, 102, 20 *Car. II.*) the Lord Keeper said he considered twenty years to be a fit time within which a mortgage was to be redeemable, in imitation of the statutes of limitations in real actions. So early were the statutes of limitation admitted to be the rule of decision in equity as well as law, and though the courts of equity were not within the words of the statute, the time presented by them was adopted by analogy as a fit and just period for a bar in equity of analogous claims."

1. Statute of limitations against mortgages.

Guided by the rule that whenever the legislature has limited a period for law proceedings, equity will, in analagous cases, consider equitable rights as barred by the same limitation, the courts of this State, in determining when a suit to foreclose a mortgage on real property is barred, have, invariably, followed the statute of limitations, which fixes the time in which the mortgagee is allowed to bring an action at law for the recovery of the land; and held that both these actions can be brought in the same period of time. This is well settled by this court, without a single conflicting

opinion. See *Birnie v. Main*, 29 *Ark.*, 591; *Coldcleugh v. Johnson*, 34 *Ark.*, 312; *Waddell v. Carlock*, 41 *Ark.*, 523; *Harris v. King*, 16 *Ark.*, 122; *Guthrie v. Field*, 21 *Ark.*, 379, *Hall v. Denckla*, 28 *Ark.*, 506. It must then necessarily follow, and there is no escaping the conclusion, that seven years adverse possession is necessary to bar an action like this; for the mortgagee can sue at law, at any time after the right of possession accrues, for the recovery of the land mortgaged until it is barred by seven successive, consecutive years of adverse possession. It is true that the statute, which fixes the time in which these actions shall be brought, expressly provides: "No person or persons, or their heirs, shall have sue or maintain any action or suit, either in law or equity, for any lands, tenements, hereditaments, but within seven years next after his, her, or their right to commence, have or maintain such suit shall have come, fallen or accrued." But the right of action does not accrue until there is an adverse possession, and, in the absence of limitation, ceases when there is no longer any adverse possession; for the rightful owner is deemed to be in possession until he is ousted or disseized, and, in the absence of limitation, is restored to possession when the hostile possession ceases. This is the result of the well settled principle of law, that possession follows title in the absence of any possession adverse to it, and there can be but one actual seizin of the same estate at one and the same time. *Bradley v. West*, 60 *Mo.*, 40; *Pulaski County v. State*, 42 *Ark.*, 118; *Byers v. Danley*, 27 *Ark.*, 77; *Trapnall v. Burton*, 24 *Ark.*, 371; *Ellsworth v. Hale*, 33 *Ark.*, 633; and *Kirk v. Smith*, 9 *Wheaton*, 241.

Adverse possession.

In speaking of the rules which apply to the statutes of limitation generally, Chief Justice Marshall, in *Kirk v. Smith*, *supra*, said: "One of these, which has been recognized in the courts of England, and in all others where the rules established in those courts have been adopted, is, that

possession to give title, must be adversary. The word is not, indeed, to be found in the statutes; but the plainest dictates of common justice require that it should be implied. It would shock that sense of right which must be felt equally by legislators and judges, if a possession which was permissive, and entirely consistent with the title of another, should silently bar that title. Several cases have been decided in this court, in which the principle seems to have been considered as generally acknowledged; and in the state of Pennsylvania, particularly, it has been expressly recognized. To allow a different construction, would be to make the statute of limitations a statute for the encouragement of fraud—a statute to enable one man to steal the title of another by professing to hold under it. No laws admit of such a construction."

It not only follows from the rule for fixing the period of limitation of equitable actions adopted by the Courts of Equity in England and in this country, and followed from the twenty-first year of the reign of James I., down to the present time, and upon principle, that seven years adverse possession is necessary to bar an action to foreclose a mortgage on land, but it has been so expressly held in the latest and best considered opinions of this court upon this question; and these opinions are most unquestionably sustained by the decided weight of authority. *Birnie v. Main, supra; Coldcleugh v. Johnson, supra; Harris v. King, supra; and the authorities hereinafter cited.*

What is adverse possession against mortgages.

Seven years adverse possession is necessary to bar an action for the recovery of land and an action to foreclose a mortgage on real property. What, then, is necessary to constitute that possession? It is well settled by the authorities that this possession must be actual, open, continuous, hostile, exclusive, and be accompanied by an intent to hold adversely and "in derogation of" and not in "conformity

with" the rights of the true owner, or mortgagee, and must continue for the full period prescribed by the statute of limitations. The wisdom and policy of this rule is manifest. It must be actual, either of all or part of the land claimed, as the same may be held with color of title or without; because constructive possession follows the title, and there cannot be two possessions of the same land at the same time; and the owner being in possession by virtue of his title, remains until he is disseized or ousted by another entering and holding for himself. It must be open in order to give the owner notice of the adverse claim, and force him to protect his rights, or lose them by a failure to assert them within the period of time allowed him by the statute to do so. It must be continuous, because when it ceases the seizin of the owner revests and the statute ceases to run; and any subsequent ouster or disseizin forms the beginning of a new period of limitation and of a new adverse possession. It must be hostile in order to show that it is not held in subordination and subserviency to the title of the owner. It must be exclusive, because the owner's possession continues until he is disseized and there cannot be two actual possessions of the same premises at the same time; and in case the owner and another are in actual occupation of the same land, the legal possession follows the title. It should be accompanied by the adverse intent, because it is necessary to fix "the character of the original entry, and determine whether it be an ouster or a mere trespass, or whether the possession be in subordination or in hostility to the true owner." The possession should be continuous and unbroken during the statutory period so "as to leave no doubt on the mind of the true owner, not only who the adverse claimant was, but that it was his purpose to keep him out of his land." *Angell on Limitations*, (*5th Ed.*) *Secs.* 386, 390, 392; 3 *Washburn on Real Property*, (*4th Ed.*) 134, 135; 2 *Smith's Leading Cases*, (*5th Am. Ed.*) 560, 561, 565; 2 *Greenleaf on*

Evidence, Secs. 430, 557; *Sedgwick & Wait on the Trial of Title to Land*, Sec. 724–753; *Bradstreet v. Huntington*, 5 *Peters*, 440; *Ewing v. Burnett*, 11 *Peters*, 41; *Harris v. King*, *supra*; *Mooney v. Coolidge*, 30 *Ark.*, 640; *Blood v. Wood*, 1 *Met.* (*Mass.*,) 528; *Little v. Downing*, 37 *N. H.*, 367; *Byers v. Danley*, *supra*.

Was the possession of appellees and their grantors adverse and sufficient to bar this action? To decide this question correctly it is necessary to understand what interest and rights the mortgagee acquired in the mortgaged premises, and the relation the mortgagor and his vendees, and those claiming under them, sustained to him. For, in the absence of evidence of the declarations of the mortgagor, or those claiming under him, showing that he or they held in open hostility to the mortgagee, it will be impossible to ascertain whether or not his or their possession was adverse by reason of its being hostile to or inconsistent with the rights of the mortgagee, unless we know what those rights were. It would be preposterous to say, that the possession of a mortgagor and those claiming under him was adverse to the mortgagee, in the absence of declarations brought home to the mortgagee, showing that he or they were holding in hostility to him, when such possession was consistent and in accord and harmony with all the rights of the mortgagee. No possession which is consistent with the rights of the mortgagee can be adverse to him.

Relative rights of mortgagor and mortgagee.

What, then, are the interest and rights of the mortgagee in lands mortgaged for the payment of debts, and what relation does the mortgagor sustain to him? In equity, as well as at law, the legal estate in the mortgaged premises is in the mortgagee until the debt secured by the mortgage is paid. At law this estate becomes absolute upon the failure of the mortgagor to perform the conditions of the mortgage, while in equity it is at all

times before foreclosure, subject to redemption. In equity the legal estate is in the mortgagee, and is held by him as a trust estate for the purpose of securing his debt and the payment thereof; and upon the default of the mortgagor in the performance of the conditions of the mortgage he has the right to take possession of the mortgaged premises and apply the rents and profits arising therefrom to the payment of his debt. Until the mortgagee does so, or being entitled to possession under the mortgage demands it, the mortgagor has a right to collect the rents and profits and use the same as his own, without being in any manner held accountable to the mortgagee therefor, and to improve, use, occupy and deal with the mortgaged premises as the owner thereof, and may lease or sell the same. In so doing he does not act adversely to the mortgagee, but acts in the exercise of the dominion over the property vested in him by law and in equity. All these acts are, however, subject to the mortgagee's rights. His possession is in subordination to the rights and interest of the mortgagee. But he may, by his acts or declarations, openly repudiate the mortgage, deny the rights or interest claimed under it, and convert his holding into an adverse possession. Until he does so, his possession is subordinate to the rights and estate of the mortgagee and consistent therewith. *Conard v. The Atlantic Ins. Co.*, 1 *Peters*, 441; *Jones on Mortgages, Sec's.* 11, 58, 672, 667, 670, 673, 676, 697, 699, 703, 1152, 1194, *and authorities cited*; 4 *Kent Com.* (11*th Ed.*) 170-172; 2 *Story's Eq.* (6*th Ed.*), 1013 *and note* 2, 1015, 1017; *Angell on Limitations*, *Sec.* 449.

Was the occupancy of the mortgagor, Woodruff, consistent with or adverse to, the rights and interest of the mortgagee? Upon the answer of this question, it seems difficult to entertain a serious doubt. He never disclaimed or disavowed the title of the mortgagee, but

on the contrary, he states, he never disputed the validity of the mortgage, but, with the view of paying the mortgage debt, made payments to, and advanced money and paid taxes for, the mortgagee, from time to time, and at intervals, between none of which was there a seven years lapse. Between the maturing of the mortgage debt and first payment and the last payment and the commencement of this action less than seven years intervened. The evidence clearly shows that his possession was not adverse to, but entirely consistent with the rights and interest of the mortgagee.

But appellees insist, that there was an interval between the thirteenth day of July, 1855, and the nineteenth day of February, 1870, in which Woodruff made no payments on the mortgage debt, and that, therefore, plaintiff should not maintain this action against them. But this is not sustained by the evidence, which shows, that in this interval Woodruff advanced moneys and paid taxes for Ringo with the expectation of receiving, and under a tacit agreement that he should receive, credit therefor on the mortgage, which Ringo afterwards gave him. There was nothing in this interval to show that Woodruff held adversely to Ringo, but on the contrary the evidence establishes the reverse.

Appellant is not barred from maintaining his action against Woodruff. Do those claiming under Woodruff stand in a better position than he did at the time he conveyed to them? The mortgage executed by Woodruff to Ringo having been filed for record and recorded, became a notice to all subsequent purchasers and mortgagees, of its execution, existence and contents. With this notice the grantees of Woodruff purchased portions of the mortgaged property and acquired the interest he held therein and took his title subject to the mortgage.

They acquired no rights and interest other than he had. They simply took the place of Woodruff, and are bound by his previous recognition of the mortgage as a subsisting incumbrance on the property purchased by them. Taking the place of Woodruff as to the property purchased, their possession thereof was, as Woodruff's, subordinate to the rights and interest of the mortgagee, and remained so until they, by their acts or declarations, made it adverse; and it is persumed that it remained subordinate until such time as the evidence clearly shows it was rendered inconsistent with the rights of the mortgagee, by such declarations or acts as were sufficient to put the mortgagee on notice that they were claiming and holding in hostility to his rights and adversely to him. *Coldcleugh v. Johnson, Supra*; *Jones on Mortgages, Sec.* 1202; *Medley v. Elliot*, 62 *Ill.*, 532; *Thayer v. Cramer*, 1 *McCord* (*S. C.*) *Ch.* 395; *Mitchell v. Bogan*, 11 *Rich. Eq.*, (*S. C.*) 686, 706; *Wright v. Eaves*, 5 *Rich. Eq.*, 81; *Hughes v. Edwards*, 9 *Wheaton* 489; *Martin v. Jackson*, 27 *Pa. St.*, 504; 2 *Zeller's Lessee v. Eckert*, 4 *How.* 289; 3 *Washburne on Real Property*, (*4th Ed.*) 158; *Smith v. Hosmer*, 7 *N. H.* 436; *Smith v. Burtis*, 6 *Johns.* 218; *Jackson v. Sharp*, 9 *Johns.* 163; *Pierson v. Turner*, 2 *Ind.*, 123; *Alexander v. Polk*, 39 *Miss.*, 755; *and the authorities on adverse possession hereinafter cited.*

Several of the appellees say, in their respective answers, that they and their grantors held possession of the tract, lot or block respectively claimed by them, for more than seven years next before the commencement of this action, and during that time no payment was made by them, or either of them, on the writing obligatory described in plaintiffs complaint, or with their knowledge or consent. They insist that such possession was adverse and that appellant is barred from maintaining his action as to the

property claimed by them, by reason thereof. Are they correct?

In *Mayo & Jones v. Cartwright*, 30 *Ark.*, 407, cited and relied upon by appelles, the facts are these: One George Washington, being the owner and occupant of a certain tract of land, conveyed the same, on the eighth day of April, 1856, by deed of trust, to Mayo, to secure the payment of certain notes he owed one Loftus. The deed of trust contained a power of sale; was acknowledged and recorded on the tenth day of April, 1856; and the trust was accepted by Mayo. Washington still remained in possession until some time in December, 1857, when he sold and delivered possession of the land to Cartwright, who since then remained in possession, and used, cultivated and improved it. In October, in 1868, Mayo undertook to sell the land under the power of sale contained in the deed of trust, and Cartwright brought suit to enjoin the sale. In the opinion in that case the pleadings are not set out in full, but it seems that the main ground for relief set up in the complaint was the uninterrupted adverse possession for more than seven years, which was set up by Cartwright as a bar to the sale of the land by the trustee under the trust deed; and that "defendants, in their answer, admitted the purchase and possession of the land by the complainant, but denied that their [right to enforce the trust was barred by limitation, upon the ground that the statute bar was suspended during the late war, and that deducting that time, seven years had not elapsed between the time the *adverse possession commenced* and the time when the trustee attempted to enforce his trust;" and that several payments had been made by Washington upon the notes secured by the deed of trust, up to, and as late as the year 1862. This court held that the statutes of limitatlon was not suspended by the war in that case, and that the payments made by Washington after he

sold the land did not arrest the statute as to Cartwright. It did not undertake to say, in that case, what is necessary to constitute adverse possession. The effect of the failure of Cartwright to make payments on the debts secured by the deed of trust, while he remained in possession of the land, upon his possession was not even considered. The only questions of limitation decided in the case were: Did the war suspend the statute of limitations, and if not, did the payments made by Washington *arrest* the statute of limitation as to Cartwright? There was no occasion for the court to pass upon any others; as it appears that the defendants in that case admitted the possession of Cartwright to be adverse.

But the question in this case is not, was the statute of limitation arrested by the payments made by Woodruff, but is, was the possession of appellees and their grantors adverse? Unless it was at some time adverse, the statute never commenced running and there was nothing for the payments to arrest. In this case the grantees of Woodruff acquired such title, estate and possession as he had. He could convey or deliver no other. That possession was consistent with the rights of the mortgagee and subordinate to his interest, and remained so until it was rendered inconsistent by such acts or declarations as were sufficient to put Ringo on notice that it was held in hostility and adversely to his rights. The failure of appellees or their grantors to make payments could not make their possession adverse, unless it was their duty or they were under obligations to pay. Such failure was not inconsistent with the rights of the mortgagee. For if they had not assumed the mortgage debt, (and there being no evidence that they did, it is not presumed they did) they were under no obligations to pay it; and they had a right to remain in possession of

the property purchased by them, without paying the mortgage debt, or any part of it, and in so doing did nothing in hostility to the mortgagee's rights, but acted in the exercise of a right acquired by their purchases, which was perfectly consistent and in accord with those of the mortgagee. Such conduct being consistent with the rights of Ringo, and his executor, could not make the possession of appellees, or their grantors adverse. See authorities before cited, and *Jones on Mortgages*, *Sec's.* 738, 748; *Johnson v. Monell*, 13 *Iowa*, 300; *and Hull v. Alexander*, 26 *Iowa*, 569.

The agreed statement of facts by plaintiff and the defendant, City of Little Rock, shows that the City of Little Rock held actual, continuous, notorious and adverse possession of the South East quarter of section eleven (11) in township one (1) North and in range twelve (12, West, under a deed of conveyance thereof, executed to her by Woodruff for more than seven years next before the commencement of this action, with the knowledge of Daniel Ringo, in his lifetime, and the plaintiff is thereby barred from maintaining his action to foreclose his mortgage upon this tract of land. Appellant concedes this much in his brief.

Adverse possession.

The agreed statement of facts by plaintiff and John D. Adams, as administrator of Alexander George, deceased, and by plaintiff and James Brodie, show that possession of the lots, respectively, claimed by Adams, as administrator, and Brodie, was held by them and those through whom they respectively claim from Woodruff, for more than seven successive years next before the commencement of this suit. But was this possession sufficient to constitute a bar under the statute of limitations? It is admitted that they openly controlled these lots, and paid taxes thereon, as their absolute property. But it is also

admitted that they claim and derived their respective titles to these lots from Woodruff, through grantors, to whom Woodruff sold and conveyed after plaintiff's mortgage was executed and recorded. There is no evidence that Daniel Ringo, or his executor, at any time, demanded possession of these lots, or refused to permit Adams, as administrator, or James Brodie, or any one of those under whom they respectively claim, to hold possession thereof. Under this state of facts they, and those under whom they claim, had the right to use, occupy, improve and control these lots as their own property, and could have done so without infringing upon or violating any right of Ringo, or his executor. Such possession being consistent with the rights of the mortgagee is presumed to have been held in subordination to his title, unless the evidence clearly proves that it was adverse and hostile to the owner of the mortgage. No secret intent to hold adversely would have been sufficient to convert such possession for any length of time into a bar under the statute of limitations; but it must have been held for seven years in open denial of the title of the mortgagee and his legal representative, and in such manner and accompanied with such acts or declarations as was sufficient to put Ringo, or his executor, on notice that it was held adversely and in hostility to his rights and interest. The fact that Adams, as administrator, and James Brodie, and those under whom they claim, respectively held possession of, controlled and paid taxes on, the lots severally claimed by them, as their absolute property, is not sufficient to prove that their possession was adverse to plaintiff, or his testator, or that they controlled and dealt with them in a manner inconsistent with the rights of Ringo, and his executor, under the mortgage. They might have done so and not have given the slightest indication that they held in hostility to the rights and interest

of plaintiff or his testator. According to the evidence adduced in the court below plaintiff is not barred from maintaining his action to foreclose the mortgage upon these two lots.

The agreed statement of facts by plaintiff and Henly does not show that Henly and Caldwell, or either of them, held adverse possession of fractional block one hundred and forty-five for seven years next before the commencement of this suit, even if the possession of each of them be united. The facts relied on to show adverse possession were all within seven years next before the commencement of this action and the filing of Henly's answer, and it follows there is nothing to bar plaintiff's action as to fractional block one hundred and forty-five.

There is no proof that plaintiff's action is barred by any act of Whittington, or that Whittington's mortgage, second in time and order of filing, has acquired precedence over plaintiff's.

2. CHANCERY PRACTICE: No cross-relief without cross complaint.

Several of the defendants insist, in their respective answers, that the levy on block ten, in Woodruff's addition, to satisfy the execution issued on the judgment recovered by plaintsff against Woodruff should be first exhausted before the sale of any part of the property described in plaintiff's mortgage; and that, in the event plaintiff's mortgage should be held a valid and subsisting lien on the tracts, lots and blocks respectively claimed by them, and the enforcement thereof is not barred by the statute of limitations, such tracts, lots and blocks should be sold in the inverse order of the alienation thereof by Woodruff, until such liens shall be satisfied, and that so much thereof as shall then be unsold should be discharged of the lien; and that if plaintiff is not required to exhaust the aforesaid levy before selling any part of the mortgaged premises, and any part of the mortgaged

property should be sold to satisfy the lien held by the plaintiff under his mortgage, those of them claiming the the tract, lot or block so sold should be subrogated to the rights acquired by plaintiff under such levy. But neither of them made his answer a cross-complaint. Failing to do this, there was lacking the pleading which was necessary to authorize the court below to grant them such relief. For in asking this relief they seek to go beyond the inquiry proposed by the complaint, and ask for relief against co defendants which is dependent on facts of which no statement is made in plaintiff's complaint and are not involved in the determination of the relief plaintiff is entitled to, or in the determination of the questions presented by the allegations of his complaint, and are not responsive to the allegations of the complaint, and cannot be set up in opposition to the relief prayed for by plaintiff. To obtain this relief insisted on by defendants, as stated, it was necessary for them to have stated the facts upon which they demanded it, and asked for it, in an answer made a cross-complaint against the co-defendants against whom the relief was sought. It was not sufficient to state the facts and ask for the relief in the answer, but the answer should have been made a cross-complaint against the co-defendants who would have been affected by the relief if it had been granted. "Parties defendant are as necessary to" cross-complaints "as to original" complaints, "and their appearance in both cases is enforced by process in the same manner," unless there is a formal appearance entered on the record or answer filed. An answer in the nature of a cross-complaint, "which makes nobody defendant, which prays for no process, and under which no process is issued" as in this case "is a nullity." Unless he be made a party defendant in the answer in the nature of a cross-com-

plaint in the manner indicated, the co-defendant is not required to answer the allegations constituting the grounds of relief asked for against him; and as corollary to this it follows, no proof is required to disprove the allegations on which this relief is asked. *Gantt's Digest, Sec.* 4550; *Mars v. Lewis*, 31 *Ark.*, 204; *Garner v. Beaty*, 7 *J. J. Marsh*, 229; *Rogers v. McMacham*, 4 *J. J. Marsh*, 37; *Washington Railroad v. Bradley*, 10 *Wall.*, 299.

Then, again, there is no evidence on which this relief against the co-defendants could be granted. The interests of the defendants in the subject matter of the action are separate and distinct; and the admissions contained in the several agreed statements of facts upon which the action was heard and submitted cannot affect any one except those who respectively made them. 1 *Greenleaf on evidence, sec.* 174.

The sale under which Whittington claims did and does not affect plaintiff and the defendants in this action who were not parties to the suit in which it was made. None of the parties to this action who were not parties to the suit instituted by Whittington, are bound or affected by the decree or any proceeding therein.

Whittington, having acquired an interest in fractional block one hundred and forty-five by the mortgage executed to him by Woodruff, and claiming to be the purchaser and owner thereof under the decree foreclosing his mortgage, and having redeemed the same from a forfeiture on account of the non-payment of taxes, which were a paramount lien thereon, in order to protect the interest he claimed therein, is entitled by subrogation to reimbursement out of the block itself for the taxes, penalty, costs and interest legally chargeable against the same, which he paid in the redemption thereof. Having benefited all parties interested by relieving them from

the payment of such taxes, penalty, costs and interest in an effort to protect the interest he claimed, the plainest equity demands he should have a lien therefor by subrogation. *Blodgett v. Hitt*, 29 *Wis.*, 169; *Levy v. Martin*, 48 *Wis.*, 198; *Copehart v. Mhoon*, 5 *Jones' Eq.* (*N. C.*), 178; *Gilbert v. Gilbert*, 39 *Iowa*, 657; *Whitaker v. Wright*, 35 *Ark.*, 515; *Johnson v. Payne*, 11 *Neb.*, 269.

It is therefore the opinion of this court, that appellant is entitled to a foreclosure of his mortgage upon lot seven in block thirty-six, lot seven in block ten in Pope's addition, fractional block one hundred and forty-five, and the North West quarter of section thirteen, in township one North and in range twelve West, by sale, and to the payment of his debt out of the proceeds arising from such foreclosure so far as the same will extend; that Whittington is entitled to a lien on fractional block one hundred and forty-five for such taxes, penalty, costs and interest paid by him as was properly and legally chargeable against the same, and legal interest on the amount so paid from the date of the payment thereof, and to the enforcement of such lien, and to be first paid such taxes, penalty, costs and interest out of the proceeds of any sale of fractional block one hundred and forty-five which may be made in this cause; and that the complaint was properly dismissed as to the City of Little Rock.

There being no appeal taken by any of the defendants from the decree of the court below, and no complaint on their part as to such decree, the same will be permitted to remain in force as to them, except wherein it affects appellant and is inconsistent with this opinion. The decree of the court below so far as it is inconsistent with this opinion is therefore reversed, and this cause is remanded with instructions to that court to enter a decree herein in accordance with this opinion, and to cause the

same to be executed according to the statutes and equity practice in force in this State, and to adjust the costs incurred in the court below in such manner as to the Chancellor, in the exercise of his discretion, may seem equitable.

S. F. CLARK, S. J. In regard to that part of the mortgaged property claimed by the defendant Brodie, to-wit: Lot number seven in block number ten in Pope's addition to Little Rock, I differ from the majority of the court for the reasons which follow:

It is agreed that the possession of Brodie and those under whom he claims was sufficient as to length of time (seven years) to bar the action of the mortgagees. But it is held that his and their possession were not sufficiently adverse to the mortgagee's title to entitle him to the benefit of the statute of limitations, and that the statute did not commence running in behalf of that possession.

The answer of Brodie alleges that Woodruff, the mortgagor, on the 28th day of April A. D., 1862, sold this lot to S. B. Laughlin for the sum of $700 cash paid, and conveyed it to him; that on the 24th of October in the same year Laughlin sold and conveyed it to Benjamin Peyton Brodie, a minor, for the sum of eight hundred dollars cash paid; that Benjamin P. Brodie dying without heirs of his body, the property descended to his father Robert Brodie, who for the consideration of $2,000 cash, conveyed it to the defendant James Brodie on the 22d of February A. D. 1871.

And the agreed statement of facts expressly admits that these parties have, ever since the purchase by Laughlin on the 28th of April, 1869, held actual and continuous possession and occupancy of said lot, and

during all that time have openly controlled and improved the same and paid taxes thereon as *his and their own absolute property.*

In the case of *Coldcleugh v. Johnson's Adm'r*, 34 *Ark.*, 312, it was held by this court that while the statute does not run in behalf of the mortgagor who simply remain in possession, yet it is competent for him at any time to make his possession adverse and set the statute running in his behalf by some open and notorious act inconsistent with the mortgagee's title. There is no decision of this court, nor is it indicated in the opinion of the majority in this case, what kind of a public or notorious act is required to set the statute running in behalf of the mortgagor or his vendeee.

If selling the whole property—not the equity of redemption merely—to a stranger, by a mortgagor, after forfeiture, and putting the purchaser into actual possession as his own absolute property is not such a public and notorious act as will convert a friendly possession into an adverse one, then it is in my opinion useless to speculate as to what will be such notorious act, and there is and can be practically no such thing in the law, as a plea of the statute of limitations to an action to foreclose a mortgage.

The very essence of an adverse possession is a possession in one's own right—holding, improving, paying taxes on the property as his own absolute property. An admission of such a possession excludes every idea of a holding as tenant to any one or in subordination to any title whatever except his own.

In the case of the city of Little Rock, defendant in this case, the majority of the court have allowed the benefit of the statute under precisely the same state of circumstances, except that in the case of the city it is admitted

in the agreed statement of facts that Ringo, the mortgagee, in his lifetime knew of the adverse possession while it is silent as as to his knowledge in the case of Brodie.

In my opinion this is a distinction without a difference.

Actual possession is always notice to all parties interested in the lands. This is the general rule. There is no question here as to color of title. It is admitted that these parties were in the actual possession as their own absolute property. This admission is made by the plaintiff—the mortgagee, which, if actual knowledge of such possession were material, would, it seems to me, be an admission of such knowledge. But there is no reason why a mortgagee, who is a conditional owner, should not be required to take notice of parties in actual possession, and the character of such possession, any more than there is why an absolute owner should not.

The general rule where no statute on the subject prevails, is, as derived from English jurisprudence, that the possession of the mortgagee or his vendee is not adverse to the title of the mortgagor whether before or after forfeiture; that such parties hold as tenants at will to the mortgagee, and the mortgage may be foreclosed at any time short of the time when it would by law be presumed to be paid, which was twenty years. This legal presumption was derived from a statute of 21st James I, chapter 10, section——, which took away the right of entry of all parties who had been out of possession for twenty years. 2 *Hilliard on Mortgages, page* 5. This general rule has been changed or modified in most of the States of the Union, and the different wording of such statutes and the different constructions given to them by the courts, has involved the whole subject in interminable confusion. But our statute (Gantt's Digest adopted in 1851, and extended to all cases in equity as well as

at law) is historically known to have been adopted for the express purpose of settling and quieting titles to land. Its express object was to vest title in any one who should hold possession in his own right, and as his own absolute property for the term of seven years against all the world—as well against the mortgagor as any absolute owner; and in my opinion no proper construction can make any decision of this court hold otherwise until the case of *Colcleugh v. Johnson's Adm'r* 34 *Ark.*, 312. In that case this court for the first time held that the statute would not run in behalf of a mortgagor in possession as against the mortgagee's right to foreclose, but held that the mortgagor might make his possession adverse by some open and notorious act inconsistent with the mortgagee's title, and which should give notice to the mortgagee. See the cases of *Sullivan v. Hadley*, 16 *Ark.*. 129; *Guthrie v. Field*, 21 *Ark.*, 379; *McGehee v. Blackwell*, 28 *Ark.*, 27; *Bernie v. Maine*, 29 *Ark.*, 591; *Mayo & Wright v. Cartwright*, 30 *Ark.*, 407.

In the case of *Bernie v. Maine*, this court decided that the statute would not run so as to bar a foreclosure by the mortgagee where the mortgaged property was not in possession of the mortgagor or his vendee but was vacant. It decided nothing further.

Whatever may have been the previous decisions, however, the rule adopted in the case of *Colcleugh v. Johnson's Adm'r*, is now the law on the subject. But if such a rule be adopted as to what constitutes an adverse and hostile possession in fact as cannot, or as in the ordinary business transactions of life, never does exist, then the court practically holds that there is no limitation by statute as between the mortgagor or his vendees, and the mortgagee's right to foreclose in this State.

In my opinion such a ruling is unfortunate because it

practically operates to revive mortgage liens which have been dormant for years, and will cast a cloud upon the validity of titles to real estate in many cases where those titles have been supposed to be settled and at rest.

Before the Hons. W. W. SMITH, Judge, and B. B. BATTLE and S. F. CLARK, Special Judges. Hons. S. R. COCKRILL, C. J., and J. R. EAKIN, Judge, not sitting.

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WHITTINGTON v. FLINT.

1. MORTGAGE: *Release of part of mortgaged lots by mortgagee.*
A release by a mortgagee of part of the mortgaged premises after the sale of the other part by the mortgagor, will not prejudice the lien for the whole debt on that part, unless at the time of the release the mortgagee had actual notice of the sale.

2. MORTGAGE: *Estate of mortgagee.*
The legal estate in mortgaged property passes to the mortgagee, subject to be defeated by performance of the conditions of the mortgage; and the right of possession follows the legal title, unless controlled by stipulations in the deed, or by the apparent intention of the parties.

3. MORTGAGE: *Adverse possession: Cases approved and overruled.*
The doctrine announced in *Harris v. King*, 16 *Ark.*, 122; *Birnie v. Maine*, 29 *Ark.*, 591; and in *Coldclough v. Johnson*, 34 *Ark.*, 312, as to adverse possession against a mortgagee, is approved; and the cases of *Sullivan v. Hadley*, 16 *Ark.*, 129; *Guthrie v. Field*, 21 *Ark.*, 371; *McGeehe v. Blackwell*, 28 *Ark.*, 27; *Hall v. Denckla*, *Ib.*, 506; and *Mayo v. Cartwright*, 30 *Ark.*, 407, so far as they hold that adverse possession may be set up by a mortgagor or his vendee with notice, without a distinct denial of, or acts inconsistent with the mortgagee's title, are overruled.

4. MORTGAGE: *Statute limitations: Adverse possession.*
Possession of the mortgagor, or his privies, including his grantees

with notice, will not be adverse, nor bar an action by the mortgagee for foreclosure, or for possession of the land, unless there has been an open and explicit disavowal and disclaimer of holding under the mortgagee's title, and assertion of title in the holder brought home to the mortgagee. The mere taking possession by the vendee of the mortgagor, and continued occupancy by him and his vendees for the period of the statutory bar; their open control and improvement of the land, and payment of taxes thereon as their own absolute property, with the intention of holding it against all comers, will not bar the action.

APPEAL from *Pulaski* Circuit Court.

Hon. J. W. MARTIN Circuit Judge.

U. M. & G. B. Rose for appellant.

In order to bar the claim of a mortgagee there must be an open, notorious and adverse possession. *Birnie v. Maine*, 29 *Ark.*, 591. In this case there was no adverse holding; no disclaimer of appellant's title.

The mortgagor until foreclosure has a right to hold the mortgaged premises, and unless he or those claiming under him does some open unequivocal act, sufficient to put the mortgagee upon his guard and warn him of the necessity of prompt action, the statute will not run, though upon general principles of equity he might be precluded from asserting his demand after twenty years. See also *Coldcleugh v. Johnson*, 34 *Ark.*, 312, in which the doctrine of *Birnie v. Maine* was re-affirmed, also *Medley v. Elliott*, 62 *Ill.*, 532; *Martin v. Jackson*, 27 *Penn. St.*, 504.

John M. Moore and C. B. Moore for appellees.

The release by Whittington of a part of the mortgaged premises (to the value of over $6,000.) thus throwing an additional burden on the lot in controversy, discharged

it *pro tanto*, to the extent of at least $6,000., from the lien of the mortgage. 6 *Paige*, 35; 14 *Wis.*, 307; 27 *Iowa*, 361.

The appellees and their vendors have been in actual, open, notorious, adverse possession and occupancy of the lot from the 1*st of May* 1869, and were in such open, adverse possession when this suit was commenced, *April* 4, 1878, more than nine years, and appellant is barred by the statute of limitation of seven years. The debt was barred, so far as appellees were concerned in 1877, when Whittington foreclosed; and these appellees were not parties to that suit, nor bound by it.

Under the doctrine in *Mayo & Jones v. Cartwright*, 30 *Ark.*, 407, payments by Woodruff did not revive the debt against appellees. They were not parties to the foreclosure suit, and the statute bar had attached when Woodruff made the payment May 24th, 1871, over thirteen years after the last prior payment of May 1st, 1858, and counting out the period of the war, over eight years between payments. In *Birnie v. Maine* the original mortgagor was the defendant in possession pleading the statute. In *Coldcleugh v. Johnson* the mortgaged premises had passed to the heirs of the mortgagee, and the court approved of the ruling in *Birnie v. Main* as between mortgagor and morgagee. But the court quotes and adopts this passage from note on p. 604 of 5 Bam. & Add. If the tenancy "be determined by death of the mortgagor, and his heirs or devisees enter and hold without any recognition of the mortgagee's title by payment of interest or other act, an adverse possession may be considered to take place."

In *Hall v. Denckla*, 28 *Ark.*, 506, which was a proceeding against the heirs at law of the original vendee under a bond for title, the court applied the bar upon the possession for the statutory period.

Whittington v. Flint.

SMITH, J. Whittington, on the first of April, 1878, brought ejectment against Flint and his tenants for a lot in the City of Little Rock. He claimed under a mortgage executed by William E. Woodruff, Sr., in the year 1853, and under a Master's sale and conveyance to him made pursuant to a decree of foreclosure. The mortgage had been recorded in due season in the proper office, and embraced other lots beside the one in controversy. The bill for foreclosure, to which the mortgagor was the sole defendant, was not filed until 1877; but the mortgagor had made partial payments on the debt in 1858, in 1871 and in every successive year thereafter down to and including 1876.

The defendant's chain of title consisted of the following links: In 1869 William E. Woodruff, Sr., sold and by bond obliged himself to convey this same lot to William E. Woodruff, Jr., or his assigns on receipt of the purchase price. Woodruff Junior afterwards re-sold one-half of the lot to Blocher and the other half to Adams. And to them Woodruff Senior, on the 29th of July, 1872, conveyed their several parts by deeds with covenants of general warranty. Blocher subsequently acquired Adams' half and in 1874 mortgaged the whole lot to Flint. At the sale under this mortgage, Flint purchased and received a conveyance. All of the instruments except the bond for title, were put upon the public records soon after they were made.

1. Release of part of mortgaged property. Effect on balance.

The defendant relied upon the statute of limitations and adverse possession for a period of more than seven years. His answer also averred that the plaintiff had, in 1870, released the other lots described in his mortgage from the lien and operation thereof. The truth of this last mentioned allegation is admitted in the agreed statement of facts upon which the case was tried. But as it is not alleged

nor shown that when the release was made the plaintiff had actual notice of the prior sale to Woodruff Junior, the circuit court, to which the cause was submitted without calling a jury, properly ignored this defence as an immaterial issue. *Birnie v. Main*, 29 *Ark.*, 591; *Jones on Mortgages*, *Sec.* 981.

The facts set up as constituting adverse possession and held insufficient.

It was also agreed that Woodruff Junior had taken possession on the first of May, 1869, and that he, and those claiming under him, had been in the continuous occupancy of the premises ever since; during which time they had openly controlled and improved the same, and had paid taxes thereon as their own absolute property, with the intention of holding it against all comers.

The court was asked to declare, that, upon the facts agreed upon, there was no such open and notorious denial of the mortgagee's title as would constitute an adverse holding. But this request was refused and the law was declared to be, that upon the admitted facts, the holding of the defendant and his grantors, immediate and remote, had been adverse since May 1, 1869, and the statute of limitations began to run against the plaintiff from that date. And judgment was given for the defendant.

Upon the acquisition of title by adverse possession, when a relation of trust or privity of estate subsists between the parties, the previous decisions of this court are in a state of hopeless confusion. From these decisions no one interested in an estate incumbered by an old, but unsatisfied mortgage, can tell what his rights and obligations are. He can not with safety purchase, sell or improve. And no lawyer can, with any confidence, give advice to his client under such circumstances. He can only inform him that if litigation arises about it, and the suit is brought in, or removed to, the Federal Court, the rule of decision will be one way; while if it is pending in the State courts, it will depend on the indi-

vidual views of the trial judge and the members for the time being of the appellate court. This is an intolerable condition of things. It therefore behooves us to make our reckonings and to take observations with a view to determine to what point we have drifted.

Statute of limitations: Adverse possession. Former decisions reviewed.

In *Harris v. King*, 16 *Ark.*, 122, a vendor of land received the purchase money, gave his vendee a bond for title, and died in possession without ever having done an act inconsistent with his vendee's title. His administrators sold the land as part of his estate. Upon a bill filed by the first vendee, more than ten years after the transaction for specific performance, and to annul the deed made by the administrators, it was ruled that the original vendor held the naked legal title in trust for the vendee; that the purchaser at administrator's sale stood in the same situation, and the statute of limitations was no bar. True, there was in the bill an allegation, and in the evidence some proof, that the vendee had constituted the vendor his agent in respect to the land. But the case was not decided on the doctrine of agency, but on the broad ground that the statute does not run against an express trust, so long as the trustee does not deny the rights of his *cestui que* trust.

Singularly enough the very next case in 16 *Ark.*, *at page* 129, *Sullivan v. Hadley*, proceeds upon an entirely different principle. The circumstances were these: A debtor in Tennessee had, for the better securing of his creditors, executed a deed of trust upon slaves and other personal property. He had afterward emigrated to this State and, by permission of his trustee, had brought the slaves with him; but the deed of trust was recorded in the county which he selected for his new residence. The maker of the trust deed had never denied the trustee's right to the slaves, but on the contrary had used the trust deed both in Tennessee and in Arkansas, to keep his unsecured creditors at bay.

Upon a bill filed by the trustee to foreclose the trust deed, less than nine years after it was made, this court held that five years peaceable possession of the slaves barred all relief. In other words the court presumed without evidence and indeed when the facts all pointed the other way, that the possession of the creator of the trust was hostile to the title of the trustee. This was to confound actual possession with adverse possession.

In *Conway v. Kinsworthy*, 21 *Ark.*, 9, the owner of an unlocated donation claim had executed an instrument, which was duly acknowledged and recorded, reciting that he had sold his claim and covenanting to convey the legal title to the lands to be entered with it, as soon as the patent was issued. The lands were afterwards located and a patent issued; but the patentee instead of making a deed to the persons to whom he had sold his claim, sold and conveyed the land to another party. Upon a bill filed thirteen years afterward to establish title under the first sale, against one who claimed under the second sale, it was held too late. Here the trustee had disavowed the trust; and this, according to all the cases, set the statute in motion.

Guthrie v. Field, 21 *Ark.*, 379, follows *Sullivan v. Hadley*, and holds that a mortgagor of real estate, being in possession, may rely upon lapse of time as a defence to a bill to foreclose, brought more than ten years after the date of the mortgage.

In *Trapnall v. Burton*, 24 *Ark.*, 371, it was adjudged that the possession of a defendant in execution, who continues to hold over after a sale of land without any agreement to hold under the purchaser, is adverse and the purchaser is barred if he does not gain actual possession in ten years.

In *Lewis v. Boskins*, 27 *Ark*, 61, it was ruled that wher land is sold on a credit and bond is given to make title on payment of the purchase price, the transaction is the same,

in legal effect, as if the vendor had conveyed the land by absolute deed and had taken a mortgage back; that the vendor's lien under such circumstances exists as a charge upon the land, binding not only the vendee, but his privies in law, blood and estate; and that the vendee cannot, so long as he retains possession, deny his vendor's title.

McGeehee v. Blackwell, 28 *Ark.*, 27, and *Hall v. Denckla*, *Ib.*, 506, proceed upon the idea that when, upon a sale of land, the vendor retains the legal title as security for the purchase money, a bill to foreclose must be brought within the time limited by law for bringing an action of ejectment, which by act of January 4, 1851, (*Gantt's Dig.*, *Sec.* 4113,) was shortened to seven years.

Birnie v. Main, 29 *Ark.*, 591, returns to the old doctrine of Harris v. King, that in order to constitute an adverse holding in favor of the mortgagor, there must be an open and notorious denial of the mortgagee's title, and that until such denial the possession of the mortgagor is the possession of the mortgagee.

In *Mayo v. Cartwright*, 30 *Ark.*, 407, a debtor had given a deed of trust upon a plantation to secure the payment of a debt. The deed was registered in the proper office. The debtor, who had remained in possession, in a year or two, sold and conveyed the plantation for a full consideration, and with covenants of warranty, to a stranger, who had no actual knowledge of the previous incumbrance, but was chargeable with constructive notice by the registry.

The purchaser entered, cultivated the plantation, took the rents and profits, made valuable improvements and paid the taxes. The debtor made payments from time to time on the debt secured by the trust-deed. Eleven years after the sale to the stranger, but not over six years since the secured creditor had received a payment on his debt, the trustee advertised the property for sale under a power contained in the

deed. The purchaser enjoined the sale upon the ground that he had been in the adverse enjoyment of the premises for more than seven years. And the court held that the trustee had slept upon his rights too long. The course of reasoning by which this result was reached was as follows. From uninterrupted and exclusive occupation and the exercise of acts of dominion over the land, the court assumed that the purchaser's possession was adverse to those claiming under the trust-deed; and the makers of the trust-deed having parted with all interest in the land, his subsequent payments on the debt, while reviving the debt against himself, could not bind the land, being *res inter alios acta*. The only authority cited was *N. Y. Life Ins. Co. v. Covert*, 29 *Barber*, 435, a decision of the Supreme Court of New York, which was reversed by the Court of Appeals, (6 *Abbott's Pr. Rep., N. S.*, 154,) and the rule declared to be that the presumption of payment arising from the lapse of twenty years since the cause of action accrued, is not available to the owner of the equity of redemption, to defeat the foreclosure, if the mortgagor has made payments upon the mortgage debt within twenty years before the commencement of the suit; and that if the mortgage is recorded, the grantee of the equity of redemption takes his title subject to the lien of the mortgage, and the mortgagor still has the power to prevent the exoneration of the land through lapse of time by making partial payment. See also *Heyer v. Pruyn*, 7 *Paige*, 465, for the rule upon this subject in New York.

Coldcleugh v. Johnson, 34 *Ark.*, 312, follows *Birnie v. Main*, and announces that the possession of a vendee by title-bond is not adverse, and the statute will not begin to run for his protection until there has been an open and notorious denial of his vendor's title.

These are the principal cases in our reports on this subject, and it is manifest from a brief review, that they have

been decided without much reference to each other, and that there is in this State nothing like a settled rule of property to guide us. So notorious is this fact that the Federal courts, which ordinarily follow the State courts in matters affecting real estate and in the construction of State statutes, have refused to follow our oscillations on this point, but have always adhered to the rule as first laid down in *Harris v. King*, *supra*. Thus in *Lewis v. Hawkins*, 23 *Wall.*, 119, there was a sale of land in this State by bond for title in 1853. In 1855 the vendee sold and conveyed to a stranger, who entered and held possession until his death in 1866, and after his death his widow and children continued to occupy the premises. In 1871, a bill was filed to enforce the vendor's lien for the purchase money due upon the sale in 1853. The defence was seven years possession under the statute. And the court held that the vendee, or a purchaser from him, stood in the relation of a trustee to the vendor for the unpaid purchase money, against whom the statute does not run. In this case the sub-purchaser had assumed the payment of the original purchase notes. But the suit was brought some sixteen years after such assumption, and the decision did not turn on this feature.

See also *Butler v. Douglass*, 1 *McCrary*, 630, where it is stated that a bill to foreclose a vendor's lien for purchase money on real estate, is not barred under twenty years.

If there were any established rule applicable to this case, we should follow it, however unreasonable it might appear to us; leaving the legislature to devise a remedy, which in that event would only operate prospectively. For the alteration by courts of rules of property affecting the transfer of real estate and the consequent disturbance of titles acquired in faith of the stability of those rules is a very grave matter. A rule of decision once deliberately adopted and declared ought not to be dis-

turbed "by the same court, except for very cogent reasons and upon a clear manifestation of error." But there are cases which "ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error." 1 *Kent's Comm.*, 476–7.

Turning to the adjudications elsewhere, it is not difficult to discover what the law is on this subject. Thus *Hall v. Doe*, 5 *Barn. & Ald.*, 687, (7 *E. C. L. R.*, 232) decided in 1822, was a case where premises were mortgaged in fee, with a proviso for reconveyance, if the principal were paid on a given day, and in the meantime the mortgagor should continue in possession. Upon special verdict it was found that the principal was not paid on the day named, but that the mortgagor remained in possession. There was no finding by the jury either that interest had or had not been paid by the mortgagor. Under these circumstances, it was held by the Court of King's Bench, that the occupation was by permission of the mortgagee; and consequently that although more than twenty years had elapsed since default in the payment of the money, still the mortgagee was not barred by the statute of limitations. It was further held that an entry by the mortgagee was not necessary to avoid a fine levied by the mortgagor.

See also *Doe d. Jones v. Williams*, 5 *A. & E.*, 291, (31 *E. C. L. R.*, 619), decided in 1836, and *Doe d. Palmer v. Eyre*, 17 *A. & E., N. S.*, 366, (72 *E. C. L. R.*) A. D. 1851.

In Chinnery v. Evans, 11 *H. L.*, 115 (A. D. 1864), M. was possessed of estates in three counties, Cork, Kerry and Limerick. In 1776 he mortgaged them to F. The interest on the mortgage was not regularly paid, and on petition of F. a receiver was appointed. In form his

appointment embraced the three estates; in fact he never entered into possession of any but the Limerick estate, from which alone he took the money necessary to keep down the interest on the mortgage. M., in 1789, without any knowledge of the matter on the part of F. sold the Cork and Kerry estates to C., who entered, continued in uninterrupted possession until his death in 1808, and his son had succeeded to the property. In 1856, after the lapse of nearly twenty years since the last payment made by the receiver, F. claimed to have a sale of all the estates included in the original mortgage in order to cover arrears of interest. And it was held that the payment by the receiver out of the rents of the Limerick estate, was a payment which in law must be considered as made by the mortgagee in respect of the mortgage debt and therefore prevented the statute of limitations operating as a bar to the demand as to any of the estates comprised in the mortgage.

In *Pugh v. Heath*, 7 *Appeal Cases*, 235; *S. C.*, 35 *Monk's Eng. Rep.*, 172, the ultimate facts are thus stated by Earl Cairns: "A legal mortgage of free hold land in 1856; no possession by the mortgagee; and no payment of principal or interest to him; nor any acknowledgment of his title. Then in 1870, that is, after fourteen years, the mortgagee filed a bill to foreclose. He obtains a decree *nisi* in 1874 and a decree absolute in 1877. Then in 1878 he brings the present action to recover possession of the land." The defence was the statute of limitations. And it was held that, although brought more than twenty years after the date of the mortgage, the action was not barred.

In *Higginson v. Mien*, 4 *Cr.*, 414, the facts were as follows: In 1769, Alexander Wylley, then residing in

Georgia, executed his bond to certain merchants of London, and to secure the payment of the same, also executed his deed of mortgage, which was recorded. Wylley took part with the British in the war of the revolution, in consequence of which his estate was confiscated and commissioners were appointed to take possession of and sell it. In 1784 the mortgaged premises were sold and conveyed by the commissioners to certain persons, who re-sold and conveyed them to one Houston, who retained peaceable possession of them until his death. In 1796 these lands were sold under execution to satisfy a judgment obtained against the executor of Houston. A bill was filed in 1802 to enforce payment of the debt due from Wylley by foreclosure of the mortgage. And it was held, Marshall, C. J. speaking for the court, that the estate of the mortgagor only was confiscated, not that of the mortgagee; that the possession of the mortgagor and of those claiming through him, was not adverse to, but compatible with, the rights of the mortgagee and consequently the statute of limitations did not apply.

In *Hughes v. Edwards*, 9 *Wheaton*, 490, the bill was filed in 1816, to foreclose a mortgage executed in 1793. The mortgagor had alienated parts of the mortgaged premises to various parties, all of whom had purchased with constructive notice of the plaintiff's lien, the mortgage deed having been duly recorded. The defendants relied on the length of time and uninterrupted possession of the premises, from the date of the mortgage, by the mortgagor or those claiming under him. But it was proved that the mortgagor had made payments on the debt in 1798, in 1803, and in 1808, and had acknowledged in letters that the mortgage still subsisted, that the debt was unpaid and promising to pay it when in his power. And it was ruled that the mortgage was not barred as against the mortgagor, and that a purchaser from him with notice, could only protect himself by lapse of time

under the same circumstances which would afford protection to the mortgagor. Said the court *per* Mr. Justice Washington: "But it is insisted that although these acknowledgments may be sufficient to deprive the mortgagor of the right to set up the presumption of payment or release, they cannot affect the other defendants, who purchased from him parts of the mortgaged premises for a valuable consideration. The conclusive answer to these arguments is that they were purchasers with notice of this incumbrance. * * * * His conveyance to a purchaser with notice passes nothing but the equity of redemption, and the latter can no more than the mortgagor, assert that equity against the mortgagee without paying the debt or showing that it has been paid or released."

And so the rule is laid down in the text-books. Thus in 2 *Wash on Real Prop.*, 3*rd. Ed.*, 158: "He (the mortgagor) can not make any lease or conveyance which can bind the mortgagee, or prejudice his title * * * * So long as the mortgagee does not treat the mortgagor as a trespasser, the posssession of the mortgagor is not hostile to, nor inconsistent with, the mortgagee's right. The possession of the mortgagor is, to this extent, the possession of the mortgagee."

In *Jones on Mortgages, Sec.* 676: "A mortgagor has a perfect right to convey his equity of redemption. * * * * Of course the mortgagee is not affected by any act of the mortgagor in passing any right of his in the premises to third persons, whether by deed, or by confession of judgment, or otherwise. The mortgagor's assignee has no greater rights than the mortgagor himself; and the construction of the mortgage is the same in every respect, whether the mortgagor has conveyed the equity of redemption or not. Neither can the mortgagor and his grantee, by any subsequent arrangements between themselves, affect the mortga-

gee's lien, or prevent its operating to the full extent conferred by the mortgage."

Again at section 1202: "The grantee (of the mortgagor) succeeds to the estate and occupies the position of his grantor. He takes subject to the incumbrance; and his title and possession are no more adverse to the mortgagee than was the title and possession of the mortgagor. * * * A purchaser from the mortgagor stands in no better position than the mortgagor himself as to gaining title by possession and lapse of time, if the mortgage be recorded. The record is notice of the mortgage to a subsequent purchaser; and the mere fact that he has had actual possession under his purchase for the statute period of limitation is no bar to a foreclosure."

In *Sedgwick & Wait on Trial of Title to Land, Section* 751, the law is stated thus: Whenever such a relation, or trust, or privity of estate exists between the actual occupant of the land and another, that, in respect to possession, there is between them an identity or subordination of interests, then the possession of one—the occupant—becomes, as in the case of a co-tenancy, the possession of the other, through the principle of agency or trust. * * * * * Such relation, privity or trust, must be explicitly renounced or disclaimed by declarations or acts unmistakably hostile to it, and an exclusive adverse claim asserted before the possession of the occupant can be considsidered adverse. In other words there must be a concurrence of two things: A repudiation of the previously existing relation, and an assertion of an appropriation by the occupant for himself, accompanied, of course, by an actual, exclusive occupation." See also *Sections* 729, 749; and compare 4 *Kent Comm.*, *157; *Angell on Limitations*, 6*th Ed.*, *Ch.* 34.

In Massachusetts, where the same incidents attach to a

mortgage as in this State, the court in *Pike v. Goodman*, 12 *Allen*, 472, say: "We do not mean to intimate that the holder of the original mortgage, having received the payment of interest exclusively from the owner of a part of the equity of redemption *for any number of years*, would by that fact alone be precluded from subjecting to a foreclosure the whole property which his mortgage covered. His interest being regularly paid by a person in possession of a part of the land, he would have no reason to know or to inquire from whom it came, or to know what grants of the estate had been made by the mortgagor." See also *Bacon v. McIntyre*, 8 *Metc.*, 87; *Parker v. Banks*, 79 *N. C.*, 480.

Estate of mortgagee.

And this is the law so far as we are advised, in all of the States where a mortgage carries the legal title, except Mississippi. There, it seems, the possession of the mortgagor, after condition broken, is prima facie adverse to the mortgagee. Of course the question of adverse possession can not arise at all in favor of a mortgagor in possession against a mortgagee in those States, where the latter's interest is considered a mere chattel interest and not an interest in the land. For there, the mortgagee is, under no circumstances, entitled to the possession. But with us the legal estate in mortgaged property passes to the mortgagee, subject to be defeated by performance of the conditions of the mortgage; and the right of possession follows the legal title, unless controlled by stipulations in the deed, or the apparent intention of the parties. *Fitzgerald v. Beebe*, 7 *Ark.*, 310; *Kennedy v. McCarrow*, 18 *Id.*, 166; *Gilchrist v. Patterson*, *Ib.*, 575; *Terry v. Rozelle*, 32 *Id.*, 478; *Reynolds v. Canal Co.*, 30 *Id.*, 520.

Mr. Justice Story in *Conard v. Atlantic Ins. Co.*, 1 *Pet.*, 441, says: "It is true that in discussions in courts of equity, a mortgage is sometimes called a lien for a debt. And so it certainly is, and something more; it is a transfer of the

property itself, as security for the debt. This must be admitted to be true at law; and it is equally true in equity; for in this respect, equity follows the law. It does not consider the estate of the mortgagee as defeated and reduced to a mere lien, but it treats it as a trust estate, and according to the intention of the parties, as a qualified estate and security. When the debt is discharged, there is a resulting trust for the mortgagor. It is therefore only in a loose and general sense that it is sometimes called a lien, and then only by way of contrast to an estate absolute and indefeasible."

The sale and conveyance of the lot by the senior Woodruff, the putting of the purchaser in possession and the subsequent improvement of it by building upon it, were not sufficient to set the statute running. Such acts did not import any denial of Whittington's title, nor apprise him of any hostile claim.

There is nothing peculiar in our statute limiting actions for the recovery of land, except that it does not contain the word "possession" at all. But adverse possession on the part of the defendant is as much implied in the statute as if it had been expressed. With this understood, the language is not so strong as the statute of Illinois, which enacts that every person in the actual possession of land, under color of title, for the space of seven years, and who has during that time paid the taxes, shall be deemed the legal owner, to the extent and according to the purport of his paper title. Yet in *Medley v. Elliott*, 62 *Ill.*, 532, it was held, "That the grantees of a mortgagor are not protected in their title against a foreclosure of the mortgage duly recorded, by seven years possession and payment of taxes under the first section of the act of 1839.

"From the peculiar relation of mortgagor and mortgagee, and the fact that a purchaser from the former succeeded to his rights with notice of the incumbrance and the conse-

quent privity between the parties, the possession of such purchaser, must be considered in subordination to such mortgage, and not adverse; and it cannot cease to be of that character until there is an open disclaimer of holding under it, and the assertion of a distinct title with the knowledge of the mortgagee." See also *Martin v. Jackson*, 27 *Pa. St.*, 504.

ADVERSE POSSESSION: Cases approved and overculed.

The doctrine announced in Harris v. King, in Birnie v. Main and in Coldcleugh v. Johnson is approved. The cases of Sullivan v. Hadley, of Guthrie v. Feild, of Hall v. Denckla, of McGeehee v. Blackwell, and of Mayo v. Cartwright, in so far as they hold that an adverse possession may be set up by a mortgagor, or a purchaser from him with notice, without a distinct denial of, or acts inconsistent with, the mortgagee's title, are overruled.

The correct rule stated.

The true rule is stated in *Zeller's Lessee v. Eckert*, 4 *How.*, 289; "Where the original possession by the holder of land is in privity with the title of the rightful owner, in order to enable such holder to avail himself of the statute of limitations, nothing short of an open and explicit disavowal and disclaimer of holding under that title, and assertion of title in himself brought home to the other party, will satisfy the law."

An "overt act of hostility" is required to set the statute in motion in favor of a mortgagor, or his vendee, against a mortgagee out of possession. *Boyd v. Beck*, 29 *Ala.*, 703.

Reversed and remanded for a new trial.

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WOODALL V. DELATOUR.

1. TAXES: *Lien of agent for.*

No lien can be declared for an agent for taxes paid on his principal's lands, and for trouble and expenses incurred in assessing them, unless he avers in his pleading that he was seized of the

lands or had the care of them; and taxes paid upon personalty cannot be joined with taxes upon land, and included in the judgment and lien for the latter.

2. PRACTICE: *In suits against infants.*

A judgment by default cannot be taken against an infant, even when he has a regular guardian who is summond to appear. Upon his failure to answer for the infant, a guardian *ad litem* must be appointed, and defense made by him, before judgment can be rendered against the infant.

APPEAL from *Phillips* Circuit Court in Chancery.

Hon. J. N. CYPERT, Circuit Judge.

Palmer & Nicholls, for appellant.

1. It was error to declare a lien on the lands for the amount of the taxes upon the personal property. There is no law to warrant it.

2. It is not averred that Delatour was *seized or had the care* of the lands, and this case falls within the rule of *Peay, adm'r v. Field*, 30 *Ark.*, 690; *Gantt's Dig., Sec.* 5233.

DUVAL, SPECIAL JUDGE. On 18th day of April, A. D. 1876, the appellee filed his complaint in equity, against Mrs. S. W. Woodall, Bythena E. Woodall, Arthur B. Woodall, and Mary E. Woodall, minors, and D. E. Holland, as guardian for Bythena, Arthur B. and Mary E. Woodall, and on the same day summons was issued, directed to the sheriff, and returned served.

The complaint alleges and sets forth that the plaintiff, as agent for the defendants, on the 16th day of April, 1874, paid the taxes assessed on certain land therein described, amounting to the sum of three hundred and twenty-eight dollars and eighty cents, and also the sum of twenty-six dollars and forty-four cents, assessed as a personal tax, making

a total of taxes paid at the request of said defendants, three hundred and fifty dollars and forty-seven cents.

He filed with his complaint the receipts of the collector for the amounts, whereupon he prayed judgment for said sums, with a reasonable commission for attending to said payment and advances. That the same be charged as a lien upon the lands therein deseribed, and that in default of payment, by a day to be fixed by the court, that the lands be sold, &c.

There was no defence interposed by any of the defendants, nor by their guardians, and at the May term, 1876, judgment by default was entered in favor of the plaintiff, for the sum of four hundred and sixty-two dollars and eighty-five cents, with interest and cost of suit, and it was ordered and decreed that if said amount was not paid on or before the 20th of June, 1876, that the lands therein described be sold to satisfy the same.

No lien on real property for taxes paid on personals.

The amount paid for taxes on the personal property was included in the judgment and declared to be a lien upon the real estate. There was no distinction recognized by the court below, as to whether the taxes were paid on personal or the real estate.

It was error to hold that there was a lien upon the real estate for taxes paid on the personal property.

Lien of agent for taxes paid.

The lien sought to be enforced derived its validity from section 5233, Gantt's Digest, which declares that: "Every agent, guardian, executor, or administrator seized or having the care of lands, who shall be put to any trouble or expense in listing or paying taxes on such lands, shall be allowed a reasonable compensation for the time spent, the expense incurred and money advanced, which shall be deemed in all courts a just charge against the person for whose benefit the sum shall have been advanced, and the same shall be preferred to all other debts or claims, and be

a lien on the estate, both real and personal, of the person for whose benefit the same shall have been advanced."

Necessary averments in his complaint.

This case comes clearly within the ruling in *Peay ad. of Shall v. Field et al*, 30 *Ark.*, 600. In this, as in that case, the appellee "does not aver that he was seized of or had the care of the appellant's land in any capacity, but he does aver that he advanced the money and paid the taxes.

This is not sufficient, the additional averment to create a lien was necessary, either that he was seized of the lands or had the care of them.

2. PRACTICE: No judgment by default against infants.

As part of the defendants were infants, the court below erred in rendering a decree by default against them. *Section* 4493, *Gantt's Digest*, declares that, "The defence of an infant must be by his regular guardian or by a guardian appointed (by the court) to defend for him when no regular guardian appears, or where the court directs a defence by a guardian. *No judgment can be rendered against an infant until after a defence by a guardian.* The guardian to defend shall be appointed by the court or the judge thereof. The appointment cannot be made until after summons in the action. *Sec.* 4494, *G. D.*

It might be inferred from the papers that the infants had a regular guardian, and that he had been served with process. His default could not prejudice his wards—it was the duty of the court, as he failed to appear, to appoint a guardian *ad litem*, and direct him to make a defence for them. Until that was done the court could not proceed in the cause.

It has been the uniform rule of this court to insist upon a strict construction of law for the protection of infant litigants. And in future, as in the past, the rule will be adhered to with the utmost rigor.

For the error above referred to, this cause must be reversed.

JUDGE SMITH did not sit in this case.

OUACHITA COUNTY v. RUMPH.

1. TAXES: *Power of Legislature to levy.*

The right to impose taxes upon citizens and property for the support of the state government, may be restricted by the constitution, but needs no clause to confer it.

2. TAXES: *Property subject to.*

Notes, bills of exchange, shares, stocks and securities of all kinds, are property, and subject to taxation; and a note given for land, and the land itself, are both subject to taxes; the note as property of the holder, and the land, of the purchaser.

APPEAL from *Ouachita* Circuit Court.

Hon. B. F. ASKEW Circuit Judge.

Barker & Johnson for appellant.

Promissory notes given for the purchase of land are subject to taxation. They are *property* within the meaning of the Constitution, and the Revenue Act of 1883, and hence taxable. *Const. Art.* 16 *Sec.* 5, *Art.* 2 *Decl. of Rights, Secs.* 2 *and* 20; *Gantt's Dig. Secs.* 1529–30; *Probst & Hilb v. Scott* 31 *Ark.* 656; *Bouvier Law Dict.*; 4 *Pet.* 511; 17 *Johnson* 283; 2 *Kent p.* 406 *note A. 9th Ed*; *Bouv. Inst. Vol.* 1, *Sec.* 481, 468; *Story on Const. Sec.* 400; 1 *Black. Com.* 59; 43 *Cal.* 331; 13 *Am. Rep.* 143; 21 *Id.* 704; 2 *Com.* 806; 1 *Green* 240; 11 *Ark.* 44; 42 *Conn.* 426; 36 *Ohio St* 28; 30 *N. J.* 13; 16 *Pick.* 572; 6 *Binney* 94; 4 *East* 370;

By *all property subject to taxation* is meant, that all property in the State is subject to taxation except such only as is *exempt* by the Constitution itself.

H. G. Bunn for appellee.

Promissory notes being mere choses in action, or "credits" are not subject to taxation under the Constitution or the Revenue Act of 1883. 2 *Ark.* 291; *Const. Art.* 16 *Secs* 8, 9, *&c.*; 51 *Cal.* 243; 21 *Am. Rep.* 704; 14 *Kans.* 585; 19 *Am. Rep.* 107.

The Constitution of 1874, in so far as its definition of "property subject to taxation" goes, is an exact copy of that of 1836, and under it no Legislature ever attempted to tax "credits," or demand that they were property in the taxing sense.

All efforts to fix an uniformity and equality upon "credits" is futile. They cannot be seen and assessed by the Assessor. The present constitution expressly left out that provision of the constitution of 1868, taxing credits, returning to the language of that of 1836.

It is double taxation, until the purchase money is paid &c., &c.

EAKIN, J. At the July term 1883, the appellee, Rumph, applied to the county court, by way of appeal from the Board of Equalization, to correct his assessment of personal property for taxation, showing: That in the preceding January he had sold and conveyed to Patrick Gaughan, certain lots in Camden for five thousand dollars, and taken notes for four thousand dollars of the purchase money, secured by deed of trust on the land; that the lands had been assessed at their proper value to Gaughan; and that the notes had also been assessed in the name of petitioner against his protest. He insisted that this amounted to double taxation, and prays that his note may be stricken from his assessment. His prayer was refused and Rumph appealed to the circuit court, where the county demurred to the petition. The demurrer was overruled, the county declined to plead further, and judgment was rendered in favor of petitioner. From this the county appeals here.

The question presented is, can land and a note given for the purchase of it be both taxed in the hands of different parties.

It is first contended that notes cannot be taxed at all, inasmuch as they are choses in action, and not tangible property.

1. TAXES: Power of legislature to levy.

By the constitution the state's ancient right of taxation is fully and expressly conceded. *Art.* 2, *Sec.* 23. This is an ancient right of sovereignty, indispensible in all governments, to impose taxes for its support upon the citizens and upon property. It may be restricted by constitutional restrictions but needs no clause to confer it; and so, in the constitution we find only the assertion of the general right, with such restrictions as the people have thought fit to impose. For instance, it is said that "all property, subject to taxation," that is, all property not made exempt by the constitution and therefore taxable, shall be taxed "according to its value."

2. Notes for land taxable

If this were taken, however, as an indication that only *property* should be taxable, choses in action, as distinct from claims for unliquidated damages, have all the character of property. The term is not confined to tangible things either in its strict or its popular sense. It is said of every thing which is a man's *own*, or that is peculiar to him, belonging to him alone, or in connexion with others exclusive of other persons; something to which he has a legal title, whether in possession or not. (*see Webster in Verb*). This certainly is the case with notes, bills of exchange, shares, stocks and securities of all kinds as well as money. If one had a million dollars in this way it could not be said of him that he was without property, and under no obligation to contribute to the support of the government, whose protection and whose remedies give these things all their value. Choses in action of this nature have been

subjects of taxation in many, perhaps all the states. It is common political practice. See a large array of cases cited by Mr. Desty in his work on taxation, Vol. 1, p. 67, especially *Wilcox v. Ellis*, 14 *Kansas* 601

In this state the question as to whether choses in action are property, has been set at rest by judicial decision. By the constitution of 1868 the personal property "of any resident to the value of $2000, to be by him selected," was made exempt from execution. It was held in *Probst & Hilb v. Scott*, 31 *Ark.* 652, that he might select a debt due him, so as to absolve it from process of garnishment; and this was followed under the present constitution in *Winter & Co. v. Simpson et al*, 42 *Ark.* 410.

It is further contended, in support of the judgment below, that if notes be generally taxable, these are, nevertheless exempt; because they represent land, and the land has been assessed to the purchaser at its full value. This, it is said, amounts to double taxation, and it is illustrated by saying that if everybody should sell his real estate on a credit, the taxable property of the county would be doubled. The argument is striking and plausible, but there seems to underlie it a fallacy.

There is no positive prohibition of double taxation; that is, of property and that which represents it in different hands, whilst each is taxed with what he owns uniformly with other members of the community. A note given for land is no more, nor less valuable than one given by a non-resident for property out of the state; or one given for valuable services rendered; or for luxuries consumed in the use. Why should one be exempt and the other taxed, when the notes are alike and of equal value. This would violate the provision for uniformity. The corpus of the land is taxed according to its value, but that is the business of the purchaser alone. The vendor who holds the note has no

concern with that. His note is valuable to him. It is property for which he ought to be taxed also.

The fallacy consists in looking at the note and the land as the same property. The land is only the consideration for it, but it has no further connection with it. In the present case a security on the land was taken, but it would not have altered the aspect of matters if that security had been merely personal. The two kinds of property are neither the same nor representing each other. The holder of the notes is taxed for what he owns—for something having a real value—representing not land, but the fruits of the future industry, or good fortune perhaps of the debtor, by which he means to pay. On the other hand the purchaser is taxed upon land for which he owes. It may be presumed this was considered in the amouut of the purchase price, as something to be deducted from the rents and profits, before anything could go towards payment of the note. Moreover, under our Revenue law he gets, to the amount of his debt, a credit on his own taxable credits; which the state concedes perhaps on the very ground that this debt *may* be taxed as a credit to some one else.

We think notes may properly be, and have been made taxable by the Revenue act of 1883; and that the honorable circuit court erred in directing a credit of the notes in question, to be made on the tax books in favor of appellee.

Reversed and remanded for further proceedings in accordance with law and this opinion.

L. R. & F. S. Railway v. Dean.

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1. Railroads: *Limited tickets*: *Obligations of purchaser and carrier.*

A passenger on a limited railroad ticket is bound to use it within

the time specified in the ticket, and to observe the reasonable regulations of the carrier for the running of trains and for facilitating the business of the carriage of passengers; and the company is bound to afford him the opportunity to do so, by running its trains within the time; and if in this it fail, though the last day be a Sunday, it can not refuse the ticket afterwards, at least when offered on the first train after the expiration of the time.

2. SAME: *Same: Continuous journey.*

A purchaser of a limited ticket over several connecting lines of railroads is not bound to make a continuous journey over all, but is bound to make it continuous over each coupon of the ticket; and over the last within the time limited.

3. SAME: *Ejection of passenger: Elements of damage.*

A limited railroad ticket over several connecting lines expired on Sunday: the last line ran no train on that day, and the passenger offered the ticket on the train the next dav. It was refused, and the passenger, under protest and under threat of ejection by the conductor, paid his fare to a further station and there, for want of money, was put off and walked to his destination. HELD: That the extra fare paid, the humiliation of being put off the train, and the inconvenience of reaching his destination by walking, were proper elements of damage to be considered by the jury.

APPEAL from *Pope* Circuit Court.

Hon. J. P. WOOD, Special Judge.

J. M. Moore, for appellant.

1. So long as railroads are run on their published time table, parties purchasing tickets and contracting for transportation must take notice of the rules. And if they fail to do so they cannot ask the court to relieve them from their contract, and to make contracts for them. *Thompson on Carriers of Pass., p.* 68, *Sec.* 4, and *p.* 70, *Sec.* 6.

2. The verdict was excessive, and the jury misdirected

as to the measure of damages. There was nothing in the evidence on which to base an instruction as to damages or injury to appellee's feelings, humiliation, &c. The proper measure of damages would have been the actual pecuniary loss or damage in money or loss of time and expenses of performing the residue of the journey.

H. S. Carter, for appellee.

The stiuplation in the ticket that Dean could ride on and between the days punched in the margin was at least a false representation and the judgment is correct. *Denton v. G. N. R. Co.*, 5 *El. & Bl.*, 860; 2 *Jur. N. S.*, 185; 25 *Q. B*, 129.

Dean had a right to rely on information received from the agent who sold him the ticket, to the effect that appellant run a train on Sunday. 13 *Reporter*, 368. There was nothing to prevent the running of a special train on Sunday and carrying Dean to his destination as it had agreed to do. 2 *Jac. Fisher's Dig.*, 1551.

When the performance of a contract falls on Sunday, it shall be performed on the following day.

COCKRILL, C. J. The appellee purchased a ticket from Middleton, Tennessee, from the agent of the Memphis & Charleston Railway, via said railway, the Memphis and Little Rock Railway, and the appellant's railway to Russellville, Arkansas, on the first day of September, 1882. The ticket was limited on its face to the third of September. According to the regulations of the several roads as to the time of running trains, appellee should have reached Little Rock at 1 A. M. on the second of September, and in time to take the morning train on appellant's road, but although he arrived on that day at Argenta, no train went out after his arrival, until the morning of the fourth of September. The third day of the month was Sunday and no

trains were run on the appellant's road on that day. The appellee, not being provided with the means to pay the expense of the delay, walked to the house of a friend about ten miles out on his route, and on Monday morning boarded the first train going in the direction of his destination since his arrival at Argenta. The conductor refused to honor his ticket because the time limited had run out, and informed him that he must pay his fare or leave the train. Appellee protested and told him that he did not have the money to pay his fare, but finally gave the conductor all he had except ten cents, and a dollar that he borrowed for that purpose, and paid his fare to Pott's Station, which was short of his destination. On arrival at this station the conductor compelled him to leave the train, as he declined to pay any additional fare. Appellee being without money was forced to walk from that point to his destination. He sued the railroad for ejecting him from the train, and had a verdict and judgment for two hundred dollars.

It is urged here that this judgment should be reversed because the conductor did nothing more than his duty, or if he did, the damages awarded appellee are excessive.

1. RAILROADS: Limited tickets; obligations of carrier and purchaser.

It seems at first to have been doubted whether it was competent for a passenger carrier to enter into a contract limiting the time within which the holder of a ticket should avail himself of the right to use it, but the doubt has been definitely solved in favor of the contract. A passenger riding on a ticket limited as to the time within which it may be used, is bound by the terms of the contract he has made in that regard, and he cannot wait until the ticket has expired by its own limitation, and still be entitled to ride by virtue of it. He is bound, too, to observe the reasonable regulations made for the running of trains and for facilitating the business of the carriage of passengers. The obligation bears

upon the carrier with equal force. He must afford the purchaser of such a ticket the necessary facilities for accomplishing his journey within the stipulated time, and upon his failure to do so, he is not in position to treat the contract of carriage as forfeited, and demand a re-payment of fare for the same passage, at least if the ticket holder avail himself, as in this instance, of the first opportunity to complete his journey after the expiration of the time limited. *Auerbach v. N. Y. Cent. Ry.*, 60 *How.*, (*N. Y.*)——; *Stone v. C. & N. R.*, 47 *Iowa*, 82.

A party who has himself caused delay cannnot inflict a forfeiture on another consequent on the latter failing to come up to time.

2. Limited tickets: continuous journey.

When the appellee bought his ticket he was informed that it could be used on appellant's road on the third day of September. This, in fact, is embraced in the terms of the contract itself, for it specified that the ticket could be used on the first, second and third days of the month, and the last coupon was for use on appellant's road. The carrier selling the ticket was the agent of the appellant for that purpose, and the coupon attached for appellant's road was a contract by appellant as binding as if issued by its agent here. This is not disputed, but it is urged that the appellee should have presented himself to be carried on the train leaving Argenta on the morning of the second day. Appellee's contract did not require him so to do. The ticket named the third day and not the second as the limit. The holder of the ticket was not required to make a continuous trip from the starting point to the place of destination. All that could be demanded of him was that he should make a continuous trip under each coupon within the time limited. That is, when he started on his journey over any one of the connecting lines, he was bound to continue without stop to the point on that line named in his coupon. *Hutchinson on Car.*, *Sec.* 578; *Auerback v. N. Y. Cent. Ry.*, 89 *N. Y.*

The appellee appears, however, to have made all the expedition in his power. He left Middleton on Friday, arrived at Memphis the same day, at Argenta the next, and boarded the first train leaving that place on appellant's road after his arrival.

Appellant admits that no trains were run over its roads on a Sunday, and that appellee had no opportunity to use his ticket on the third day of the month in question on that account It may be that appellant was under no obligation to run its trains for the accommodation of the public on that day. No breach of duty in that regard is complained of in this case. The appellant elected to treat Sunday as no day, and declined to execute its contract, the performance of which fell on that day, for that reason. Under these circumstances we can see no reason why the rule applicable to other contracts should not be enforced as to this, viz: if a contract matures on Sunday the performance is to be exacted on the next day. 2 *Whart. Cont., Sec.*, 897; *Clock v. Bunn*, 6 *Johns.*, 326; *Perkins v. Dibble*, 10 *Ohio*, 433; *Link v. Clemmens*, 7 *Blackf.* (*Ind.*), 479.

This rule is the more applicable to the case at bar for the reason that the time for the performance is imposed by the railroad by way of limitation, and the contract should be so construed as to save the right and prevent a forfeiture if it can be done. *Barnes v. Eddy*. 12 *R. I.*, 25; *Evans v. St. L., I. M. & S. Ry.*, 11 *Mo. App.*, 463; *Auerbach v. N. Y. Central Ry.*, 89 *N. Y.*, 281.

The regulation of the company requiring the conductor to refuse such tickets after the last day of its limit could not affect appellee's legal rights. *Burnham v. R. R.*, 63 *Me.*, 298; *Jeffersonville R. Co. v. Rogers*, 38 *Ind.*, 116.

The conductor doubtless thought he was performing his duty, but that does not help the appellant's case.

No harsh or unnecessary means appear to have been resorted to in this instance to expel the appellee from the train, though he, himself, testified that the conductor threatened to throw him off. The elements of damage the jury were directed to consider in case they found for appellee, were, the extra fare paid by him, the humiliation of being put off the train, and the inconvenience of being compelled to reach his destination by other means. The jury might well consider all of this, and we can not say that the amount awarded is excessive. *Sutherland on Dam., pp.*, 250 *et Seq.*, 270; *Walsh v. R. R.*, 42 *Wisc.*, 23; *Jeffersonville R. R. v. Rogers*, 38 *Ind.*, 116; *Pittsburg, Cin., & St. L. Ry. v. Humeigh*, 39 *Ib.*, 509.

8. Wrongful ejection of passenger: measure of damages.

Affirmed.

HARRIS v. HARRIS.

43 535
57 549

1. REPLEVIN: *Verdict: judgment.*

When property sued for in replevin is delivered by defendant into the control of the court, there is no necessity that a verdict for the plaintiff should assess its value, so that the court can render an alternative judgment for the property or its value. The judgment should be only for delivery.

2. PRACTICE IN SUPREME COURT: *When errors are not injurious.*

The Supreme Court will not reverse or modify a judgment or decree of an inferior court for errors which are not prejudicial to appellant.

APPEAL from *Jackson* Circuit Court.

Hon. R. H. POWELL, Circuit Judge.

W. R. Coody, for appellant.

1. Where two parties have an interest in property, or when by agreement two persons place it in the hands of a common bailee, replevin does not lie, neither having the exclusive right to the possession. 37 *Ark.*, 66; *Gantt's Dig., Sec.* 5035; 17 *Ark.*, 450, 39 *Ark.*, 447; 16 *Ark.*, 90. Between the parties there can be no question as to the gift or title of the wife, her possession being presumed legal *prima facie* evidence of title. 38 *Ark.*, 416. Appellee having treated with appellant as to the deposit of the policy, recognized her right of possession, and by his agreement induced her to place it in the hands of the bailee, is estopped so to deny her authority to do so. 37 *Ark.*, 53.

2. The action was barred by the statute of limitations of three years. *Gantt's Digest, Sec.* 4120; 22 *Ark.*, 134 *and* 226; 14 *Ark.*, 509.

3. Having voluntarily procured the policy for his wife, and delivered it to her, it became her separate property. And he having paid it off for her, it became a gift to her and she was entitled to its possession and control. *Art.* 12, *Sec.* 6, *Const.* 1868; *Gantt's Dig., Sec.* 4192; 36 *Ark.*, 588.

4. The verdict was invalid to base a judgment upon, as it failed to find any value; and the judgment not being in the alternative, was incorrect. 37 *Ark.*, 550; *Gantt's Dig., Sec.* 4718; 29 *Ark.*, 383; 4 *Ark.*, 425. Defendant had the right to pay for the policy and keep it. *Ib.*

Appellee's remedy was in equity, and not replevin.

Franklin Doswell, for appellee.

There was no alternative judgment for the value of the policy, and no damages for detention, but appellant was not prejudiced thereby. If the property can be found appellee is entitled to the possession—to have it.

Appellant has no right to retain it and pay the value. Delivery of the property will be compelled. *Act Dec.* 14, 1875, *p.* 165. Nor was she prejndiced by failure to take judgment for, or jury to find value of the property. 29 *Ark.*, 270. Plaintiff is entitled to the value, only when delivery cannot be had. 29 *Id.*, 372.

In 37 *Ark.*, 544, the judgment was for the value of the property only, with an award of execution for the money. This was error, as defendant had the right to discharge the judgment by delivery of the property. 14 *Ark.*, 425. By the common law the value was immaterial; *Wells on Rep., Sec.* 760; and the judgment was for damages only; *Fields' Prac., p.* 842; and only when finding for defendant was the value found. *Ib., p.* 798. The property was in the custody of the law. The verdict and judgment were right upon the whole case.

EAKIN, J. Appellee, Wm. L. Harris, sued Hoffman in replevin to recover a policy of insurance, which he had effected on his own life, payable after his death to appellant, Anna S. and others, the children of said Wm. L. The complaint describes the policy, as one which had been issued in lieu of a former one, which Harris had effected during the life of a former wife, the second wife being made a beneficiary in the new policy. Hoffman is charged with detaining it without right.

Hoffman admitted in his answer, that he held the policy, but disclaimed any right to it, saying, that some time before Harris and his then wife, the appellant, Anna S., separated on account of domestic difficulties, and in a division of property made between them, could not agree as to the custody of the policy. Whereupon the parties interested agreed that it should be left with him as a mutual friend, and that he had been forbidden by

said Anna S. to surrender it to plaintiff. He brought it into court and asked that she be required to interplead, and that he be discharged.

Upon her application, she was then made defendant, and answered, saying: That in June, 1875, whilst she and plaintiff were living together as man and wife, being married, he placed the policy in her hands and sole possession, and for her benefit as a provision for her support in case of his death; to be held and collected by her if she should survive. That she afterwards, with the consent of all parties, including the plaintiff, placed it in the hands of Hoffman as bailee, for herself and the other beneficiaries; that said bailee has continued in possession ever since, and that his possession is hers; that they were afterwards divorced and plaintiff has made no other provision for her support. She also pleads the statute of limitation of three years.

There was a trial by jury, and a verdict simply finding the property to be that of plaintiff. A judgment was entered that he recover the policy. He waived all damages and costs, and the judgment directed that the policy be delivered up to him by the clerk. There was a motion for a new trial, bill of exceptions and appeal.

The parties have made no question as to whether or not the policy of insurance was of such a nature as to be the subject of replevin, and we do not feel called upon in this case to determine that matter definitely. The functions of the writ of replevin in America have been extended far beyond its English use originally, when it was used only for the purpose of reclaiming tangible property improperly distrained. It has been applied to recover quite a number of classes of securities for choses in action. Evidently, this policy had a present value depending on possession. It was fully paid up, and drew

dividends payable to the holder. Besides, it may be inferred that according to the rules of the insurance office, it might be delivered up, as the former had been, and cancelled, and a new policy issued upon it with different provisions. The complaint was not met by demurrer. It has sufficient *indicia* of property to justify us in accepting the views of the parties, and treating it as repleviable. It certainly is a tangible thing of *some* value.

Perhaps, too, the proper course of the original defendant may have been to make his answer a bill of interpleader—bringing in all the beneficiaries, and adopting equitable proceedings. But in admitting her to become sole defendant and plead, the case assumed the same phase it would have presented if she had been holding the policy and the action had been brought against her originally. This view also the parties have adopted and the case proceeded accordingly.

The statute of limitations depended on facts submitted to the jury. If the possession of the wife was merely for safe keeping, it would not become adverse because of any conjugal explanations of his design in effecting the policy; nor after separation would that of the mutual friend be adverse before demand and refusal.

The objection that an action of replevin would not lie against one who had been made a bailee is one that should have been made by the bailee himself. When he passed out, and the appellant took his place, the action, by her own motion, assumed the phase of a hostile proceeding against herself, as holding property claimed by the plaintiff.

It is urged as error upon the record proper, that the verdict of the jury was illegal, inasmuch as it did not find the value of the property; and that the judgment was erroneous, inasmuch as it was not in the alter-

'1. REPLEVIN: verdict need not find value when property in custody of court.

native, so that defendant might have exercised the option of keeping the property and paying the value.

Both the verdict and judgment are technically incorrect. In replevin the jury must assess the value of the property, and damages, whenever, by their verdict, there will be a judgment for the recovery or return of the property (*Gantt's Digest, Sec.* 4682,) and upon a verdict, judgment "may be for the delivery of the property, or for the value thereof, *in case a delivery cannot be had.*"

It was held in *Hauf v. Ford,* 37 *Ark.*, 544, that the finding of the value was important with reference to this judgment. If a delivery cannot, for any cause, be had, and several articles are sued for, the defendant may be credited for what is actually delivered, and charged on execution with the rest. It is, therefore, important that each article be valued separately.

But in this case, when the verdict was rendered, although the defendant on the pleadings and by virtue of the course adopted, stood in the attitude of detaining the policy, it had been in fact delivered into the control of the court. There was no reason to find its value. If the verdict were right, no execution was needed. Substantial justice would in that case be accomplished by ordering the clerk to transfer the possession to the plaintiff. This court does not reverse for harmless error. It is a peculiar case in replevin where it was already known by the court that delivery *could* be had, and there was no need of an alternative judgment.

An examination of the evidence discloses discrepancy as to the mode by which defendant originally came into possession of the policy. There is sufficient evidence, however, to sustain the finding, in the testimony tending to show that it was put into her hands for safe keeping.

One instruction only was given at the instance of the

plaintiff. It was, in substance, that if the jury believed the policy to have been taken out in lieu of one for the benefit of the former wife and children, and was a paid policy, and that plaintiff was entitled to draw the annual dividends; and if they further believe that, with plaintiff's consent, it had been deposited in the hands of Hoffman for safe-keeping only; and that plaintiff demanded its delivery within three years, then they might find that the action was not barred and render a verdict for the plaintiff. The court approves this instruction, in its application to the case.

Of its own motion, the court added that if the jury believed the plaintiff intended to make a gift of the policy to defendant and the other beneficiaries, they should find for the defendant. Of this she cannot complain.

She, on her part, asked four instructions, the first being a mere declaration of our statute regarding the separate property of married women. It had no application out side of the evidence on the point of the gift, and an instruction on that point had already been given, as favorable to her as could have been desired.

The second was that marriage is a good consideration for a gift to the wife, and if the paper was given to her for her support, the jury should find for the defendant. There was no evidence whatever that the policy was given in consideration of marriage, and that instruction was properly refused.

The third was on the statute of limitations, to the effect that if the jury should find that the defendant had been in possession of the paper for three years, adversely to the husband, before the beginning of the suit, they should find for the defendants. There was no evidence to show that she held adversely before some

time in 1878, before the divorce in September, 1879. Her account of the matter, in her testimony is, that in 1875 he placed the policy in her hands, she being then his wife; telling her that she had an interest in it, and directing her to keep it till his death and then collect the money. She says, however, that in 1878 he commenced efforts to get it from her, and she refused to let him have it. That perhaps was after their dissensions began. It was placed in the hands of Hoffman for safe-keeping in April, 1879, after which it is certain the possession was not adverse to plaintiff before demand. The original deposit with her, by her husband, was certainly not a gift, but the simple custody of a security until the time should come to use it. There was no proof upon which any instruction as to the statute of limitations could be based, and this third instruction was properly refused.

The fourth was that it was necessary for the plaintiff to show that the property was of some value. This is a correct declaration of law, and should, ordinarily, be given. It was technical error to refuse it, but it was not an issue under the peculiar circumstances of this case, of any importance; and no proof of value could affect defendant.

2. Supreme court will not reverse for uninjurious errors.

Notwithstanding there were errors in practice, and in instructions, we are satisfied they were not prejudicial to defendant. It is right that the plaintiff should have and control and enjoy the dividends of a policy effected and paid up, by himself. It is only for error prejudicial to appellant that this court will remove or modify a judgment or decree of an inferior court. *Gantt's Digest*, *Sec.* 1093.

Affirm.

WALKER ET AL V. TAYLOR.

43 543
76 455

1. LAND COMMISSIONER'S DEEDS: *Recitals in, unneccessary.*
The commissioner of state lands is not required by statute to make any recitals in his deeds of lands forfeited for taxes. They convey whatever title the state had without recitals. In the absence of allegations and proof to the contrary the courts presume that everything which should have been done by the different officers, was done, in order to vest title in the state.

2. PLEADINGS: *Exhibits*
A deed exhibited with a complaint in ejectment, is no part of the complaint, and if defective, can be avoided only by exceptions to it as evidence. It is no ground for demurrer to the complaint.

APPEAL from *Jackson* Circuit Court.
Hon. R. H. POWELL Circuit Judge.

W. R. Coody for appellant.

1. The annexed complaint good, the title sufficiently stated, with deed exhibited and set out. *Acts* 1875, *p.* 229.

2. The deed from the state is sufficient evidence of appellant's title, and that all things required were properly done, until the contrary is shown. *Act Dec.* 13 1875, *p.* 92; 31 *Ark.* 609, 610.

3. The deed being the foundation of the action and required to be exhibited therewith, becomes part of the pleadings, and is conclusive on the demurrer in this case. *Gantt's Digest, Secs.* 4599–4600.

EAKIN, J. Action in ejectment. Appellants in this complaint say that by virtue of a certain deed from the commissioner of state lands, Mrs. Walker is the owner, and entitled to the possession of the land in controversy; that the defendant holds the possession without right, and has for a long time, unlawfully, kept the plaintiff out of posses-

sion. She describes the land and exhibits the deed. It was executed by the commissioner on the 27th of May 1879, and recites that the land was forfeited to the state for taxes of 1868, and that they appeared upon the books of the office as vacant and subject to sale. Then follows the consideration of taxes paid by Mrs. Walker, and the words of conveyance.

The circuit court sustained a demurrer to the complaint, upon which complainants rested, and appealed from the judgment entered.

Neither the record, nor the counsel for appellee, affords us any information of the grounds upon which the honorable circuit judge made his ruling, and none suggest themselves as valid. The allegations of the complaint contain everything essential to the right of recovery. If there had been any defect or want of certainty, it should have been met with a motion to make more definite.

The commissioner was not required, by statute, to make any recitals in his deed. It is effective to convey whatever right the state had. In the absence of any allegation or proof to the contrary, the courts presume that every thing which should have been done by the different officers, was done, in order to vest title in the state.

But that is of no consequence at this stage of the proceedings. If the deed be invalid from any cause not suggested to us, it should have been met by exceptions to it as evidence. It forms no part of the pleadings, and should not have been considered on demurrer. *Jacks v. Chaffin*, 34 *Ark.*, 534.

The court erred in sustaining the demurrer. For which reverse the judgment, and remand, with directions to overrule it, and for further proceedings.

EPPS v. SASBY ET AL.

1. PRACTICE: *Service: Appearance: Judgment.*
A. and B. were sued before a Justice of the Peace on a debt. A. was not served with process and did not appear. B. appeared and asked for a postponement until his attorney could arrive. In due time his attorney came and moved to quash the service which was insufficient. The Justice refused to quash it; and B. saying nothing further, judgment was rendered against both defendants: HELD, on *certiorari* to quash it, that the judgment was void as to A. for want of service, but good as to B., who had voluntarily appeared.

APPEAL from *Pope* Circuit Court.

Hon. G. S. CUNNINGHAM.

D. B. Granger, for appellant.

There was no proper service on Epps. *Gantt's Dig., Sec.* 4511–4514. And the Justice had no jurisdiction to render judgment by default. Judgment without notice is void. *Ib., Sec.* 4738.

Epps only appeared for the purpose of moving to quash the return, and objecting to the Justice taking jurisdiction. This was not an appearance to the action. *Ib.*, 3736; 3 *Ark.*, 532; 5 *Id.*, 409; 18 *Id.*, 308; 1 *Id.*, 376; 5 *Id.*, 517; 20 *Id.*, 12. The judgment being void there was no remedy by appeal. *Rose Dig.*

G. W. Shinn, for appellee.

Epps having voluntarily appeared before the Justice, his only remedy was by appeal. Argues upon the merits, that Sasby was an innocent purchaser of the due bill for value, before maturity, and that Epps could not plead want of consideration, &c., &c.

SMITH, J. Sasby sued Steel & Epps upon a due bill made by them, in their firm name, for $20.62. The constable returned service upon Epps by leaving a copy of process at his residence with a member of his family over the age of fifteen years. As to Steel, he made a return of "*non est inventus.*" At 10 A. M., of the day set for trial, Epps appeared and requested that the case be postponed until 1 P. M., in order to give his attorney time to arrive. In due time the attorney came and moved the justice to quash the return upon the summons. This the justice declined to do, and Epps saying nothing further, judgment was rendered against both defendants.

To quash this judgment, Steel & Epps sued out a writ of *certiorari*, alleging in their petition that the same was void, for want of jurisdiction over the persons of the defendants, and further, that the due bill, which was the foundation of the action, was made without consideration, and under the influence of false and fraudulent representation of the payee of the instrument.

On the hearing it was admitted that no valid service of the process had been made upon either Steel or Epps. The circuit court in effect quashed the judgment against Steel, and affirmed it as to Epps.

With the justice or injustice of the original claim, and whether Epps was legally liable to pay it, if the action had been defended, we have nothing to do. That matter has been forever set at rest by the adjudication of the justice, if there has been a valid one. And the only method of correcting any error in the proceedings, after the question of jurisdiction is settled, was by prosecuting an appeal.

The judgment against Steel, being without notice to him, was absolutely void. *Gantt's Dig., Sec.*, 4738. But Epps was bound by his own voluntary appearance. *Smith. v Par-*

ker, 25 *Ark.*, 518; *McCoy v. Lemons*, *Hempst.*, 216; *Ward v. Todd*, 103 *U. S.*, 327.

Affirmed.

KRONE v. COOPER.

1. RESIDENCE: DOMICILE: *Meaning of*

"Domicile is of broader meaning than residence." It includes residence: but actual residence is not indispensable to retain a domicile after it is once acquired. It is retained by the mere intention not to change it.

2. ATTACHMENT: *Residence of defendant*:

"Residence" in the attachment laws generally, implies an established abode, fixed permanently for a time, for business or other purposes, although there may be an intent existing all the while to return at some time to the true domicile. An actual resident in this state, having a domicile in another, cannot be attached here as a non-resident.

APPEAL from *Lawrence* Circuit Court.

Hon. R. H. POWELL, Circuit Judge.

U. M. & G. B. Rose, for appellant.

The dwelling place of Krone's family was not necessarily his domicile. The domicile of the family follows that of the head. Absence from the state does not make one a non-resident, however protracted, if he has the *animo revertendi*. 29 *Ark.*, 280; 13 *Mass.*, 501; 5 *Bush*, 671; 19 *Wend.*, 11. "Residence" and "domicile" are not synonymous. One may have his residence in one state and his domicile in another. Residence within the

meaning of the attachment laws, is the place where a man remains the greater part of his time, and where personal service can be had upon him. See *Drake on Attachment, Sec.* 58; *note to Frost v. Brisbin*, 32 *Am. Dec.*, 427; 30 *Grat.*, 718; 40 *How. Pr.*, 260; 54 *Miss.*, 308; 1 *Seld.*, 422; 75 *N. C.*, 21; 37 *N. J. L.*, 492; 19 *Md.*, 82.

W. F. Henderson, for appellee.

The testimony preponderates that Krone not only was a resident of Missouri, but that his domicile was there. He had at best but a commercial residence in Arkansas. He was liable to be proceeded against as a non-resident. *Drake on Attachment, Sec.* 67; 10 *La. An.*, 726; 38 *Mo.*, 384; 68 *N. Y.*, 370; 37 *N. J. Law*, 492; *Drake on Attachment, Secs.* 65, 66 *and note* 2.

Krone & Boas were partners, and jointly and severally liable on the note, and the firm property was properly levied on. 8 *Ga.*, 532; *Drake on Attachment, Sec.* 66.

COCKRILL, C. J. Cooper sued Krone, Oppenheimer and Boas on a promissory note, and sued out an attachment against Krone & Boas. There was a judgment *in personam* against all the defendants, and the attachments were sustained. The question chiefly litigated in the court below, and discussed by counsel here, is whether Krone, who alone appeals, was a non-resident of this state at the time the attachment was sued out.

1. RESIDENCE. DOMICILE: Meaning of.

The terms "resident" and "non-resident" used in the provisions of our statute governing attachments, have never been defined by this court, and the provisions themselves do not profess to determine the meaning that was intended in their use. No exact definition of these terms, to fit all cases, is practicable, for the reason that their meaning varies with the subject matter to which

they are applied. The meaning of the word citizen, in the homestead act of 1852, was restricted to that of "resident" merely, (*McKenzie v. Murphy*, 24 *Ark.*, 155,) and the purpose and policy of laws relating to homesteads, the right of the elective franchise, and other subjects, show that "residence" is there to be understood in the enlarged sense of "domicile." So that what is meant by their use in any given instance must be determined according to all the light that the context affords. The definition of domicile is itself, in a measure, uncertain, but it is agreed that it has a broader meaning than residence. It includes residence. Actual residence, however, is not indispensable to retain a domicile after it is once acquired. It is retained by the mere intention not to change it. *Story Conft. Laws, Sec.* 44.

No word, it is said, is more nearly synonymous with domicile than home, and it is generally agreed that a man can have but one home or domicile, but that he may have more than one place of residence. The domicile of a citizen may be in one state and his actual residence in another. *Savage v. Scott*, 45 *Iowa*, 130; *Board v. Davenport*, 40 *Ill.*, 197.

Drake, in his work on attachments, section 58, says: "In determing whether a debtor is a resident of a particular state, the question of his domicile is not necessarily involved, for he may have a residence which is not in law his domicile."

Under the attachment law of Missouri, residence and domicile are construed to mean about the same thing, and any one not domiciled in that state, may be proceeded against by attachment; but this seems to result from the phraseology of the statute. See *County v. Moberly*, 59 *Mo.*, 238.

In other states the distinction between residence and

domicile is taken, and the word "resident" in this connection, is generally construed to mean an actual resident, merely, without reference to the place of domicile.

Thus, where a mother left the state of her domicile and accompanied her children into another state, with the intention, however, of returning when their education was completed, she was held liable to the process of attachment in the state of her domicile, as being a non-resident of that state. *Alston v. Newcomer*, 42 *Miss.*, 186.

In *Wheeler v. Cobb*, 91 *N. C.*, 21, the defendant left his home to discharge the duties of a federal office in another state. He always claimed the place of his old home as his domicile, and occasionally visited it. The court drew the line between domicile and residence, and sustained an attachment against him in the state of his domicile.

The same rule was applied in a case where the defendant was located in another state than that of his domicile for several years attending to a law suit, although he continued to maintain his home in his absence as before. *Haggard v. Morgan*, 1 *Selden*, (5 *N. Y.*) 422.

Frost v. Brisbill, 19 *Wend.*, 11, reviews the previous New York cases, construing the meaning of the word "resident" in the statutes regulating the rights and remidies of debtor and creditor; and it is there said that they all virtually decide that actual residence without regard to the domicile of the defendant, was within the contemplation of the statutes. The same case holds that to make one a resident within the meaning of these statutes, "there must be a settled, fixed abode, and intention to remain permanently, at least for a time, for business or other purposes."

In *Long v. Ryan*, 30 *Gratt.*, 718, the case presented was that of a person domiciled in Washington city, who

removed to Virginia with the intention of remaining there nine months, or such additional time as might be required to complete certain contracts for building parts of a railroad. He rented his residence in Washington and removed the greater part of his family with him, but without the intention of abandoning his domicile, and during the time of his work, he always claimed Washington as his place of residence, and declared his intention of returning there as soon as his contracts were completed. Upon this state of facts the court considered him a resident of Virginia, and held he was not liable to be subjected to the process of attachment given by statute against non-residents.

In Morgan v. Nunes, 54 *Miss.*, 308, the defendant was proceeded against as a non-resident debtor in Mississippi. The proof showed that he was a ship-master from New York, where he had left his family, to engage in trade from ports on the Mississippi sound. He stated to a witness, before the attachment, that his residence was in New York, but he, himself, testified that he came to Mississippi to remain permanently, and that he had voted there. He did not keep house, and was in the county where he claimed residence only when the vessel was in port, but was connected in business with parties there. The court thought he was a resident.

2. Residence under the attachment laws.

We may conclude from the cases, that in contemplation of the attachment laws generally, residence implies an established abode, fixed permanently for a time for business or other purpose, although there may be an intent existing all the while to return at some time or other to the true domicile; but so difficult is it found to provide a definition to meet all the varying phases of circumstance that the determination of this question may present, that the courts say, that, subject to the general rule, each case must be decided on its own state of facts.

The evidence here, aside from the appellant's testimony, shows that at the time the attachments were sued out, and for seven or eight years prior thereto, appellant was carrying on a mercantile business in the town of Walnut Ridge, in Arkansas, in partnership with his co-defendant, Oppenheimer, and also had been engaged in a railroad contract thereabouts with Boas; that his family resided in St. Louis, Missouri, and that he was in the habit of speaking of St. Louis as his home. He told one witness about fifteen months before suit, that he lived or resided in St. Louis, and refused at one time to vote in a municipal election at Walnut Ridge, giving as a reason that his residence was in St. Louis. He had no place of business and owned no real estate, except in Walnut Ridge. He spent about three-fourths of his time there, sometimes keeping house, sometimes boarding at a hotel. His family occassionally visited him at Walnut Ridge, and it is shown that he had visited his family in St. Louis, though whether his visits were often or protracted the evidence does not disclose. The appellant himself testified that all of his time was devoted to the firm business above mentioned, either at Walnut Ridge or in purchasing goods abroad for the concern, which seems to have prospered. He also testified that he came to Arkansas from Illinois, and that his residence had been in this state ever since; that he had offered to vote in Arkansas, but was rejected on account of prejudice, as he supposed; that he had never registered nor voted in St. Louis; and that his wife lived in St. Louis with his children for the purpose of educating them there. He left Walnut Ridge on Saturday, stating that he was sick and was going home, and his effects were attached on the following Monday. After a few days absence he returned to his business as usual.

The appellant's testimony, taken alone, would estab-

lish, not only an actual residence, but a domicile in this state. His honor, the circuit Judge, who determined the facts upon the testimony, might well have concluded, as he doubtless did, that appellant's acts and previous statements about his domicile, contradicted his testimony in that behalf. Admitting, however, that the testimony clearly shows that appellant's domicile was in St. Louis, we find nothing sufficient to show that his actual residence was not in Arkansas. The burden of showing this was upon the appellees. It was not shown that appellant's regular place of abode, his dwelling place, was in St. Louis. If it had been, the bare fact that he spent a great part of his time in Arkansas attending to business interests there, would not have been a sufficient answer. A mere presence, or temporary sojourn, in this state, whether on business or pleasure, unaccompanied by the intention of remaining for a length of time that would give some idea of permanency, would not constitute residence within the meaning of the attachment laws, though by permanency we are not to understand a determination to stay always. Such residence, when established, may be lost by departure from the state with the intention of not returning, or of taking up an abode elsewhere; but a mere temporary absence from the state, without this intention, would not render one amenable to the attachment law as a non-resident. See *Mandel v. Peet*, 18 *Ark.*, 236.

If appellant's temporary absence from his place of residence afforded a ground for attachment against his propery, it must be found in some other subdivision of the attachment provision. No error as to the judgment *in personam* is assigned. The judgment sustaining the attachment must be reversed and the case remanded with directions to grant the appellant a new trial as to that issue.

(Supplemental opinion on motion to modify judgment.)

APPEAL: *Supersedeas bond: Judgment in Supreme Court.*

When an appellant desires to supersede an order of the circuit court, sustaining an attachment of his property, and not also the personal judgment against him, he should give bond and issue supersedeas as provided in section 1299, Mansfield's Digest. If he execute bond as provided in section 1295, then, upon affirmance of the personal judgment, the Supreme Court will render judgment for it against the appellant and his sureties in the bond, although it reverse the order sustaining the attachment.

COCKRILL, C. J. Krone prosecuted an appeal from a judgment sustaining an attachment and awarding execution for $876.59 against him. We reversed the case as to the attachment issue and affirmed the judgment *in personam*. The clerk failed to enter a judgment here against the sureties in the supersedeas bond, and the appellee has moved for such judgment.

If the appellant had desired to supersede only that part of the judgment relating to the attachment proceedings, he might have done so by framing his bond in accordance with Section 1299, of Mansfield's Digest. He did not see fit to do this, but caused a bond to be executed to stay all proceedings under the judgment. The appellee has thus been prevented from having execution for his money, the only means of enforcement left him, inasmuch as the appellant had released the attached property from the grasp of the order by giving bond for that purpose.

The sureties in the supersedeas bond have aided in this delay, and have, in effect, made themselves parties to the suit and agreed to pay any judgment that this court may render or order to be rendered against the

appellant. *White v. Prigmore*, 29 *Ark.*, 208; *Mansfield's Dig., Sec.* 1295; *Hobbs v. King* 3 *Metc.*, (*Ky.*) 249.

The fact that the order sustaining the attachment was reversed, does not affect the sureties' liability to pay that part of the judgment which is affirmed. The case of *Rodgers v. Brooks*, 31 *Ark.*, 194; (*S. C.*, 30 *Ib.*, 612); is in point. A decree had been rendered against Rodgers for money he owed, and the amount was charged as a lien on his lands. On appeal the decree was reversed as to the lien, and a decree entered here against Rodgers and the sureties in his appeal bond, for the money found due.

The appellee is entitled to his judgment here under the statute, against the appellant and his sureties and it is so ordered.

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ACCOMPLICE.

See CRIMINAL LAW, 14.

ACKNOWLEDGMENT OF DEEDS.

See MARRIED WOMAN, 1, 2, 3.

1. *Curing act of* 1883.

The act of 1883, curing defective acknowledgments, could not, in any case, interfere with rights of third parties vested at the time of its passage. McGeehe, trustee v. McKenzie et al. 156

2. *Party to deed cannot take.*

An acknowledgment of the execution of a deed taken by a party to it does not authorize it to be recorded, and the record of it imparts no notice to subsequent purchasers or incumbrancers. But such acknowledgment taken before the curing act of March 8, 1883, was validated by that act, except in cases where it affected vested rights, or the conveyances of minors or insane persons. Green v. Abraham. 420

ACTION.

1. TOLL BRIDGE: *Avoiding tolls by crossing elsewhere*: *Obstructing highways.*

Appellant by license from the County Court erected a toll bridge at the crossing of a stream by the public road, and to prevent par-

ties from crossing the stream at a ford where the old public road through his land crossed it, he extended his fence across the old road. Defendant pulled down the fence and crossed at the ford and induced others to do likewise. The old road had never been vacated by the County Court. Plaintiff sued the defendant for travelling the old road across his lands, and tearing down his fences, and also for inducing others to avoid paying tolls at the bridge. HELD: That the road not being vacated the defendant had the right to travel it and to remove the obstructions, provided he did no wrongful act to make him a trespasser *ab initio:* 2. A party is not liable for damages for avoiding a toll bridge and the payment of tolls by crossing elsewhere, or for inducing others to do likewise. Wright v. Morris. 1, 3

2. DAMAGES: *For fraud.*

Fraud and injury must concur to furnish ground for judicial action. Fraud without damage or damage without fraud is not sufficient. Carvill v. Jacks. 454

3. SAME: *Fraudulent representations: Who may sue for.*

It is not necessary to support an action for false representations that the representation be addressed directly to the plaintiff. If it be made with the intent to influence every person to whom it may be communicated, or who may read or hear of it, it is sufficient. Nor is it essential to the right of action that the misrepresentation be the sole inducement to a purchase. Ib.

ADMINISTRATION.

See CHANCERY JURISDICTION.

1. *Fraudulent settlements. Notice of settlement.*

It is a very great irregularity for the Probate Court to confirm an administrator's account before the notice of filing the account has been given as required by law; but the omission of the clerk to give the notice cannot make the account fraudulent. Greely Burnham Grocery Co. v. Graves. 171

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1. CERTIORARI: *No substitute for appeal.*

The writ of *certiorari* cannot be used as a substitute for appeal to correct the mere errors of an inferior court. Pettigrew v. Washington county. 33

2. *Remedy when County Court refuses to grant appeal.*

When the County Court refuses to grant an appeal, or to act on the application for it, it may be compelled by mandamus; and if the time for appealing has elapsed it will be compelled to make the necessary order by a *nunc pro tunc* entry. Ib.

3. JUSTICE OF THE PEACE: *Transcript to Circuit Court. Certification of.*

The transcript of a Justice of the Peace containing the entries of each day's proceedings, over his official signature, and ending with the following memorandum, "Transcript to Circuit Court, Bradley county, Ark., B. M. Tussel, J. P.," is sufficient to support an appeal to the Circuit Court. Turner v. Harrison. 233

4. SAME: *Verdict of jury, when a judgment. Appeal from.*

The verdict of a jury in a trial before a Justice of the Peace is, itself, in legal effect, a judgment, (when no formal judgment has been entered by the Justice,) from which an appeal may be taken to the Circuit Court. Ib.

5. APPEAL: *Supersedeas bond. Judgment in Supreme Court.*

When an appellant desires to supersede an order of the circuit court, sustaining an attachment of his property, and not also the personal judgment against him, he should give bond and issue supersedeas as provided in section 1299, Mansfield's Digest. If he execute bond as provided in section 1295, then upon affirm-

ance of the personal judgment, the Supreme Court will render judgment for it against the appellant and his sureties in the bond, although it reverse the order sustaining the attachment. Krone v. Cooper. 554

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ATTACHMENT.

1. RESIDENCE: DOMICILE: *Meaning of.*

"Domicile is of broader meaning than residence." It includes residence: but actual residence is not indispensable to retain a domicile after it is once acquired. It is retained by the mere intention not to change it. Krone v. Cooper. 547.

2. *Residence of defendant.*

"Residence" in the attachment laws generally, implies an established abode, fixed permanently for time, for business or other purposes, although there may be an intent existing all the while to return at some time to the true domicile. An actual resident in this state, having a domicile in another, cannot be attached here as a non-resident. Ib.

BAIL.

See CRIMINAL PRACTICE, 1.

BURGLARY.

See CRIMINAL LAW, 13. INDICTMENT, 6, 8.

CERTIORARI.

PLEADING AND PRACTICE. See TAXES, 1, 2, 4.

1. *None to correct errors.*

Mere errors and irregularities in a judgment can be corrected only by appeal. Hickey v. Matthews. 241.

2. *Practice in.*

Since the passage of the act of 1873, regulating the practice on *certiorari* (Gantt's Dig., Sec's 1196-7), a Justice's return to the writ is not conclusive as before then. The court may look beyond the transcript certified by the justice, to the original record itself, and hear evidence as to any subsequent alterations and amendments of that record. Ib.

CHANCERY JURISDICTION.

See JURISDICTION, 1, 2.

1. ADMINISTRATION: *Settlements of administrators, how corrected.*

Chancery has no power to correct the mere errors in an administrator's settlement: it must be done by appeal to the circuit court. Greely Burnham Grocery Co., v. Graves, 171.

CHANGE TICKETS.

CONTRACTS, 2. See EVIDENCE, 9.

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See NOTES and BILLS, 1, 2.

1. COMPROMISE: *As consideration for contract.*

A compromise of a disputed claim, however void of merit or foundation, is sufficient consideration to support an express promise for its settlement. Mason v. Wilson, 172.

CONTRACTS.

See CONSIDERATION, 1. STOPPAGE IN TRANSITU, 1.

1. *Dependent.*

Where agreements go to the whole of the consideration on both sides, the promises are dependent, and one of them is a condition precedent to the other; and before one of the parties can [illegible] he must show a performance, or readiness to [illegible] the contract. Haney v. Caldwell, 184.

2. *Entire and seperable: Change tickets: Statute limitations: Interest.*

In 1873 the I. M. & H. Ry. Co. contracted with A. for the construction of the road from Helena to Forest City for a specified compensation payable in installments, which being unable to pay, they in 1874, issued to A. change tickets in the sum of five dollars, in a form prohibited by statute and payable to bearer in freight or passage six months after the completion of the road. A with the knowledge and consent of the company delivered a part of the tickets to a sub-contractor, B., for work done by him in 1875. Six months after the completion of the road the company refused to honor the tickets held by B. and he sued them for the amount of work represented by the tickets: HELD: 1. That B. was the equitable assignee of the demand which the tickets professed to represent and could recover so much of the claim of A. against the company as was represented by the tickets, and they, though illegal, were evidence of the amount. 2. The contract with A. being entire and indivisible the statute of limitations did not run against any part of the demand until the whole road was completed. 3. But as the work was payable in installments, B.'s demand bore interest from the time he received the tickets. I. M. & H. R. R. v. Stansell, 275.

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See INJUNCTIONS, 3.

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See ELECTIONS, 3.

1. *Jurisdiction over defaulting collector of school taxes.*

The county court has jurisdiction to render judgment against a defaulting collector and his sureties, for school taxes collected by him and not paid over. Pettigrew v. Washington Co., 33.

CRIMINAL LAW.

1. SELLING LIQUOR: *Former conviction, when a defence.*

A former conviction is a bar to any offence of which the defend-

ant might have been convicted under the indictment and proof in the first case. And so when a defendant has been convicted under a valid indictment for unlawfully selling liquor, and under proof of several different sales in a given time, and the state made no election as to which it would prosecute, the conviction is a bar to subsequent indictment for any sale to the same party within the same time. State v. Nunnelly, 68.

2. *Carrying weapon.*

On trial of a defendant for carrying a pistol as a weapon, it is not necessary to prove that the pistol was loaded. State v. Wardlow, 73.

3. GAMING: *Betting cigars.*

Parties who play at cards under an agreement that the beaten party shall treat the others to cigars, are guilty of unlawful gaming, under the statute. State v. Wade. 77.

4. *Sabbath breaking by keeping store door open.*

To commit the offence of Sabbath breaking by keeping a store door open on Sunday, it is not necessary to keep it so opened as to induce customers to enter and trade. It is sufficient if the door is partially open, or intentionally left unlocked, so that any person may enter as readily as if left upon. Or if it is opened to the knocking of a stranger and he admitted or invited in, this is a keeping open within the prohibition of the statute. Seelig v. State, 96.

5. ARREST: *Killing a resisting or flying felon.*

If a felon resist arrest or fly, so that he cannot possibly be apprehended alive by those who pursue him, whether private persons or public officers, with or without a warrant from a magistrate, he may be lawfully slain by them. Carr v. State, 99.

6. ARREST: *Who may make.*

Where a felony has in fact been committed, either an officer or a private citizen who has reasonable ground to suspect a particular person, may, acting in good faith, arrest him, without incurring any liability, civil or criminal, though the suspicion prove unfounded. But if no offence be in fact committed a private person making such arrest will not be justified by such suspicion and good faith, though an officer will be. Ib.

7. *Liability for acts of accomplices.*

When persons combine to do an unlawful thing, if the act of one

proceeding according to the common plan, ends in a criminal result, though not the particular result intended, all are liable. Ib.

8. *Confederates—standing watch.*

Where one stands watch while his confederate is robbing a house, both are equally guilty. Thomas v. State, 149.

9. *In Jeopardy: Discharge of Juror.*

A prisoner is in jeopardy from the time that the jury is impaneled and sworn in a court of competent jurisdiction, upon an indictment sufficient in form and substance to sustain a conviction; and the entry of a *nolle prosequi*, or discharge of a juror, after that, without his consent, operates as an acquittal, except in cases of overruling necessity, as the death or illness of the judge or juror, or inability of the jury to agree on a verdict. Whitmore v. State, 271.

10. *Grand juror not incompetent for petit juror.*

A grand juror who assisted in finding an indictment is not thereby disqualified as a petit juror to try the case. It is only cause of challenge for implied bias. Ib.

11. SELLING MORTGAGED PROPERTY: *Mortgage: Interest in crop.*

A cropper on shares has such an interest in the crop as is the subject of mortgage, and for the sale of which, when mortgaged, and the mortgage recorded, he will be guilty of a felony. Beard v. State, 284.

12. SAME: *Intent.*

In order to find one guilty of selling mortgaged property, it is not necessary that the jury find that he sold it with the feloneous intent to deprive the mortgagee of his debt. Ib.

EAKIN, J., dissenting.

NOTE. The mortgage in this case was du'y recorded.—*Reporter.*

13. BURGLARY: *Out house.*

Any house under our statute comes within the prohibition against burglary and arson. An out-house is not necessarily within the curtilage. A house contiguous to and used in connection with a hotel, both belonging to and controlled by the same person is an out house. Shotwell v. State, 367.

14. ACCOMPLICE: *Verdict of jury conclusive.*

When the question whether one was an accomplice in a crime is

submitted to the jury as a mixed question of law and fact, under proper instructions from the court, their verdict is final. Melton v. State, 367.

15. *Defense—Former conviction: Plea: Proof.*

To maintain the defense of former conviction for selling liquor to the same person, the defendant must both plead and prove that the offense charged in the last indictment was the same of which he was convicted under the first; and the record of the former conviction is not of itself evidence of the identity of the offense. Nor does the fact that the evidence on the last indictment would support a conviction on the first necessarily sustain the plea. Emmerson v. State. 372

16. SLANDER: *Is a felony under act of* 1869.

Under the slander act of 1869, slander is a felony and not a misdemeanor, and it is not left to the court or jury to say which it is. State v. Waller. 381

17. FELONIES: *Alternative punishments: Power of Legislature.*

The Legislature has the right to provide in felony cases, alternative punishments, to be left at the discretion of the court, of such nature as belong to misdemeanors: and this discretion to mitigate the punishment, does not alter the nature of the crime. Ib.

CRIMINAL PRACTICE.

See EVIDENCE, 5.

1. *On bail bonds. Surrender of principal by bail.*

Carter, the security in a bail bond of Spain, surrendered his principal to the Deputy Sheriff (or supposed Deputy), in the manner provided by the statute, on the 31st day of October, 1882. The Sheriff had been elected in 1880, and again in 1882, and was qualified under the last election on the 30th day of October, 1882, but had not been commissioned. After his qualification on the 30th he had not reappointed the deputy. It did not appear that either the surety or the deputy knew that the Sheriff had qualified under his new term on the day before. The surrender seemed regular, according to law, and in good faith and without collusion of the surety for the escape of the principal. *Held*, in a suit against the surety on the bail bond, that the par-

ties had reason to believe that the deputy was an officer *de jure* as well as *de facto* and that the surety should be discharged. Carter v. The State. 132

2. *No trial without plea.*

In a criminal case there can be no valid trial without plea of the defendant. State v. Dillingham. 154

3. *Admissions of attorney at the trial, effect of.*

A prisoner is not bound by the waiver or admission of his attorney at the trial unless it be distinct and formal and made for the purpose of binding the prisoner. Flynn v. State. 289

4. *Instructions.*

A declaration by the judge in instructing the jury in a case of assault with intent to kill "that the prisoner is guilly of an assault with intent to kill or he is guilty of nothing," is error. Ib.

5. *Serving copy of indictment on defendant.*

Where a defendant pleads to an indictment, declares himself ready for trial, and a jury is empanneled, and the trial commenced, it is too late for him then to object that he has not been furnished with a copy of the indictment. Johnson v. State. 391

DAMAGES.

See ACTION, 2, 3. RAILROADS, 5.

1. *Fraudulent representations in sale of lands.*

The measure of damages for breach of the usual covenants of a deed is the purchase money and interest. Nothing can be allowed for improvements and the increased value of the lands But where the vendee is induced to purchase by the fraudulent representations of the vendor as to his title, he may, upon eviction by a better title, recover of his vendor all the damages naturally resulting from the fraud, although the land was conveyed by deed with warranty. The action is upon the fraud, not upon the covenants of the deed; and the rule of damages for breach of the covenants does not apply. Carvill v. Jacks. 439

2. *Same: Measure of damages.*

In an action for breach of the covenants of seizen and quiet enjoyment in a deed, the measure of damages is the purchase money and interest; but where the purchase is induced by the vendor's

false and fraudulent representations of his title, the purchaser may, upon eviction by a better title, sue upon the fraud and recover the purchase money and interest and also the value of such improvements made upon the land as were consistent with the use for which he purchased it. Jacks v. Carvill. 454

DECREE.

See PARTIES, 1.

DEED.

See ACKNOWLEDGMENT OF DEEDS, 1, 2. LAND COMMISSIONER'S DEEDS, 1. MARRIED WOMAN, 1, 2.

EJECTMENT.

See PLEADING AND PRACTICE, 11.

ELECTIONS.

1. *Duty of canvasing boards.*

The duties of canvassing boards are purely ministerial. They have no judicial functions and no discretionary power to go behind the returns for any purpose. Williford v. State. 62

2 *Manner of conducting elections: Statute directory.*

The board of canvassers can not reject a poll-book on account of its being transmitted to the clerk through one not an elective officer. Statutes concerning the manner of conducting elections are directory, unless a non-compliance is expressly declared to be fatal to the validity of the election, or will change or make doubtful the result. Ib.

3. ELECTION OF COUNTY SEAT; *Jurisdiction of Chancery: of County Court; Appeal.*

Chancery has no power to restrain the counting of votes in a County seat election, for fraud or illegality. The jurisdiction is in the County Court to purge the polls of fraudulent and illegal votes, as an incident to its exclusive jurisdiction over all matters

per aining to the local concerns of the county; and from its decision any person aggrieved may appeal to the circuit court. Ib.

EVIDENCE.

See CRIMINAL LAW, 15. LIQUOR, 4. PLEADING AND PRACTICE, 7. STATUTE OF LIMITATION, 1.

1. *Impeaching witnesses: Indictment for felony.*

The State cannot impeach the character of a witness, nor discredit him before the jury, nor impair the weight of his testimony, by evidence that he had been *indicted* for a felony. Carr v. State. 99

2. *Excluding improper, from jury: Presumption as to verdict.*

Where improper evidence is admitted and afterwards excluded from the jury, it is presumed that their verdict is based upon legal testimony only. Ib.

3. RES GESTAE: *What are?*

Res Gestae are the surrounding facts of a transaction, explanatory of an act, or showing a motive for acting. They may be submitted to the jury provided they can be established by competent means, sanctioned by the law, and afford any fair presumption or inference as to the question in dispute. Ib

4. SAME: *Same?*

Circumstances and declarations contemporaneous with the main fact under consideration, or so nearly related to it as to illustrate its character and the state of mind, sentiments and disposition of the actors are parts of the *res gestae*—are regarded as verbal facts indicating a present purpose and intention and therefore admitted in proof as any other material facts. And they need not be strictly coincident as to time, if they are generated by an excited feeling which extends without break or let down from the moment of the event they illustrate; but they must stand in immediate causal relation to the act and become part, either of the action immediately preceding it, or of action which it immediately precedes. Ib

5. CRIMINAL PRACTICE: *Admission of evidence:*

The Circuit Courts should, in the trial of criminal causes, admit all testimony offered, of which they doubt the competency. Ib

6. *Variance between proof and allegations.*

Mrs. Dillingham was indicted for an attempt to bribe a witness to

withhold his testimony in a criminal proceeding before a J. P., against Tom Dillingham. For evidence of the proceeding the docket of the Justice was offered, from which it appeared that Tom Dillingham and John Royal had been arrested on an affidavit charging them jointly with stealing a cow. The cause was styled "The State of Arkansas v. Dillingham and Royal." That they severed and on trial Royal was discharged, and afterwards Dillingham was put on trial and bound over to the Circuit Court. HELD: That there was no material variance between the docket and the indictment as to the description of the proceeding and the docket was admissible. State v. Dillingham. 154

7. *Practice in other States, how proved.*

Matters of practice in another State may be proved by the testimony of lawyers skilled in the laws, usages and practice of the State. Blackwell v. Glass. 210

8. *Of Justice's judgment from another State.*

A Justice's judgment from another State cannot be proved by a certified copy of his minutes like a certified transcript from a court of record. The original minutes must be produced, or a copy verified by the testimony of witnesses who have compared it with the original. Ib.

9. CHANGE TICKETS: *Evidence.*

In an action for money due on a contract, change tickets issued by the defendant in violation of the statute and delivered in payment of the debt, though illegal, may be used as evidence of the amount due on the contract. They are a written admission that the maker has received the value expressed in them. I. M. & H. R. R v. Stansell, 275

10. CRIMINAL EVIDENCE: *Res gestæ: Declarations:*

In prosecutions for assault words uttered during the continuance of the main transaction or so soon thereafter as to preclude the hypothesis of concoction or premeditation, whether by the active or passive party, become a part of the transaction itself; and if relevant, may be proved as any other fact, without calling the party who uttered them; but declarations are not admissible until it is shown that the declarant was a participant in the transaction which the declaration is intended to explain or enlarge. Flynn v. State, 289

11. TITLE: *Not impeached by declarations of vendor after sale:*

The title of a purchaser of personal property cannot be impeached

by the statement of his vendor made in his absence after the sale. Smith v. Hamlet, 320

12. *Record of administrator's sale.*

The Probate Court Record of an administrator's sale of property of his intestate and confirmation of the sale by the court, is evidence to support the title of a purchaser from the vendee, and can not be disputed by the testimony of the administrator to defeat the title. Ib.

13. CRIMINAL EVIDENCE: *Homicide. Corpus delicti.*

For evidence held sufficient of the *corpus delicti* in this case, see the opinion. Cavaness v. State, 331

14. SAME: *Sanity of prisoner: Burden of proof.*

Evidence on the trial of a homicide sufficient to raise a doubt of the prisoner's sanity does not put upon the State the burden to prove his sanity beyond a reasonable doubt. Ib.

15. CRIMINAL EVIDENCE: *Confession, when sufficient for conviction.*

The confession of a prisoner accompanied with proof that the offense was actually committed by some one, will warrant his conviction. Melton v. State, 367

16. SAME: *Accomplice: Corroboration.*

A defendant can not be convicted of a crime upon the testimony of a partaker in the crime, whether his guilt be in the same degree or not, unless corroborated by evidence tending to connect the defendant with the commission of the offense; the corroboration is not sufficient if it merely prove the *corpus delicti* and the circumstances thereof, and one accomplice cannot corroborate the testimony of another. Ib.

17. *Of one offense to prove another.*

The general rule that upon a trial for a particular crime the State cannot aid the proof against the prisoner by showing that he has committed another and distinct offense does not apply to cases where the evidence shows a series of connected wrongs growing out of and illustrating one another and culminating in homicide; but even in cases where the crimes have no apparent connection, evidence of a previous offense is competent where it discloses a motive for the act under prosecution. Ib.

18. *On plea of payment.*

The plea of payment admits evidence of payment in cash or in

any other mode agreed upon by the parties, e. g., by the delivery of chattels received by the creditor in satisfaction of his demand, or by the giving and acceptance of anything in lieu of money and in discharge of the debt. Payment may be made in anything that the creditor will receive in payment. Bush v. Sproat, 416

EXECUTION.

See HOMESTEAD, 4.

EXEMPTIONS.

See HOMESTEAD, 2.

1. *None for tort, &c.*

A debtor's property is not exempt from execution for a tort, nor for the purchase price of the property. Cason v. Bone *et al*, 17

2. *Remedy of claimant of: Waiver of exemption.*

The remedy of an execution debtor, when a Justice of the Peace refuses a supersedeas upon the filing of his schedule, is by appeal to the circuit court; and a failure to appeal is a waiver of his exemption. Ib.

EXHIBITS.

See PLEADING and PRACTICE, 18.

FEES.

1. *Collector's on certificate of tax sales.*

The revenue act of 1883 does not require the sheriff to include more than one tract in a certificate of purchase at a tax sale, and if he includes more he can charge only the single fee of twenty-five cents for one certificate. Bagley v. Shoppach, 375

2. JURISDICTION: *For exacting excessive fees.*

An action for exacting excessive fees is *ex delicto*, and within the original jurisdiction of the Circuit Court without regard to the amount exacted. Ib.

FINES AND FORFEITURES.

1. FINES AND FORFEITURES: *Who entitled to, where change of venue.*

Where there is a change of venue, in a criminal case, from one county to another, the forfeiture of a bail bond for the defendant's appearance in the latter county, or a fine imposed in that county, belongs to the county in which the offense was committed and the indictment found. Washington Co. v. Benton County, 267

FRAUD.

See DAMAGES, 1. NOTES and BILLS, 1.

FRAUDLENT CONVEYANCE.

See HOMESTEAD, 3.

1. *Innocent purchaser: Equitable garnishee: Practice.*

On the 17th day of May, 1872, Harbison executed a note to Filer, Stowell & Co., for $618.13. On the 25th of October, 1872, Harbison and wife conveyed to Curry in fraud of his creditors, a large body of lands, and afterwards on the 20th of December, 1872, Curry conveyed the lands to Mrs. Harbison without any consideration paid by her, and afterwards Mrs. Harbison sold and conveyed the lands to Hamlet for $2000, one third cash, the balance on time. On the 16th of February, 1876, Filer, Stowell & Co., recovered judgment on the note, and afterwards levied execution on the lands and filed their bill in equity to uncover the fraud and sell the lands for satisfaction of the judgment, or, if that could not be done, that Hamlet be held as an equitable garnishee and pay the judgment out of the unpaid purchase money. It conceded that Hamlet was an innocent purchaser. Harbison and wife answered, denying the fraud, and Harbison filed a cross-bill alleging that Hamlet had purchased the judgment pending this suit, for one-fourth of its amount, and the suit was prosecuted for his benefit to get credit on the purchase money for the full amount of the judgment. HELD: That it being conceded in the bill that Hamlet was an innocent purchaser, he could be held only as an equitable garnishee to the amount of the judgment: but if he had in fact purchased the judgment at a discount, he could not speculate upon his pur-

chase, but would be allowed as a credit on the unpaid purchase money only the sum he had paid for the judgment and interest on it. HELD FURTHER: that the matter of the cross-bill might be set up by supplemental answer of Mrs. Harbison on return of the case to the Circuit Court. Tappan, McKillop & Co., v. Harbison. 84

GAMING.

See CRIMINAL LAW, 3.

GARNISHMENT.

See FRAUDULENT CONVEYANCE, 1.

GIFTS.

1. GIFTS *inter vivos: Defined.*

Where a gift is intended *in presenti* and is accompanied with such delivery as the nature of the property will admit, and the circumstances and situation of the parties render reasonably possible, it operates at once, and as to the parties is irrevocable; and the delivery may be to a bailee as well as to the donor in person; but if there be only an intention to give and no delivery, it will be inchoate and imperfect and the property will not pass. Nolen v. Harden. 307

HOMESTEAD.

1. *When attaches*: Lien.

Quere: Can a valid lien fixed upon land before it acquires the character of a homestead be displaced or impaired by the subsequent occupation of the land by the debtor as a homestead? Hanna v. Morrow. 107

2. *Not lost by death of wife and children.*

A homestead estate when once acquired and still occupied by the owner is not lost by the death of his wife and arrival of his children at the age of maturity, or their removal from the premises (Cockrill, C. J., dissenting.) Stanley v. Snider. 429.

3. *Fraudlent conveyance of, no prejudice to creditors.*

Creditors cannot complain that a conveyance of a homestead was fraudulent to defeat the collection of their debts. They could not reach it if not conveyed, and the motives for the conveyance do not concern them. Ib.

4. *U. S. not subject to debts before patent.*

A homestead on land of the United States is not liable to any debt contracted prior to the issuance of the patent therefor. Sorrels v. Self. 451

HUSBAND AND WIFE.

See WITNESSES, 1.

1 *Curtesy: Husband's deed of wife's land.*

Land conveyed to a wife in 1872, in usual form, becomes the husband's for life as tenant by curtesy upon the birth of a child alive, and death of the wife; and his deed of it conveyed to his grantee the right of possession for the husband's life. Morris v. Edwards. 427

INDICTMENT.

1. *Assault with a deadly weapon.*

An indictment for an assault with a deadly weapon, in the language of the statute and specifying time and place, is sufficient without specifying the instrument or weapon with which the assault was made. State v. Tidwell. 71

2. *Not amendable.*

An indictment when filed in court is a record and can not be withdrawn for amendment or any other purpose. If insufficient, a *nol prosequi* should be entered and a new indictment found. State v. Springer. 91

3. *For concealing death of bastard child.*

An indictment for concealing the death of a bastard child must expressly and distinctly allege the child to be dead; but it need not state whether the child died before, at, or after its birth, nor how the mother endeavored to conceal its death. State v. Ellis. 93

4. *Exception in statute.*

An exception in a criminal statute not contained in the enacting clause need not be noticed in an indictment. It is matter of defense. State v. Bailey. 150

5. *Charging offense to be "unlawfully" done.*

It is not necessary for an indictment to charge that an offense was "unlawfully" done, if the statute describing the offense does not use the word "unlawful." State v. Murphy. 178

6. BURGLARY: *Indictment for.*

An indictment for burglary charging that the defendant "feloneously, willfully and burglariously did break and enter," is equivalent to charging in the language of the statute that he "willfully and maliciously and with force did break and enter." The word "maliciously" in the statute does not mean malice towards the owner of the house entered, but the intent from which follows the unlawful act; and the words "did break" imply force. Shotwell v. The State. 345

7. *When crime is the same by statute and common law.*

When the elements of a crime are the same by the common law and by statute, the indictment may follow either, as a general rule. Ib.

8. *Burglary. Specifications of intent.*

An indictment for burglary charging that the defendant entered "with the felonious intent then and there to commit arson," sufficiently specifies the felony intended to be committed. Ib.

9. *For selling mortgaged property.*

An indictment for selling mortgaged property must show not only that the mortgage was recorded or filed with the clerk as a record, but also that it was acknowledged; and it would be better to state the name of the purchaser or that his name was unknown. State v. Harberson. 378

INFANTS.

See PLEADING and PRACTICE, 15, 17.

INJUNCTIONS.

1. *Issued without authority void.*

A writ of injunction issued in a matter over which the court has

no jurisdiction is void, and no one is bound to obey it. Willi-ford v. State. 62

2. *Against Judgments: Diligence, &c.*

To entitle a party to enjoin a judgment he must show, not only that the judgment was unjust, but that it was not the result of any inattention or negligence on his part. That he omitted to defend the suit in consequence of being mislead by the clerk of the court as to its character, was inexcusable negligence. Hanna v. Morrow. 107

3. CORPORATIONS: *When restrained, &c.*

Although the existence of corporations voluntarily organized under general statutes, can not be questioned collaterally, yet if they have resulted from fraudulent combinations of individuals to procure powers under circumstances, and for purposes not within the scope and purpose of legislative intent, and under shelter of their charter are about to exercise powers oppressive to an individual, they may be restrained by private suit of those injured or about to be. Neimeyer v. L. R. Junc. Ry. 111

INNOCENT PURCHASER.

See FRAUDULENT CONVEYANCE, 1.

INSTRUCTIONS.

See CRIMINAL PRACTICE, 4.

1. *Repetition of.*

A multiplication of instructions announcing in effect the same legal principle, tends only to encumber the record, perhaps to confuse the jury, and ought not to be encouraged. Haney v. Caldwell. 184

INTEREST.

See CONTRACTS, 3.

JUDGE.

See PLEADING and PRACTICE, 2.

1. *Interest that disqualifies.*

The interest that disqualifies a judge under the constitution, is not the interest which one feels in public proceedings or public measures, but a pecuniary or property interest; one affecting his individual rights, and the liability of pecuniary gain or relief to the judge must occur upon the event of the suit, not result remotely, in the future, from the general operation of laws and government upon the status fixed by the decision. Foreman v. Marianna, 324

JUDICIAL OFFICER.

1. JUSTICE OF THE PEACE. *Liability for official acts.*

Neither a justice of the peace nor any other person having judicial powers is liable for his official acts. Cason v. Bone *et al*, 17

JURISDICTION.

See COUNTY COURT, 1. ELECTIONS, 3. JUSTICE OF THE PEACE, 1. FEES, 2.

1. EQUITY JURISDICTION: *To remove cloud from title.*

Unless the plaintiff's title is a mere equitable one, incapable of effectual assertion at law, possession is necessary to give a court of chancery jurisdiction to remove a cloud upon it. Bryan v. Winburn, 28

2. CHANCERY JURISDICTION: *To restrain railroads from taking land for track, &c.*

Where the proposed action of a railroad company in taking land for its track is unauthorized, chancery may restrain it by injunction. Neimeyer & Darragh v. L. R. J. Ry., 111

3. *Of Circuit Court: Forfeited bail bond in Mayor's court.*

The summary proceedings on a forfeited bail bond authorized by sections 1739 to 1742, Gantt's Digest, must be in the court in which the party was required to appear. The circuit court has no jurisdiction under them to render judgment upon a forfeited bail bond in a Mayor's court, for failure of a party to appear in that court to answer for a violation of a municipal ordinance. Cauthorn v. State, 128

4. *Power of Mayor to take bail bond.*

Whether a Mayor of an incorporated town, not a city, can issue a warrant of arrest for the violation of a town ordinance which does not constitute a public offense against the criminal laws of the State, and take a bail bond for the defendant's appearance. *Quere,* Ib.

JURY.

See CRIMINAL LAW, 10.

JUSTICE OF THE PEACE.

APPEAL, 3, 4. See JUDICIAL OFFICERS, 1.

1. JURISDICTION OF J. P.: *Judgment beyond, incurable.*

A judgment before a justice of the peace upon a claim above his jurisdiction is void and can not be cured, or set off against another judgment. Hanna v. Morrow, 207

LAND COMMISSIONER'S DEEDS.

1. *Recitals in, unnecessary.*

The Commissioner of State Lands is not required by statute to make any recitals in his deeds of lands forfeited for taxes. They convey whatever title the state had without recitals. In the absence of allegations and proof to the contrary the courts presume that everything which should have been done by the different officers, was done, in order to vest title in the state. Walker v. Taylor, 543

LANDLORD AND TENANT.

1. *Tenant disclaiming possession.*

A tenant in possession cannot disclaim his landlord's title without surrendering possession to him. He cannot collude with and attorn to another to the prejudice of his landlord. Bryant v. Winburn, 28.

LANDS.

See LEVEE BONDS, 1, 2.

LEGISLATURE.

See STATUTES, 2, 3. TAXES, 9.

LEVEE BONDS.

1. *As payment for lands: Mandamus.*

The Commissioner of State Lands can not be compelled by mandamus to issue a patent for lands previously sold for levee bonds, though a certificate of purchase was issued and the bonds have not been returned to the purchaser. The bonds are void and worthless in the hands of any one. Cochran v. Cobb, Land Com., 180.

2. *Same. Rights of the State and her vendee. Tender.*

When the State has executed a deed for lands sold for levee bonds and the lands have passed into the hands of an innocent third party for value, the State is estopped by its grant to resort to the land, but may sue the grantee for the purchase price. But where the land, though patented, is in the hands of the original vendee or those holding under him, except by purchase for a valuable consideration without notice that the entry money is unpaid and in *all* cases where no deed has been made, but the original purchaser or his vendee holds only a certificate of purchase, the State may treat the payment as a nullity and subject the land to the purchase debt; and no tender of the bonds before suit, or with the bill will be necessary. Ib.

LICENSE.

See LIQUOR, 1, 2, 9, 10, 13. MUNICIPAL CORPORATIONS, 1, 2, 3.

LIEN.

See HOMESTED, 1. TAXES, 7, 8. VENDOR and VENDEE, 1, 2.

1. LABORER'S LIEN: *Overseer of farm.*

A farm overseer is not a laborer within the meaning of the laborer's lien laws of this State. Flournoy v. Shelton & Co., 168.

LIQUOR.

See CRIMINAL LAW, 1, 15.

1. APPEAL: *From County Court's refusal of liquor license.*

Upon the refusual of a County Court to grant license to sell liquor the appplicant may appeal the Circuit Court. Leon Levy, *Ex parte*, 42.

2. *Discretion of County Court in granting license to sell.*

The County Court has the discretion to grant or entirely refuse license to sell liquor at all, in township or city wards, where the county and township, or ward, have voted for license: but if it license some it cannot arbitrarily refuse other applicants in the same township or ward who are of good moral character and comply with the requirements of the statute; and when some are refused, the Court should give its reasons, so that an appellate court may see whether a sound legal discretion has been exercised. Ib.

3. *Indictment for selling: The evidence.*

A. asked the defendant in his field if he had any whiskey, and was told that there was some at the house. A. expressed a strong desire for a dram. Defendant replied "all right, I'm tired of working and had as lief walk to the house as not." On arriving at the house A. was taken up stairs, the lower room being occupied by defendant as a residence. Defendant poured from a jug, a drink for A. and one for himself. There was sugar there and two or three bottles of whiskey on a shelf. A. took one of them, holding a pint, and put it in his pocket, laying a half dollar on a table. Defendant was in the room and there was nothing to prevent him from seeing what A. was doing, but he did not direct or encourage A. to take the bottle; but A. wanted the whiskey and left what he thought was the worth of it. The jury found the defendant guilty and this court refuses to disturb their verdict. McLure v. State. 75

4. *Evidence of selling.*

The having a goverment liquor license in one's house prior to the

passage of the act of March the 13,1883, making the possession of such license *prima facie* evidence of a "blind tiger," was not evidence that the owner or occupant of the house was selling liquor. Liles v. State. 95.

5. *Indictment for Selling. Name of purchaser: Druggist.*

An indictment for selling liquor in violation of the Three Mile Law, need not allege the name of the purchaser, nor negative that the defendant was a druggist selling for medical purposes only. State v. Bailey. 150

6. *Local option; Prohibitory order can designate but one point*

An order of the County Court prohibiting the sale of liquor within three miles of two different points is void, and a violation of the order is no offence. Ib.

7. *Selling alcohol.*

Under an indictment for selling liquor in violation of the Three Mile Law of March 21st, 1881, the defendant could be convicted on proof of selling alcohol, when it was plain that it was a mere subterfuge for evading the law. Winn v. State. 153

8. *Sale on order. Place of sale.*

Davidson, at Ozark, sent a written order to Carl & Tobey, merchants at Little Rock, to send him one gallon of whiskey by the L. R. & Ft. S. Ry. Express company, C. O. D. Carl and Tobey delivered the whiskey to the company C. O. D, as directed, and agreed that in case the whiskey was not called for and charges paid within thirty days, the company might, at their option, return the same to Carl & Tobey and they would pay the freight both ways. Davidson received and paid for the whiskey at Ozark, and Carl & Tobey were indicted for selling it at Ozark. HELD, that the sale was at Little Rock, and the defendants were not guilty. State v. Carl & Tobey. 353

9. *None can sell without license.*

In this state no one, not even a druggist upon the prescription of a physician, can sell liquor without license from the County Court. Chew v. The State. 361

10. *None can sell in three mile limit.*

Where the local option law has been put in force in a given territory, the County Court is powerless for two years to license the sale of liquor within the same territory. Ib.

11. *Indictment for sale in prohibited district.*

A party who sells liquor within a local option district may, since the passage of the act of March 26, 1883, be indicted either for selling without license, or for violation of the local option law, Ib.

12. *Traffic controlled by the legislature.*

In the absence of Constitutional restraints the regulation of the traffic in liquors, is wholly within Legislative control. The Legislature may entirely prohibit it, or empower municipal corporations to do so within their limits. But neither counties, cities or towns can impose a tax upon the privilege not authorized by the Legislature. Drew County v. Bennett. 364

13. *License: Excess recoverable from county.*

The Revenue Act of March 31, 1883, fixes the amount of license for the sale of liquor, and deprives the county court of discretion as to the amount; and any excess exacted by the county court above the amount fixed by the statute may be recovered from the county. Ib.

14. *Indictment for selling: Proof of sale of alcohol.*

Proof of sale of alcohol to a minor since the passage of the act of March 26, 1883, will support an indictment for selling liquor to him. Emmerson v. State, 372

15. *Evasion of the liquor law.*

No trick, device, subterfuge or pretense can be allowed to evade the operation, or defeat the policy of the liquor laws, if liquor be thereby procured where it is unlawful to sell or give it away. (This was a purchase of whiskey under pretense of buying turpentine. Rep.) Looney v. State, 389

16. *Selling or giving away on election day.*

The provision of the general election law of Jan'y 23, 1875, against giving away or selling intoxicating liquor on election day, does not apply to an election for school director at an annual school meeting provided for by the common schools act of 1875. Stout v. State, 413

MANDAMUS.

1. *When proper remedy.*

Mandamus is an appropriate remedy where a public officer is

called upon to perform a plain and specific public duty positively required by law, calling for the exercise of no discretion or official judgment. Williford v. State. 62

2. *Against School Directors.*

Mandamus to compel a public corporation to pay a debt can be employed only after judgment establishing the amount of the debt. School Dist. No. 3 v. Bodenhamer. 140

MARRIED WOMAN.

1. *Deed: Acknowledgment.*

Since the adoption of the constitution of 1874 a married woman can convey her separate property the same as if she were single; and where she joins her husband in a deed of her land, and also relinquishes dower, the deed will convey the fee, though she acknowledges only the relinquishment. Bryant v. Winburn. 28

2. *Same.*

The deed of a married woman executed prior to the adoption of the constitution of 1874, and not acknowledged according to law is absolutely void. McGehee Trustee v. McKenzie *et al.* 156

3. *Her conveyance of separate property. Acknowledgment.*

Since the adoption of the Constitution of 1874 a married woman can convey her separate property as a *femme sole*; and in the acknowledgment of her deed no privy examination, nor disclaimer of compulsion or undue influence of her husband, is necessary. Her deed is good without acknowledgment as to all parties with notice of it. Stone v. Stone. 160

4. *Capacity to contract.*

Neither the Act of April 28, 1883, nor Sec. 7, Art. IX, of the Constitution of 1874, nor any subsequent legislation expressly enlarges the power of married women to contract *generally*; though by implications of that statute she may charge her separate estate, and bind, in equity, a new estate acquired by purchase; and the provision authorizing her to carry on any trade or business on her sole and separate account may imply the power to make contracts in relation to it, and to execute notes and bills upon which she would be personally liable. Walker v. Jessup. 163

5. *Partner in trade.*

A married woman may, under the Act of May 28, 1873, form a partnership as a sole trader with a third person other than her husband, and will, as to her separate property, be bound by all the contracts of the firm as effectually and to the same extent as if she were a man. Abbott v. Jackson. 212

MORTGAGE.

See CRIMINAL LAW, 11, 12. INDICTMENT, 9. STATUTE LIMITATIONS, 4, 5, 6. TAXES, 7.

1. *What is a sufficient filing for record.*

The deposit of a mortgage by the mortagagee in the recorder's office for record, the endorsement on it by the clerk, of the date of filing, and the putting of it in the place in the office where unrecorded mortgages are kept for record, are sufficient to affect with notice all who subsequently deal with the property, though the mortgagee do not expressly direct it to be recorded, and the endorsement do not say filed "for record." Case & Co. v. Hargadine. 144

2. *Same.*

A mortgage is filed within the meaning of the statute when it is delivered to the proper officer, and by him received, for the purpose of being recorded; and his neglect to make the proper endorsement upon it, or to record it, will not prejudice the mortgagee. Ib.

3. *Description of property.*

A mortgage of "all of a crop of ten acres of cotton to be grown" by the mortgagor upon a field containing forty acres in cotton, is, as to strangers to the mortgage, void for uncertainty; and parol evidence to designate the particular ten acres intended, is not admissible. Krone v. Phelps. 350

4. *Release of part of mortgaged lots by mortgagee.*

A release by a mortgagee of part of the mortgaged premises after the sale of the other part by the mortgagor, will not prejudice the lien for the whole debt on that part, unless at the time of the release the mortgagee had actual notice of the sale. Whittington v. Flint. 504

5. *Estate of mortgagee.*

The legal estate in mortgaged property passes to the mortgagee,

subject to be defeated by performance of the conditions of the mortgage; and the right of possession follows the legal title, unless controlled by stipulations in the deed, or by the apparent intention of the parties. Ib.

MOTION FOR NEW TRIAL.

See PRACTICE IN SUPREME COURT, 4. PLEADING AND PRACTICE, 14.

MUNICIPAL CORPORATIONS.

See JURISDICTION, 3, 4.

1. *Power to license wagons, drays, &c.*

The power to regulate wagons, drays, &c., conferred by the municipal corporations act of March 9th, 1875, includes the power to license as a means of regulating. Fort Smith v. Ayers, 82

2. *Same.*

A license fee demanded by a municipal corporation for running a dray, when imposed as a mere police regulation and not as a measure for raising revenue, is not a tax upon an occupation, but a compensation for issuing the license, for keeping the necessary record and for municipal supervision over the business. Ib.

3. *Same.*

If a license upon an occupation is so large as to have been manifestly imposed by a city for the sole or main purpose of revenue, it is, in effect, a tax upon the owner or his property, and not within the power conferred by the statute. Ib.

4. CITIES and TOWNS: *Annexation of territory to: Proceedings to quash.*

The petition of parties for *certiorari* to quash an order of the County Court annexing territory to a town, must show that the petitioners have an interest in the question as residents or owners of property, either in the old town or the territory annexed. Perkins v. Holman, 219

5. *Jurisdiction of County Court.*

The organization of municipal corporations does not depend upon the citizens, whether or not they may be subject to their restrictions and burdens any further than the Legislature may allow the exercise of that will. The whole public is concerned,

and the Legislature may prescribe the terms or conditions upon which they may be formed or extended, and may vest in the County Court the power to determine when they may or may not be necessary or useful. Foreman v. Marianna, 324

6. *Annexation of territory: Amending petition.*

The petition for annexation of territory to a town or city may be amended during the progress of the cause in the County Court by diminishing the area of the proposed annexation but not by enlarging it. Ib.

7. *Same: Disqualification of County Judge.*

A Judge of the County Court is not disqualified to act upon an application to annex territory to a municipal corporation by reason of being a resident of the corporation and having voted for or against the annexation. Ib.

NEGLIGENCE.

See RAILROADS, 2.

NOTES AND BILLS.

1. *Accommodation endorsers: Consideration: Fraud.*

Mrs. Moreland, as executrix of her deceased husband, by the advice and at the request of Lovejoy of the firm of Lovejoy & Co., sold a portion of the property of the estate to pay an account of $200 which the firm had against her husband; Lovejoy agreeing to buy enough to pay the account. At the sale Lovejoy purchased to the amount of the account and took the property purchased in full discharge of the debt. He then let Hinton take it, between whom and the firm there was a private arrangement that he should execute his notes to her for the property. This was done and she then indorsed them to the firm at the request and by the advice of Lovejoy in whom she placed implicit confidence, and to whom she looked for advice. She did not know Lovejoy's object in putting it in that shape, and neither he nor she intended anything but to give the firm the right to collect the notes from Hinton without making her in any way responsible, and solely for the benefit and accommodation of the firm. Afterwards, Lovejoy died and the surviving partner sued on her endorsement. HELD: That the facts were a good defense at

law; the indorsement being without consideration and for the accommodation of the endorsees:—also a good defense in equity, being a fraud in the surviving partner to abuse the confidence reposed in Lovejoy; and her expression of concern on hearing of the failure of Hinton to pay the note, and asking indulgence from the firm, in ignorance of her rights, ought not to estop her. Platt v. Snypes, 21

2. *Endorsement: Want of consideration for.*

Want of consideration for an indorsement is a good defence to a suit on it by the endorsee where no new credit is given by him to the maker of the bill or note, or any former party, on account of the endorsement, and where no considerations moved the endorser. Ib.

3. NOTES and BILLS: *Draft on particular fund: conditional acceptance.*

Kendrick delivered to Smith the following draft:

"Mr John M. Defee:

"Please pay to J. G. Smith the sum of four hundred and fifty dollars, amount due me for carrying the mail from Camden to El Dorado for the the last quarter of 1850."

R. S. KENDRICK."

Defee accepted the draft for payment as soon as he could get a settlement of his accounts with the Government for the same service. In a suit on the acceptance, HELD: 1st, That the draft was not on a particular fund, but absolute and unconditional. 2nd, Both parties were bound by the conditional acceptance, and the condition being performed, the acceptor must pay the draft. Defee v. Smith, 221

PARTIES.

See PRACTICE IN CHANCERY, 1, 2.

1, DECREE: *Parties to, bound by finding of facts.*

A party to a suit in equity is bound by the finding and decree of the court, and is estopped to deny in a subsequent suit a material fact charged in the pleading and found by the court. Carvill v. Jacks, 439

PARTNERSHIP

See MARRIED WOMEN, 5.

PLEADING AND PRACTICE.

See CRIMINAL PRACTICE, 5. INSTRUCTIONS, 1. MUNICIPAL CORPORATIONS, 4. REPLEVIN, 1.

1. PRACTICE: *Objections to plaintiff's capacity to sue.*

Objections to plaintiff's capacity to sue must be taken by demurrer or answer. It is too late to make them to the judgment. Pettigrew v. Washington County. 33

2. *Disqualification f Judge.*

It is too late after judgment to object that the judge was disqualified to try the case on account of consanguinty to one of the defendants. Ib.

3. PRACTICE: *Snggestions of the judge on trial.*

Our constitution forbids judges to charge juries as to facts, and it is error for a judge to advise a prosecuting attorney in the presence of the jury to dismiss a prosecution for want of evidence. State v. Wardlow, 73

4. PRACTICE: *Suspension of trial for evidence.*

The suspension of a trial after it is begun to obtain further evidence, is within the sound discretion of the court. Wynn v. State, 151

5. PLEADING: *Demurrer abandonded by pleading over.*

The civil code does not change the rule that by pleading over after demurrer overruled the party abandons his grounds of demurrer. Jones v. Terry, 230

6. SAME: *To an action on a judgment.*

Nothing can be pleaded to an action on a judgment that could have been litigated in the original action, except the question of jurisdiction of the court rendering the judgment. All other matters are merged in the judgment. Ib.

7. SAME: *Same: Evidence.*

In an action upon a Justice's judgment the defendant may show in contradiction of the recitals of the judgment, that he was not served with process nor appeared to the action, and that the judgment is therefore void for want of jurisdiction. Recitals of their jurisdiction either of the matter in controversy or over the parties to the action, are only *prima facie* evidence and may be disproved. Ib.

8. SAME: *The complaint on a J. P's. judgment.*

The complaint on a judgment of a court of special jurisdiction must allege that the court had jurisdiction of the subject matter and the person of the defendant, or that the judgment was duly given or rendered. Ib.

9. REVIVOR OF JUDGMENT: *Defense to.*

Errors or irregularities in obtaining a judgment can not be set up by demurrer or plea to a *scire facias* to revive it. Calhoun v. Adams. 238

10. SAME: *Petition to revive.*

A petition to revive a judgment is unnecessary. The *scire facias* is both a declaration and a summons, and may be issued for the assignee of the judgment; but it must run in the names of all the plaintiffs in the judgment against all the defendants, when all are living; and if it does not, yet if it is so certain in description that the defendant must know what judgment was intended, and the revivor is in fact made in the names of the parties in the judgment, this court will, on appeal, consider that the writ was properly amended below. Ib

11. PRACTICE: *Certiorari not converted by the court into bill for injunction.*

Proceedings by *certiorari* are of a special nature, having an appropriate practice, which was not destroyed by the Legislature abolishing forms of action: and they may not be converted by the court of its own motion into proceedings for injunction and transferred to the equity docket. This can be done only by the parties moulding their pleadings for equitable relief. Moon, adr. v. Turner, col. 243

12. PLEADING: *Ejectment: Answer, pleading conclusions of law.*

An answer in ejectment denying that the plaintiff is the legal owner of the land—that the defendant holds unlawfully and without right, and that he unlawfully keeps plaintiff out of possession, sets up only conclusions of law and is demurrable. Keith v. Freeman. 296

13. PRACTICE: *Motion for new trial waives exceptions.*

The filing of a motion for new trial waives all previous exceptions not expressly embodied in it. Johnson v. State. 391

14. PRACTICE: *Jury trial.*

When all the facts of a case are agreed on there is no necessity for a trial by jury. Douglass v. Flynn. 398

15. MOTION FOR NEW TRIAL: *When necessary.*

Error of law in giving or refusing instructions to a jury, or announced by a judge in trying law and fact which *bears upon the finding of the facts*, is good ground for a motion for new trial; but error of law announced as the basis of a judgment or decree, upon given facts, found or admitted, cannot be remedied by a new trial, but may be directly appealed to the Supreme Court without motion for a new trial, or for re-consideration. Ib.

16. INFANTS: *Practice*: *Pleading counter claim.*

A counter claim to the suit of an infant prosecuted by next friend can not be taken as confessed for want of a reply. A guardian *ad litem* must be appointed for him, and a reply filed, denying every material allegation in the counter claim; and the Circuit Court should see that this is done. Morris v. Edmunds. 427

17. PLEADING AND PRACTICE: *Amending to correspond with proof*: *Presumption.*

If a plaintiff fails to demur to an answer defectively stating a good defence, and the testimony which is admitted without objection, shows a good defence, the answer will be regarded as amended to correspond with it. And where there is no bill of exceptions this court will, in support of a judgment below, presume that the defects in the answer were cured by the proof at the trial. Sorrells v. Self. 451

18. PRACTICE: *In suits against infants.*

A judgment by default cannot be taken against an infant, even when he has a regular guardian who is summoned to appear. Upon his failure to answer for the infant, a guardian *ad litem* must be appointed, and defence made by him, before judgment can be rendered against the infant. Woodall v. Delatour. 521

19. PLEADINGS: *Exhibits.*

A deed exhibited with a complaint in ejectment, is no part of the complaint, and if defective, can be avoided only by exceptions to it as evidence. It is no ground for demurrer to the complaint. Walker v. Taylor. 543

20. PRACTICE: *Service*: *Appearance*: *Judgment.*

A. and B. were sued before a Justice of the Peace on a debt. A

was not served with process and did not appear. B. appeared and asked for a postponement until his attorney could arrive. In due time his attorney came and moved to quash the service which was insufficient. The Justice refused to quash it, and B. saying nothing further, judgment was rendered against both defendants: HELD, on *certiorari* to quash it, that the judgment was void as to A. for want of service, but good as to B., who had voluntarily appeared. Epps v. Sasby. 545

PRACTICE IN CHANCERY.

See FRAUDLENT CONVEYANCE, 1.

1. *Joinder of several creditors against fraudulent conveyance.*

Separate judgment creditors may join as plaintiffs in the same bill to set aside a fraudulent conveyance of their common debtor. Fry & Co. v. Kruse and wife. 142

2. *All interested must be parties.*

Ordinarily, parties should see that all persons to be affected by the decree should be brought before the court; and if they do not, the court should, of its own motion, direct them to be brought in. Stone v. Stone. 160

3. *Foreclosure on administrator's sale of land.*

A bill by an administrator against a purchaser of land sold by him under an order of the Probate Court, for foreclosure and sale of the land for the purchase money bid at the sale, must allege that the sale has been confirmed by the Probate Court. Courts can not presume that such a sale has been confirmed. Walker v. Jessup. 163

4. *Decree of foreclosure: Tender of deed.*

Chancery will not decree for an administrator, against the purchaser, a foreclosure and sale of land for the purchase-price, without requiring the administrator to bring into court a deed to the purchaser for the land. Ib.

5. *Cross-Relief.*

A defendant can not get cross-relief against a co-defendant upon any statements in his answer to the plaintiff's complaint. He must make his answer a cross-complaint againt the co-defendant, and prav relief, and serve process on him, unless he enters his appearance. Ringo v. Woodruff. 469

PRACTICE IN SUPREME COURT.

1. *Uninjurious errors not reversed.*

The Supreme Court will not reverse except for errors which are substantial and injurious to the appellant. Perkins v. Holman. 219.

2. *Erroneous declaration of law by Circuit Court.*

When there is no error in the finding of the facts, nor in the judgment of the Circuit Court, in a case tried by the court, the judgment will be affirmed though the declarations of law by the court be erroneous. Keith v. Freeman. 296

3. *As to the facts in Chancery causes.*

In Chancery causes the Supreme Court will, on appeal, sift the whole evidence and determine what the finding of the Chancellor should have been upon such of the evidence as was competent and proper; with due deference, however, to the decision of the Chancellor where the preponderance is nice. Nolen v. Harden. 307.

4. *Motion for new trial: Bill of exceptions.*

The cases of *Farquharson v. Johnson* 35, *Ark.*, 536, *Gaines v Summers* 39 *Ark.*, 482, and all others holding that the bill of exceptions must embody or refer to and identify the motion for a new trial, are, on this point, overruled; and hereafter this court will consider the merits whenever the record contains a motion for new trial and shows that it was filed and overruled, and the bill of exceptions shows that the overruling was excepted to. Johnson v. State. 391

5. *When errors are not injurious.*

The Supreme Court will not reverse or modify a judgment or decree of an inferior court for errors which are not prejudicial to appellant. Harris v. Harris. 535

RAILROADS.

1. *Proceedings to condemn right of way.*

The statutory proceeding to condemn land for right of way for railroads is special, to ascertain the compensation to be paid the owner for the land to be taken. No provision is made for any issue upon the *right* to condemn, and the owner cannot in that proceeding question the legality of the corporation. Neimeyer v. L. R. Junc. Ry., 111

2. *Negligence in killing stock.*

To excuse a railroad company for negligence in killing stock wrongfully upon its track, it must appear that there was no negligence of the engineer in keeping watch or in observing signals of danger, and that reasonable care was exercised to avoid the collision after the danger was discovered. M. & L. R. Ry. v. Sanders. 225

3. *Limited tickets: Obligations of purchaser and carrier.*

A passenger on a limited railroad ticket is bound to use it within the time specified in the ticket, and to observe the reasonable regulations of the carrier for the running of trains and for facilitating the business of the carriage of passengers; and the company is bound to afford him the opportunity to do so, by running its trains within the time; and if in this it fail, though the last day be a Sunday, it cannot refuse the ticket afterwards, at least when offered on the first train after the expiration of the time. L. R. & Ft. S. Ry. v. Dean, 529

4. *Same: Continuous journey.*

A purchaser of a limited ticket over several connecting lines of railroads, is not bound to make a continuous journey over all, but is bound to made it continuous over each coupon of the ticket; and over the last within the time limited. Ib.

5. *Ejection of passenger. Elements of damage.*

A limited railroad ticket over several connecting lines expired on Sunday; the last line ran no train on that day, and the passenger offered the ticket on the train the next day. It was refused and the passenger, under protest and under threat of ejection by the conductor, paid his fare to a further station and there, for want of money, was put off and walked to his destination. HELD: That the extra fare paid, the humiliation of being put off the train, and the inconvenience of reaching his destination by walking were proper elements of damage to be considered by the jury. Ib.

REPLEVIN.

See SALES, 1.

1. *Identity of goods: Separate value of each article.*

In ascertaining the separate value of each article of goods replevied

from a sheriff who had seized them under an attachment, it is admissible for the jury to take to the jury room the invoice of the goods taken by the sheriff when he took possession of them, where the invoice is proved to be correct in description and value. Hickman v. Ford, 207

2. *Verdict: Judgment.*

When property sued for in replevin is delivered by defendant into the control of the court, there is no necessity that a verdict for the plaintiff should assess its value, so that the court can render an alternative judgment for the property or its value. The judgment should be only for delivery. Harris v. Harris, 535

REVIVOR OF JUDGMENTS.

See PLEADING and PRACTICE, 9, 10.

REWARD.

1. *What claimants must prove.*

The claimant of a reward for the apprehension of a felon must prove not only that the reward was offered as alleged in his complaint, but also that the person arrested was the guilty party, if the answer denies both of these facts. Ames v. Conner, 337

2. *What is.*

The offer of a reward is a promise conditional upon the rendition of some proposed service. The offerer may prescribe any terms he sees fit, and these terms must be complied with before any contract arises between him and a claimaint. Ib.

SALES.

See LIQUOR, 8.

1. *Delivery, what sufficient: Replevin.*

Cowan made a crop on shares with Graves. Before it was gathered he sold his interest in it to Long for 900 pounds of seed cotton to be delivered by Long at a certain gin in the neighborhood. Graves afterwards assumed Long's obligation to deliver the cotton for Cowan, and did deliver 1,100 pounds to the gin,

200 pounds of which he sold to the ginner, leaving 900 pounds in a stall for Cowan. HELD: That the sale and delivery were complete and Cowan could maintain replevin for the cotton. Graves v. Cowan, 134

SCHOOL—COMMON.

1. SCHOOL DISTRICTS: *May sue and be sued.*

By section 53 of the common schools act of December 7, 1875, each school district is constituted a body corporate with power to sue and be sued in any of the courts of this State having competent jurisdiction. School Dist. No. 3 v. Bodenhamer, 140

2. COMMOM SCHOOLS LAW: *Act of Dec.* 7, 1875.

The common schools act of December 7, 1875, revises the whole subject matter of the school law, and was intended as a substitute for all former enactments on that subject; and the notice of the annual meetings of the school directors for levying the school tax must, since its passage, be given by the school directors only instead of by them and the sheriff as before then. Davies v. Holland, 425

SLANDER.

See CRIMINAL LAW, 17.

STATUTES.

See SCHOOLS, 2.

1. *Unconstitutional, effect of.*

When a statute is adjudged unconstitutional it is as if it had never been. Rights cannot be built up under it. Contracts depending upon it for their consideration are void. It protects no one who has acted under it. Cochran v. Cobb, Land Com., 180

2. LEGISLATURE: *Power to pass healing acts.*

The Legislature has power to pass healing acts which do not impair the obligation of contracts nor interfere with vested rights. Green v. Abraham, 420.

3. SAME: *Same.*

The rule in regard to healing acts is this: if the thing omitted or failed to be done, and which constitutes the defect in the proceedings, is something which the Legislature might have dispensed with by a previous statute, it may do so by a subsequent one. And if the irregularity consists in *doing* some act, or in the *mode* or *manner* of doing it, which the Legislature might have made immaterial by a prior law, it may do so by a subsequent one. Ib.

4. STATUTES; *Healing, affect pending suits.*

The bringing of a suit vests in a party no right to a particular decision. His case must be determined on the law as it stands at the time of the judgment—not at the bringing of the suit; and if pending an appeal the law is changed, the appellate court must determine the case under the law in force at the time of its decision. Ib.

5. SAME: *Same.*

McReynolds executed a mortgage to Green in 1882, which was acknowledged before Green as a notary public and recorded. Afterwards a constable levied on the property an execution against McReynolds, and Green brought replevin for it. HELD: That the acknowledgment could not be taken by Green and the record was no notice; but both were validated by the curing act of March 8, 1883, except as against purchasers, and that the constable was not a purchaser, but succeeded only to the rights of the mortgagor, and neither of them had a vested right to a defense based upon an informality which did not affect their substantial equities. Ib.

STATUTE LIMITATIONS.

See CONTRACTS, 2.

1. *Pleaded by a County: Evidence.*

When a County pleads the Statute of Limitations to an action against it, the plaintiff must prove both the cause of action and the commencement of legal proceedings within the time mentioned by the statute. Ouachita County v. Tufts. 136

2. *On vendor's lien.*

The statute bar to the enforcement of a vendor's equitable lien,

depends, not upon the length of time of adverse possession of the land, but on the fact whether the debt is barred at the institution of the suit; after that it cannot be enforced. Stephens v. Shannon, 464

3. *On sealed instruments.*

The statute of limitations of ten years applies to sealed instruments concerning contracts between individuals executed while the constitution of 1868 was in force, Ib.

4. *Mortgages: Adverse Possession, what is.*

Seven years continuous adverse possession against the mortgagee will bar his action for the recovery of the mortgaged premises, or for foreclosure of the mortgage; but to constitute adverse possession against a mortgagee it is not sufficient that the mortgagor or those holding under him, occupy, use, improve and pay taxes on the premises, as their own absolute property, but the possession must be in open denial of the mortgagee's title, and accompanied with such acts or declarations of the holders as are sufficient to put the mortgagee on notice that they claim and hold in hostility to his rights, and adversely to him. Until then the possession is consistent with his rights and not adverse, and the statute does not begin to run. Ringo v. Woodruff, 469

5. MORTGAGE. *Adverse possession: Cases approved and overruled*

The doctrine announced in *Harris v. King*, 16, *Ark.*, 122; *Birnie v Maine*, 29 *Ark.*, 591; and in *Coldcleugh v. Johnson*, 34 *Ark.*, 312, as to adverse possession against a mortgagee, is approved; and the cases of *Sullivan v. Hadley*, 16 *Ark.*, 129; *Guthrie v. Field*, 21 *Ark.*, 371: *McGehee v. Blackwell*, 28 *Ark.*, 27; *Hall v. Denckla*, *Ib.*, 506: and *Mayo v. Cartwright*, 30 *Ark.*, 407, so far as they hold that adverse possession may be set up by a mortgagor or his vendee with notice, without a distinct denial of, or acts inconsistent with the mortgagee's title, are overruled. Whittington v. Flint, 504

6. MORTGAGE: *Statute limitations: Adverse possession.*

Possession of the mortgagor, or his privies, including his grantees with notice, will not be adverse, nor bar an action by the mortgagee for foreclosure, or for possession of the land, unless there has been an open and explicit disavowal and disclaimer of holding under the mortgagee's title, and assertion of title in the holder brought home to the mortgagee. The mere taking

possession by the vendee of the mortgagor, and continued occupancy by him and his vendees for the period of the statutory bar; their open control and improvement of the land, and payment of taxes thereon as their own absolute property, with the intention of holding it against all comers, will not bar the action. Ib.

STOPPAGE IN TRANSITU.

1 *When the right of ends.*

The right of the unpaid vendor of goods to stop them *in transitu*, upon the bankruptcy or insolvency of the purchaser, is not defeated by their mere arrival at their destination. The *transitus* is not at an end until they have come to the vendee's actual possession, or to his constructive possession by delivery to his agent; and, *a fortiori*, the right may be exercised where the purchaser declines to receive them. Mason v. Wilson, 172

TAXES.

1. *Quashing assessment*: *Want of oath of Assessor.*

The failure of the tax assessor to take the oath of office required by law is no ground for quashing the assessment on *certiorari*. His official character cannot be questioned in such collateral proceedings. *Parker v. Overman*, 13 *How.*, 137, explained. Moore, admr., Jacks v Turner. col. 243

2. *Same*: *Affidavit to assessment.*

The Assessor of Phillips county attached to his assessment the following affidavit:

"I, B. W. Greene, assessor, etc., do swear that I have made diligent enquiry to ascertain all the taxable property subject to taxation in Phillips county; that so far as I have been able to ascertain, the same is correctly set forth in the foregoing return." HELD: That the omission to state in the affidavit, as required by law "that he had appraised each tract or lot of land at its true value in money," was no cause for quashing the assessment on *certiorari*, in the absence of any showing that the assessor had not made such appraisement. It would be presumed, in the absence of any charge to the contrary, that the Assessor, in making the assessment, had complied with the law. Ib.

3. FILING ASSESSMENT: *Date of filing*: *Presumption.*

When there is nothing to show the date of filing an assessment list with the County Clerk, it will be presumed to have been filed on the day of the date of the assessor's affidavit attached to it. Ib.

4. SAME: *Same: Failure of Assessor to examine lands.*

The failure of the Assessor to personally view lands to ascertain their value is no cause to quash the assessment on *ceritorari*. Ib.

5. *Filing assessment*: *Time not essential.*

The filing of the assessment list with the County Clerk *by* the 3rd Monday in September, as required bv section 6, of the revenue act of 1873, was not essential to the validity of the assessment or the levy of taxes at the succeeding term of the County Court. Ib.

6. *Warrant to collect directed to Sheriff.*

A warrant attached to the tax book for collecting the taxes is not illegal for being addressed to the Sheriff instead of to the collector of revenue, unless the Sheriff and collector of the county are different persons. Keith v. Freeman, 296

7. *Junior mortgagee has lien for taxes.*

A junior mortgagee has a lien on the mortgaged premises for money paid for taxes, or to redeem them from forfeiture, and cost, and interest from the time of payment; and is entitled to be reimbursed for these items out of the proceeds of the sale of the premises under the senior mortgage. Ringo v. Woodruff, 469

8. *Lien of agent for.*

No lien can be declared for an agent for taxes paid on his principal's lands, and for trouble and expenses incurred in assessing them, unless he avers in his pleading that he was seized of the lands or had the care of them; and taxes paid upon personalty cannot be joined with taxes upon land, and included in the judgment and lien for the latter. Woodall v. Delatour, 521

9. *Power of Legislature to levy*

The right to impose taxes upon citizens and property for the support of the state gevernment, may be restricted by the constitution, but needs no clause to confer it. Ouachita County v. Rumph, 525

10. *Property subject to.*

Notes, bills of exchange, shares, stocks and securities of all kinds, are property, and subject to taxation; and a note given for land, and the land itself, are both subject to taxes; the note as property of the holder, and the land, of the purchaser. Ib.

TAX SALES.

See FEES, 1.

1. *When land purchased from U. S. is subject to taxes.*

Land purchased from the United States becomes subject to taxes as soon as the entry is made and the price paid, though no patent has been issued; but until the price has been fully paid, however long after the entry, the land cannot be taxed, and a sale for taxes is void. Diver v. Freidheim, 203

2. *Certificate of purchase by the State: What sufficient.*

A list of lands showing in separate columns, the sections, township, range, acres, year of the taxes, valuation, different kinds of taxes with their respective amounts, the total taxes, penalty, costs, and aggregate of the whole, headed "List of Lands forfeited or sold to the State in Benton county, Ark., May 13th, 1872, for non-payment of taxes for the years 1870-1871, and which remained unredeemed on the 21st day of March, 1875," and signed at the end "John Black, Clerk," and recorded in the recorder's office of the county, is a sufficient certificate of purchase by the State under the revenue act of 1874. Keith v. Freeman. 296

3. *Redemption by infant after sale by the State.*

When land of an infant has been forfeited to the State and been sold by the State before his time for redemption has expired, he may redeem from the purchaser from the State, and the redemption money will belong to the purchaser and not to the State. Ib.

4. TAX SALES: *Donee's claim: Act of January* 10, 1857.

No one claiming as assignee or vendee of a donation claim, on which the donee has made no improvements at the time of his sale, can be said to be holding under it, inasmuch as the statute re-vests the land in the State upon such attempt to sell; and therefore the act of January 10, 1857, "to quiet land titles," has no application, either as to the tender of taxes, or limitation of the action, expressed in the act. Douglass v Flynn 398

5. TAX TITLES: *Act of January* 10, 1857.

The act of January 10, 1857, "to quiet land titles," (Secs. 2649-2651, Mansfield's Digest) is penal in its nature and to be strictly construed. It does not prevent persons from asserting their just rights, who were under no obligations to pay the taxes for which the lands were sold, and have committed no default in failing to do so. It has no application where the State has no power in itself, nor its officers by any warrant of law, to collect any taxes on the land, and when the sale was absolute y void on that account. and not for irregularities merely: Nor in any case when the suit is not directly for the recovery of possession of land, nor when the tax title is repelled by defense or cross-claim. And so much of the decision in *Haney v. Cole*, 28 *Ark.*, 299, as holds that the statute gives any holder of a void tax or donation deed a lien, in any case, not only for the taxes discharged and cost (which is right), but also for the highly penal percentage expressed in the act, is erroneous. Ib

TITLE.

See EVIDENCE, 11, 12.

1. TITLE TO LAND: *Surrender of deed by grantee to grantor.*

A grantee can not revest his grantor with title to land by returning the deed to him. Diver v. Freidheim, 208

TOLL BRIDGE.

See ACTION.

TORTS.

See JUDICIAL OFFICERS, 1. ACTION, 1.

VENDOR AND VENDEE.

1. *Lien for purchase money—Notice to sub-vendee.*

A vendor of land who has parted with the legal title, has, in equity, a lien on the land for the unpaid purchase money, as against the vendee and his privies, including subsequent pur-

chasers with notice; and a subsequent purchaser is affected with notice of all recitals in the title deeds of his vendor, whether recorded or not. Stephens v. Shannon, 464

2. VENDOR'S LIEN: *Its nature and inception.*

A vendor's lien upon land is not an estate in the land, but is a charge or right which has its inception only on bill filed. Ib.

WEAPON.

See CRIMINAL LAW, 2.

WITNESS.

See EVIDENCE, 1.

1. *Husband and wife.*

The public policy which forbids a husband or wife from testifying for or against each other, does not extend to collateral suits between third parties. In these a wife may testify as to transactions of her husband where she can do so without breach of matrimonial confidence. But even after coverture she cannot disclose facts obtained through matrimonial confidence. Nolen v. Harden. 307

2. *For and against admiuistrators or guardians.*

The parties excluded by the proviso to Sec. second of the schedule to Constitution of 1874, from testifying as to transactions or statements of testators, intestates and wards, are the executors, administrators and guardians on one hand and their opponents in the suit on the other, and do not include their co-defendants or other parties not pursuing nor pursued by the fiduciaries. Ib.

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Ex. 4. a. a.

ERRATA.

On page 108, fourth line from bottom, for "*sb.*" read "*St.*"
On page 134, second line from top, for "*excesses*" read *excuses.*"
On page 147, eleventh line from bottom, for "*lines*" read "*liens.*"
On page 154, sixth line from top, for "*is*" read "*as.*"
On page 308, tenth line from top, for ,'don*or*" read "don*ee.*"
On page 399, fourth line from top (in syllabus), for "*sued*" read "*said.*"
On page 411, nineteenth line from bottom, for "*denied*" read "*deresigned.*"
On page 503, sixth line from top, for "mortgag*or*" read "mortgag*ee.*"

If the reader will, at once, turn to the proper places, and with pen or pencil make the proper corrections, it may save him confusion afterwards.